COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In Re

MONIQUE A. McDEVITT
Appellant

V.

DAVID A DAVIS
Respondent

NO. 31348-4-III

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erred by entering a parenting plan where the residential time ordered by the court exceeded the scope and authority as allowed by the order on adequate cause and/or statute, to whit the final parenting plan granted by the court exceed either the 24 day and/or 90 overnight limits allowed by RCW 26.09.260(5)(a)(b)(c) and further, that sufficient findings were not made by the trial court to allow the relief requested under RCW 26.09.260(5)(c).
2. The trial court erred by entering a parenting plan, where the underlying basis for the plan modification was that a parenting plan review had been previously authorized by Judge Leveque, where such a parenting plan review had already been conducted by a prior judicial officer, and thus the issue was not before the trial court and/or the trial court exceeded the scope of its authority.
3. The trial court erred by modifying the decision making provisions and other non-residential provisions of the prior parenting plan.
4. The trial court erred by not dismissing the modification action where the relocating custodial parent chose not to relocate.

STATEMENT OF THE CASE

A final parenting plan in this matter was entered on September 1, 2009 by Superior Court Judge Jerome Leveque pursuant to a decree of dissolution. CP 1-6. Monique McDevitt (hereafter referred to as "mother") was ordered to be the custodial parent. CP 1-6. Judge Leveque further ordered that because of the ages of the children and because the mother had relocated to Hawaii, the father could exercise visitation of 3 hours per day when he traveled to Hawaii. Additional visitation could occur if the mother traveled to the continental United States. CP 1-6. Judge Leveque ordered that "This plan shall be subject to review on the motion of either party when the children are two years old to determine if the placement schedule with the father should change." CP 1-6.

David Davis (hereafter referred to as "father") moved for reconsideration of Judge Leveque's decision, contesting in part the parenting plan provisions. CP 7-8. He filed a brief in support of his reconsideration motion. CP 9-24. The mother also filed a reconsideration brief. CP 25-28. This motion for reconsideration was denied by Judge Leveque. CP 29-30. Thus, per Judge Leveque's parenting plan, the residential schedule could be reviewed on motion by either party once the children were two years of age.

On November 16, 2010, the father filed his motion for a review of the residential schedule as authorized by Judge Leveque's final parenting plan and on January 25, 2011, an order was entered by Court Commissioner Valerie Jolicouer pursuant to the father's request for a review hearing, providing the father with revised parenting time. CP 31-33.

After this new parenting schedule had been in place for less than a year, the father filed a petition for a summons and petition for modification of the parenting plan on November 22, 2011. CP 34-43. His basis for this modification was that the final parenting contemplates modification. CP 34-43. He proposed a new parenting plan. CP 44-52. He set a hearing for an adequate cause determination. CP 53-54. The motion for adequate cause was denied without prejudice. CP 55-56. In denying the motion for adequate cause, Court Commissioner Valerie Jolicouer made a finding that this review hearing provided for in Judge Leveque's final parenting plan had already been provided on January 25, 2011. CP 55-56. See also CP 31-33.

On February 2, 2012, the father filed an amended petition for modification of the parenting plan. CP 57-64. He also filed a new request for an adequate cause hearing given Commissioner Jolicouer's prior dismissal without prejudice. CP 65-66. On February 22, 2012, the order

on adequate cause was entered by Commissioner Jolicouer. CP 67-68. This order on adequate on adequate cause limited Mr. Davis to a minor modification. CP 67-68. It also allowed the matter to proceed based on the mother's request to relocate. CP 67-68 The mother submitted a proposed parenting plan on July 23, 2012. CP 69-76. The father submitted a proposed parenting plan on August 10, 2012. CP 77-86.

The matter then proceeded to trial and on October 25, 2012 Judge Salvatore Cozza entered his memorandum opinion. CP 87-89. On November 6, 2012, Ms. McDevitt filed a motion for reconsideration. CP 90-93. She also filed a memorandum in support of the motion for reconsideration on the same date. CP 94-97. This was followed by a declaration from Ms. McDevitt on November 13, 2012. CP 98-107. In this declaration, Ms. McDevitt informed the court that she was not relocating due to her husband's loss of a job, and that she was returning to Hawaii. CP 98-107. This issue was noted for hearing. CP 108-109. A notice of withdrawal for request to relocate was also filed. CP 110-111.

