

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Parentage of:

No. 41648-4-II

M.J.,†

Child,

DANIEL JONES,

Respondent,

v.

VERONICA THOMPSON nka BIEHNER,

UNPUBLISHED OPINION

Appellant.

Johanson, J. — Veronica L. Thompson¹ appeals a final parenting plan. We affirm because the trial court did not abuse its discretion (1) by denying Thompson’s continuance motion as untimely, without good cause, and for being in the child’s best interest, (2) by granting Jones sole decision-making authority, and (3) by denying Thompson’s motion for reconsideration.

† We use juveniles’ initials to protect their privacy.

¹ Veronica Thompson married on March 27, 2010. Her new married name is Biehner; we refer to her as Thompson because that is the name generally used in the record.

FACTS

Thompson and Daniel Jones lived together for several years, never married and had one child together, M.J. Thompson's older child, Z.H. also lived with them. During their relationship, the parties jointly cared for the children. In May 2006, Thompson and Jones separated; M.J. and Z.H. moved with Thompson from the shared residence. In November 2009, Z.H. alleged physical abuse and the State removed both Z.H. and M.J. from Thompson's care. Jones arranged to have both children brought to his parents' house; then he moved in with his parents to care for the children. Jones's parents supervised Thompson's visits with both children in their home.

In January 2010, Jones petitioned to be the primary residential parent and proposed unsupervised visits for Thompson every other weekend. In February 2010, Jones amended his proposed parenting plan, proposing supervised visits for Thompson because of the pending criminal charges alleging abuse. Later that month, the State dismissed M.J.'s dependency petition and placed M.J. in Jones's care. Jones and M.J. moved to Jones's townhouse. Z.H. continued to live with Jones's parents until May 2010.

In March 2010, the court commissioner ordered a temporary parenting plan for M.J. that designated Jones the primary residential parent, granted joint decision-making authority, granted Thompson supervised visitation every other weekend, and authorized Thompson's husband Jason Biehner to provide visitation transport.

On the day of trial, September 16, 2010, Thompson argued to continue the trial date for the permanent parenting plan.² She argued that (1) her pending November 3 trial for second

degree felony assault charges would prejudice her, (2) the trial court should appoint a guardian ad litem (GAL) for M.J., and (3) she needed to arrange for expert testimony regarding her psychological evaluation conducted in the dependency case.

Jones responded that (1) Thompson's motion was untimely because the trial date had been set well in advance, (2) a GAL was unnecessary because the court had appointed a GAL, Sharon Green, for M.J.'s dependency, and (3) local rules require parties to subpoena expert witnesses two months before trial and Thompson had not complied with the local rule. The trial court denied Thompson's continuation motion because it was untimely and without good cause, and because resolution was in the best interests of the child.

At trial, Green testified that she had investigated Jones as part of M.J.'s now dismissed dependency case. Green testified that she had visited Jones's home, had seen him with M.J., and had concluded that Jones's home was appropriate and healthy. Jones's parents, Margaret and Irving Jones, each testified on behalf of Jones. Jones and Thompson each testified. After hearing from the parties and their witnesses, the court noted its concern that Thompson "is angry and disrespectful" and she had alienated the family and friends who might otherwise be visitation supervisors. 2-B Report of Proceedings (RP) at 201. The court ruled that Jones would be the residential parent, granted Thompson professionally supervised visitation every other Saturday for ten hours, and ordered Thompson to pay child support.

On December 10, 2010, the parties informed the court that the State had dismissed the criminal case against Thompson and returned Z.H. to Thompson's care. Based on these changed

² Thompson filed a written motion to continue on September 8, 2010.

circumstances, the court granted Thompson alternating weekend, unsupervised visitation with M.J. Jones asked the court to grant him sole decision-making authority over M.J. because of cooperation and communication issues; Thompson responded that no legal basis existed to restrict Thompson's decision-making authority over M.J. The court found that joint decision-making authority over M.J. was reasonable and signed the order.

Both parties moved the court for reconsideration and the court heard the motions on December 23, 2010. Jones told the court that previously, it had not considered issues involving Thompson's strong religious views against medical care, and asked the court to grant him sole decision-making authority regarding religious, medical, and education issues because Thompson's staunch position negatively affected M.J.'s welfare.

Thompson asked the court to restore her as the primary residential parent or in the alternative, increase visitation time and grant a downward deviation for her child support payments based on her custody of Z.H. The court responded:

The court: I remember this case. I remember that she was recalcitrant, the mother was. She also had problems with the juvenile dependency, and so on, issues that she had, which have now been resolved. But, historically, she, for whatever reason, in my opinion, when I entered my decision, I did not think that she had the child's best interests at heart. And, therefore, I ruled the way I did at that time.

