

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:	)	
	)	No. 63967-6-1
RYAN MICHAEL KEANE,	)	
	)	DIVISION ONE
Appellant,	)	
	)	
and	)	
	)	
NICOLE KEANE,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: October 4, 2010
_____	)	

Becker, J. — Ryan Keane challenges a parenting plan and order for maintenance entered in the dissolution of his marriage to Nicole Keane. Because substantial evidence supports the trial court’s finding that Ryan had a history of acts of domestic violence, we affirm the decision allocating decision making authority solely to Nicole. We conclude the trial court acted within its broad discretion in designating Nicole as the parent who will provide primary residential care for the child and in declining to order equal residential time. The modest award of temporary maintenance to Nicole is also affirmed.

Ryan Keane and Nicole Keane married on August 22, 2006. Ryan, who had joined the Navy, left for boot camp in Florida. Nicole later joined him. Their daughter was born there on January 20, 2007. The couple moved to Virginia for a few months and then moved to Oak Harbor, Washington, on November 14,

2007. The parties separated in February 2008. Ryan filed for dissolution in April 2008. The case was tried beginning June 30, 2009. Ryan raises four issues in his appeal from the final order entered after trial.

#### Allocation of Decision Making Authority

The court ordered that Nicole would have sole decision making authority concerning the child. Ryan challenges the court's finding that he had a "history of acts of domestic violence" as defined by RCW 26.09.191(1), the finding on which the order of sole decision making authority for Nicole was based.

In creating a permanent parenting plan, a court cannot order mutual decision making if there is a history of acts of domestic violence by a parent:

The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in . . . a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

RCW 26.09.191(1). Domestic violence means:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010(1).

Nicole testified about numerous acts of domestic violence by Ryan. She

testified that two incidents of domestic violence occurred when she was pregnant, one where Ryan punched a wall and one where he tackled her to the ground. She testified that he tackled her to the ground on one occasion in Florida after she started to break video tapes. She testified that while they were living in Oak Harbor, Ryan pushed her against the wall or down to the floor, tackled her and held her down, and chased her when she fled to other rooms.

Ryan testified and denied committing most of these acts. Regarding the video tape incident, Ryan testified that he did restrain Nicole after she started breaking and banging on property they owned. He testified that there were times when Nicole hit him.

Findings of fact are reviewed for substantial evidence and conclusions of law de novo. In re Marriage of Zier, 136 Wn. App. 40, 45, 147 P.3d 624 (2006), review denied, 162 Wn.2d 1008 (2007). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. Thompson v. Hanson, 142 Wn. App. 53, 60, 174 P.3d 120 (2007), aff'd, No. 81311-6, 2010 WL 3023341 (Wash. March 30, 2010). We defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. Thompson, 142 Wn. App. at 60.

Ryan does not acknowledge that Nicole's testimony is evidence of domestic violence. He cites In re Marriage of Caven for the proposition that

“mere accusations” are insufficient to establish a finding of a history of acts of domestic violence. He argues that Nicole’s testimony regarding domestic violence amounted to “mere accusations.” In re Marriage of Caven, 136 Wn.2d 800, 809, 966 P.2d 1247 (1998).

Caven was primarily a statutory construction case. Caven held that the statutory language “a history of acts of domestic violence” and “an assault or sexual assault which causes grievous bodily harm or the fear of such harm” provided two alternative bases for denying mutual decision making authority in a permanent parenting plan because the two phrases were separated by the word “or.” Thus, the statute requires sole decision making upon a finding of a history of acts of domestic violence regardless of whether those acts caused bodily harm. See Caven, 136 Wn.2d at 807, 810. It was argued that such an interpretation would give an incentive to parents to levy false accusations of domestic violence in order to restrict the other parent’s relationship with the child. Caven, 136 Wn.2d at 809. The court disagreed, observing that the statute requires a finding by the court that there is a history of acts of domestic violence. Mere accusations, without proof, are not sufficient to invoke the restrictions under the statute. Caven, 136 Wn.2d at 809.

Nothing in Caven prevents a party from proving acts of domestic violence by sworn testimony. Because Nicole testified under oath that Ryan assaulted her by tackling her to the ground and through other physical acts, she provided proof of a history of acts of domestic violence, not “mere accusations.” Ryan

points out that the court did state in its oral ruling that Nicole's testimony about Ryan's allegedly enraged and controlling behavior "was substantially overblown." Nevertheless, Nicole's testimony substantiates the challenged finding.

Because the court found a history of acts of domestic violence, under RCW 26.09.191(1), the court lacked discretion to require mutual decision making in the permanent parenting plan. In re Marriage of C.M.C., 87 Wn. App. 84, 89, 940 P.2d 669 (1997), aff'd, 136 Wn.2d 800, 966 P.2d 1247 (1998). The court did not err.

#### Primary Residential Caretaker

Ryan argues that the court abused its discretion in assigning to Nicole the primary responsibility for the child's residential care.

A trial court has broad discretion in matters affecting the welfare of children, including parenting plans, and its decision is reviewed for abuse of discretion. In re Marriage of Cabalquinto, 100 Wn.2d 325, 327, 669 P.2d 886 (1983). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). An appellate court may not substitute its findings for those of the trial court where there is ample evidence in the record to support the trial court's determination. In re Marriage of Kovacs, 121 Wn.2d

795, 810, 854 P.2d 629 (1993).

A statute outlines the considerations a court should take into account in determining the residential schedule of a child:

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

- (i) The relative strength, nature, and stability of the child's relationship with each parent;
  - (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
  - (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;
  - (iv) The emotional needs and developmental level of the child;
  - (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;
  - (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; and
  - (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.
- Factor (i) shall be given the greatest weight.

