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No. 51956-9-II

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

In re Parentage of C.M.,

Cassandra Weisenberger,

Appellant,

v.

Tyler Mittge,

Respondent.

REPLY BRIEF OF APPELLANT

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1. Reply Introduction

The trial court abused its discretion when it denied adequate cause under RCW 26.09.260, despite Ms. Weisenberger pleading facts sufficient to prove a substantial change in circumstances. Those sufficient facts included Mr. Mittge relocating to another county, approximately an hour and a half away, since entry of the final parenting plan. Mr. Mittge also switched employment, which constituted a relevant change since the terms of the residential schedule for C.M. were formulated around Mr. Mittge's prior employment.

Between the relocation an hour and a half away, to a new school district, and the change in employment schedule, the trial court should have found adequate cause and held a testimonial hearing before changing terms within the final parenting plan. See CP 79-80.

When the final parenting plan was entered on March 6, 2017, "home" for C.M. and both parties was Raymond, Washington. At the time the final parenting plan was entered, both parents resided in Raymond. CP at 39-40. Since C.M.'s birth and prior, both parents resided in Raymond. Mr. Mittge's relocation to Chehalis was not anticipated at the time of entry. CP 23-33. Chehalis is

approximately an hour and a half away from Raymond, in a different school district.

In September 2017, after entry of the final parenting plan, it is uncontested the parents agreed to enroll C.M. in preschool in Raymond. CP 83-84. The parents agreed, without court involvement, to C.M.'s enrollment. *Id.* For the next five months, C.M. regularly attended preschool in Raymond. *Id.* But after the order on February 9, 2018, C.M.'s school attendance ceased when the child was in Mr. Mittge's care. *Id.*

Mr. Mittge contends that after he changed his employment and moved to Chehalis, "[Ms.] Weisenberger did not cooperate" with his demands. Resp. Br. at 3. Mr. Mittge does not provide any examples or proof of Ms. Weisenberger denying him visitation. In fact, Ms. Weisenberger described numerous efforts she undertook for purposes of accommodating Mr. Mittge's changed circumstances¹. Although not a statutory requirement prior to

¹ A plain reading of the final parenting plan; CP 25-26; with the conditions the order imposes, does not provide for any visitation between Mr. Mittge and C.M. under Mr. Mittge's changed circumstances. Ms. Weisenberger technically could have denied all visitation under a plain reading, but did not do so. The parties worked in agreement until Ms. Weisenberger petitioned the court for a modified parenting plan and the *Order Re: Denial of Adequate Cause* was entered.

requesting a modification, Ms. Weisenberger detailed the efforts she undertook to work with Mr. Mittge:

Whenever Mr. Mittge texts or calls me requesting visitation with [C.M.] (even if it's only a few hours prior), I have been accommodating and make arrangements to exchange at his request... In the past eight months there has only been a few times that I was unable to accommodate him.

CP 40. Ms. Weisenberger attached a few text messages exchanges with Mr. Mittge in support of her declaration, showing the parents coordinating visitation every other Friday. CP 44-45. After leaving his prior job, Mr. Mittge only requested C.M. be in his care every other weekend, for which Ms. Weisenberger complied. CP 70-71.

In contrast, Mr. Mittge did not provide specific examples where he made requests and Ms. Weisenberger would not “cooperate”.² CP 61–62. Eventually, after months of not having an operable parenting plan, Ms. Weisenberger sought relief through a

² See Resp. Br. at 8-9. Mr. Mittge cites to *Goodsell v. Goodsell*, 38 Wn. 2d 135, 138, 228 P.2d 155 (1951), but this case is unpersuasive and does not involve the clarification of a parenting plan. Mr. Mittge cites to *Goodsell* when stating, “The trial court must have the power to make the parenting plan effective even if one or both parties are uncooperative”. See Resp. Br. at 9. This is a long stretch, as *Goodsell* does not involve an uncooperative party being the basis for a modification without a hearing, nor does it involve a parenting plan or custody arrangement as an issue on appeal.

modification, a routine petition in a domestic case if changed circumstances arise.

The trial court's February 9, 2018 order permanently affected the parents' rights under the parenting plan, which is an abuse of discretion. *See In re Marriage of Christel & Blanchard*, 101 Wn. App. 13, 22, 1 P.3d 600, 606 (2000). The parents' rights were altered in numerous ways, including changing geographical limits for visitation and transportation requirements. CP 79-80. For example, Mr. Mittge can exercise the same visitation in a larger geographical area, whereas Ms. Weisenberger must travel a total of three additional hours per week to exchange C.M. Further, C.M. did not continue attending school in Raymond as the parties previously as a result of the trial court's order. CP 83-84.

