IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Parentage of:		**No. 28380-1-III**
LMS,	)	
Child,	)	
BONNIE J. DIAL,	)	**Division Three**
Appellant,	)	
and	)	
JOEL R. SEXTON,	)	
Respondent.	)	**UNPUBLISHED OPINION**

Sweeney, J. — Courts of review are very deferential to trial judges in dissolution and dissolution-related proceedings for at least a couple of reasons. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). First, the trial judge's decisions tend to be fact-based, and the trial judge is in the best position to determine the facts. Second, the financial and emotional toll exacted by dissolution cases weighs in favor of finality. *Id.* And the litigants and their children benefit from the certainty and stability of a

decision. The decisions are never easy, and the Court of Appeals rarely adds anything by second-guessing the trial judge. Here, a trial judge listened to testimony and argument for five days. He essentially accepted the recommendation of a qualified guardian ad litem (GAL) that primary custody of the minor child here should be with her father. That discretionary decision is supported by appropriate and well-supported findings, and we will not revisit it. We affirm the decision of the court.

FACTS

Bonnie Dial and Joel Sexton are the parents of a five-year-old girl, LMS. In May 2007, Ms. Dial petitioned the court to establish a parenting plan for LMS. The court appointed a guardian ad litem for LMS in June. It also entered a temporary residential schedule that placed LMS primarily with Ms. Dial.

In January 2008, the GAL filed her first report following an investigation. She recommended that LMS be placed primarily with Mr. Sexton. The court entered a temporary residential schedule that placed LMS primarily with Mr. Sexton pending trial and the entry of a permanent parenting plan. Ms. Dial moved to terminate the GAL's services. She claimed the GAL was biased, unprofessional, and failed to adequately investigate the case. The court apparently denied Ms. Dial's motion, although the ruling is not part of the record.

The dispute proceeded to trial. The court heard from the parties, the GAL, and several other witnesses. Ms. Dial testified that Mr. Sexton committed several acts of domestic violence against her. The GAL reiterated her recommendation that Mr. Sexton have primary custody of LMS. The court then considered the parties' wishes and agreements, their employment schedules, their past and potential for future performance as parents, the child's emotional needs and developmental level, and her relationship with each parent. It found that LMS had a stronger relationship with Mr. Sexton than with Ms. Dial, that Mr. Sexton's potential for future parenting was superior to Ms. Dial's, and that Mr. Sexton met LMS's emotional needs better than Ms. Dial. Clerk's Papers (CP) at 1123-24. The court did not find that Mr. Sexton had a history of domestic violence. It adopted the GAL's recommendation and ordered that LMS live primarily with Mr. Sexton.

DISCUSSION

History of Domestic Violence

Ms. Dial contends that the court erred by giving Mr. Sexton primary custody of LMS. She maintains the decision is based on the court's temporary award of primary custody to Mr. Sexton. And this, she contends, is wrong. RCW 26.09.060(10). Ms. Dial also contends that the court failed to base its decision on statutorily required findings of

each parent's past and potential future performance of parenting functions, whether a parent has taken greater responsibility for performing parenting functions, the child's emotional needs and developmental level, and Mr. Sexton's history of domestic violence.

The court has considerable discretion to decide a child's residential placement. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). We review that decision for abuse of discretion only. *Id.* A judge abuses his discretion if his decision is based on an incorrect standard or on findings of fact that the record does not support. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). We will not substitute our findings for those of the court if those findings are supported by substantial evidence, even if other evidence contradicts them. *Kovacs*, 121 Wn.2d at 810. Parties to contested custody cases often offer conflicting evidence and conclusions to be drawn from that evidence. The court, as the trier of fact, has the difficult task of weighing the evidence and passing on the credibility of witnesses. We, therefore, do not review a court's weight and credibility determinations. *In re Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002). We instead defer to those determinations because the court sees the witnesses and hears their testimony while we read a written record. *In re Welfare of M.R.H.*, 145 Wn. App. 10, 24, 188 P.3d 510 (2008).

