93873-3

NO. 48027-1-II

RESPONSE TO PETITION FOR REVIEW
WASHINGTON SUPREME COURT

ON APPEAL FROM COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

ANGELA K. SCOUTTEN NKA SCHREINER,

Appellant,

v.

MICHAEL J. SCOUTTEN,

Respondent

JOHN A MILLER, WSBA #5741
john@johnmillerlegal.com
Attorney for Respondent
1019 Regents Blvd. Suite 204
Fircrest, WA 98466
253-564-5054

Table of Contents

Table of Authorities

A. Table of Cases

Washington Cases

B. Statutes

C. Court Rules

A. Statement of the Issue

1. A Petition for Review can only be granted if the Court ruled in conflict with an Appellate or Supreme Court case. The Court correctly followed the law and the record supports the ruling. Should this Court deny the Petition for Review because there is no basis to grant it?

B. Introduction

This is a case involving two actions, brought on behalf of two parties, with two filing fees: (1) a Relocation Action brought by Angie, and (2) a Petition to Modify the Parenting Plan brought by Mike. The Court was impartial and fair, followed the proper procedure and law for both actions, and made findings that are supported by the record.

This is not the case where after the Court's denial of Angie's relocation, and her subsequent withdrawal of her intent to relocate, the Court acted without authority and arbitrarily entered a modified Parenting Plan. This is a case where Mike filed a Petition to Modify, which gave the Court authority to modify the parenting plan regardless of whether Angie would later withdraw her relocation. After a relocation and modification trial, and receiving supplement briefing from both Counsel addressing the detrimental effect of Memphis' present environment, the Court found a substantial change occurred since the entry of the 2013 Parenting Plan and modification was in Memphis' best interest.

The Appellate Court properly affirmed the trial Court's (1) denial of the relocation, and (2) the modification of the parenting plan because both decisions were discretionary, the Court followed the proper procedure and law for both decisions, and substantial evidence supports the findings for both decisions.

C. Statement of the Facts

Incorporated from Mr. Scoutten's Appellate Brief.

D. Argument

I. There is No Basis for A Petition for Review to Be Granted.

A petition for review will be accepted by the Supreme Court only:

1. If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
2. If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or[1] RAP 13.4(b)(1)-(4).

Because Ms. Schreiner has not advanced any arguments that would bring 13.4(b)(1)-(4) under view, this Court should not grant acceptance of review. However, if the Court finds Ms. Schreiner's arguments do fall under section (1) or (2), any argument advanced is not supported by her brief or the record. The trial Court did not err

---

1. If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
2. If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1)-(4).

in applying the statutory presumption, correctly applied the required ten (10) statutory factors, substantial evidence supports the Court's decision, and the Court followed all established, controlling law.

II. The Trial Court Had Authority to Modify the Parenting Plan Because Mike Filed a Petition to Modify, Established a Substantial Change Occurred, and Modification was in Memphis' Best Interest

Angie's argument that the "trial Court was already making the decision to modify the parenting plan before it made a decision to grant or restrict relocation..." Petition for Review, 22, is wrong. Even though the Court ruled against the Relocation and Angie stated she would not relocate, the Modification was proper because Mike filed a Petition to Modify, paid a filing fee for the separate action, there was a Modification trial with no objections, and the Court requested additional briefing prior to ruling.

The Court of Appeals "may refuse to review any claim of error which was not raised in the trial Court." RAP 2.5(a). There were no objections at trial to moving forward with Mike's petition to Modify the Parenting Plan after the Relocation trial. Every right was afforded to Angie to respond, call witnesses, cross-examine witnesses, and put forward additional briefing at trial. Angie should not be permitted to raise this issue for the first time on appeal.

This case is controlled first by the Relocation statute and second by the Modification statute, and does not fall squarely under *Grigsby* because Mike filed a petition to Modify the 2013 Parenting Plan. There does not appear to be any case law directly on point with the procedural posture of this case where a modification outside of the relocation was filed at the same time of the relocation.[2] Even so, there were two issues, no objections, two trials, supplemental briefing, and two rulings.

