# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| In the Matter of the Marriage of<br><br>JOHN EDWARD PENNINGTON,<br><br>Respondent,<br><br>v.<br><br>ANNE LAUGHLIN PENNINGTON,<br><br>Appellant. | ) | No. 65317-2-1<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br><br><br>FILED: May 23, 2011 |

GROSSE, J. — To order a child's name change during a dissolution proceeding, the trial court must enter findings in support of the name change and make a determination that it is in the child's best interests. Here, the trial court did neither. Accordingly, we reverse that portion of the decision. However, in every other aspect, the rulings of the trial court were well within its discretion and have ample support in the record. Hence, they are affirmed.

FACTS

Anne Laughlin and John Pennington were married in September 2007. Before they married but while they were dating, John was awarded primary custody of his daughter, G.P., from a previous marriage. That dissolution resulted in a contentious dissolution trial, in which Anne participated and supported John. The custody proceedings continued after John and Anne married.

Not long after they married, Anne became pregnant. Anne left the home in May 2008 and John filed a petition for separation shortly thereafter. Anne then sought a domestic violence protection order. John responded by asking for dismissal of the

order and also filed an amended petition for dissolution. In June 2008, the trial court granted Anne's request for the protection order, which applied to both her and the unborn child.

On July 1, 2008, their child was born. Anne named the baby Katelin Pennington Laughlin. John did not have contact with the child, but his attorney sent a letter to Anne's attorney asking about the baby. Anne's attorney sent a letter informing him that the baby had been born.

In August 2008, Anne became involved in the ongoing custody proceedings with John's other daughter, G.P., but this time supported his ex-wife, and provided information to the court that the child was in danger. In September 2008, John was criminally charged for domestic violence involving Anne. In May 2009, the charges were dismissed, but Anne filed a motion to renew the protection order. John ultimately agreed to the extension of the protection order through the dissolution trial.

The dissolution trial began in January 2010, when Katelin was 18 months old. The court heard testimony from Anne that John had committed domestic violence against her and abandoned Katelin. John testified and denied the domestic violence allegations, contending that they were fabricated and retaliatory. The court also reviewed psychological reports prepared by Dr. Marsha Hedrick, who evaluated both parties, and a report prepared by Debra Hunter, the family court services caseworker. Both recommended counseling for Anne and John to address issues that created a risk of continued conflict.

The trial court found neither John nor Anne entirely credible. The court

disbelieved Anne's domestic allegations and John's testimony that he was addressing his issues in therapy. As the court explained in supplemental findings:

> [W]hen John Pennington testifies that he in his therapy with Susan Fenner he had begun to address issues related to empathy the court doesn't believe him and has therefore ordered a far more rigorous treatment modality.
>
> When Anne Laughlin testifies to issues related to "domestic violence" the court doesn't believe her. Clearly there have been concerning, even alarming events but the characterization of those events made by Anne is not sufficiently reliable to find that there is a history of acts of domestic violence or serious assaults sufficient[ly] adequate to support mandatory [RCW] 26.09.191 restrictions.
>
> Both Debra Hunter and Dr. Hedrick discuss John's behaviors in terms of domestic violence which is not inappropriate although it must be pointed out that in quoting Judge Lucas Ms. Hunter omits a significant legal finding *"The court concludes that the Respondent does not have a history of acts of domestic violence"* Ex. 20, page 29. John's behaviors, and psychological profile have many characteristics found in domestic violence perpetrators so the court has ordered a similar type of therapy. Battering, stalking, economic coercion, isolation from family and friends, escalation of fear are all notably absent [in] his profile.

The court further found:

> Anne made a very serious mistake when she started dating John and has the proclivity to repeat it. That mistake was letting herself become enmeshed in his conflict with his first wife. John's fears about the ally he created turning enemy are not unfounded as may be seen in Ex. 90, p. 20.
>
> Both these parents have a strong need for validation which motivates them to seek allies. This will be very problematic to developing co-parenting sufficiently functional to work for Katelin. The court has added item 16 to Section VI of the Parenting Plan in an effort to address this.[1]

In the final parenting plan, the court concluded that none of the restrictions applied under RCW 26.09.191(1) and (2) to prevent mutual decision-making or prohibit contact with the child. But the court also concluded that other factors exist under RCW

[1] Item 16 of Section VI states: "Neither parent will engage or involve other family members, partners, friends or relatives in their disagreements, issues and disputes. The parents must take positive steps to overcome their past behaviors in this regard."

26.09.191(3) that permit the court to limit some of the parenting plan provisions. Those factors included John's impairment of emotional ties between him and the child, John's anger management issues, and Anne's abusive use of conflict.