This Court should find the trial court abused its discretion in finding there had not been a substantial change in circumstances, find the trial court modified a final order in an abuse of discretion, thereby vacating the trial court order entered February 9, 2018, *Order Re: Denial of Adequate Cause*, and remand for further proceedings consistent with this Court's ruling.

2. Reply Argument

2.1 When analyzing whether the trial court clarified or modified the final order, Mr. Mittge errs in focusing on the parties' "original intent" because the terms of the final parenting plan are unambiguous.

A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment. RCW 26.09.170(1); *Kern v. Kern*, 28 Wn. 2d 617, 619, 183 P.2d 811 (1947). An ambiguous decree may be clarified, but not modified. RCW 26.09.170(1); *In re Marriage of Greenlee*, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992).

Here, there were not any "ambiguous" terms in dispute. Both parties agreed Mr. Mittge had relocated to Lewis County at the time of adequate cause. CP 39-40, 61-62, 83-84. The changes made by the trial court to the final order were not clarifications, but accommodations to Mr. Mittge's changed circumstances, such as "Pacific County" being newly defined as anywhere within 85 miles of Raymond, Washington. CP 79-80.

Instead of conducting an independent inquiry of the changes it was making to the final order, the trial court focused on the original intent of the parties. When questioned by counsel, the trial court did not specify how the *Order Re: Denial Adequate Cause*

constituted mere clarifications. RP at 40 (“It’s a clarification to mean that – I don’t want your client deciding that Pacific County means Pacific County”).³ The trial court instead analyzed the purported “original intent” of the parties to make broad changes that were ultimately modifications under applicable case law. *See, e.g., Christel*, 101 Wn. App. at 22, 1 P.3d at 606.

2.1.1 Mr. Mittge lacks legal authority for the “original intent” approach that he asks this Court to apply

Mr. Mittge’s response heavily relies on *In re the Marriage of Thompson* in support of his argument that the court did not abuse its discretion when changing and adding terms to the final parenting plan, as those changes and additions were within the parties “original intent”. However, *Thompson* is distinguishable because it does not interpret the original intent of an entire residential schedule the way Mr. Mittge is attempting to do in his response. *In re Marriage of Thompson*, 97 Wn. App. 873, 879, 988 P.2d 499 (1999).

³ The trial court did make sweeping statements that the parties intended to have a 50/50 plan. RP at 29, 40. This was a peculiar conclusion for the trial court to make, as neither party contended the “original intent” was for a 50/50 parenting plan, indefinitely and regardless of circumstances, at the time the final parenting plan was entered.

In *Thompson*, the court mentions “intent” in clarifying how a dissolution decree was to distribute personal property in a dissolution, but does not interpret the “original intent” of a parenting plan. *Thompson*, 97 Wn. App. at 879, 988 P.2d 499. As such, *Thompson* does not support Mr. Mittge’s argument that the original intent of the parenting plan was for an indefinite, 50/50 split as to the visitation schedule. Mr. Mittge asks this Court to accept that despite whatever changed circumstances may arise in the future, such as moving to a new school district an hour and a half away, the parties intended for a 50/50 schedule regardless of what circumstances may arise. This is an untenable position. The final parenting plan suggests no such original intent. More importantly, Mr. Mittge does not cite to legal authority for this “original intent” approach to analyzing the parenting plan.

In contrast, Ms. Weisenberger cited specific examples where a trial court changed a final parenting plan without holding a testimonial hearing, and those changes were deemed modifications, not clarifications. See *Christel*, 101 Wn. App. at 23, P.3d at 600 (“This language goes beyond explaining the provisions of the existing parenting plan... The court abused its discretion with respect to the dispute resolution provisions contained in the order”).

Mr. Mittge's response does not address how *Christel*, or any of the other cases cited in the opening brief, are distinguishable from the factual scenario of this case in terms of modifying a final order. And any potential modification to a final order, no matter how slight, requires an independent inquiry by the trial court. See *In re Marriage of Coy*, 160 Wn. App. 797, 804, 248 P.3d 1101, 1105 (2011).

2.1.2 At no time did Ms. Weisenberger advocate to the trial court that it was a “reasonable” for Mr. Mittge to not have visitation, but rather that was the effect of a plain reading of the parenting plan, therefore the necessity for a modification

Mr. Mittge response states, “Weisenberger’s first assignment of error suggests that the term ‘Pacific County’ has only one reasonable meaning – that is, that Mittge must be physically present within the geographic boundary of Pacific County in order to qualify for any visitation under the parenting plan.” Resp. Br. at 12. This statement is problematic in numerous ways.