A response to the other's declaration was filed by the father on November 14, 2012. CP 112-113. A further response by the father was filed the same date. CP 114-117.

On November 5, 2012, Judge Cozza entered the final parenting

plan. CP 118-128. An order on modification was also entered. CP 129-131. Reconsideration was denied. CP 132-132. See also the trial minutes at CP 133-133. An appeal was timely field by the mother. CP 134-150.

ISSUES/ARGUMENT

1. THE TRIAL COURT ERRED BY ENTERING A PARENTING PLAN WHERE THE RESIDENTIAL TIME ORDERED BY THE COURT EXCEEDED THE SCOPE AND AUTHORITY AS ALLOWED BY THE ORDER ON ADEQUATE CAUSE AND/OR STATUTE, TO WHIT THE FINAL PARENTING PLAN GRANTED BY THE COURT EXCEEDED EITHER THE 24 DAY AND/OR 90 OVERNIGHT LIMITS ALLOWED BY RCW 26.09.260(5)(a)(b)(c) AND FURTHER, THAT SUFFICIENT FINDINGS WERE NOT MADE BY THE TRIAL COURT TO ALLOW THE RELIEF REQUESTED UNDER RCW 26.09.260(5)(c).

This petition was filed seeking residential time relief pursuant to RCW 26.09.260(5)(a) and (b) and also RCW 26.09.260(5)(c). Under (5)(a) and (b), the father requested only a change of "not more than 24 full days in a calendar year" from the prior final parenting plan. CP 57-64. See page 4 of the amended petition. Pursuant to subsection (5)(c) the father also requested a schedule that does not exceed ninety overnights in a year. See page 5 of the amended petition. The order on adequate cause

limited the scope of the modification to minor modification. CP 67-68.

The best interests of the child must be the controlling consideration in any custody decision. Marriage of McDole, 122 Wn.2d 604, 610 (1993). However, the procedures relating to the modification of a parenting plan are statutorily prescribed and compliance with the criteria set forth in the statute is mandatory. Marriage of Shyrock, 76 Wn.App. 848, 852 (1995).

Accordingly, under the scope of the petition/statute pled, and under the scope of the order on adequate cause, the trial court was expressly limited to entering a final parenting which does not exceed a change of more than 24 full days in a calendar year. RCW 26.09.260(5)(a). The final parenting plan entered by the trial court, CP 118-128, dramatically exceeds the 24 days allowed. Accordingly, this judgment should be reversed with an order remanding the matter to the trial court to enter a plan providing a change of no more than 24 days in a calendar year.

Alternatively, the father requested a plan which provides for no more than 90 overnights in a calendar year. The overnights provided for in the final parenting plan entered by the trial court exceeds even this 90 overnight limit. Accordingly, this judgment must be reversed.

Additionally, the RCW 26.09.260(5)(c) requires that in order for the trial court to grant a modification under this subsection, it must make findings

that the existing parenting plan does not provide reasonable residential time for the noncustodial parent and that this modification action is in the best interests of the child. However, the trial court did not make such findings. In fact, there are no findings justifying any modification under RCW 26.09.260(a)(b)(c).

CP 129-131 is the order on modification. At page 2 of this order, section 2.3, it can be seen that no modification was granted under RCW 26.09.260(5). At section 2.5 of the same page, it can be seen that no adjustment pursuant to RCW 26.09.260(5)(c) was granted. Thus, there is no basis under RCW 26.09.260(5) to grant the final parenting plan much less make the findings of fact required by this statute. The judgment of the lower court should be reversed on this basis as well.

The only findings appear at section 2.4 of page 2 (CP 129-131), which is the portion of the statute which allows changes to the plan pursuant to a relocation. This is thus completely inapplicable to any modification under RCW 26.09.260(5)(a)(b)(c). Even if section 2.4 were somehow to be construed as providing findings, it omits the statutorily required finding under RCW 26.09.260(5)(c) that the prior plan does not provide reasonable time with the noncustodial parent. The required findings cannot be located in the Court's memorandum opinion either. CP 87-89.