The court then ordered that Anne would have sole decision-making authority until February 1, 2011, and thereafter the parties would have joint decision making authority. During the transitional year, the parties were ordered to undergo therapy and work with the case manager as directed by the court. The court specifically found:

> There are limiting factors in paragraph 2.2, but there are no restrictions on mutual decision making for the following reasons:
>
> The parents are utilizing a case manager until February 1, 2011 and the father agrees to the mother having sole decision making on major decisions until that date.
>
> If a parent is found to be in contempt of this order, any provision contained in paragraph 3.13, or any provision of Section VI, then a review may be sought to determine if a restriction in decision making is appropriate.

Additionally, the parenting plan ordered the parties to "cooperate to change the child's birth certificate to reflect the name of the child as: Katelin Laughlin Pennington."[2]

The court also ordered John to make child support payments in the amount of $741.47, but provided for a review of the payment when Anne became employed. In its property distribution determination, the court denied Anne's request that she receive a portion of the parties' joint 2007 tax refund and John's separate 2008 tax refund. The court also declined to award her reimbursements for home improvements made to the couple's home.

Following the trial, Anne filed a motion for reconsideration notifying the court that

[2] This was also ordered in the final decree.

the child support calculation was erroneously based on the schedule in effect the year before. In response, John acknowledged the error, but requested the court keep the payment the same based on costs for Katelin's medical insurance and court-ordered counseling required for visitation, and Anne's ability to earn additional income through tutoring. The court denied the motion to reconsider and left the $741.47 child support payment in tact as a deviation from the standard calculation. Anne appeals.

ANALYSIS

I. Name Change

Anne first contends that the trial court erred by changing their child's name because there was no evidence or argument that the name change was in Katelin's best interests. As our courts have recognized, the dissolution statutes do not provide for change of a child's name.[3] Rather, application for such a change must be made under RCW 4.24.130, which provides:

> Any person desiring a change of his or her name or that of his or her child or ward, may apply therefor to the district court of the judicial district in which he or she resides, by petition setting forth the reasons for such change; thereupon such court in its discretion may order a change of the name and thenceforth the new name shall be in place of the former.

In Hurta, the court held that the father in a dissolution proceeding improperly sought to change the child's name in a petition to modify the dissolution decree. The court further concluded that even if he properly applied for the change under RCW 4.24.130, the court would have had to deny the petition because there was nothing in

[3] Hurta v. Hurta, 25 Wn. App. 95, 96, 605 P.2d 1278 (1979). See also Daves v. Nastos, 105 Wn.2d 24, 29, 711 P.2d 314 (1985) (recognizing Hurta in support of its holding that the paternity statutes do not authorize a name change).

the record to show that the proposed name change was in the child's best interests.[4] Citing Hurta, the court later explained in Daves:

> Once a surname has been selected for a child, be it the maternal, paternal, or some combination of the child's parents' surnames, a change in the child's surname should be granted only when the change promotes the child's best interests. Since the child's best interests are the ultimate fact on this material issue, the trial court is required to enter a finding on this issue.[5]

Thus, a trial court must set forth its reasons for granting or denying the application to change a minor's surname.[6]

Here, John did not apply for a name change under RCW 4.24.130 or file a petition setting forth the reasons for the name change.[7] Nor did the trial court set forth its reasons for ordering the change, much less enter a finding that the change promotes the child's best interests. Accordingly, we reverse the court's order requiring the name change.[8]

II. Joint Decision Making

Anne challenges the court's order that she and John share decision making after one year, contending that the evidence supports a finding that limitations exist that prevent joint decision making. We review a trial court's parenting plan decisions for an

---

[4] Hurta, 25 Wn. App. at 96.
[5] 105 Wn.2d 24, 30, 711 P.2d 314 (1985)
[6] Daves, 105 Wn.2d at 31.
[7] His petition simply refers to the child as "Infant Pennington" under the section listing "**Children of the Marriage Dependent Upon Either or Both Spouses**." It does not request a name change in the request for relief (though it requests that Anne's name be restored to her maiden name).
[8] John contends that Anne has waived any objection to the name change on appeal because she initially placed the issue before the court and therefore invited the error. But the record indicates that Anne only did so in response to the allegations in his petition stating that the baby's surname was Pennington, despite the fact that the name on the birth certificate was Laughlin.

abuse of discretion.[9] The trial court has broad discretion because of its "unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence."[10]

RCW 26.09.191(1) addresses parenting plan orders that relate to decision-making and provides:

> (1) 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 any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) 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.[11]

Here, the court's parenting plan addressed both decision making and contact with the child order, stating:

> *Under certain circumstances, as outlined below, the court may limit or prohibit a parent's contact with the child and the right to make decisions for the child.*
>
> **2.1 Parental Conduct (RCW 26.09.191(1), (2))**
>
> Does not apply.
>
> **2.2 Other factors (RCW 26.09.191(3))**
>
> The petitioner's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the factors which follow:
>
> > The absence or substantial impairment of emotional ties between the parent and child due to the fact that the respondent has had no contact with the child.
> > Other:

[9] In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).
[10] In re Marriage of Woffinden, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), rev. denied, 99 Wn.2d 1001 (1983).
[11] RCW 26.09.191(2) addresses residential time and similarly provides that such conduct shall restrict a parent's residential time. Residential time was not an issue on appeal.