First, a plain reading of the parenting plan does indeed condition Mr. Mittge’s visitation on being “home” or in Pacific County. CP 25-26. His previous employment would require him to be out-of-state for weeks or months at a time. A plain reading and

application of the parenting plan is precisely *why* Ms. Weisenberger sought to modify the parenting plan.

Second, at no time does Ms. Weisenberger suggest it is a “reasonable” interpretation for Mr. Mittge not to have visitation under the final parenting plan. Rather, that interpretation is a plain reading of the final order. Only when terms are ambiguous does the court analyze whether it needs to be clarified. *See Greenlee*, 65 Wn. App. at 710, 829 P.2d 1120. The term “Pacific County” is clearly defined and does not require clarification. The term “home”, when looking at where the parties resided, was Raymond, Washington. They resided in Raymond, and always had prior, in March of 2017 when the final parenting plan was entered. CP 83-84.

Here, the terms the trial court modified, such as “Pacific County”, were plain and clear. The transportation terms were clear. Under the final parenting plan, the parents are to exchange C.M. at “Raymond Police Station or another agreed upon location.” CP 15-29. However, to accommodate the changed circumstances, the trial court unilaterally modified several terms in the *Order Re: Denial of Adequate Cause*, which is an abuse of discretion. There must first be a testimonial hearing before a final order can be modified. This

is why adequate cause should not be an insurmountable standard, as it is the only relief for parents if the terms of the final parenting plan do not apply to changed life circumstances, much like Mr. Mittge's changed circumstances.

2.2 Mr. Mittge's brief fails to address how a substantial change in circumstances did not occur pursuant to RCW 26.09.260.

Mr. Mittge's brief does not analyze whether a substantial change in circumstances occurred pursuant to the threshold standard for a finding adequate cause under RCW 26.09.260. "Relocation of either parent is a changed circumstance that may justify a minor modification, but only if the original parenting plan did not anticipate relocation". *In re Marriage of Tomsovic*, 118 Wash. App. 96, 106, 74 P.3d 692, 697 (2003). The determinative question is whether: (1) the facts underlying the substantial change of circumstances existed at the time of entry of the original plan; or (2) were unanticipated by the superior court at that time. See RCW 26.09.260(1). If the underlying facts did not exist or the prior or original plan did not anticipate the substantial change in circumstances, the superior court may adjust the parenting plan. RCW 26.09.260(5). *In re Marriage of Hoseth*, 115 Wash. App. 563, 571, 63 P.3d 164, 168 (2003).

Mr. Mittge's analysis conflates the adequate cause standard with the "original intent" analysis discussed in the section above. Ms. Weisenberger brought a motion for adequate cause, not a motion for clarification of the final parenting plan. Only once the trial court changed terms via the *Order Re: Denial of Adequate Cause* did the clarification v. modification analysis become applicable.

In analyzing the adequate cause standard, Mr. Mittge states, "Given [the trial court's] interpretation, it was reasonable for the trial court to conclude that there had not been a substantial change in circumstances not contemplated by the plan when Mittge did, in fact, live within a reasonable distance of Weisenberger". Resp. Br. at 7. Mittge then states that his relocation was anticipated in the final parenting plan, just like how the relocation in *Tomsovic* was anticipated, but the two cases are completely different. See *In re Marriage of Tomsovic*; 118 Wn. App. 96, 106-107, 74 P.3d 692, 697 (2003). The final parenting plan in *Tomsovic* was explicit about the contemplated relocation:

The parenting plan established three schedules for visitation based on the distance between the parties: (1) "close proximity," which allowed Mr. Tomsovic to pick up the children from school for weekly visits and to spend alternate weekends with the boys; (2) "Zone A," adopting a different schedule when the parents do not live in close proximity but do live within 400 miles

of each other; and (3) “Zone B,” which recognized that Mr. Tomsovic teaches occasionally out of state, or more than 400 miles away. Clerk's Papers (CP) at 2–3. A monthly visitation schedule was set out in the parenting plan for all three zones.

Tomsovic, 118 Wn. App. at 101, 74 P.3d at 694.

