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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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Pierce County Superior Court No. ~~06-34029~~87-8  
Court of Appeals No. 38595-3 II

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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GERARDO OMAR GROSJEAN,

Appellant,

v.

BUTSABA GROSJEAN,

Respondent.

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**RESPONSE BRIEF**

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## **I. INTRODUCTION**

On August 24, 2006, Butsaba Grosjean took her 2-year old son, RG, and left the home of her husband because of his physical and emotional abuse of them both. Ms. Grosjean and RG moved into a shelter and Ms. Grosjean applied for financial aid, secured day care for RG, and began searching for a job.

In November of 2008, the trial court awarded primary residential custody of RG to Ms. Grosjean, who had already moved to California to take a job as a language/cultural instructor at the Defense Language Institute Foreign Language Center at the Presidio in Monterey, California. RG has been living in California with his mother since that time.

This Court is called upon to decide whether the trial court complied with RCW 26.09.520 in the proceedings below and, if not, what action should be taken to correct the situation.

## **II. RESTATEMENT OF THE CASE**

On August 30, 2006, six days after Ms. Grosjean moved into a shelter with RG, Mr. Grosjean filed a Petition for Legal Separation. CP 577-585. On the same date, Mr. Grosjean obtained an ex parte restraining order that RG should reside with him until the hearing on his Motion, set for September 25, 2006. CP 599-602.

Ms. Grosjean filed her Response to the Petition for Legal

Separation and Proposed Parenting Plan on September 15, 2006 , stating that she did not want legal separation, but was seeking divorce instead. CP 603-616. She also filed a Motion for Ex Parte Restraining Order, requesting that Mr. Grosjean be restrained from coming within “a city block” of the home, work place, or school of RG and of herself, and asked that the Court vacate the ex parte restraining orders obtained by Mr. Grosjean on August 30 and September 13. CP 617-622. In support of her Motion for Ex Parte Restraining Order, Ms. Grosjean filed her Declaration, describing physical and emotional abuse of herself and RG by Mr. Grosjean. CP 1-3.

On September 15, 2006, both parties appeared at the ex parte department of the Pierce County Superior Court, “were sworn and testified.” CP 623-626. The Court entered an Order vacating the August 30 and September 13 Orders obtained by Mr. Grosjean “to the extent it vests the father with custody/residence of the child.” CP 625.

On October 5, 2006, the Court found that Ms. Grosjean was the “primary parent,” and ruled that Mr. Grosjean was “to have child every Friday through Sunday.” CP 81. *See also* 10/06/06 Verbatim Transcript of Hearing, page 13, lines 14-15 and 22-23. The Court also entered an order for the selection of a parenting investigator. *Id.* at lines 10-14.

A status conference was held on March 29, 2007, with RG’s

guardian ad litem, RaeLea Newman, in attendance, during which an agreed order was entered setting up “an alternating week residential visitation schedule for a variety of reasons.” 3/39/07 Verbatim Transcript of Proceedings, page 3, lines 21-23.

On May 18, 2007, Ms. Grosjean filed a Notice of Intended Relocation of Children, informing the Court and Mr. Grosjean that she had been offered and had accepted a full time position as a language/cultural instructor with the Department of the U.S. Army at the Defense Language Institute Foreign Language Center at the Presidio in Monterey, California. CP 627-628. Mr. Grosjean filed an Objection to Relocation on June 7, 2007. CP 90-96.

Guardian ad litem Newman testified regarding relocation at a June 21, 2007 hearing on Mr. Grosjean’s motion for a temporary order restraining relocation of RG pending trial, stating her recommendation that relocation of RG not be permitted at that time because of a scheduled eye operation in relation to the alternating week visitation schedule then in effect:

Mr. Grosjean wanted to have both the pre-operative and post-operative time for taking care of Ryan. I felt if we were going to choose between who had the pre-operative and who had the post-operative time that it would be best for Mr. Grosjean to have the post-operative time, as it appeared to me from the list that I received from Dr. Pratt’s office that the post-operative time could be more

complicated than the pre-operative time.

That's why -- and Mr. Grosjean and I had that conversation -- that I felt it would be best for him to have the post-operative time because I felt that the care was more complicated. He wanted both the pre- and the post-operative time, and I didn't feel that it was reasonable to recommend that he have both.

So that's why -- and I feel that the post-operative time, if Ms. Grosjean had been unable to ask for assistance or help because she has limited language and if the child was uncomfortable, that he would be best able to provide that.

