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DIVISION II
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STATE OF WASHINGTON
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No. 46078-5-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

GARRETT LAIL, Respondent

and

KIMBERLY BRIGGS, Appellant

RESPONDENT'S REPLY BRIEF

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III. INTRODUCTION

This appeal follows a bench trial on a family law parenting plan relocation request filed by Appellant, which was tried simultaneously with a petition to modify custody filed by Respondent. The bench trial pertinent to this appeal occurred after a prior appeal from an earlier trial on the same issues resulted in a reversal and remand for a new trial before a different judge.

Appellant Kimberly Briggs has raised fifteen assignments of error, thirteen of which she clearly delineates as alleged factual errors by the trial court. Only two of Appellant's assignments of error, numbered eleven (11) and fifteen (15), arguably pertain to legal conclusions. Appellant has filed no other requests for relief. Respondent Garrett Lail has raised no counter issues on appeal.

IV. ASSIGNMENTS OF ERROR

Respondent does not believe the trial court erred.

V. COUNTER STATEMENT OF THE CASE

The parties are divorced and have one minor child together, Mason, now nearly age 12. Appellant Briggs was designated the primary custodian of Mason under the original Final Parenting Plan entered in 2006.

The relevant facts date back to a request to relocate filed by Appellant Briggs with the Grays Harbor County Superior Court on June 2, 2011. Respondent Lail objected to the relocation request and filed a petition to modify custody, based on integration by consent and other issues, as of June 11, 2011. Several hearings were held in 2011 on these issues, culminating in a trial and orders entered on September 15, 2011. Appellant appealed those orders, and won a reversal and remand for new trial, with a Mandate being issued on October 30, 2013. CP 001-015 (Mandate, with prior appellate decision attached).

The retrial was held before Grays Harbor Superior Court Judge David Edwards on December 10, 2013. The parties and one other witness testified. December 10, 2013 RP 1-160.

Appellant began by objecting to proceeding on the modification petition, on the basis that no determination of adequate cause had been made, 12/10/13 RP 6, since the prior appellate decision had vacated all orders previously entered by Judge Gordon Godfrey, CP 014, which arguably included a determination of adequate cause. 12/10/13 RP 8. Judge Edwards reviewed the case file, reaffirmed the 2011 finding of adequate cause and made his own independent finding of adequate cause, and the trial proceeded. 12/10/13 RP 13-14.

Respondent's testimony covered the consensual integration of Mason into the father's care and custody a majority of the time prior to the 2011 court proceedings. 12/10/13 RP 81-86. Mr. Lail kept a calendar tracking his residential time with Mason, which averaged four out of every seven days for at least six months prior to the 2011 petition to modify. 12/10/13 RP 83, 85. The calendar was offered and admitted as an exhibit. 12/10/13 RP 83. Ms Briggs' residential time with Mason was even less during the pendency of the first appeal, and increased to just two days each week after the first appellate decision was received. 12/10/13 RP 88. Mason has resided with Respondent since 2011. 12/10/13 RP 86-87.

Mr. Lail testified that he and Mason reside in Cosmopolis, 12/10/13 RP 75, while Ms. Briggs said she had moved to the Olympia area in 2011 for job and educational opportunities. 12/10/13 RP 25. Ms Briggs admitted that she had not been employed since April 2013, and was not looking for work. 12/10/13 RP 48-49. She further admitted she was not attending college. 12/10/13 RP 51.

Ms Briggs admitted to various transportation difficulties, including not having a working vehicle, 12/10/13 RP 56-57, not having vehicle insurance, Ibid, texting while driving, 12/10/13 RP 58, cell phone use

while driving, Ibid, and allowing Mason to ride in the bed of a pickup truck without required seatbelts. Ibid.

At the time of trial, Ms Briggs was residing in a one bedroom apartment. When Mason stayed the night, he would sleep in the same bed with his mother. 12/10/13 RP 64. Mason was 9, almost 10 years old, at the time. 12/10/13 RP 75.

Ms Briggs admitted to discussing the court case with Mason, at least as of September 2013, when he would have been 9 years of age. 12/10/13 RP 66. She admitted Mason had been in counseling, and that Mason's problems were attributed to disputes between the parents. 12/10/13 RP 67-69. Both of the parties admit that they have trouble communicating with each other. 12/10/13 RP 70-71, 89.

Mr. Lail testified to his involvement in Mason's school, 12/10/13 RP 75-79, including working with Mason's teacher when problems arose at school. Ibid. He produced an attendance record that showed a number of tardies to school, on days when Ms Brigg's had Mason. 12/10/13 RP 78-80.

On the relocation factors, Mr. Lail, the objecting party, offered testimony addressing each of the eleven statutory factors in turn. 12/10/13

RP 90-105. Ms Briggs did not similarly address every factor at trial, but did file two post-trial declarations, CP 71-82, 94-136, which she cites extensively as evidence controverting the decision after trial and supporting her position on appeal.