RCW 26.09.260(6) governs a request for modification made as part of an objection to a petition for relocation. In a relocation case, it is not necessary for the court to consider whether there is a substantial change in circumstances other than the relocation itself, to consider the factors contained in RCW 26.09.260(2). Under the relocation statute, the objecting party can petition to change the residence the child resides a majority of the time without a showing of adequate cause. This statute does not control the outcome of the

---

[2] Dicta in a footnote from a Division three case, *In Re Marriage of McDevitt*, 181 Wn. App. 765, 772, 326 P.3d 865 (2014) touches on the less than clear statutory restrictions on the proper procedure for what happens after a relocation is denied, a parent withdraws their relocation request, and modification under the best interests of the child has been explored. That FN though is not directly on point either as this Court went through a best interest of Memphis analysis because Mike filed for a Modification.

case once the relocation is off the table because Mike filed a petition to modify and paid the filing fee.

Instead, RCW 26.09.260(1) governs Mike's petition to modify. In order for the Court to have authority to modify the parenting plan after Angie withdrew her intended relocation, the Court had to find (1) based off facts that have arisen since the 2013 parenting plan was entered that (2) a substantial change has occurred in regards to Memphis or Angie, and that (3) modification it is in the best interest of Memphis, and necessary to serve her best interests. RCW 26.09.260(1).

In determining whether modification is in the best interest of Memphis, the Court could not change the PP unless it found (1) Memphis' present environment is detrimental to the her physical, mental, or emotional health and (2) the harm likely to be caused by a change of environment is outweighed by the advantage of the change to the her. RCW 26.09.260(1)(c). The Court did exactly what it was required to do under the law. The Court found modification was in Memphis' best interest based on the instability that was apparent and harming Memphis since the entry of the 2013 PP.

In *In re Marriage of Grigsby*, 112 Wn. App 1, 57 P.3d 1166 (2002), the Trial Court denied the Relocation after finding that the detrimental effect of the relocation outweighed any benefit. The mother withdrew her request to relocate, but the Trial Court modified the Parenting Plan to make the father the primary parent. The COA affirmed the Relocation because the FF were supported by substantial evidence, but reversed the modification fo the PP because the Court did not have authority to modify the PP to make the father the primary parent once the mother withdrew the request to relocate. *Id.* 1. The Court found that once the mother was no longer pursuing the relocation, there was no substantial change in circumstances and none of the factors contained in RCW 26.09.260(2) were present. *Id.*

Our case is distinguishable from *Grigsby* factually and procedurally. First, Mike filed a Petition to Modify the PP and paid the fee, whereas the father in *Grigsby* did not. Second, in our case, there was a Modification trial and a Relocation trial; there was only a Relocation trial in *Grigsby*. Third, because there was a Modification trial, the Court made its decision to modify the PP because there were RCW 26.09.260(2) factors present. Fourth, after the Court ruled denying the relocation, the mother withdrew her relocation, and

the Court did not alter the PP, leaving it to the parties to bring another Motion if it wanted to modify the PP.

In *Grisby*, two months after the relocation ruling, the parties came before the Court for a hearing (unknown who initiated, FN 3) and the Court modified the PP. *Id.* 5. The Court made the father the primary parent, but kept everything else the same, reasoning that it was protecting the children from any proposed relocation in the future. Our case is different because there was a modification trial, not just a relocation trial, the Court made findings for each trial, supported by substantial evidence, and the Court did not just change the primary parent to protect Memphis from a proposed relocation in the future, like the Court did in *Grigsby*; it made Mike the primary parent because Memphis was being harmed by actions that arose since the 2013 PP was entered and it was in her best interest to live with Mike, not Angie.

After Reversing the Modification of the PP, the *Grigsby* Court addressed the procedural difference from that case and ours by noting the father was free to seek modification of the PP under RCW 26.09.260(2), should he be able to establish that there was a substantial change in circumstances and that the modification was necessary to serve the best interests of the child. *Id.* 26-27.

Here, the trial Court did not modify the Parenting Plan under 26.09.520(6), it modified the Parenting Plan under RCW 26.09.260(1),(2)(c). Had the Court modified the PP under the relocation statute after Angie withdrew her relocation request, the Court *may* have erred, but the Court had authority under .260 to modify after it found, based on facts that had arisen since 2013, which involved the inability to co-parent, unilateral decision making, deceptive behavior, withholding communication – all of which were detrimental to Memphis' well being.