RCW 26.09.187(3) outlines the factors a court must consider for a residential

placement. *Kovacs*, 121 Wn.2d at 809. The court must consider the parties' wishes and agreements, their employment schedules, their past and potential for future performance of parenting functions, the child's emotional needs and developmental level, her relationship with each parent, any siblings, and other important people, and her involvement in school and other activities. RCW 26.09.187(3). Ms. Dial takes issue with the court's findings, or lack of findings, on LMS's relationship with each parent, each parent's potential future performance of parenting functions, domestic violence, and LMS's emotional needs. We address each in order.

Parent-Child Relationships

Ms. Dial first contends that the court's finding on LMS's parent-child relationships shows the court erroneously applied a presumption in favor of Mr. Sexton as the temporary primary parent. The court found:

> The relative strength, nature and stability of the child's relationship with each parent [are] taken into consideration. The Court finds that at the present time, the child has been in the primary care of her father. It is evident from the testimony not only from the father, but from the testimony of the Guardian ad Litem and Joyce Padilla, the daycare provider, the father also has done an admirable job and he has been the primary caregiver and the mother has had very little contact with the child. It is clear that during this period of time that the father has had the child, she has thrived in his care.
>
> For the past year the child has been cared for well by the father and . . . the child's stability is best served by placement with the father.

CP at 1124.

The court may not draw presumptions from a temporary parenting plan when entering a permanent parenting plan. RCW 26.09.191(5); *Kovacs*, 121 Wn.2d at 809. *In re Marriage of Combs* illustrates this rule. 105 Wn. App. 168, 19 P.3d 469 (2001). There, the court believed both parents were equally qualified to be the permanent primary residential parent. *Id.* at 176. So the court broke the "tie" by considering the mother's success as the temporary primary parent. *Id.* We concluded the court abused its discretion by designating the mother the permanent primary parent based on her success as the temporary primary parent. *Id.* at 176-77.

The court here undoubtedly found that Mr. Sexton was the temporary primary parent and performed his temporary parenting functions admirably. But it also found that LMS thrived in Mr. Sexton's care and had very little contact with Ms. Dial while the temporary parenting plan was in effect. The court ultimately found that LMS has a stronger and more caring relationship with her father than with her mother. It, then, did not use Mr. Sexton's status as the temporary primary parent to break a tie or apply a presumption in favor of maintaining the status quo. *See* 5 Report of Proceedings (RP) at 145-46 (oral ruling). It instead considered LMS's relationship with each parent during the pendency of this case and found that LMS had a better relationship with Mr. Sexton

than with Ms. Dial. The court appropriately considered the parent-child relationship factor; it did not abuse its discretion.

Parenting Performance

Ms. Dial next challenges the court's finding that Mr. Sexton's potential for future performance of parenting functions was superior to Ms. Dial's. It based this finding on evidence that Ms. Dial used abusive language toward her children, experienced significant mood swings, and violated an order restraining her from Mr. Sexton's home:

> With regards to each parent's past and potential for future performance of parenting functions:
>
> The Court finds on the evidence, on the strength of the testimony of the Guardian ad Litem, on the report of the mother's previous paramour, Mr. Thereon, and the testimony of Pam Nelson, a previous daycare provider, that the mother has used abusive language to her oldest daughters. The Court also finds on the strength primarily of Pam Nelson's testimony [corroborated] by Mr. Sexton (who obviously has some bias), is that the mother is subject to pretty significant mood swings.
>
> The Court also finds that the mother, Bonnie Dial, has violated Court orders on at least one occasion by violating the restrictive order when she went to Mr. Sexton's home.
>
> The Court finds that the father's potential for future performance of parenting functions at this stage is superior to that of the mother.

CP at 1124.