RCW 26.09.187(3)(a).

In Washington, there is no presumption in favor of the primary caregiver and using such a presumption is impermissible under the statute. Kovacs, 121

Wn.2d at 800. Ryan argues that in weighing these factors, the court applied the presumption declared impermissible by Kovacs.

A court is not forbidden from taking into account who has been the primary caretaker in evaluating the seven factors. Indeed, the third factor by its plain language invites such consideration.

This is not a case like In re Marriage of Combs, 105 Wn. App. 168, 19 P.3d 469, review denied, 144 Wn.2d 1013 (2001), where the trial court failed to examine the statutory factors, thus giving force to an argument that the court had improperly applied a presumption in favor of the status quo in violation of Kovacs. Combs, 105 Wn. App. at 177. Here, the trial court carefully went over all seven factors in its oral ruling. Considering the first factor, the court found that while both parties have strong and stable relationships with their child, the first factor favored Nicole because she had been the primary parent for all of the child's life and Ryan had only recently developed a relationship with the child. The court found the third factor favored Nicole. In considering the fourth factor, the emotional needs and developmental level of the child, the court found that both parents could meet these needs, but that the factor favored Nicole because she had a longer track record of meeting the child's needs. The court found the fifth factor to favor Ryan because of his family support. The court found the second and sixth factors did not apply and that the seventh factor weighed equally.

This analysis does not reflect the use of an impermissible primary

caretaker presumption. Nowhere did the court state it was making a presumption in favor of Nicole as the primary caretaker. We conclude the court reasonably applied the statutory factors.

Ryan also argues that the court failed to properly consider the evidence that Nicole had exhibited poor decision making skills by participating in the adult entertainment industry. The court did indicate that it had concerns that Nicole's participation in this industry had the potential to lead to harm to the child. But because Nicole had since quit working in the industry and there was virtually no evidence to suggest that the child had been harmed by her actions, we conclude the court was well within its discretion to give little weight to this evidence.

#### Residential Time

The guardian ad litem recommended equal residential time for both parents. Ryan contends the court erred by not following this recommendation.

In determining whether equal residential time should be ordered, a court finds guidance in factors listed in RCW 26.09.187(3)(b), including geographic proximity:

Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties' geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

The court possibly could have placed restrictions on Ryan's residential

time based on his history of acts of domestic violence under RCW 26.09.191, but did not. The court expressly found that contact between Ryan and the child would not be harmful. See RCW 26.09.191(2)(n).

Nevertheless, the court had two other valid reasons for rejecting equal residential time. First, it was likely the parties would be moving and their lack of geographic proximity would be problematic to work with a residential schedule involving frequent alteration between households. Second, the court found the parties' lack of a history of cooperation weighed against such an arrangement. The court's reasons are supported by evidence in the record.

Ryan argues the court could not appropriately consider possible future geographic proximity or the history of cooperation between the parties because the statute does not mention these factors. But the trial court has wide discretion and RCW 26.09.187(3)(b) uses permissive rather than mandatory language with respect to the factors that may be considered in deciding whether or not equal intervals of time with each parent would serve the child's best interests. We conclude the court did not abuse its discretion in denying Ryan's request for equal residential time.

#### Maintenance

The court ordered Ryan to pay \$457.21 per month for three months from August 1, 2009 through October 31, 2009.

The findings of fact state only that "maintenance should be ordered." Ryan contends such a conclusory finding of fact regarding maintenance is

insufficient. He cites In re Marriage of Monkowski, 17 Wn. App. 816, 818-19, 565 P.2d 1210 (1977). If the conclusory finding was all that existed, then under Monkowski remand might be necessary. However, the oral ruling provides a sufficient record to review the maintenance award.

Ryan argues that the court abused its discretion by ordering maintenance because his monthly expenses were determined to exceed his income. In determining whether maintenance is appropriate, for what amount, and for how long, RCW 26.09.090(1) provides guidance to a trial court. Relevant factors include, but are not limited to, the financial resources of the party seeking maintenance, the time necessary for that party to acquire sufficient education or training to facilitate employment, the duration of the marriage, and the ability of the spouse from whom maintenance is sought to meet his own needs and financial obligation while also paying maintenance.

An award of maintenance is within the broad discretion of the trial court. In re Marriage of Terry, 79 Wn. App. 866, 869, 905 P.2d 935 (1995). A trial court abuses its discretion if the court bases its award on untenable grounds or untenable reasons. Terry, 79 Wn. App. at 869.

In its oral ruling, the court considered the statutory factors. The court reasoned that Nicole needed maintenance because she had little to no financial resources or property and needed time to get some education and to gain employment. The court found the marriage was short term, the standard of living was not high during the marriage, Nicole was young and in relatively good

health, and she had few debts. While Ryan would not be able to pay maintenance for a long period of time, he could afford to pay maintenance for a few months:

Even with some adjustments downward in his monthly expenses, Mr. Keane's monthly expenses exceed his income, even if his temporary maintenance obligation is not taken into account. He does not have the ability to pay maintenance except for a limited period of time to provide some minimal stability until Ms. Keane can get her affairs in order.

Ryan's monthly net income was calculated to be \$2,729.13 while Nicole's monthly net income was imputed at \$1,115.92 based on minimum wage.

We find no abuse of discretion in the award of maintenance under these circumstances. The court examined the appropriate statutory factors and gave appropriate reasons for its decision.

Affirmed.

Becker, J.

WE CONCUR:

Sperry, J.

Dwyer, C. J.