> Anger management and control issues that indicate that the Petitioner would benefit from additional extended therapy to address the behaviors identified in psychological reports and parenting evaluation. See supplemental findings of the court.

The respondent's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the factors which follow:

> The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development by exposure to conflict and rigidity. This may be related to a long term issue referenced by evaluators and therapists. See supplemental findings of the court.

Anne contends that the court erred by failing to find that limitations existed to prevent mutual decision making under RCW 26.09.191(1) because the evidence supported a finding that John willfully abandoned Katelin and substantially refused to perform parenting functions. She points to his admission that he made no effort to see or have any contact with Katelin for the first 18 months of her life, and that he contributed no financial support, including covering her under his medical insurance plan. She acknowledges that his lack of contact was due to the domestic violence allegations and resulting protection order, but contends that his lack of contact was nonetheless willful, regardless of the motive.

John points to his testimony that he did not initiate contact and challenge the protection order because he did not want to escalate things further. He explained that this was during the time Anne became involved in the custody proceedings with his other daughter and that he wanted to show he was cooperating by not seeking contact, noting that Anne had refused to allow him any access to or information about the baby. As the trier of fact, the trial court was entitled to accept his testimony and find that his conduct did not amount to willful abandonment. Additionally, our courts have

recognized that loss of contact with a child due to court orders cannot supply substantial evidence in support of a parenting plan restriction.[12]

Anne further contends that because the court found limitations existed under RCW 26.09.191(3), it was compelled under RCW 26.09.187 to award sole decision making to her. We disagree.

RCW 26.09.187(2) provides:

> (b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:
> (i) A limitation on the other parent's decision-making authority is mandated by RCW 26.09.191;
> (ii) Both parents are opposed to mutual decision making;
> (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:
> (i) The existence of a limitation under RCW 26.09.191;
> (ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(5)(a);
> (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); and
> (iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

Anne contends that the court's finding that limitations existed under RCW 26.09.191(3) warranted a finding of sole decision making under this statute. But RCW 26.09.191(3) does not mandate restrictions on decision-making authority and residential time based on findings of a limitation, as do sections (1) and (2) of the statute. Rather, section (3) gives the court discretion to limit any provision of the

[12] See In re Marriage of Watson, 132 Wn. App. 222, 232, 130 P.3d 915 (2006) (restrictions on residential schedule sought based on loss of contact with children due to no contact order).

parenting plan if a parent's conduct has an adverse effect on the child's best interests and provides:

> (3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:
> (a) A parent's neglect or substantial nonperformance of parenting functions;
> (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
> (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
> (d) The absence or substantial impairment of emotional ties between the parent and the child;
> (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
> (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
> (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.[13]

The trial court here did make findings under this section that the child's best interests were impacted by John's absence or substantial impairment of emotional ties and anger management issues and Anne's abusive use of conflict. But these findings do not compel an award of sole decision making to Anne. Nor should the lack of cooperation prevent joint decision making, as Anne contends, since both parties engaged in uncooperative conduct. Rather, the fact that both parents have issues that impact the child's best interests only supports the trial court's decision to phase in joint decision making and allow a supervised transition period for both parents to work on these issues. This is precisely the type of discretion the trial court may exercise to address each set of unique circumstances presented in dissolution cases. As our courts have observed:

Restrictions imposed at a vulnerable time in a child's life may not be necessary

[13] RCW 26.09.191(3).

> at a later time, either as a result of the child's maturation or because the parents have become more stable as they learn to cope with their own feelings about the separation and divorce.[14]

Anne next contends that the court erred by ordering joint decision making on extracurricular activities, choice of daycare provider, body tattoos, military service, or marriage before age 18 because there was no agreement by the parties to do so. She relies on "the explicit terms" of RCW 26.09.184(5)(a), which provides:

> The plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in RCW 26.09.187 and 26.09.191. Regardless of the allocation of decision-making in the parenting plan, either parent may make emergency decisions affecting the health or safety of the child.

