

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

46598-1
NO. ~~465981-1-II~~

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

DARCIA DAVIS,

Appellant,

v.

GEORGE PATECEK

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

In the Respondent' brief, the Respondent contends that the trial court granted the relocation request to occur. The Respondent contends that the court granted the relocation to Bellingham and that the court entered a Final Parenting Plan supported by Findings of Fact and Conclusions of Law. CP 142, 143, 160, and 166. First, the Clerk's Papers 142 and 143 is simply a Temporary Order Re Relocation that was granted by the court prior to the final trial. A motion was made for a temporary order re relocation and the court granted it. The Clerk's Papers 160-166 refers to the Final Parenting Plan that was eventually adopted by the court on July 21, 2014. Neither references refer to the Findings of Fact and Conclusions of Law there were ordered by the court. Any findings that were made by the court concerning the issues of relocation and/or a modification of custody were set forth in Clerk's Papers 180 – 183 Order Re Modification/ Adjustment of Custody Decree/Parenting Plan/Residential Schedule. It is clear in reviewing this order that the court did not consider the factors set forth in RCW 26.09.520. The statute sets forth the factors that are to be considered in relocation.

RCW 26.09.520 sets forth a presumption as follows:

The person proposing to relocate with the child shall provided 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 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 statute goes on to request that the court consider relevant factors such as (1) The relative strength, nature, quality, extent of involvement and stability of the child's relationship with parent, siblings, and other significant persons in the child's life; (3) Whether the 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; (6) The age, developmental state, 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 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.

It is clear that the court is to consider all of these factors to determine the impact upon the child of the relocation and/or the denial of the relocation.

Washington law has been clear that custodial continuity is a significant factor in any child modification proceeding. In 20 Wash.Prac. § 33.35 2 it is stated as follows:

2. Modification

Because of the strong presumption in favor of custodial continuity, and the sentiment that abrupt change is detrimental to a child's best interests, modification of the parenting plan is not encouraged by either the courts or the Legislature. Consequently, the burden to proceed with a modification is high. See *In Re the Marriage of McDole*, 122 Wn.2d 604, 859 P.2d 1239 (1993); *In Re Parentage of Schroeder*, 106 Wn.App. 343, 22 P.3d 1280 (2001). *In Re Marriage of Taddeo-Smith*, 127 Wn.App. 400, 110 P.3d 1192 (2005).

In the present case, it is unclear what the court concluded about any of the individual factors set forth in RCW 26.09.520 concerning modification and the impact on minor child in this case. The Order Re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule merely states that "the mother has moved, both parents have different employment and multiple petitions have been brought before the court. Relocation statutes as well as modification statutory factors were all considered during the multiple day trial." Nothing more was said about the court's findings concerning these individual factors and how they

impacted the child. An examination of the record reveals that the Appellant, Darcia Davis' relationship with her minor son was strong. Her nature of involvement and stability with her child was significant. The record was further replete with the fact of how involved the mother was involved in her son' life including activities and day care. Unfortunately, the court did not consider nor make any findings regarding these factors.

The Respondent's contention that the relocation was granted when in fact the parenting plan that the court ordered basically changed the status quo from the mother having full time custody and the father having alternate weekend visitation to the father having full time custody for the next year and then alternating years annually is tantamount to a decision by the court to deny the relocation.

In the Respondent's Reply Brief, they contend that a modification was appropriate under RCW 26.09.260 (1), (2), (c). They state in their brief that the court may modify the existing parenting plan if it finds 1) that a substantial change occurred in the circumstances as they were previously known to the court; 2) The present arrangement is detrimental to the child's health; 3) The modification is in the child's best interest and 4) the change will be more helpful than harmful for the child. RCW 26.09.260 (1) (2) (c)

RCW 26.09.260 (1) reads in pertinent part as follows:

The court shall not modify a prior custody decree or parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. . . .