6/21/07 Verbatim Report of Proceedings, page 4, lines 17-25; page 5, lines 1-11.

Following the hearing on the temporary relocation of RG, the Court ruled “[t]here are not circumstances sufficient to warrant a relocation of the child prior to a final determination at trial.” 6/29/07 Verbatim Report of Proceedings, page 2, lines 6-8; page 11, lines 7-9. The Court emphasized the “special needs” of RG, who was undergoing follow-up care after his eye surgery. *See* 6/29/07 Verbatim Report of Proceedings, page 7, lines 8-25; page 8, line 1.

At the time of the hearing, trial was set for November 8, 2007, and the Court noted: “it’s not that far way, but I would like to move the trial up to September.” *Id.*, page 15, lines 11-12. The Court also ruled regarding the residential schedule until trial:

It’s 20 days/10 days. First 20 days with dad, because I’m

still concerned about the aftercare with the child, and then 10 days with mom and then 20 days with dad, 10 days with mom.

*Id.*, page 14, lines 19-22.

Trial did not commence until September of 2008 before Honorable Ronald Thomas, Pierce County Superior Court Pro Tempore Judge. Following several days of testimony and the Court's consideration of three reports prepared by the guardian ad litem (9/5/08 Verbatim Report of Proceedings, page 7, lines 17-22), the Court ruled orally that "the requirements of the relocation statute are satisfied," and that "the custody of the child be, primary custody be awarded to the mother[.]" *Id.*, page 7, lines 22-25.

On October 27, 2008, the Findings of Fact and Conclusions of Law were entered. The Court made the following written findings of fact:

- The Court finds that the factors of the Statute (RCW 26.09.520) have been met in favor of the relocation of the child to reside with the mother. Substantial evidence was presented by both sides throughout the trial as to the relevant factors and the Court finds that the factors in sum favor the relocation.
- The Court finds that both parents are good parents.
- The Court finds that the Mother was forced to leave the family home with the child and to hide from the father.
- The Court finds that the Mother was forced to find employment and did so. The Court finds that the employment sought was reasonable given the

circumstances and skill levels.

- The Court finds that the Mother is able to provide medical and dental services for the child.

- The requirements of the relocation statute are satisfied.

CP 550.

Additional findings of fact were included in an “Addendum” to the

Findings of Fact and Conclusions of Law (*see* CP 551):

1. The number one priority when you come to what goes into the Parenting Plan is what is in the best interests of the child.
2. Both parties are good parents.
3. In so far as their relationship is concerned, both parties are great parents, and there has been no evidence or testimony to the contrary.
4. The wife found it necessary to leave the house, to move into a shelter and take the child with her and to, if you will, hide from the husband/father.
5. The wife found employment in Monterey at the world famous language school in Monterey. This school is an excellent facility. It is one used by the Armed Forces in their most critical language education. It is a great school.
6. Monterey is a good place and California is a good place.
7. The wife found a good place for her employment.
8. There is good reason on both sides, to move the child to California in one instance or to keep the child here in the other instance.

9. Father is available almost full time, has no employment at the present time because he's on L & I, so that gives him an advantage because he is present at all times.

10. Mother is employed full time and has the benefit of providing medical and dental services for the child, which is certainly a plus in her favor.

11. The evidence shows that the mother was forced to move to California. She did not pick California. She was forced to find a job and that is where the job came up. It was reasonable under the circumstances.

12. She should not be denied the custody of her child because of what happened here under these circumstances.

13. All of the Guardian ad Litem reports state that it is in the best interests of the child to be with the mother. These reports were issued prior to the time that she had a flare up with the Petitioner's prior attorney. There is no real reason to disagree with the Guardian ad Litem.

14. The requirements of the relocation statute are satisfied.

15. Primary custody of the child shall be with mother. The father to have reasonable and liberal visitation pursuant to the terms of mother's proposed Parenting Plan.

16. Father has done a great job as a father.

17. Equity demands that this child be, at this present time, in the primary care of the mother.

CP 556.

Mr. Grosjean's Assignment of Error is that "the court abused its discretion in finding adequate cause and failed to make specific findings

regarding the requirements outlined in the relocation statu[t]e RCW 26.09.520, and RCW 26.09.260.” Appellant’s Brief, page 5. Mr. Grosjean asks this Court to reverse “the ruling of the trial court,” and dismiss Ms. Grosjean’s “petition for custody and relocation of the child[.]” Brief, page 11. Respondent Butsaba Grosjean submits this Response to the Appellant’s Brief.