But as John points out, while the statute mandates that the court allocate decision-making authority in the specified areas ("shall allocate"), nowhere does it prohibit the court from including provisions relating to decision making in other unspecified areas absent an agreement. Rather, it simply provides that the parties "may" incorporate an agreement for decision making in either these specified areas or other areas. Anne fails to show that the trial court's inclusion of these additional areas amounts to an abuse of discretion.

III. Property Distribution

Anne also challenges the property distribution award, contending that six months of John's 2008 tax refund is attributable to his pre-separation earnings and therefore that portion is community property to which she entitled. John contends that majority of

[14] In re Marriage of Jensen-Branch, 78 Wn. App. 482, 491, 899 P.2d 803 (1995).

his 2008 earnings were after the separation (May through December) and therefore separate property. He also points out that Anne filed her 2008 taxes separately and kept her refund. Thus, he contends that the court's decision to let each party keep their own refund was equitable. This determination was within the court's discretion and the court was charged with evaluating the credibility of the parties and the evidence. Anne fails to show that the court abused its discretion.

Anne further contends that she was entitled to the 2007 joint tax refund. She does not specify whether she was entitled to the entire year's refund and why, but simply asserts that John "took the $13,714 tax refund." John contends that the evidence supported the trial court's decision not to award her any amount of that refund. He testified that they decided to file jointly that year even though they had only been married a little over three months because Anne would be refunded more money than if she had filed separately. He further testified that she borrowed money from him in 2007 and used part of that tax refund to pay him back in $500 increments and that the issue was resolved. Anne admitted to owing John money but denied that she received any part of the 2007 tax refund. Again, as the fact finder, the trial court was charged with weighing all of the evidence and resolved the factual disputes in favor of John. We cannot disturb those factual determinations on appeal.

Anne further contends that she was entitled to at $5,000 to compensate her for improvements she made to John's home while they resided together there. Anne testified that she estimated it cost her over $10,000 to install a pond and paint the house. Anne did not provide any proof of the expenses other than her testimony. John

testified that the pond was part of the house when he purchased it, but that it was not fully finished. He testified that Anne finished the pond just before they married and the only expenses of which he was aware were for plants in the amount of $500. Both Anne and John testified that they painted the house together. Again, this was a factual dispute that the trial court resolved in John's favor. We will not disturb that determination.

IV. Child Support

Anne further contends that the trial court erred by denying her motion to reconsider the child support order because the ordered payment deviated from the standard calculation and John offered no evidence in support of a deviation. A trial court may deviate from the standard child support calculation, but must set forth specific reasons for the deviation in written findings of fact and must be supported by the evidence.[15] Reasons for deviation are included in RCW 26.19.175(1) but are not limited by the statute.[16]

Here, Anne moved for reconsideration because the court relied on an outdated schedule to determine the standard calculation. Under the correct schedule, the transfer payment should have been $940 per month instead of $741. In response, John agreed that the standard calculation was incorrect but argued that the payment should remain at $741, as a deviation based on Anne's supplemental income for tutoring, which was not disclosed on the worksheets. The court denied the motion and

[15] RCW 26.19.075(2) ("Unless specific reasons for deviation are set forth in the written findings of fact and are supported by the evidence, the court shall order each parent to pay the amount of support determined by using the standard calculation.").
[16] RCW 26.19.075(1) (stating that the reasons for deviation "include but are not limited to the following . . . .").

issued the following order:

> Respondent's Motion for Reconsideration/clarification is denied except insofar as the version of SupportCalc used to generate the child support was out of date that the amount ordered shall be considered a deviation, taking into account an offset against Respondent's unreported income.

As John contends, the court's finding of a deviation was supported by the record. Anne testified that she had tutored in the past, making between $1,500 to $2,000 a year, and this was income she reported on her taxes, and this was not included in the support calculation. Anne fails to show that the trial court's order was an abuse of discretion.

V. Attorney Fees

Finally, Anne asserts that she "reserves [her] right to obtain attorney fees and costs for this appeal." But as John correctly notes, such a request is insufficient for an award of attorney fees. As our courts have recognized, a request for fees on appeal requires more than "a bald request."[17] Rather, as required by RAP 18.1(b), to receive a request of an award of attorney fees on appeal a party must devote a section of the brief to the fee request and include argument and citation of authority.[18] In any event, Anne cannot demonstrate that she is substantially the prevailing party because she only prevails on the name change claim. Thus, there is no basis for a fee award to her.

We affirm in part and reverse in part.

---

[17] Phillips Building Co. v. An, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996); Hommel v. Thweatt, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992).
[18] Phillips Building Co., 81 Wn. App. at 705; Austin v. U.S. Bank, 73 Wn. App. 293, 313, 869 P.2d 404 (1994).

Grosse, J.

WE CONCUR:

Dwyer, C.J.

Cox, J.