It is apparent from the order on modification that the only basis for modifying the residential provisions of the parenting plan was the adjustment for relocation allowed under RCW 26.09.260(6) and upon the trial court's belief that it was entitled to conduct a review hearing. This basis for modification will be addressed below. However, there is no basis for a modification under RCW 26.09.260(5)(a)(b) or (c).

2. THE TRIAL COURT ERRED BY ENTERING A PARENTING PLAN, WHERE THE UNDERLYING BASIS FOR THE PLAN MODIFICATION WAS THAT A PARENTING PLAN REVIEW HAD BEEN PREVIOUSLY AUTHORIZED BY JUDGE LEVEQUE, WHERE SUCH A PARENTING PLAN REVIEW HAD ALREADY BEEN CONDUCTED BY A PRIOR JUDICIAL OFFICER, AND THUS THE ISSUE WAS NOT BEFORE THE TRIAL COURT AND/OR THE TRIAL COURT EXCEEDED THE SCOPE OF ITS AUTHORITY.

As discussed above, the trial court granted the modification based on the language contained at section 2.4 of page 2 of the order re: modification. CP 129-131. The trial court ruled that it was entitled to conduct a review hearing. This perceived basis for modification is in error.

The original final parenting plan in this matter was entered on September 1, 2009 by Superior Court Judge Jerome Leveque pursuant to a decree of dissolution. CP 1-6. Judge Leveque further ordered that because of the ages of the children and because the mother had relocated to

Hawaii, the father could exercise visitation of 3 hours per day when he traveled to Hawaii. Additional visitation could occur if the mother traveled to the continental United States. CP 1-6. Judge Leveque ordered that "This plan shall be subject to review on the motion of either party when the children are two years old to determine if the placement schedule with the father should change." CP 1-6.

On November 16, 2010, the father filed his motion for a review of the residential schedule as authorized by Judge Leveque's final parenting plan and on January 25, 2011, an order was entered by Court Commissioner Valerie Jolicouer pursuant to the father's request for a review hearing, providing the father with revised parenting time. CP 31-33. Thus, the father received his review hearing. Judge Cozza, was without authority to conduct a second review hearing.

This conclusion is made even clearer by the father action's which followed Commissioner Jolicouer's review hearing. After this new parenting schedule (pursuant to the review hearing) had been in place for less than a year, the father filed a petition for a summons and petition for modification of the parenting plan on November 22, 2011. CP 34-43. His basis for this modification was that the final parenting contemplates modification. CP 34-43. He proposed a new parenting plan. CP 44-52.

He set a hearing for an adequate cause determination. CP 53-54. The motion for adequate cause was denied without prejudice. CP 55-56. In denying the motion for adequate cause, Court Commissioner Valerie Jolicouer made a finding that this review hearing provided for in Judge Leveque's final parenting plan had already been provided on January 25, 2011. CP 55-56. See also CP 31-33.

Judge Cozza had no authority to conduct a second review hearing. Such authority was not contained in the underlying order on adequate cause. CP 67-68. A request for a review hearing cannot even be found in the amended petition for modification. CP 57-64. As there is no authority for a second review hearing, the Court's decision to grant a review hearing as set forth at section 2.4 of the order re: modification (CP 129-131) must be reversed.

3. THE TRIAL COURT ERRED BY MODIFYING THE DECISION MAKING PROVISIONS AND OTHER NON-RESIDENTIAL PROVISIONS OF THE PRIOR PARENTING PLAN.

As previously noted, the procedures relating to the modification of a parenting plan are statutorily prescribed and compliance with the criteria set forth in the statute is mandatory. Marriage of Shyrock, 76 Wn.App. 848,

852 (1995). The modification of nonresidential provisions in a parenting plan are governed exclusively by RCW 26.09.260(10). This statute allows for a change of the nonresidential aspect of a parenting plan upon a showing of substantial change of circumstances of either parent or of the child, and that the change is in the best interests of the child.