Ms. Dial argues that evidence of her use of abusive language is not credible. The

trial court determined otherwise, and we will defer to that determination. *Burrill*, 113 Wn. App. at 868. Ms. Dial also argues that some evidence shows she did *not* use inappropriate language with her children or experience sudden mood swings. She might be correct. But the question before us is whether substantial evidence supports the court's finding, not whether other evidence would support other findings. *Id.* Substantial evidence is any evidence that suggests the trial court's finding is true. *Id.* And, here, Ms. Dial admits and the record shows that Mr. Sexton and a former daycare provider, Pam Nelson, testified that Ms. Dial had mood swings. Appellant's Br. at 16; 5 RP at 54-55; 3 RP at 71. Ms. Nelson also testified that Ms. Dial used abusive language when speaking to her daughters. 3 RP at 69-71. That testimony is substantial evidence and supports the court's findings.

History of Domestic Violence

Ms. Dial next argues that the court should have found Mr. Sexton has a history of domestic violence since it found negative things about her. Ms. Dial's reference to a history of domestic violence is a term from RCW 26.09.191. A court's placement decision must be consistent with RCW 26.09.191. RCW 26.09.187(3)(a). That statute requires that the court restrict a parent's residential time with a child if the court finds the parent engaged in "a history of acts of domestic violence." RCW 26.09.191(2)(a).

"Domestic violence" includes "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members." RCW 26.50.010(1)(a). Evidence in the record would have supported a finding of a history of acts of domestic violence if believed. RP (Mar. 11, 2009) at 81-99; 5 RP at 117-20; CP at 46-48, 54-55, 68-69. But the fact that the court did not find a history of acts of domestic violence suggests the court was not persuaded by that evidence. Again, we will not revisit the court's judgment on the weight of the evidence or the credibility of witnesses. *Burrill*, 113 Wn. App. at 868.

LMS's Emotional Needs

Ms. Dial also challenges the court's finding on LMS's emotional needs. The court found Mr. Sexton met LMS's needs better than Ms. Dial:

> The emotional needs and developmental level of the child are better met by the father.

CP at 1124. Ms. Dial again cites portions of the record that tend to contradict the court's finding. And, again, her approach ignores our standard of review. We review for evidence supporting the finding, not for evidence contradicting it. *Burrill*, 113 Wn. App. at 868. We will not retry this case in the Court of Appeals.

We can glean from the court's findings that LMS's primary emotional needs at her developmental level (age 4 at the time of trial) are stability and positive, consistent relationships. *See* CP at 1124; *accord*

RCW 26.09.187(3)(a). Ample evidence supports the finding that Mr. Sexton meets these needs better than Ms. Dial.

Mr. Sexton quit his job in Seattle, moved to Moses Lake, and found work in Moses Lake just to maintain his relationship with LMS. 5 RP at 4-12, 17, 27. He found a licensed day-care provider who has cared for and bonded with LMS since LMS has lived with Mr. Sexton. 5 RP at 23, 25. He has ensured LMS's continued relationship with her previous unlicensed caretaker, with whom LMS has a good relationship. 5 RP at 26.

The court's suggestion that Ms. Dial appears to have had more trouble meeting LMS's needs for stability and positive relationships is also easily supported by this record. She took LMS to multiple day-care providers, starting when they moved to Moses Lake to when Mr. Sexton took custody of LMS. 5 RP at 13-14. She has had limited contact with LMS since Mr. Sexton took over primary custody. And, again, she has mood swings and has used abusive language at times. Based on this evidence, the court did not err by finding that Mr. Sexton better meets LMS's emotional needs. And the judge did not abuse his discretion by awarding Mr. Sexton primary custody of LMS.

