NO: 48914-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Parenting and Support of L.H. and C.H.

MARESA LYNETTE HARDEN,

Appellant

v.

JASON ANTHONY HESTER,

Respondent

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Mr. Hester does not -- and cannot -- dispute that the trial court in this case declined to find a history of domestic violence under RCW 26.09.191 for one specific reason: a misguided concern that including such a finding in the parenting plan would "dog" or "haunt" Mr. Hester. (RP Trial 167:13-168:9). Mr. Hester makes no attempt to dispute that this is an improper basis for a trial court to decline to make a .191 finding or to decline to enter restrictions in a parenting plan as required by the statute.

Instead, for the first time on appeal, Mr. Hester attempts to suggest that he should not be subject to restrictions under RCW 26.09.191 for a different reason. He asserts that he does not have a history of acts of domestic violence or has not committed an assault that caused grievous bodily harm or the fear of such harm, the conduct that requires restrictions under .191. In doing so, he fails to address the substantial evidence in the record that shows otherwise and instead relies on a series of assertions that are incorrect both as a matter of fact and as a matter of law.

Mr. Hester ignores that the trial court specifically stated in its oral ruling that "there has been prior domestic violence," urged him to "get past the DV," and ordered him to complete domestic violence perpetrator treatment in order to obtain increased residential time with L.H. and C.H.

(RP Trial 167:13-168:9, 145:21-25). He fails to acknowledge that the GAL's report, that was admitted into evidence at his request without objection (RP 45:16-25), described incidents of domestic violence reported by the mother and recommended restrictions under .191 in the parenting plan. (SCP 6-7, 14). He also neglects the fact that he is subject to a domestic violence protection order that protects Ms. Harden from him based on his acts of domestic violence against her. (SCP 6; RP Trial 44:17-21).

In making parenting plans determinations, courts must use all available information to consider whether there is domestic violence present and, if there is, take steps to ensure the safety of the protective parent and the children. Furthermore, the Washington State legislature has been clear in RCW 26.09.191 that the presence of domestic violence is an essential, mandatory factor in establishing a parenting plan and that if a court finds that there is either a history of domestic violence or a single assault that causes grievous bodily harm or fear, it must enter a finding of domestic violence, and: (1) must not require mutual decision-making; (2) must not require dispute resolution other than court action; and (3) must limit residential time, unless it makes express findings to support a contrary decision.

A trial court has no latitude to refuse to make a finding under 26.09.191 because of concerns that the finding would "dog" or "haunt" a parent. The trial court's failure to make and enter restrictions pursuant to

.191 due to the perceived stigma such a finding would cause Mr. Hester must be reversed and this matter should be remanded for the trial court to apply the requirements of RCW 26.09.191.

II. ARGUMENT

A. The record supports a 26.09.191 finding and restrictions, whether or not appellant's post-trial declaration is considered.

Mr. Hester attempts to suggest that the trial court declined to make a .191 finding because there was not a reason to do so. However, the trial court expressly acknowledged "there has been prior domestic violence" and that it understood why the guardian ad litem had recommended restrictions under .191. (RP Trial 167:18-19, 168:5). Nonetheless, the trial court stated it was not entering a .191 finding because of concerns that it would "follow him around like some ghost," "haunt him," and "dog him forever" if it was put in writing. (RP Trial 167:16-168:9). The trial court never suggested it was declining to make a .191 finding because there was not sufficient evidence of domestic violence. Indeed, the trial court specifically required Mr. Hester to complete domestic violence treatment in the parenting plan in order to increase his residential time with the children.

Ignoring these facts, Mr. Hester tries to maintain that the record does not support a .191 finding. These arguments not only overlook the trial court's explicit reason for declining to make a .191 finding but misstates the facts and the law.

Mr. Hester devotes much of his response arguing that a declaration filed by Ms. Harden on September 23, 2015 (CP 123) was not properly before the court because it was submitted after the oral ruling issued by the trial court on July 21, 2015. (Resp. Br. at 5). However, oral decisions are not binding until formally incorporated and Ms. Harden was therefore "free to utilize whatever procedural tactics she deemed appropriate to obtain entry of findings of fact, conclusions of law, and judgment in her favor." *Seidler v. Hansen,* 14 Wn. App. 915, 917, 547 P.2d 917 (1976). Furthermore, the Washington Supreme Court has ruled that in making custody determinations, "the trial court should seek all the light available," even when such evidence was cumulative and could have been offered at trial. *Atkinson v. Atkinson,* 38 Wn.2d 769, 771, 231 P.2d 641 (1951).

Among other things, the declaration provided additional information from Ms. Harden regarding domestic violence by Mr. Hester and his criminal history from the Judicial Information System, in addition to evidence of domestic violence that had been presented earlier. (CP 124-26). This declaration sheds further light on the issues to be addressed at the presentation hearing for final orders. The declaration was therefore properly before the court to help ensure that the trial court had access to all the necessary information to make an appropriate determination before entering final orders, including whether to enter a .191 finding and restriction in the final orders.

But even if Ms. Harden's post-trial declaration is not considered the record, as well as the trial court's oral ruling, plainly supports a .191 finding and restrictions. In his response brief, Mr. Hester does not accurately present the record and largely relies on two opinions neither of which provide support.