### **III. ARGUMENT**

#### **A. Standard of Review**

A trial judge has broad discretion in child custody matters. *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 327, 669 P.2d 886 (1983).

[I]f there is one area of substantive law in which appellate courts have traditionally deferred to the trial bench, it is in the area of domestic relations:

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality.... The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

*In re Jannot*, 110 Wn. App. 16, 21, 37 P.3d 1265 (2002) (quoting *In re Marriage of Landry*, 103 Wash.2d 807, 809-10, 699 P.2d 214 (1985)), *affirmed*, 149 Wn.2d 123, 65 P.3d 664 (2003). *See also Cabalquinto*, 100

Wn.2d at 327, 669 P.2d 886 (“A trial court's disposition of a case involving rights of custody and visitation will not be disturbed on appeal unless the court manifestly abused its discretion.”).

**B. RCW 26.09.260 does not apply and “adequate cause” is not an issue in this case.**

Mr. Grosjean’s Assignment of Error includes the assertion that the trial court abused its discretion in finding adequate cause and failed to make specific findings regarding the requirements outlined in RCW 26.09.260. The issue related to this Assignment of Error is identified by Mr. Grosjean as, “[f]or purposes of RCW 26.09.260(1), (2). There are not findings regarding these issues.” Appellant’s Brief, page 6.

When a party files a motion and supporting affidavits for a temporary custody order, a temporary parenting plan, or modification of an existing custody decree or parenting plan, “The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits[.]” RCW 26.09.270. The proceedings below did **not** involve modification of an existing custody decree or parenting plan.

RCW 26.09.260, which governs modification, does not apply in this case. The trial below was for the purpose of dissolving the parties’ marriage, distributing property, awarding primary residential custody of

RG, and entering the **initial** parenting plan -- **not** for the purpose of modifying an existing custody decree or parenting plan.

At page 6 of his Brief, Mr. Grosjean erroneously asserts that “custody was changed” on March 29, 2007 and “custody was awarded to the father” on January 4, 2008. In fact, custody of RG was not awarded until trial.

All orders entered prior to trial were temporary only, and related not to “custody” of RG but to a residential schedule for RG pending trial, and all temporary orders, including the January 4, 2008 Temporary Order, terminated upon entry of the final decree. RCW 26.09.260(10)(c) (temporary orders and temporary restraining orders terminate when the final decree is entered). Mr. Grosjean’s assignment of error based on RCW 26.09.260, the modification statute, and his issue designated as “E” are without merit.

**C. The Court should refuse to consider the Issues designated A - D because they are not adequately briefed and no legal citation is presented in support of Mr. Grosjean’s arguments.**

There is **no** argument related to Issues A-D of Mr. Grosjean’s Brief, which include citations to RCW 26.09.520(1), (3), (6), and (7), which set out some of the relocation factors.

Instead, Mr. Grosjean’s argument begins with reference to Judge

Thompson's decision "to change custody to the mother." Appellant's Brief, page 7. The argument section itself consists of two points only: (1) an assertion that consideration of the mother's ability to provide health and dental insurance for RG "should not have any bearing on the decision" on the "designation of custody;" and (2) Mr. Grosjean's several complaints about the guardian ad litem's reports. There is no reference to any of the Issues A-D or to any section of RCW 26.09.520 in the argument section of the brief, nor is there citation to any legal authority whatsoever to be found in Mr. Grosjean's argument.

RAP 10.3(a) sets out the proper content of an appellant's brief. As to the argument section, the Rule requires "argument **in support of the issues presented for review**, together with **citations to legal authority** and references to relevant parts of the record." RAP 10.3(a)(6) (emphasis added). Mr. Grosjean's brief contains neither.

First, "[o]nly those issues which are properly briefed are considered by the court on appeal." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 689 fn 4, 974 P.2d 836 (1999) (citing *Saldin Sec., Inc. v. Snohomish County*, 134 Wash.2d 288, 297-98 n. 4, 949 P.2d 370 (1998); *Johnson v. Mermis*, 91 Wash.App. 127, 136 n. 23, 955 P.2d 826 (1998)).

Second, where a proposition is argued without supporting authority, "it is not properly before" the court. *Beal for Martinez v. City of*

*Seattle*, 134 Wn.2d 769, 777 fn2, 954 P.2d 237 (1998) (citing *Schmidt v. Cornerstone Inv., Inc.*, 115 Wash.2d 148, 166, 795 P.2d 1143 (1990)). See also *Cowiche Canyon Conversancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (where grounds argued were not supported by any reference to the record nor by any citation of authority, the court “do[es] not consider them.”).