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(c) The child's present environment is detrimental to the child's physical, mental or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child

First, there are absolutely no evidence whatsoever that the child's present environment was detrimental to child's physical, mental or emotional health nor that the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child. Here, the record was replete with the fact that the child was doing well, not only in school, but also socially. The mother had a good relationship with the child and the Guardian ad Litem and almost all of the witnesses testified that the environment was a good one for the child. Further, there are absolutely no findings concerning this in the Order Re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule. CP 180-183.

The Respondent next contends that RCW 26.09.260 (6) provides an exception with the requirements of RCW 26.09.260 (1), (2), and allows the court to make a major modification without any findings or standards simply based upon the fact that a relocation is being processed. RCW 26.09.260 provides in pertinent part:

The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through RCW 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

While it is clear that RCW 26.09.260 does not require an adequate cause hearing, it certainly does not eliminate the standards that the court is to consider in determining whether a relocation is appropriate. In fact, RCW 26.09.260 provides that the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through RCW 26.09.560.

The court in the matter of the *Marriage of Kathryn Sue Rostrom and Dale Lee Rostrom*, 184 Wash.App. 744, 339 P.3d 185 stated at page 751 and 752:

In child relocation matters, Washington state courts have wide discretion to decide where and with which parent a child will reside; the determination is inherently a subjective one. However the child relocation act (CRA), RCW 26.09.405-. 560, provides guidance to courts. The CRA directs consideration of the best interests of both the child and the relocating person. It creates a rebuttable presumption permitting relocation based on the idea “that a fit parent will act in the best interests of her child.” The party objecting to the relocation has the burden of demonstrating by a preponderance of the evidence, that “the ‘detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person.’ ” When deciding if the objecting party has met this burden, the court must consider each of the relevant child relocation factors enumerated in RCW 26.09.520, which “are equally important because they are neither weighted nor listed in any particular order.”

As a footnote, Darcia Davis did not relocate in violation of the parenting plan and the notice requirements of the relocation act as alleged by the Respondent. In fact, the Respondent has even cited in their brief that she made a motion for a temporary relocation before moving and the court granted it. CP 142 and 143.

II. CONCLUSION

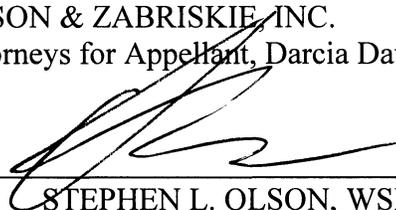
The trial court clearly abused its discretion when it failed to consider the case law concerning the importance of custodial continuity for a child and the rebuttable presumption set in favor of an intended

relocation set forth in RCW 26.09.520. The court further abused its discretion when it failed to consider and make findings concerning the relocation factors required to be considered under RCW 26.09.520 prior to granting a major modification in the parenting plan.

RESPECTFULLY SUBMITTED this 12 day of May, 2015

OLSON & ZABRISKIE, INC.
Attorneys for Appellant, Darcia Davis

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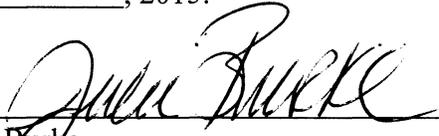
DARCIA DAVIS, vs. GEORGE PATECEK,	Appellant, Respondent.	46598-1 COA NO. 465981-1-II DECLARATION OF MAILING
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Julie Burke, under penalty of perjury under the laws of the State of Washington,
declares:

I am regularly employed by the law firm of Olson & Zabriskie, Inc. On May 12,
2015, I deposited a true and correct copy of the Reply Brief of Appellant, to the Court of
Appeals, Division II, and the attorney for Respondent, by placing the same in the United
States Postal Service, property postage prepaid, on the 12th day of May, 2015, addressed as
follows:

David Ponzoha, Clerk of Court Court of Appeals, Division II 950 Broadway Suite 300 Tacoma WA 98402-4454	Benjamin Winkelman Attorney at Law P.O. Box 700 Hoquiam, WA 98550
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DATED May 18, 2015.



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