

NO. 49439-6-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

DESIREE PEACOCK,

Appellant,

v.

THEODORE A. PECK,

Respondent.

APPELLANT DESIREE PEACOCK'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Assignments of error.

Appellant Desiree Peacock assigns error to the following findings of fact & conclusions of law from the trial court's August 18, 2016 "Final Order and Findings on Petition to Change a Parenting Plan, Residential Schedule or Custody Order":

- finding of fact no. 4;
- conclusions of law no. 11;

Appellant Desiree Peacock also assigns error to the following findings of fact & conclusions of law from the trial court's August 18, 2016 "Findings of Fact and Conclusions of Law Re: Relocation and Modifications to Parenting Plan":

- findings of fact no. 7, 8, 9, 10, 11, 19, 20, 23;
- conclusions of law (as to relocation) no. 1, 2;
- conclusions of law (as to modification) no. 1, 3, 9.

2. Issues pertaining to assignments of error.

Whether the trial court erred in finding detriment to the children and reversing custody where, after trial, the court initially offered the mother (who had moved to Centralia under a

commissioner's order granting temporary relocation) to continue as primary custodian if she moved back to Yelm.

B. STATEMENT OF THE CASE

1. Background.

The parties in this matter divorced in 2013. Clerk's Papers at 181. The Parenting Plan, entered October 3, 2013, provided the mother, Appellant Desiree Peacock, with primary custody. In April 2015, Ms. Peacock served a Notice of Intent to Relocate. Id. Respondent Theodore Peck objected to relocation and filed a Petition to Modify the Parenting Plan, seeking primary custody of the children. Id. On June 18, 2015, a commissioner granted Ms. Peacock's Motion for Temporary Relocation. Id. As such, Ms. Peacock moved from Yelm to Centralia with the parties' two daughters. Id.

2. Oral Ruling After Trial.

The girls continued to live with Ms. Peacock, as they had ever since the divorce. Trial took place from June 14-16, 2016. On June 29, 2016, the Court gave its initial oral ruling. In that oral ruling, the Court relied heavily on the testimony of the Guardian ad Litem, who had invested only 15 hours in the case, who had not visited the

mother's home where the girls lived, and who had not visited girls' schools, contrary to her "normal" investigative procedures. See June 14, 2016 Verbatim Report of Proceedings (hereinafter VRP) at 36-37. Indeed, it is undisputed the GAL believed relocation had already happened and as such the GAL did not even try to assess or investigate factors relation to relocation. CP 182 (finding of fact 8). The Court relied heavily on the GAL's testimony and focused largely on factor 3 of the relocation statute:

Factor three is really what the focus of the guardian ad litem's report and a considerable amount of testimony at trial focused on, and that is whether or not disrupting the contact between the children and the mother would be more detrimental to the children than disrupting the contact between the children and the father.

See June 29, 2016 VRP at 345.

The Court went on to deny relocation. Id. at 353. The Court then, however, declined to rule on Respondent Peck's Petition to Modify and change custody. Instead, the Court asked whether "the mother intends to relocate back to Yelm[.]" Id. The Court stated it had "already gone through the impact of whether or not the mother's going to relocate." Id. at 354. On that issue, the Court indicated it would keep custody with Ms. Peacock if she moved back to Yelm from

Centralia:

I'm sure counsel has discussed with both of you that there are only a number of alternatives available to this Court to address this factor. One is to change custody to the father and give Mother the reverse residential time that the father has had over the last seven years; two, have the mother relocate back to the Yelm area; or three, deny everyone's petition and life goes on as difficult and troubling as has been demonstrated through this trial.

Id. at 349-50.

The Court set a follow up hearing for July 7, 2016 to rule on Respondent's Modification action.

3. July 7, 2016 Hearing.

At the July 7, 2016 hearing, trial counsel for Ms. Peacock indicated she would be complying with the Court's request and moving back from Centralia: "yes, it is her intent to move back to that area so that Your Honor can take that into consideration in ruling on the major modification." See July 7, 2016 VRP at 9-10. The Court ruled it would give Ms. Peacock some time to do this:

But I would like to give the mother an opportunity to demonstrate whether or not she can comply with the Court's order and complete the relocation. If not, I'll move the girls at the start of the school year, Mr. Bobman, to the father's house.

Id. at 12. The Court set the next hearing for August 18, 2016.

4. August 12, 2016 Hearing on Motion to Clarify.

As Ms. Peacock began looking for homes for her move back to the Yelm area, it became unclear whether certain candidate homes would comply with the Court's order. For this reason, she moved to clarify the Court's order. Counsel for Ms. Peacock gave an example at the July 12, 2016 hearing of a home in Eatonville that was not technically in the Yelm school district, but was just as close to Mr. Peck's home. Counsel pointed out that Mr. Peck's home in Roy was not eligible for the Yelm school district either. See August 12, 2016 VRP at 2-5.