Because Mr. Grosjean neither properly briefed the issues he identified nor supported his arguments with any legal authority, this Court should refuse to consider Issues A-D and the arguments presented by Appellant.

**D. The trial court considered substantial evidence regarding the relocation factors set out in RCW 26.09.520 and determined that the evidence weighed in favor of relocation of RG.**

Mr. Grosjean’s Assignment of Error also states that the trial court abused its discretion in failing “to make specific findings regarding the requirements outlined in the relocation statu[t]e RCW 26.09.520.”

Appellant’s Brief, page 5.

RCW 26.09.520 sets out the “relocation factors”:

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of

the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

- (1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
- (2) Prior agreements of the parties;
- (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
- (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;
- (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
- (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
- (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
- (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;

(9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;

(10) The financial impact and logistics of the relocation or its prevention; and

(11) For a temporary order, the amount of time before a final decision can be made at trial.

\* \* \*

In *In the Matter of the Marriage of Horner*, 151 Wn.2d 884, 894 - 895, 93 P.3d 124 (2004), the Supreme Court held that “trial courts must consider all of the child relocation factors,” and must determine “whether the ‘detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person.’”

In *Horner*, the trial court made only two “conclusory” findings: “the detrimental effects of the relocation outweigh the benefit of the change to the child and Petitioner,” and “[a]fter analysis of the factors for consideration outlined in RCW 26.09.520, the court has determined Respondent has rebutted the presumption that the relocation should be permitted.” *Horner*, 151 Wn.2d at 896-897, 93 P.3d 124. The *Horner* Court ruled that these findings were insufficient. *Id.*

With regard to the relocation statute, the trial court in this case stated:

The Court finds that the factors of the Statute (RCW 26.09.520) have been met in favor of the relocation of the

child to reside with the mother. Substantial evidence was presented by both sides throughout the trial as to the relevant factors and the Court finds that the factors in sum favor the relocation.

...

The requirements of the relocation statute are satisfied.

CP 550.

Thus, the trial court indicated that it did, in fact, consider the eleven relocation factors, because substantial evidence regarding the factors was presented throughout the trial, and based on that evidence, it reached the conclusion that relocation of RG would be permitted.

Put another way, Mr. Grosjean did not carry his burden of overcoming the presumption that relocation would be permitted. *See Horner*, 151 Wn.2d at 895, 93 P.3d 124 (the relocation statute establishes a rebuttable presumption that the relocation of the child will be allowed; burden of overcoming that presumption is on the objecting party, “who can prevail only by demonstrating that the detrimental effect of the relocation upon the child outweighs the benefit of the change to the child and the relocating person.”) (quoting *In re Custody of Osborne*, 119 Wn. App. 133, 144, 79 P.3d 465 (2003)).

**E. The written findings and the incomplete record of the trial may provide insufficient documentation of the court’s consideration of the relocation factors under *Horner*.**

A third holding in *Horner* is that it is an abuse of discretion to fail to satisfy one of two methods of documenting the trial court's consideration of the child relocation factors set out in RCW 26.09.250. A trial court must either enter "specific findings of fact on each factor," or there must be "substantial evidence" presented on each factor and "the trial court's findings of fact and oral articulations reflect that it considered each factor." *Horner*, 151 Wn.2d at 896, 93 P.3d 124.

Here, the trial court did not enter specific written findings of fact regarding each and every one of the eleven relocation factors. Thus, the trial court did not meet the first approved method of documenting its consideration of the relocation factors under *Horner*.

The second approved method of documenting a trial court's consideration of the relocation factors under *Horner* requires appellate review of the record to determine whether substantial evidence was presented on each factor, and whether the trial court's findings of fact and oral articulations reflect that it considered each factor. *Horner*, 151 Wn.2d at 896, 93 P.3d 124.

Although the written findings of fact indicate that substantial evidence was presented throughout the trial as to the relocation factors, a complete verbatim transcript of the trial has not been provided by Mr.

Grosjean, making appellate review of whether substantial evidence was presented on each factor impossible.

RAP 9.2(b) states that “[a] party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review.” In this case, the entire trial transcript was necessary to determine whether substantial evidence was presented on each of the 11 relocation factors set out in RCW 26.09.520.

RAP 9.2(c) requires the party seeking review to “include in the statement of arrangements a statement of the issues the party intends to present on review” when that party “arranges for less than all of the verbatim report of proceedings.” Mr. Grosjean’s Statements of Arrangements did not include a statement of the issues he intended to present on review.

