

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of)	
)	No. 63063-6-I
MICHELE L. SAMODUROV,)	
)	DIVISION ONE
Respondent,)	
)	UNPUBLISHED OPINION
and)	
)	
BRENT JAMES SAMODUROV,)	
)	FILED: November 16, 2009
Appellant.)	

Grosse, J. — Where the record supports the trial court’s finding that a parent has engaged in sexual abuse of a child, RCW 26.09.191(2) requires the court to limit the parent’s residential time. Here, the trial court found credible a child’s statements to her mother and police that the father exposed himself to her and her siblings, despite the fact that a Child Protective Services (CPS) investigation concluded that the allegations were unfounded. Accordingly, we affirm the visitation restrictions ordered in the parenting plan.

FACTS

Brent and Michele Samodurov were married on June 15, 1996 in King County, Washington.¹ They have four children: Madelyn, age 8; Brynn, age 5; Caleb, age 4 and Isabella, age 1.² In August 2007, shortly after the birth of their youngest child, Isabella, Brent and Michele separated and then filed for

¹ To avoid confusion, we refer to the parties by their first names.

² These were their ages at the time of trial.

dissolution in Snohomish County Superior Court. Michele then relocated with the children to Sacramento, California, and in the spring of 2008, Brent eventually relocated to Rancho Cordova, California to be near the children.

The dissolution proceedings were highly contentious and a trial date was set in December 2008. Karin Ballantyne was appointed as Guardian Ad Litem (GAL) on behalf of the four children. In June 2008, the GAL issued her recommendation for a residential schedule, which permitted Brent to have residential time on alternate weekends and one mid-week visit for the next four months. She also recommended that a non-professional supervisor monitor the visits for four hours per visit day, to be reduced to two hours per weekend, if “no significant issues of concern” were reported by the supervisor or Michele.

Brent’s first partially unmonitored visit occurred on September 27-28, 2008, while the parties were living in California. According to Michele, shortly after this visit, Brynn disclosed to her that Brent had shown the children his penis. When Michele was getting the children ready for bed, Brynn told Caleb to pull his pants down, pointed to his penis and said, “When you grow up, that’s going to be very big, just like daddy’s is.” After Michele put Caleb to bed, she spoke to Brynn privately and asked her how she knew that. According to Michele, Brynn said, “Daddy showed me his private” and “pulled it out of his pocket.”

Michele then notified the GAL. The GAL said she would inform CPS and advised Michele to call the police. When the police responded, officers spoke

with Michele and interviewed each of the children separately. Brynn's statement to the police is as follows:

I am five years old. I went to visit my daddy at his apartment. His apartment has a big swimming pool. When I was visiting daddy this weekend he showed the thing that he pee's [sic] with (that is how Brynn refers to a penis) to my sister Madelyn and my brother Kaleb [sic]. I was peeking around the corner when I saw him show them. He saw me and called me over and showed it to me. He pulled it out and it was big.

Brynn also told police, "Daddy told me that I would have to keep it a secret and if you tell anybody you're going down into the pool with your clothes on."

Caleb told police that Brynn asked him to pull down his pants, pointed to his penis and told him he would be as big as daddy someday. But Caleb said that he did not see his dad show Brynn his penis. His statement to the police is as follows:

I am four years old. I know the difference between the truth and a lie. I did not see daddy show Brynn the thing he pee's [sic] out of (that is how Kaleb [sic] refers to penis). When we were getting dressed the other night Brynn asked me to pull down my pants, she pointed down there (at his penis) and told me I would be as big as daddy someday.

Madelyn told police that her father had never shown her his penis.

A month later, on November 4, 2008, Brynn was interviewed by the Sacramento Sheriff's Office Special Assault Forensic Evaluation Center (SAFE). During that interview, Brynn did not disclose ever seeing her father's penis. Sacramento CPS ultimately concluded that the allegation was unfounded and the sheriff's office closed the case.

Meanwhile, while the investigation of Brynn's disclosure was pending,

Brent's parents, Walter and Alice Samodurov, sought to obtain guardianship of the children. The Samodurovs, who lived in Oregon, initiated proceedings in Sacramento, California. They prepared a petition for appointment of a temporary guardian and notified Michele by leaving her a phone message that an emergency ex parte hearing regarding the guardianship of her children was scheduled. Neither they nor Brent notified the GAL about this. The commissioner at the ex parte hearing took no action on the guardianship petition because it was apparently withdrawn by the Samodurovs.