The Court declined to clarify its Order or provide any further guidance. CP 157.

5. August 18, 2016 Hearing.

At the August 18, 2016 hearing, counsel for Ms. Peacock indicated she had submitted application for two rental homes in the Yelm school district, and would be enrolling them in the Yelm school district once the offices reopened after summer break. See August 18, 2016 VRP at 2-5.

Despite this, counsel for Mr. Peck argued she should have

moved to Yelm sooner, and therefore custody should be switched to his client. The Court agreed with this, stating the “issue of the relocation has not been achieved” by the mother. *Id.* at 13-14. As such, she signed the Parenting Plan proposed by counsel for Mr. Peck, which switched custody. Ironically, Mr. Peck (who lived in Roy) did not reside in the Yelm school district, but his attorney told the Court “he plans to move. Now that he’s getting custody, he’s getting a bigger place and moving in there as well.” *Id.* at 17.

C. SUMMARY OF ARGUMENT

The trial court’s findings of fact and conclusions of law regarding detriment to the children in Mr. Peck’s Modification are not supported by the evidence and do not comply with the law, as is evidenced by the trial court’s other findings and its initial decision to continue the mother’s role as primary parent.

Additionally, the trial court’s findings of fact and conclusions of law regarding Relocation are not supported by the evidence and its findings to not support its conclusions of law, where they rely heavily on a GAL who testified she did not even attempt to investigate factors relating to relocation.

D. ARGUMENT

1. Standard of review.

a. Findings of fact and conclusions of law.

Where, as is the case here, “the trial court has weighed the evidence, the scope of review on appeal is limited to ascertaining whether the findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and judgment.” Jones v. Best, 134 Wn.2d 232, 239-240, 950 P.2d 1 (1998). “A mere scintilla of evidence,” however, will not support the trial court’s findings; it requires “believable evidence of a kind and quantity that will persuade an unprejudiced thinking mind of the existence of the fact to which the evidence is directed.” Hewitt v. Spokane, Portland & Seattle Railway Company, 66 Wn.2d 285, 286, 402 P.2d 334 (1965).

b. Modification of Parenting Plans.

Parenting plan modifications require a two-step process set out in RCW 26.09.260 and .270. First, a party moving to modify a parenting plan must produce an affidavit showing adequate cause for modification before the court will permit a full hearing on the matter. RCW 26.09.270. “[T]he information considered in deciding whether

a hearing is warranted should be something that was not considered in the original parenting plan.” In re Parentage of Jannot, 110 Wn. App. 16, 25, 37 P.3d 1265 (2002), aff'd, 149 Wn.2d 123, 65 P.3d 664 (2003).

If the moving party establishes adequate cause and the court holds a full hearing, the court may then modify the existing parenting plan, but only if it finds that (1) a substantial change occurred in circumstances as they were previously known to the court, (2) the present arrangement is detrimental to the child’s health, (3) modification is in the child's best interest, and (4) the change will be more helpful than harmful to the child. RCW 26.09.260(1),(2)(c). Here, Ms. Peacock is challenging the sufficiency of the findings and conclusions which support the “detrimental,” “best interest,” and “more helpful than harmful to the child” prongs.

c. Relocation.

In all cases involving the welfare of children, including relocation cases, the Court reviews the trial court’s decisions for abuse of discretion. In re Marriage of Horner, 151 Wn.2d 884, 893, 93 P.3d 124 (2004); In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d

1239 (1993). Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. Horner, 151 Wn.2d at 893.

The fact this deferential standard is applied, however, does not give trial courts license to act outside the family law statutes. Indeed, it is an abuse of discretion to fail to follow statutes such as those involved in relocation:

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Id. at 894 (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

Washington's child relocation act is codified at RCW 26.09.405–.560. The act imposes notice requirements and sets standards for relocating children who are the subject of court orders regarding residential time. In re Marriage of Fahey, 164 Wn. App. 42, 56, 262 P.3d 128 (2011); In re Custody of Osborne, 119 Wn. App. 133, 140, 79 P.3d 465 (2003). “Relocate” under the act means “a change in principal residence either permanently or for a protracted

period of time.” RCW 26.09.410(2).

A person “with whom [a] child resides a majority of the time” must provide notice of an intended relocation to every person entitled to residential time with the child. RCW 26.09.430; Fahey, 164 Wn. App. at 56. If a person entitled to residential time objects, the person seeking to relocate the child may not do so without a court order. RCW 26.09.480(2); Fahey, 164 Wn. App. at 56. A trial court must conduct a fact-finding hearing, at which the relocating parent benefits from a rebuttable presumption that the relocation will be allowed. RCW 26.09.520. The objecting person may rebut the presumption by a showing that, with regard to the child and relocating person, the detrimental effects of relocating outweigh the benefits. RCW 26.09.520. After the hearing, the trial court has the authority “to allow or not allow a person to relocate the child” based on an overall consideration of the best interests of the child. RCW 26.09.420; In re Parentage of R.F.R., 122 Wn. App. 324, 328, 93 P.3d 951 (2004); In re Marriage of Grigsby, 112 Wn. App. 1, 7–8, 57 P.3d 1166 (2002).