This case is nothing like *Tomsovic*. In fact, the final parenting plan in this case does not contemplate a relocation at all. Whereas the final order in *Tomsovic* was explicit as to a contemplated change, with different schedules based on geographical proximity of the parents, there is no language in the parties' final parenting plan indicating the changed circumstances were contemplated in March of 2017. There is no explicit or implicit language in the plan as to Mr. Mittge relocating his residence or residing outside of Pacific County. CP 23-33. The final parenting plan explicitly contemplates him working out of state for weeks or months at a time, but it does not contemplate him working Monday through Friday, in a different school district, 85 miles from Raymond, where both parties resided at the time of entry. Here, unlike *Tomsovic*, none of the changed circumstances were specifically accounted for or contemplated in the final parenting plan.

Adequate cause should not an insurmountable standard for parents seeking relief. Holding a testimonial hearing to modify is

often necessary. Mr. Mittge relocated to a different county. He switched employment, and the original parenting plan was solely based off the unusual schedule of his previous employment. When changed circumstances exist as they do here, it is an abuse of discretion to deny adequate cause to proceed.

2.3 Mr. Mittge's brief minimizes the extent of changes the trial court made to the final parenting plan, particularly in the transportation section.

The trial court's order expands and limits the substantive rights of both parties, and it is disingenuous to argue that the trial court's changes "do nothing more than fill in procedural details". Resp. Br. at 17. Under the final parenting plan, the parents exchange at the "Raymond Police Station or another agreed upon location". CP 29. Under the new transportation terms, Ms. Weisenberger must travel a total three hours per week exchange C.M. with Mr. Mittge. These exchanges occur on Ms. Weisenberger's days of work and she must leave early, twice a week, to make it to the exchange on time. The exchanges are every Friday and then either Monday or Tuesday depending on the Phase Three rotation. See CP 26.

This new distance Ms. Weisenberger is ordered to travel is a permanent change to a substantive right within the parenting plan.

This is something the trial court could order, but only after holding a testimonial hearing. Without a hearing, it's an abuse of discretion since it affects Ms. Weisenberger's work schedule and requires three hours of transportation, for C.M. and the parents, beyond what was ordered under the original parenting plan.

Mr. Mittge minimizes this drastic change by the trial court by labeling the change as a mere filling in of procedural details, but this reasoning is weak. Adding in new exchange location that requires additional hours of traveling is not the "filling in of procedural details", but instead inserting new terms into a final order, affecting the parties' substantive rights.

Mr. Mittge's rights have clearly been substantively expanded. Without a testimonial hearing, the order was changed so he could have maximum visitation (50/50) after he relocated an hour and a half away to a new school district. This is a significant expansion of rights and is inconsistent with relevant relocation law. C.M. is to start Kindergarten in the fall of 2019, yet his weekdays are split between Raymond and Chehalis. This a complete substantive change from the terms of the final parenting plan and therefore an abuse of discretion by the trial court.

2.4 Appeal is not frivolous, and this Court should award attorney fees to Ms. Weisenberger

Any modification to a final order, no matter how slight, requires an independent inquiry by the trial court. See *Coy*, 160 Wn. App. at 804, 248 P.3d at 1105. Mr. Mittge response posits that this appeal is frivolous, yet there are several independent inquiries that the trial court did not undertake. Compliance with these criteria and statutory framework is mandatory; See *In re Marriage of Stern*, 57 Wn. App. 707, 711, 789 P.2d 807 (1990); and therefore is it is unreasonable for Mr. Mittge to state that reasonable minds could not differ on the issues in this case.

Mr. Mittge's response makes broad strokes when analyzing the original intent of the parties, but fails to respond to the specific terms the trial court changed, such as the transportation terms. If terms, such as the terms in *Christel*, are found to be modifications, the sweeping changes within the *Order Re: Denial of Adequate Cause* amount to modifications as well. See 101 Wn. App. at 23–24, 1 P.3d 600; CP 79-80. Ms. Weisenberger has incurred appellate attorney's fees which were necessary in seeking the relief the trial court should have granted.

2.5 Judge Goelz regularly hears cases *pro tem* in Pacific County Superior Court since stepping down from the elected seat, and therefore the issue of judicial bias is still relevant.

Judge Goelz left the elected seat, but he regularly hears cases *pro tem*, cases he heard prior to leaving. Mr. Mittge's response states that because Judge Goelz retired, the question of judicial bias is moot. However, this judge has not retired. Ms. Weisenberger's analysis in the opening brief remains the same.

3. Conclusion

The trial court's order was an abuse of discretion. For the reasons set forth above, Ms. Weisenberger respectfully requests that this Court vacate the order of the trial court and remand for further proceedings consistent with this Court's ruling.

DATED this 1st day of May, 2019.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on April 2, 2019, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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