On December 16, 2008, the trial on the dissolution began. Brent appeared pro se and Michele was represented by counsel. Brent admitted that in June 1997, before the children were born, he exposed himself to high school students and other adults and was charged with indecent exposure. He pled guilty to the charges and was ordered to complete two years of sexual deviancy treatment. Upon completion of the treatment, the court dismissed the charge in 1999. Brent also presented evidence of a recent sexual deviancy evaluation, which was completed on April 7, 2008, and concluded that he did not exhibit sexual deviancy or predatory behavior. But Brent also admitted that he later denied the indecent exposure charges when he was seeking public office and a news article revealed the charges. He also denied the allegations that he exposed his penis to his children. Finally, he presented evidence that a recent drug and alcohol evaluation concluded that he needed only outpatient treatment and minimal follow through.

Michele testified to Brynn's disclosure and Brent's admission to her that he was addicted to pornography. She also testified that one of their daughters found pornography on the family computer and next to the family's Disney movies. Michele further testified that in October 2003, Brent told her that he went to a Costco parking lot and attempted to rape a woman there. According to Michele, Brent told her that he pretended to have a gun in his pocket and grabbed a woman jogger in the parking lot, but she screamed and startled him, so he ran off. Michele testified that he told her this during the time that the indecent exposure incident resurfaced. She said that when Brent told her about the Costco incident, he described himself as very angry and "unload[ed]" about other struggles he was having, such as pornography addiction, infidelities, and encounters with prostitutes.

Michele also presented the testimony of Kathy Owili, a woman who had an unwanted encounter with Brent while she was renting a room from Michele's mother in Sacramento. In July 2004, Brent and Michele were visiting Michele's mother and stayed in a room adjacent to Owili's room. According to Owili, Brent blocked her in the hallway, held her hands and told her she was beautiful. Later on, while Owili was in her room, Brent came into her room uninvited, lay down on her bed and began caressing her leg. He left abruptly when Michele and her mother arrived back home. Owili moved out of the house shortly thereafter to avoid further contact with Brent.

Michele also presented evidence about Brent's alcohol abuse, which

included an incident in January 2006, when Brent passed out at his desk at work after consuming an entire bottle of vodka, was taken by ambulance to the emergency room and was hospitalized for two days. Michele also presented evidence that Brent received a “Job In Jeopardy” notification from his employer for behavior that involved excessive drinking and sexual harassment during a business trip in February 2007. According to the notification, Brent became drunk while out with other employees and followed a female employee back to her hotel room, passed out in her room, and had to be removed by two managers. During the same trip, he again went drinking with other employees and spent the night, uninvited, in the room of some female employees. Michele further testified that Brent was often intoxicated in the home and passed out drunk once in Madelyn’s bed. She also described another incident when she had to remove the children from the home because he was passed out drunk.

The GAL testified and recommended that Brent have visitation every other weekend, two days each, 8 hours a day and that it be professionally supervised. The GAL also recommended that he abstain from alcohol use 24 hours before visitation times. The trial court adopted the GAL’s recommendations and restricted Brent’s visitation under RCW 26.09.191(2)(a)(ii) based on a finding that there was “strong evidence that [he] did pull his penis out of his ‘pocket’ and show it to Brynn as Brynn described.” The court’s order also cited RCW 26.09.191(3)(c) as a basis for the visitation restrictions, based on a finding that Brent has a “recent history of severe alcohol problems.”

ANALYSIS

Brent challenges the trial court's order restricting his visitation time under RCW 26.09.191(2)(a)(ii) and RCW 26.09.191(3)(c) based on findings that he exposed himself to the children and has severe alcohol problems. He contends that the court's findings are not supported by substantial evidence.