Now, the only thing that has been removed from that is the dependency thing, that they have said that she is not—didn't adjudicate that she has a problem. Isn't that the bottom line, don't you both—

[Thompson'S COUNSEL]: Your Honor, the felony charges that were against her were dismissed.

The court: That's what I said.

....

. . . if anyone looks at the history of this case, and the mother's interaction with the child that I have responsibility for, I think they are going to see that she has been less nurturing than she should be.

[THOMPSON'S COUNSEL]: Well, your Honor, in the testimony that was given, it was more so focusing on why the child wasn't in her care, and that was because of the dependency –

The court: I know. I'm not going to argue anything.

RP (Dec. 23, 2010) at 9-10.

Then, Thompson argued that no legal reason existed to restrict her decision-making. For example, there had been no testimony that Thompson had impaired judgment. The court responded that in its opinion, Jones has “continually and throughout had the interests of the child as primary” and “I don't find that with the mother.” RP (Dec. 23, 2010) at 11. The court noted, “I'm not going to take a chance with the child. So, the health, education, and religious issues are going to be the responsibility of the father.” RP (Dec. 23, 2010) at 11. The Amended Parenting Plan Final Order, dated December 23, ordered “[s]ole decision making” over M.J. on the legal basis that one parent was opposed to “mutual decision making.” Clerk's Papers (CP) at 297.

Next, Thompson argued for reconsideration regarding child support. Thompson argued for a downward deviation because she had Z.H. back in her home. Jones argued that the deviation was not automatic and that Thompson received child support from Z.H.'s biological father. The court ordered verified income from both parties, including documents verifying whether Thompson actually received child support from Z.H.'s father. The trial court signed the previously calculated child support order and told Thompson, “[I]f you want to modify it, you have to follow what I've indicated you need to have in order to modify it.” RP (Dec. 23, 2010) at 17. Thompson appeals.

ANALYSIS

I. Motion to Continue Trial

Thompson argues that the trial court abused its discretion by denying her continuance motion because (1) the pending criminal trial, less than two months away, was an exceptional circumstance, which was the reason for the removal of M.J.; (2) a continuance would have permitted a GAL to investigate³; and (3) she required time to arrange for expert testimony regarding her psychological evaluation conducted in the dependency case. We disagree.

A. Standard of Review

This court reviews a trial court's decision to deny a continuance for manifest abuse of discretion. *In re Dependency of V.R.R.*, 134 Wn. App. 573, 580-81, 141 P.3d 85 (2006). A trial court abuses its discretion when it exercises that discretion based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In deciding a motion to continue, the trial court takes into account a number of factors, including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and any prior continuances. *V.R.R.*, 134 Wn. App. at 581. The decision to deny a continuance when a witness is absent remains discretionary, even when dismissal is the result. *City of Kent v. Sandhu*, 159 Wn. App. 836, 841, 247 P.3d 454 (2011). When denial of a continuance motion allegedly violates constitutional due process rights, the appellant must show that the denial caused prejudice or that the result of the trial would likely have been different if the trial court had granted

³ Thompson assigns error to the trial court's failure to appoint a GAL and includes this statement in her argument heading. But Thompson provides no argument or legal authority regarding the trial court's denial of her request for another GAL and we decline to review it. RAP 10.3(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

continuance. *V.R.R.*, 134 Wn. App. at 581.

B. No Abuse of Discretion nor Showing of Prejudice

Thompson argues that the trial court abused its discretion by denying her continuance motion because her pending criminal and associated dependency proceedings constituted an exceptional circumstance. But contrary to her argument, the record demonstrates that the trial court designated Jones the primary residential parent for reasons unrelated to Thompson's criminal and dependency proceedings. The trial court expressly stated that Thompson was "angry and disrespectful," had been less nurturing than she should be, and did not have M.J.'s best interests at heart. RP at 201. The trial court based this decision on the testimony of Jones, his parents, the GAL assigned to the dependency proceedings, and its direct observations of Thompson. Therefore, the result of the trial would not have been different, even if the court had granted a continuance until after the criminal trial. Thompson can show no prejudice.

Here, Thompson's pending criminal and dependency proceedings did not prevent her from presenting evidence that she was the better parent. Additionally, Thompson's pending proceedings were not a surprise circumstance and Thompson could have timely moved to continue the trial, rather than wait until the day of trial.

Thompson also argues that the trial court abused its discretion by denying her continuance motion because she required time to arrange for expert testimony regarding her psychological evaluation conducted in the dependency case. But she did not make an offer of proof telling the trial court the expected content or import of the expert testimony.⁴ Thus, this court cannot

⁴ Neither did Thompson's written continuance motion explain the significance of the potential testimony.

evaluate the consequence to Thompson of not presenting her expert witness. She also does not explain why she did not arrange for this expert testimony in the months leading up to the trial. In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *V.R.R.*, 134 Wn. App. at 581.