Mr. Lail testified to Mason's relationship with his father, various relatives on both sides of the family, and other significant persons in the Grays Harbor area. 12/10/13 RP 90-95. Judge Edwards findings on the relationships factor mirrored the father's testimony and did not favor relocation. 12/10/13 RP 150-151; CP 89.

There was no agreement to the requested relocation, as should be evident from the need for multiple trials on the request, and as was testified to by Mr. Lail, 12/10/13 RP 95-96, and as was found by the trial court. CP 90.

Mr. Lail testified that allowing the relocation of then 9 year old Mason would be disruptive and detrimental to Mason. 12/10/13 RP 96. Judge Edwards expressly recognized that the placement of Mason with his father since 2011 pursuant to the initial court orders (that had been set aside) was a complication, but still found that allowing the relocation would be a disruption to Mason and his relationship with his father. 12/10/13 RP 151-152; CP 90.

There was no evidence that either parent was subject to limitations in his or her residential time pursuant to RCW 26.09.191. Judge Edwards found that this factor did not apply. 12/10/13 RP 152; CP 90.

Mr. Lail testified to his reasons for opposing the relocation, which focused on Mason's known and beneficial situation residing in Cosmopolis, as opposed to moving to Olympia where he would know no one other than his mother. 12/10/13 RP 103-105. Judge Edwards found that both parents had legitimate, good faith reasons for proposing and/or opposing the relocation, and that neither party was favored or disfavored in this regard. 12/10/13 RP 152-153; CP 90.

The age, developmental stage, and needs of the child, as well as the potential impacts of relocation, and any special needs of Mason, were testified to at some length by Mr. Lail. 12/10/13 RP 96-105. Mason has had some discipline issues at school, 12/10/13 RP 98-99, and has been in counseling. 12/10/13 RP 98-100. Judge Edwards found that Mason was perhaps a bit emotionally vulnerable, that the actions of the mother in discussing the pending legal proceedings with Mason, and that a move to a new environment would likely have a negative impact on Mason. 12/10/13 RP 153-154; CP 90-91.

Mr. Lail testified to the quality of life, resources and opportunities available to Mason in his Cosmopolis and Grays Harbor environment. Mr. Lail readily acknowledged that the situation was not exactly the same as compared to Olympia. 12/10/13 RP 108-110. Judge Edwards agreed with Mr. Lail's assessment that the comparative environments were not identical, but that neither locale was more heavily favored. 12/10/13 RP 154-155; CP 91.

As to possible alternative arrangements that might foster and continue Mason's relationship with and access to each parent, Mr. Lail readily admitted that the inability of the parties to effectively communicate with each other was a substantial hinderance to finding some middle ground or other arrangement. 12/10/13 RP 110-112. Judge Edwards agreed, and found both parents to be responsible for the lack of communication, thus preventing any alternative arrangements. 12/10/13 RP 155-156; CP 191-192.

Mr. Lail testified that a relocation to Olympia was not feasible or desirable for him, because he had a stable situation in Grays Harbor, and, was set up to eventually own and operate the chimney cleaning business where he was employed. His employer was like extended family and even helped look after Mason. 12/10/13 RP 103-105. Judge Edwards agreed

that it was not feasible for Mr. Lail to relocate to Olympia under those circumstances, but that it was feasible for Ms Briggs to not relocate from Grays Harbor (where she resided at the time of filing her request to relocate) since she was pursuing neither employment nor educational opportunities which necessitated her move. 12/10/13 RP 156-157; CP 91-92.

As to the financial impact and logistics of relocation, Mr. Lail testified to his employment situation, and his income, 12/10/13 RP 105-106, and the distance between the then residences of the parties, 12/10/13 RP 115, as well as his small daycare bill due to his neighbors and employer being of such great assistance. 12/10/13 RP 113-115. He testified that Ms Briggs was contributing nothing to the support of Mason. 12/10/13 RP 107. Judge Edwards found that financial impact or logistics of a relocation was significant, as Mr. Lail might actually spend less if relocation were granted. 12/10/13 RP 157-158; CP 92.

This trial did result in a final decision on the relocation request.

The modification of parenting plan petition was taken under advisement, and a few weeks after the December 10, 2013 trial Judge Edwards issued a three page letter decision on the issues of integration into the father's home and other factors. CP 68-70. Integration of Mason

into the father's home in substantial deviation from the pre-2011 parenting plan was found. A modification of primary custody was found to be in Mason's best interests. CP 68-70; CP 83-87.

VI. LAW AND ARGUMENT

A. All of the findings of fact made by the trial court should be upheld.

As previously indicated, thirteen of the fifteen assignments of error alleged by Appellant indicated, thirteen of the fifteen assignments of error alleged by Appellant pertain to findings of fact made by the trial court after hearing live testimony of the parties and one other witness. Ms Briggs bases her appeal on an apparent assumption that testimony she asserts she presented at trial should control the outcome. She repeatedly cites statements she presented not at trial, but only in two post-trial declarations, as evidence that the trial judge should have relied upon. She ignores evidence presented by Respondent Lail, which was generally consistent with the findings of fact made by the trial judge.