Because the Court does not have the entire verbatim transcript of the trial before it, there is an insufficient record upon which to base a decision on the issue of whether the trial court complied with the second *Horner* method of documenting its consideration of the relocation factors. This Court thus cannot determine whether the trial court abused its discretion in permitting relocation of RG. *See Cabalquinto*, 100 Wn.2d at 329, 669 P.2d 886 (where an appellate court is unable to determine the

basis for a trial court's ruling, it is unable to determine whether the ruling was an abuse of discretion).

**F. The Court should remand this case for entry of written findings of fact or oral articulations that comply with *Horner*.**

Mr. Grosjean asks the Court to reverse "the ruling" of the trial court, presumably referring to the finding that the factors set out in the relocation statute weighed in favor of relocation of RG. Appellant's Brief, page 11. Mr. Grosjean also asks the Court to dismiss Ms. Grosjean's "petition for custody and relocation of the child." *Id.*

Ms. Grosjean did not submit a "petition for custody": rather, she submitted a Proposed Parenting Plan with her Response to Mr. Grosjean's Petition for Legal Separation, and a Proposed Parenting Plan with her Notice of Intent to Relocate Child. CP 606-616; CP 632-648. While the trial court entered a temporary order denying relocation pending trial, the Parenting Plan presented by Ms. Grosjean at trial was adopted and entered by the court after primary residential custody was awarded to her and a ruling that the statutory factors favored relocation was made. 9/5/08 Verbatim Transcript of Proceedings, page 7, lines 22-25; page 8, lines 1-5; CP 478-492. Dismissal of Ms. Grosjean's Parenting Plan and Notice of Intent to Relocate Child is not an appropriate remedy.

Although *Horner* itself was a moot case (*Horner*, 152 Wn.2d at

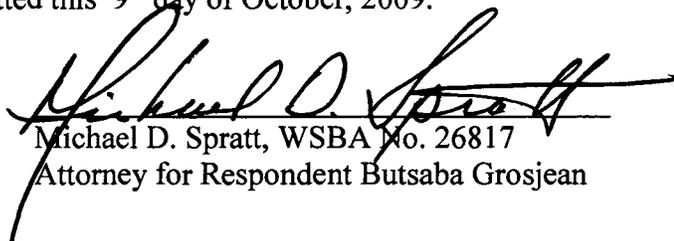
892, 93 P.3d 124), the *Horner* Court identified the proper remedy in a case that is not moot and the trial court fails to enter specific findings or articulate in its oral opinion the eleven relocation factors. That remedy, which applies here, is a “remand to the trial court for entry of specific findings of fact or oral articulations of the child relocation factors.” *Horner*, 151 Wn.2d at 897 fn 11, 93 P.3d 124. *See also Cabalquinto*, 100 Wn.2d at 329, 669 P.2d 886 (remanding case where appellate court was unable to determine the basis for the trial court’s ruling).

#### IV. CONCLUSION

Because the record presented to the Court is insufficient to determine the basis for the trial court’s decision to permit relocation of RG, the Court is not able at this time to determine whether the trial court abused its discretion in permitting relocation of RG.

Pursuant to *Cabalquinto* and *Horner*, this Court should remand this case for entry of specific findings of fact or oral articulations of the child relocation factors set out in RCW 25.09.520.

Respectfully submitted this 9<sup>th</sup> day of October, 2009.

  
Michael D. Spratt, WSBA No. 26817  
Attorney for Respondent Butsaba Grosjean

CERTIFICATE OF SERVICE

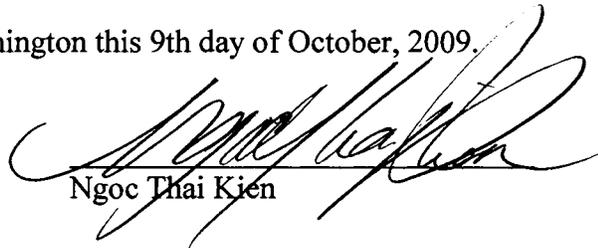
Ngoc Thai Kien hereby certifies under penalty of perjury under the laws of the State of Washington that on the 9<sup>th</sup> day of October 2009, I delivered a true and correct copy of the Respondence's Response Brief to which this certificate is attached, by Personal Delivery to the following:

Gerardo Grosjean

8300 Phillips Rd. SW, Apt. 38

Lakewood, WA 98498

Signed at Tacoma, Washington this 9th day of October, 2009.



Ngoc Thai Kien

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