While Angie is correct that there was not a technical adequate cause hearing,[3] this is only a result of the unique procedural posture of the case and should not constitute a reversible error.[4] In addition, this issue was not addressed at trial and should be barred for review by RAP 2.5(a). Before a modification can be set for a hearing, adequate cause must be established; this requires an affidavit

[3] No facts outside of the record should be considered on this appeal. Any argument or reference to anything occurring before (or after) the trial that was not testified to or after July 24, 2015, when the Final Agreed Orders were entered should be stricken and not considered, including inaccurate designation of Clerk's Papers, and any subsequent history of this case. If this Court finds an issue that was not addressed in Angie's brief, but that has merit, it should allow the parties to provide supplement briefing.

[4] If this case were solely based off just the modification statute, a hearing for adequate cause would be required before the case was set for trial. RCW 26.09.270, *Zigler* at 809. These parties were already in trial. A ruling had already been made on the relocation.

setting forth facts that arose since the entry of the last PP. *Zigler* at 809. In addressing the modification statute after the Relocation trial, the Court requested supplemental briefing before it made its ruling. The supplemental briefing goes beyond what is required to be found to pass the adequate cause hurdle required outside of the relocation statute. It could not have been the legislature's intent in this scenario where a Modification was filed and a Modification trial was in full swing to have the Court end proceedings as soon as Angie notified the Court she would not relocate without first having an adequate cause hearing. At the least, judicial economy required the case to continue and there was no harm or prejudice in continuing.

The Court did not abuse its discretion in modifying the parenting plan, it had authority to modify the PP, it made appropriate findings based off substantial evidence, and the Appellate Court properly affirmed the modification.

E. Conclusion

The trial Court properly considered all relevant factors in making its decision to deny Angie's relocation, which is supported by substantial evidence in the record. Further, the Court found that even if the trial Court didn't explicitly detail every possible reason it relied

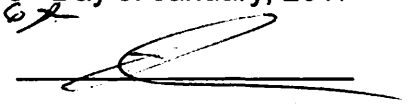
on it making its decision, there was substantial evidence in the record to support the Court's relocation findings.

The Court also had authority to modify the parenting plan even after Angie withdrew her intent to relocation because Mike filed a petition to modify, there was a modification trial, and supplemental briefing. The Court appropriately made a discretionary decision after finding a substantial change in circumstances had arisen since the May 2013 Parenting Plan and properly considered the factors under the Modification statute – 26.09.260(2). The Court found that the modification was in five-year-old Memphis' best interest because her environment was detrimental to her well-being. The Court affirmed the denial of the Relocation and affirm the Modification of the Parenting Plan, which kept Memphis where she has been living with Mike and Monica since July 2015.

The trial Court correctly applied the presumption and addressed each statutory factor, which was supported by substantial evidence. After addressing the relocation requirements, the Court moved to the modification requirements, correctly finding that a substantial change had occurred and the change was detrimental to the child. This Court should not grant Angie's Petition for Review

because there is no basis to grant it and alternatively, the Court did not err in making its ruling.

Respectfully Submitted
this 5th Day of January, 2017



John A. Miller
Attorney for Respondent
WSBA 5741

CERTIFICATE OF SERVICE

I, Joseph A. Fonseca, certify as follows:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On the 6th day of January, 2017, I caused to be filed and served true and correct copies of the above Response to Petition For Review, and this Certificate of Service; on all parties or their counsel of record, as follows:

Via E-service and Certified U.S. Mail

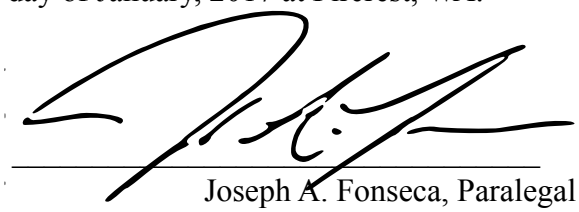
Angela Schreiner
5105 Grand Loop Way, #604
Tacoma, WA 98407
angiekschreiner@gmail.com

Original E-filed with:

Washington State Supreme Court
Clerk's Office
415 12th Street West
Olympia, WA 98504-0929
Supreme@courts.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 6th day of January, 2017 at Fircrest, WA.



Joseph A. Fonseca, Paralegal