As Ms Briggs accurately stated in her Brief of Appellant:

“A trial court's decision regarding relocation of children is reviewed for abuse of discretion. *In re Marriage of Horner*, 151 Wash.2d 893, 93 P.3d 124 (2004). A trial court manifestly abuses its discretion when a review of the record shows that its decision is based on untenable

grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wash.2d 46, 47, 940 P.2d 1362 (1997). A court’s decision is based on untenable grounds if the factual findings are unsupported by the record. *Littlefield*, A trial court’s factual findings are reviewed for substantial evidence. *In re Marriage of McDole*, 122 Wash.2d 604, 610, 859 P.2d 1239 (1993).”
Brief of Appellant, p 12-13.

The party challenging the findings of fact “bears the burden of demonstrating that substantial evidence does not exist.” *In re Marriage of Grigsby*, 112 Wn.App. 1, 9, 57 P.3d 1166 (2002). This is a significantly different burden that simply citing evidence that may have been presented, either properly at trial or improperly in post-trial declarations, which could have supported different findings of fact, but was not the evidence relied upon by the trial court in reaching its decision.

The fact pattern in the case at hand is similar to the facts of *In re Marriage of McNaught*, 189 Wn.App. 545 (2015), wherein the appellant father challenged a granted relocation request and asked the court to reexamine the trial court evidence and reach a different conclusion. The *McNaught* court rejected this approach.

Here, there is substantial evidence to support the findings of fact and ultimate decision. That evidence simply was not the evidence

introduced by Appellant Briggs, it was largely introduced by Respondent Lail. Each of the challenged findings of fact must be upheld.

B. The order denying relocation was properly made and should be upheld.

“A trial court must consider all 11 statutory factors in child relocation matters to determine if a detrimental effect outweighs the benefits to both the child and the parent wishing to relocate. Each factor has equal importance, Each factor has equal importance, and they are not weighted or listed in any order but rather provide a balancing test between the competing interests and circumstances that exist when a parent wishes to relocate. The trial court must enter specific findings on each factor, or parties must have presented substantial evidence on each factor with the trial court making findings and oral articulations that reflect its considerations of each. A trial court abuses its discretion when it fails to consider each factor.” *McNaught*, supra at 556.

A trial court decision is not manifestly unreasonable if it is within the range of acceptable choices presented. *In re Parentage of Schroeder*, 106 Wn.App. 343 ,349, 22 P.3d 1280 (2001). “Because of the trial court’s unique opportunity to observe the parties, the appellate court should be extremely reluctant to disturb child placement decisions.” *Schroeder*, at 349.

Here, all statutory factors with covered through the testimony of Mr. Lail. Trial Judge Edwards referred to every factor in his oral decision.

The written order addressed every factor. The order denying relocation is therefore valid and must be upheld.

C. The modification of custody due to integration and other factors, including the best interests of the child, was proper and should be upheld.

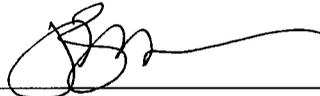
The testimony at trial fully explained the circumstances under which Mason came to spend more and more time residing with Mr. Lail, with the full knowledge and consent of Ms Briggs, at least until the entry of the 2011 orders. Integration by consent is a substantial change of circumstances, and, once a substantial change is found, the court proceeds to a ‘best interests of the child’ analysis, including a comparison of the two potential living environments. *Clark v. Gunter*, 112 Wn.App. 805 (2002). This is exactly the process and analysis that Judge Edwards followed in his written letter opinion on the modification of custody petition. CP 68-70; CP 83-87.

As Ms Briggs again accurately briefed, the standard of appellate review is that of abuse of discretion when a review of the record shows that a decision is based on untenable grounds, *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 327 (1983). A court’s decision is based on untenable grounds if the factual findings are unsupported by the record. *Littlefield*, supra at 47. A trial court’s factual findings are reviewed for substantial supporting evidence. *McDole*, supra at 610. See, Brief of Appellant, p. 38.

VII. CONCLUSION

The modification of custody was properly determined, explained, and ordered. The modification of custody must be upheld.

Respectfully submitted,



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

KIMBERLY BRIGGS,

Appellate

NO. 46078-5-II

vs.

CERTIFICATE OF MAILING

GARRETT LAIL,

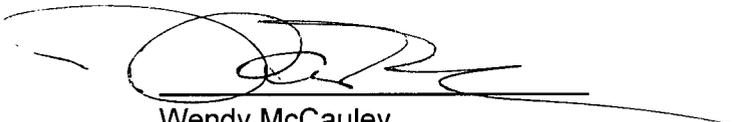
Respondent.

THE UNDERSIGNED, pursuant to CR 5(b), affirms that on the 8th day of January, 2016, she deposited in the mail at the United States Post Office, Cosmopolis, Washington, a copy of the Reply Brief of Respondent to the following at their respective addresses set forth below:

Kimberly Briggs
3800 14th Ave. SE, #D180
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David Ponzoha
Clerk of the Court
Court of Appeals, Div II
950 Market Street, Ste 350
Tacoma WA 98402

DATED this 8th day of January, 2016


Wendy McCauley
Paralegal