A trial court has wide discretion in setting the terms of a parenting plan and we will not reverse its decision unless it was manifestly unreasonable or based on untenable grounds or reasons.³ We do not review the trial court's credibility determinations nor can we weigh conflicting evidence.⁴ "So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it."⁵ Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted.⁶

RCW 26.09.191 provides for both mandatory and discretionary restrictions on parenting plans. RCW 26.09.191(2) contains the mandatory restriction and provides, "The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: . . . (ii) physical, sexual, or a pattern of emotional abuse of a child. . . ." RCW 26.09.191(3) gives the court discretion to limit any provision of the parenting plan if the court finds that "[a] parent's involvement or conduct may have an adverse effect on the child's best interests," and if any of several enumerated

³ In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

⁴ In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234, review denied, 129 Wn.2d 1030, 922 P.2d 97 (1996).

⁵ In re Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002).

⁶ Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179-80, 116 P.3d 381 (2005).

factors exist, including “[a] long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions.”⁷

I. Sex Abuse Allegation

Here, the trial court limited Brent’s visitation under RCW 26.09.191(2)(a)(ii) based on the following findings:

2.19.2 The father/Husband, Brent Samodurov, is very angry. The court finds that the father is a narcissistic individual with a sexual deviancy conduct in the recent past, severe alcohol problems in the recent past and attraction to pornography, which continues.

2.19.3 Although the court finds that the Wife tends to exaggerate and overreact, the court is persuaded by the major aspects of the Wife’s testimony, such as: (1) the Husband’s lying to her about the indecent exposure charge; (2) the Husband’s telling the Wife of his addiction to pornography, (3) the Husband’s telling the Wife about the Husband’s going to Costco with the expressed intent to rape a woman, and (4) the Husband’s telling the Wife what warning signs to look out for in his conduct. The court is persuaded that the Husband told these things to the Wife.

2.19.4 The court is persuaded that the parties’ 5-year-old child, Brynn, stated to the parties’ 4-year-old child, Caleb, that “Yours is going to be as big as daddy’s some day.” The court finds that Brynn confirmed the statement to the police and that Caleb confirmed to the police that she had done so as well.

2.19.5 The court finds that it is highly unlikely that anybody could have come up with a more credible scenario and taught a 5 and 4 year old to make this up, as the Father argued in his testimony, The court does not find that the mother is imaginative enough to come up with it either.

2.19.6 The court finds that the Father denies Brynn’s statement to the police that “Yours is going to be as big as daddy’s some day,” just as the Father has denied unpleasant things in the past. However, the court is persuaded and finds that Brynn did say this and that having said it, it is strong evidence that the Father, Brent

⁷ RCW 26.09.191(3)(c).

James Samodurov, did pull his penis out of his “pocket” and show it to Brynn as Brynn described. Thus, the court finds under RCW 26.09.191(2)(a)(ii) that the father’s time shall be restricted and the court orders supervised visitation for the father and adopts the guardian ad litem’s recommendations. . . .

Brent argues that substantial evidence does not support these findings. We disagree.

Brent points to the conflicting evidence about the sexual abuse allegations, i.e., Brynn’s failure to disclose the incident during the SAFE interview and the other children’s denials of the incident. But as the fact finder, the trial court resolved this conflict in the evidence by expressly finding that Brynn’s disclosures to Michele and to the responding police officer were credible. Other evidence in the record also supports this finding. The GAL testified that because the SAFE interview was conducted over a month later, it is likely less reliable. There was also evidence that Brynn told police that Brent had told her to keep it a secret, which may have explained her failure to disclose during the SAFE interview. Additionally, the trial court expressly rejected Brent’s denial of the allegations, noting that he had denied “unpleasant things in the past,” such as the indecent exposure incidents. We will not disturb these credibility determinations on appeal.

Brent also contends that the sexual deviancy evaluation refutes the court’s finding of sexual deviancy. But according to the record, that evaluation was completed before the alleged exposure to the children occurred,⁸ and Dr.

⁸ The evaluation was completed in April 2008 and the exposure incident involving Brynn was alleged to have occurred in September 2008.

John Lennon testified that had he known about the allegation, it would have caused him concern. We defer to the trial court's determination of the weight to be given this evidence.

Additionally, Brent argues that evidence of the polygraph test corroborated his denial of the exposure incident and his admission about the Costco incident. Again, this was a credibility issue that was resolved by the trial court's finding that his denials were not credible and we will not disturb that finding on appeal.