As a preliminary matter, Mr. Hester improperly cites an unpublished opinion in his response brief. (Resp. Br. at 8, 10) (citing *In re Marriage of Crump*, No. 42996-9-II, 2013 Wash. App. Citing an unpublished opinion violates GR 14.1. Unpublished opinions have no precedential and should not be considered by this Court. *Kitsap Cty. v.Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998) (citing *State v. Bays,* 90 Wn. App. 731, 954 P.2d 301 (1998)). *Marriage of Crump* should not be considered in the case at bar.[1]

Mr. Hester also cites *In re Marriage of CMC,* 87 Wn. App 84, 88 P2d 669 (1997) . However, that case does not support his assertion that he should not be subject to .191 restrictions. In *Marriage of CMC*, the court found that either a history of acts of domestic violence or an assault causing grievous bodily injury or fear of such harm would require a finding and restrictions under .191. *In re Marriage of CMC*, 87 Wn. App. 84, 88,

[1] In addition to being improperly cited, *Marriage of Crump* does not support Mr. Hester's contention that his domestic violence against Ms. Harden was a mere isolated incident that could only technically be considered domestic violence. (Resp. Brief at 8). In *Marriage of Crump*, the appellate court found that neither Mr. nor Ms. Crump had engaged in domestic violence against the other. Here the trial court acknowledged that Mr. Hester had perpetrated domestic violence against Ms. Harden. (RP Trial 167: 17-18).

P2d 669 (1997). Here, Mr. Hester's history of acts of domestic violence would trigger .191 restrictions. Independently, Mr. Hester's assault of Ms. Harden in 2004 would satisfy .191 by itself as an assault which caused grievous bodily harm or the fear of such harm.

Although Ms. Harden did not have the benefit of legal representation at trial the record in this case clearly includes evidence showing a history of acts of domestic violence by Mr. Hester. Contrary to Mr. Hester's claim that Ms. Harden did not "testify with regards to domestic violence" at trial (Resp. Br. 4), she did testify that she was "a victim of domestic violence at [Mr. Hester's] hands," and also testified that "there was stalking as well."[2] (RP Trial 37:3-8).

In addition, the GAL report includes Ms. Harden's report that in 2004, Mr. Hester "hit mother in the head with an open hand and choked her with both hands," as well as Ms. Harden's report of three subsequent altercations. (SPC 7). All four of these instances were corroborated by police reports. *Id.* The GAL report was admitted into evidence at Mr. Hester's request and without objection. (RP 45:16-25). The GAL report also notes that Ms. Harden was granted a domestic violence order for protection against Mr. Hester in August of 2014, which required him to complete domestic violence perpetrator treatment, a point that is noted in many other places in the record. *Id.* at 6. The GAL credited Ms.

[2] Under RCW 26.50.010, the definition of domestic violence includes stalking a former intimate partner.

Harden's endorsement of "domestic violence history, father coming to her house, and calling her in the middle of the night" by recommending that the court make a domestic violence finding under RCW 26.09.191. *Id.* at 6, 14.

As noted above, the trial court also explicitly recognized there was a history of domestic violence, stating, "there has been prior domestic violence; there have been some other issues here." (RP Trial 167:17-18, 25). Although Mr. Hester claims that the trial court "found only one instance of domestic violence which was in 2004" (Resp. Br. 4), that assertion is belied by the record.

Finally, even if the court actually had decided that Mr. Hester's 2004 domestic violence assault against Ms. Harden (an assault for which he was convicted) would "count" as an act of domestic violence, this assault by itself should trigger restrictions under RCW 26.09.191 because of its severity. Ms. Harden's description of the assault to the GAL provides evidence that it caused grievous bodily harm and/or put her in fear of such harm. Ms. Harden reported to the GAL that Mr. Hester was arrested because he "hit her in the head with an open hand and choked her with both hands." (SCP 7). Being strangled, by definition, puts a victim in fear even if the strangulation is for a relatively short period time. It would be hard to conceive of a person not being in fear who has someone's hands around their throat with a tightened grip.

As a result, the record contains substantial evidence to support a finding that Mr. Hester has a history of domestic violence, which requires the court to include restrictions in the parenting plan under RCW 26.09.191. The trial court itself made it clear that it declined to make a .191 finding and to enter restrictions due to concerns about the perceived stigma of such a finding would have on Mr. Hester and did not suggest that it declined to make a finding for any other reason.

B. The trial court should consider residential limitation based on the required .191 finding on remand.

Mr. Hester also suggests that the court allowed him significant residential time (after showing that he completed domestic violence treatment) based on its discretionary application of the RCW 26.09.191(2)(n) exception. (Resp. Br. at 10). This exception allows a trial court to decline to include restrictions in residential time in cases where a parent has a history of committing acts of domestic violence, but only if the trial court makes an express finding "that the parent's conduct did not have an impact on the child." However, he fails to note that the trial court made no such express finding here. Contrary to Mr. Hester's assertion, the court failed to expressly consider the RCW 26.09.191(2)(a) visitation limitation, as well as the exception provided for in RCW 26.09.191(2)(n), due to its erroneous conclusion that it could exercise discretion in application of RCW 26.09.191(1). The trial court should therefore review

the summer visitation schedule in light of the mandatory RCW 26.09.191(2)(a) visitation limitation.

III. CONCLUSION

Ms. Harden requests that this Court reverse the trial court's Final Parenting Plan and direct the trial court to comply with RCW 26.09.191 by entering a finding of domestic violence by Mr. Hester into the parenting plan, restricting Mr. Hester from any major decision making regarding L.H. and C.H., ordering that any future parenting disputes between Ms. Harden and Mr. Hester be resolved by court action, not mediation, and applying RCW 26.09.191(2)(a) to any limitations on Mr. Hester's parenting time.

Dated this 25th day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gina A. Mitchell declare that on the 25th day of July, 2016, caused the foregoing document to be served via US mail and email on the Respondent as follows:

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