Dismissal of GAL

Ms. Dial next argues that the court should have dismissed the GAL, excluded her

reports, or declined to follow her recommendation because she violated several statutes and rules. Specifically, Ms. Dial complains that the GAL violated RCW 26.12.180 and GALR 2(n) by giving confidential information (the GAL's report) to a nonparty (Child Protective Services). She also argues that the GAL was statutorily required but refused to (1) make her file available (that is, until Ms. Dial moved to compel its production); (2) give Ms. Dial a copy of the GAL's background information; (3) represent LMS's best interests when Ms. Dial moved to enforce the temporary residential schedule in December 2008; and (4) maintain independence, objectivity, and the appearance of fairness by telling Ms. Dial she would not investigate her side of the case if Ms. Dial did not pay for the GAL's services. Ms. Dial also says the GAL showed she was biased by stating, for no relevant reason, that Ms. Dial was using Duloxetine, by omitting that Mr. Sexton was using anti-anxiety medications, by criticizing Ms. Dial for using unlicensed daycare but failing to criticize Mr. Sexton for the same thing, by stating that Ms. Dial had several boyfriends even though she knew Ms. Dial had only one boyfriend, by saying Ms. Dial was dating a known drug user when Ms. Dial broke up with her boyfriend because she found out he used drugs, by alleging that Ms. Dial moved in violation of the child relocation act even though the act did not apply, by blaming Ms. Dial for Mr. Sexton's domestic violence, by excluding a day-care provider's positive reports about Ms. Dial

from the GAL report, by falsely claiming that Ms. Dial became pregnant and had an abortion, by falsely claiming that Ms. Dial was fired for failing a urinalysis, by revising her recommendation in Mr. Sexton's favor after receiving an e-mail from his attorney asking that she recommend immediate placement with Mr. Sexton, by alleging that Ms. Dial might suffer from untreated mental health issues, and by repeatedly questioning Ms. Dial's truthfulness. Ms. Dial also complains that the GAL refused to satisfy all mandatory training and continuing education requirements, failed to make reasonable efforts to become informed about the facts of the case and test all sources of information, failed to comply with the court's instruction that she inform the court of her findings, and failed to appear at all hearings.

We decline to review these challenges for a number of reasons. Ms. Dial's first contention is based on a ruling not in the record. *In re Marriage of Ochsner*, 47 Wn. App. 520, 528-29, 736 P.2d 292 (1987). And we need not review an assignment of error when Ms. Dial has not provided the ruling to which she assigns error. *Heilman v. Wentworth*, 18 Wn. App. 751, 754, 571 P.2d 963 (1977).

Ms. Dial also failed to object to the admission of the GAL's reports at trial. ER 103(a). She had to timely object to the court's ruling admitting the reports, stating the specific grounds for her objection. ER 103(a)(1); *City of Seattle v. Harclaon*, 56 Wn.2d

596, 597, 354 P.2d 928 (1960). At trial, Ms. Dial objected to the admission of the GAL's reports only on hearsay and confidentiality grounds and stipulated to their admission for illustrative purposes:

> THE COURT: Let me ask – I may have spoken a little too hastily. These [GAL reports] are confidential documents. If we mark them as exhibits, will they remain sealed?
> THE CLERK: No.
> THE COURT: Does counsel have any objection, these are all in the file, does counsel have any objection to my just – they're reports, I think I can consider them because they're filed.
> MR. ACRES: Right. Right.
> MR. ALBRIGHT: I would object to that, your Honor.
> THE COURT: Object to what?
> MR. ALBRIGHT: For them to be filed, for the confidentiality. And also we'd stipulate if they were to be filed, only for illustrative purposes, not for the truth of the matter asserted.
> THE COURT: So do you have any objection to my considering them on the basis of fact that they're filed under seal now?
> MR. ALBRIGHT: Yes, your Honor. We'd object to them being filed as evidence in the court case. They can be used illustratively.

3 RP at 217-18. The court did not have an opportunity to pass on Ms. Dial's current objections to the admission of the GAL's reports. And Ms. Dial does not claim that admitting the GAL's reports was a manifest constitutional error. *See* RAP 2.5(a)(3). We, then, will not consider the objections Ms. Dial now raises for the first time on appeal. RAP 2.5(a); *Harclaon*, 56 Wn.2d at 597.