Brent further argues that the GAL testified that her recommendation was based on a "belief" that he committed the abuse, not on evidence. But the GAL's testimony was only part of the evidence presented to the trial court. The court made independent findings based on all of the evidence presented and its findings do not indicate that it even relied on this testimony.

Brent's reliance on In re Marriage of Watson⁹ is misplaced. There, the court concluded that the trial court abused its discretion because the visitation restrictions "appear[ed] to be based on the court's lingering suspicion that Christopher Watson sexually abused [his child] even though insufficient evidence shows that he did so."¹⁰ Brent argues that similarly, here, the allegation was "subsequently proven to be unfounded," and therefore cannot support the court's visitation restrictions. But in Watson, the trial court found that the sex abuse allegation was unproven.¹¹ Here, it was the CPS

⁹ 132 Wn. App. 222, 130 P.3d 915 (2006).

¹⁰ 132 Wn. App. at 236.

¹¹ 132 Wn. App. at 227.

investigation—not the trial court—that concluded the allegations were unfounded. After hearing all the evidence, the trial court made its independent assessment and made express findings that the sexual abuse allegations were in fact proven. As discussed above, these findings are supported by the record and we will not disturb them on appeal. Watson is therefore distinguishable and does not apply here to invalidate the trial court’s visitation restrictions.

II. History of Alcohol Abuse

Brent also challenges the court’s order restricting his visitation under the discretionary provisions of RCW 26.09.191(3)(c), based on a finding that he has a long-term impairment resulting from alcohol abuse. He argues that there was no evidence presented that his alcohol abuse interfered with his parenting, noting that the alcohol evaluation concluded that he needed only outpatient treatment and minimal follow through, and that the GAL agreed that he was not an alcoholic. We disagree.

Brent’s alcohol abuse history and its impact on the children is documented in the record both by Michele’s testimony and the GAL’s testimony and reports. As noted above, Michele testified to incidents when he was overly intoxicated in the children’s presence. The GAL also noted these incidents in one of her reports and discussed the impact of Brent’s drinking on his parenting:

It has not been presumed that Brent drinks alcohol daily and that his drinking has habitually interfered with parenting; however, at least on one occasion, he was passed out or asleep in his oldest daughter’s room and she was disturbed by the strong smell of alcohol. His drinking led to problems in his work place. On two occasions, medical help was needed due to the large quantity of alcohol he consumed in a short time. It is likely that Brent follows a

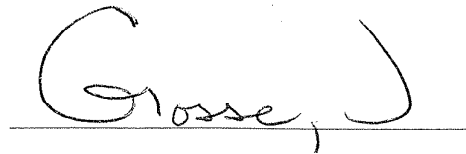
pattern of “binge drinking” when he needs relief from stressful circumstances. It is harder to monitor his drinking if he drinks less frequently. While he has now completed intensive outpatient treatment, there is a concern that he may relapse which is often the case and can be considered part of the pattern in recovery. Safeguards should be put in place to protect the children so that they are not exposed to problems relating to their father’s potential use of alcohol.

At trial, the GAL reiterated this concern and testified that the episodes where he “over used with dramatic results” demonstrated “poor judgment” and were concerning enough that she thought he should get an evaluation. But she also acknowledged that he was not an alcoholic and recommended that he refrain from alcohol use only during visitation times:

It’s difficult in these kind of cases when it’s not a matter of him being [an] alcoholic, I don’t think he is. I think he resorts to alcohol at random times and it’s difficult to prevent that from happening. And it was a difficult issue to deal with in terms of fashioning plans. I simply, I think, all along stated that [he] should not be drinking ever when he is with the children. I added in the December 16 report that he shouldn’t drink 24 hours prior to having visitation with his children. So the rest of the time he can do as he wishes.^[12]

Thus, the record demonstrates that his history of alcohol abuse has an impact on his parenting and continues to be unpredictable. The court properly adopted the GAL’s recommendation as part of the final parenting plan.

We affirm.

A handwritten signature in cursive script that reads "Grosse, J." is written above a horizontal line.

¹² This was actually less restrictive than the GAL’s previous recommendation that Brent “abstain from all alcohol/drug use.”

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WE CONCUR:

Dwyer, A.C.J.

Jaworski