2. The trial court’s findings of fact and conclusions of law regarding detriment to the children in Mr. Peck’s Modification are not supported by the evidence and do not comply

with the law, as is evidenced by the trial court's other findings and its initial decision to continue the mother's role as primary parent.

Again, it was Mr. Peck's burden to prove that (1) the present arrangement was detrimental to the girls' health, (2) modification was in their best interest, and (3) the change would be more helpful than harmful to the children. RCW 26.09.260(1), (2)(c). Here, the prime foundation upon which the trial court based its decision was that Ms. Peacock's relocation away from Yelm (and thus further away from the father) negatively impacted the girls' relationship with their father. Indeed, the trial court specifically concluded it would continue placing the girls with their mother as the primary parent if she moved back to Yelm. See July 7, 2016 VRP at 12.

In other words, the Court concluded there was no detriment requiring modification if the mother moved back to Yelm, a choice the trial court gave to the mother after trial. This is wholly at odds with the trial court's entry of findings and conclusions indicating detriment, and as such, the trial court abused its discretion and this Court should reverse.

3. The trial court's findings of fact and conclusions of law regarding Relocation are not supported by the evidence and its findings to not support its conclusions of law, where they rely heavily on a GAL who testified she did not even attempt to investigate factors relating to relocation.

In its July 29, 2016 oral ruling denying relocation, the trial Court makes it clear it relied heavily on the testimony of the Guardian ad Litem in fashioning its findings of fact and conclusions of law. But again, a “mere scintilla of evidence” will not support findings of fact; findings require “believable evidence of a kind and quantity that will persuade an unprejudiced thinking mind of the existence of the fact to which the evidence is directed.” Hewitt, 66 Wn.2d at 286.

The GAL's testimony and report does not meet this criteria because the GAL did not do her job with respect to relocation. It is undisputed she was hired “for purposes of the allegations of abuse by Mr. Peck but not for either of the modification actions.” CP 181 (findings of fact 6). As such, she invested only 15 hours in the case. See June 14, 2016 VRP at 36-37. She did not visit the mother's home where the girls lived. Id. She did not visited girls' schools. Id. According to her own testimony, this was contrary to her “normal”

investigative procedures. Id. The GAL believed relocation had already happened and as such the GAL did not even try to assess or investigate factors relation to relocation. CP 182 (finding of fact 8).

Additionally, the trial court did not give weight to the presumption in favor of relocation to which Ms. Peacock was entitled. Again, the relocating parent benefits from “a rebuttable presumption” that the relocation will be allowed. RCW 26.09.520. Here, the trial court simply found one of the eleven factors of RCW 26.09.520 weighed in favor of the father, and declared he had overcome the presumption; there are no findings of fact as to each factor. Moreover, it is clear from the oral ruling the trial Court did not consider the detriment to the girls and the mother of not allowing relocation; it simply repeated the GAL’s faulty conclusion about the father. Under these circumstances, the trial Court’s findings of fact are not supported by substantial evidence and its conclusions of law do not support denial of relocation, and this Court should reverse.

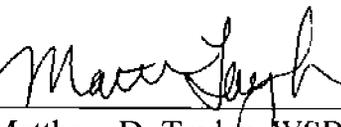
E. CONCLUSION

In sum, the trial court’s findings of fact and conclusions of law

regarding detriment to the children in Mr. Peck's Modification are not supported by the evidence and do not comply with the law. Additionally, the trial court's findings of fact and conclusions of law regarding Relocation are not supported by the evidence and its findings to not support its conclusions of law. As such, Appellant Desiree Peacock respectfully requests this Court reverse the trial court.

RESPECTFULLY SUBMITTED this 24th day of April, 2017.

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CERTIFICATE OF SERVICE

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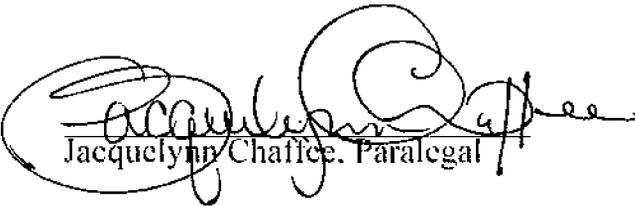
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington this 24th day of April, 2017.



Jacquelyn Chaffee, Paralegal

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