The court was within its authority to consider the GAL's recommendation in any

event. "The court may seek the advice of professional personnel," including a GAL. RCW 26.09.210. It may also receive the GAL's recommendation, "which the court may consider and weigh in conjunction with the recommendations of all the parties." RCW 26.12.175(1)(b). Finally, the weight the trial court attached to the GAL's recommendation is discretionary with that court. *Burrill*, 113 Wn. App. at 868. And we find no abuse of that discretion here.

Burden of Proof

Ms. Dial next contends the court delegated its statutory decision-making authority to the GAL by adopting the GAL's recommendation. She also contends the court placed a higher burden of proof on her because it had already awarded Mr. Sexton temporary primary custody of LMS. Ms. Dial bases these contentions on the following statement by the court:

> I can assure both counsel that you can frame these questions any way you want and I'm making my decision on the basis of information that I'm getting. It's the evidence that's being admitted. But I also understand that it's a heavy burden Mr. Albright has representing his client's [Ms. Dial's] interest in this matter and I intend to give him – to allow him to do the job. But not at the expense of some degree of efficiency and respect of the court's time.

4 RP at 37.

First, Ms. Dial's contention is a very subjective assessment of the trial proceedings

and therefore not easily subject to review. Second, even given that analytical difficulty, the court's statement does not suggest that Ms. Dial carried a higher burden than Mr. Sexton.

Moreover, a trial court's authority to order residential provisions for a child is statutory. RCW 26.09.184(6), .187(3). We review de novo whether the court properly applied a statute. *In re Welfare of A.G.*, 155 Wn. App. 578, 596, 229 P.3d 935 (2010). The court, not a GAL, must establish the residential provisions for a child based on specific factors. RCW 26.09.187(3)(a). And, when viewed in context, the court's statement does not show the court delegated its statutory decision-making authority to the GAL.

The court made the statement while Ms. Dial was cross-examining the GAL at trial. Ms. Dial asked the GAL why she did not include in her report Ms. Dial's allegation that Mr. Sexton failed to hold LMS's hand in a parking lot. Mr. Sexton objected to the question, arguing that the allegation lacked proof. The court overruled Mr. Sexton's objection, informed Mr. Sexton that it understood the difference between supported and unsupported allegations, and assured both parties that it would make its decision based on the evidence in the record. The burden the court referred to was more than likely Ms. Dial's general burden of presenting her case. The statement shows the court was

committed to allowing Ms. Dial to present her case but was also aware and concerned about the efficient use of time. Indeed, the court commented in its oral ruling that the trial here could have been much shorter:

> First of all, there have been a lot of in my mind really irrelevant matters that have been brought up . . .
>
> The second thing is that this is a difficult case from the proposition that – I think it's typical of cases like this, and as I listened to the evidence and I want to say first of all, I think my view of what's relevant and what's really substantive in this case I think differs tremendously from counsel for the petitioner and the respondent. With all due respect, I think that the relevant evidence that really compels the decision in this case could have been presented in about a day and a half. There's a lot of finger pointing and so forth that I think really had absolutely nothing to do with what's best for [LMS]. But I recognize that there was minimal relevance to this stuff, so I admitted most of it.

5 RP at 139-40. When considered in context, the court's statement did not address Ms. Dial's burden of proof or mention the delegation of authority.

The court did not hold Ms. Dial to a higher burden of proof, presume that Mr. Sexton would be the permanent primary parent, or delegate its decision-making authority to the GAL. It properly exercised its authority. Its oral and written decisions show it reached its placement decision only after carefully weighing the credibility of the witnesses and the evidence and carefully considering the factors listed in RCW 26.09.187(3). CP at 1123-24; 5 RP at 139-51.

We affirm the decision of the court.

A majority of the panel has

determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.