A review of the father's petition for modification reveals that he did not even request a change of decision making nonresidential provisions in the parenting plan. See page 6, line 5 of the amended petition for modification of the parenting plan. CP 57-64. Unquestionably, this required box is not checked. The father sought only a modification of the dispute resolution provisions and the transportation arrangements.

Yet, the trial court modified the original final parenting plan ordered by Judge Leveque. CP 1-6. Judge Leveque ordered that the mother have sole decision making over section 4.2 major decisions (education, non-emergency health care and religious upbringing) at page 4 of this plan. CP 1-6. As the father did not even request changes of these provisions in his petition for modification (CP 57-64), Judge Cozza was without authority to modify said provisions in his final parenting plan. (The father only requested modification of the dispute resolution or transportation arrangements.) Yet, Judge Cozza did modify those nonresidential

provisions, making the section 4.2 major decisions (education, non-emergency health care and religious upbringing) "joint" and adding another major decision making section (decisions requiring a parent's signature) which he also made joint. See CP 118-128, page 8. The lower court similarly erred by adding provisions under section VI. of the plan that are non-residential and other than dispute resolution or transportation arrangements. See page 9 and 10 of the plan, CP 118-129. The trial court failed to follow the statutory criteria for such modifications, and accordingly all non-residential modifications relating to decision making must be reversed.

4. THE TRIAL COURT ERRED BY NOT DISMISSING THE MODIFICATION ACTION WHERE THE RELOCATING CUSTODIAL PARENT CHOSE NOT TO RELOCATE.

The mother filed a notice of withdrawal for her request to relocate. CP 110-111. Her intent to remain in Hawaii can also be seen in her declaration. CP98-107. Yet pursuant to RCW 26.09.260(6) the trial court granted a modification based on this relocation. See order on modification, page 2, section 2.4, CP 129-131.

This issue is squarely addressed by Marriage of Grigsby, 112

Wn.App. 1 (2002). In Grigsby, after the court restrained the mother from relocation, she decided not to relocate. Id. at 4 and also at 15. The trial court nonetheless still granted the modification even after being informed that the mother was not going to relocate. Id. The Grigsby court held that while the record supported the trial court's findings of fact on the statutory relocation factors, because the mother was no longer actively pursuing relocation, the trial court was without authority to modify the parenting plan. Id. at 4 and 15-17.

Here, the mother gave notice that she was no longer relocating. The trial court thus lacked any authority to modify under RCW 26.09.260(6). The modification must be reversed on this basis as well.

CONCLUSION

This is a case where judgment rests almost purely on the issues of statutory compliance and scope of authority. There was no basis for a modification under RCW 26.09.260(5)(a)(b) or (c). Any modification based on these statutory provisions must be reversed. Further, while a modification under this statutory authority was requested by the father, the trial court did not grant the modification under said authority.

In the case of modification of the nonresidential provisions relating to major decision making issues, the father did not even request such relief.

The trial court was without authority to grant this relief. The lack of authority to modify requires reversal of this portion of the modification.

Similarly, the trial court lacked any authority for a second review hearing on the parenting plan. The father was previously provided a review hearing by Commissioner Jolicouer. No other authority exists for a second review hearing.

Finally, the mother withdrew her request for a relocation stating that she was remaining in Hawaii. This relocation served as the trial court's last basis for a modification of the prior parenting plan. Once the relocation was withdrawn, the trial court lacked the authority to modify the parenting plan. For all of these reasons the decision of the trial court should be reversed.

Respectfully submitted,

David J. Crouse 4-1-13

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 1st day of April, 2013, she served a copy of this Appellate Brief to the persons hereinafter named at the places of address stated below which is the last known address.

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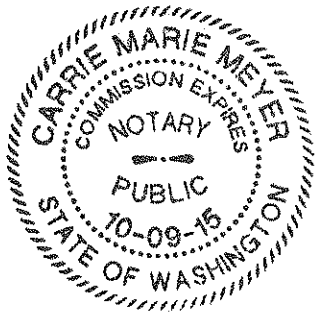
SUBSCRIBED AND SWORN to before me this 1st day of April, 2013.



Carrie Marie Meyer
NOTARY PUBLIC in and for the
State of Washington, residing in Spokane.
My Commission Expires: 10-9-2015