Thompson fails to show that the trial court abused its discretion when it denied her continuance motion because her motion was untimely, without good cause, and resolution was in the best interests of the child.

II. Sole decision Making

Thompson argues that the trial court abused its discretion by granting Jones sole decision-making authority without applying the statutory factors or outlining its findings as provided by statute. We disagree.

A. Standard of Review

We review the trial court's decisions in the final parenting plan for abuse of discretion. *In re Marriage of Mansour*, 126 Wn. App. 1, 8, 106 P.3d 768 (2004). The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Mansour*, 126 Wn. App. at 8. In matters dealing with the welfare of children, the trial court has broad discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). The reviewing court is reluctant to disturb child custody dispositions because of the trial court's unique opportunity for personal observation of the parties. *Kovacs*, 121 Wn.2d at 801

n.10.

B. Statutory Requirements

Thompson argues that the trial court granted Jones sole decision-making authority without meeting the statutory requirements of RCW 26.09.187(2).⁵ But her argument erroneously relies on inapposite case law.⁶ The applicable statute is RCW 26.09.187(2), which provides:

(b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:

.....

(iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection.

(c) MUTUAL DECISION-MAKING AUTHORITY. Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:

.....

(iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a).

Jones asked the court to grant him sole decision-making authority based on RCW 26.09.187(2)(c)(iii). After initially finding joint decision-making authority reasonable, the trial court reconsidered when learning that joint decision-making was not viable because of Thompson's strong religious views against medical care, including immunizations and the use of

⁵ Thompson contests only whether the trial court followed statutory requirements, arguing that the standard of review is abuse of discretion. Thompson does not contest Jones's representation of her views, nor does she argue that the trial court's grant of sole decision-making touches on religion or requires the higher standard of substantial evidence.

⁶ Thompson relies on case law regarding whether the trial court modified the original parenting plan without a showing of substantial change in circumstances as required by RCW 26.09.260, and whether the trial court's finding of physical abuse warranted remand for imposition of mandatory limitations under RCW 26.09.191. *See In re Marriage of Shryock*, 76 Wn. App. 848, 852, 888 P.2d 750 (1995); *Mansour*, 126 Wn. App. at 10. These issues are not applicable here.

any medications, including cold medicine. Jones argued that Thompson's staunch position did not accommodate compromise, i.e., parents either have a child fully immunized or they do not, thus joint decision-making is not possible. Jones further argued that Thompson's staunch position raised health and welfare concerns. Based on Jones's argument and on its observations of Thompson, the trial court granted Jones sole decision-making authority regarding religious, medical, and educational issues.

Here, the trial court granted sole decision-making authority to Jones in accordance with RCW 26.09.187 because (1) it was uncontested that Thompson staunchly rejected the use of medical treatment, and the trial court found that (2) she was uncooperative, and that (3) she did not have the child's best interest at heart. In matters dealing with the welfare of children, the trial court has broad discretion and none of these reasons shows that the trial court abused its discretion in granting Jones sole decision-making authority. *Kovacs*, 121 Wn.2d at 801.

III. Motion for Reconsideration

Thompson argues that the trial court erred by (1) failing to rule on the arguments in her reconsideration motion regarding designation of the primary residential parent or a downward deviation to her child support payments and (2) by directing her to set a modification motion with the commissioner instead of hearing her motion. We disagree.

Here, the trial court orally denied Thompson's reconsideration motion regarding restoring her as the custodial parent.

The court: I remember this case. I remember that she was recalcitrant, the mother was. She also had problems with the juvenile dependency, and so on, issues that she had, which have now been resolved. But, historically, she, for whatever reason, in my opinion, when I entered my decision, I did not

think that she had the child's best interests at heart. And, therefore, I ruled the way I did at that time.

Now, the only thing that has been removed from that is the dependency thing, that they have said that she is not—didn't adjudicate that she has a problem. Isn't that the bottom line, don't you both—

[Thompson'S COUNSEL]: Your Honor, the felony charges that were against her were dismissed.

The court: That's what I said.

.....

... if anyone looks at the history of this case, and the mother's interaction with the child that I have responsibility for, I think they are going to see that she has been less nurturing than she should be.

.....

The court: I know. I'm not going to argue anything.

RP (Dec. 23, 2010) at 9-10. The court recognized that the State had dismissed Thompson's criminal charges; nevertheless, the court believed that Jones was the better parent to be the primary residential parent. Additionally, the trial court did not fail to rule on Thompson's request for a downward deviation of her child support payments; the trial court denied the request and asked for additional information. We reject Thompson's arguments that the trial court failed to rule on her motions. Until Thompson complies with the trial court's request for additional information, the specifics of the child support order are not properly before this court. RAP 2.2.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

No. 41648-4-II

Hunt, J.

Penoyar, C.J.