

FILED
Court of Appeals
Division II
State of Washington
2/21/2020 4:14 PM

No. 53416-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Parentage and Support of E.B.

SHELBY BRIGHTHEART
Appellant

and

DAIN OLSEN
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

APPELLANT'S REPLY BRIEF

PATRICIA NOVOTNY
Attorney for Appellant
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT IN REPLY 1

 A. FACTUAL CLARIFICATIONS. 1

 1) The father’s restatement of facts has many inaccuracies.... 1

 2) Dain mischaracterizes an October 2018 hearing. 4

 B. CUSTODIAL CONTINUITY IS NOT ONLY RELEVANT IN CHILD RELOCATION ACT CASES BUT IS A KEY CONCERN.6

 C. THE FATHER FAILS TO ADDRESS KEY ERRORS BY THE TRIAL COURT IN DENYING RELOCATION. 7

 1) The father ignores fundamental errors by the trial court in applying the first CRA factor. 7

 2) The court erred in finding that disrupting E.B.’s contact with his mother would be less disruptive than disrupting his contact with his father. 9

 3) The court erred in weighing a neutral factor against relocation. 10

 4) The father ignores fundamental errors by the trial court in analyzing the fifth CRA factor. 10

 5) Analysis of the sixth relocation factor cannot be based merely on the trial court’s “training and experience.” 15

 6) The court erred in considering the seventh factor..... 16

 7) Dain does not dispute that contact by phone and internet could help to maintain his relationship with E.B. 17

 8) Dain and the court mistake what the ninth factor requires. 18

 9) The tenth factor did not weigh in favor of restraining relocation. 18

10) Summary..... 20

D. THE COURT FURTHER ERRED BY ENTERING THE
FINALPARENTING PLAN WITHOUT HEARING ADDITIONAL
EVIDENCE FROM SHELBY AND BY SANCTIONING HER. .. 20

E. THE FATHER’S REQUEST FOR ATTORNEY’S FEES ON
APPEAL SHOULD BE DENIED 24

III. CONCLUSION..... 25

TABLE OF AUTHORITIES

Washington Cases

In re Marriage of Fahey, 164 Wn. App. 42, 262 P.3d 128 (2011)..... 14

In re Marriage of Grigsby, 112 Wn. App. 1, 57 P.3d 1166 (2002).....
..... 13, 14, 24

In re Marriage of Kim, 179 Wn. App. 232, 317 P.3d 555 (2014) 7

In re Marriage of McNaught, 189 Wn. App. 545, 556, 359 P.3d 811
(2015)..... 18

In re Parentage of R.F.R., 122 Wn. App. 324, 93 P.3d 951 (2004) 7

In re Parenting & Support of K.B.K., No. 43560-8-II, 2013 WL 5230677
(Wn. App. Sept. 10, 2013)..... 7, 15

In re Pellanda, No. 48338-6-II, 2017 WL 499470 (Wn. App. Feb. 7, 2017)
..... 7, 24

Kearney v. Kearney, 95 Wn. App. 405, 416, 974 P.2d 872 (1999) 25

Statutes

RCW 26.09.002 6

RCW 26.09.187(3)..... 24

RCW 26.09.191 10

RCW 26.09.260 6

RCW 26.09.520(1)..... 7

RCW 26.09.520(10)..... 19

RCW 26.09.520(3)..... 9

RCW 26.09.520(4)..... 10

RCW 26.09.520(5)..... 10

RCW 26.09.520(6)..... 15

RCW 26.09.520(7).....	17
RCW 26.09.520(8).....	17
RCW 26.09.530	19-24
Rules	
CR 59	23
GR 14.1(a).....	7, 15

I. INTRODUCTION

For his entire life, E.B., along with his half-brother, has been primarily cared for by his mother, who sought to relocate with her husband. Despite the CRA's rebuttable presumption favoring relocation, the court denied her request and then denied her an opportunity to prove she would not relocate without E.B. The court then, without any additional analysis (i.e., which would apply where no relocation occurred), placed the child in the father's primary care, radically disrupting the continuity of his life.

Previously, the mother demonstrated the trial court's multiple errors. The father's response repeatedly fails to address the mother's key arguments. Further, his factual assertions are at times exaggerated or simply incorrect and unsupported by any citation to the record. Most importantly, the father claims continuity does not matter in the determination of this child's parenting plan. In fact, it matters most.

II. ARGUMENT IN REPLY

A. FACTUAL CLARIFICATIONS.

1) The father's restatement of facts has many inaccuracies.

Dain begins by disputing Shelby's description of his cabin in Jefferson County as being "rural" or "in the country." Resp. Br. 1, 39. (This would be a minor point if not for the judge's expressed preference

for population density.) He argues because his cabin is near Highway 101, he has a neighbor 150 yards away, and a fire station nearby, the environs are not rural. However, none of those facts mean a home is not “rural” or “in the country.” Indeed, Dain described his cabin as adjacent to timber property and wooded property, and described how he and E.B. would take nature hikes from his cabin to an orchard and old farmsteads easily accessible from his home. RP 444-445. As a result, his cabin (282084 U.S. Highway 101, CP 17) is clearly not “urban” or “suburban.”

The father also disputes that his “lifestyle” in 2010, when he and Shelby started a relationship, was one that the court would consider “alternative.” Resp. Br. at 1. Again, this matters because it mattered to the court, as Dain tacitly acknowledges by trying to distance himself from this “alternative lifestyle” label.¹ In any case, he does not dispute he and Shelby began their relationship while living on a communal farm. RP 25-27, 425-427; CP 278. Nor does he dispute before that he had left his wife and children in Colorado in 2008 and had spent nearly two years traveling with just a backpack. RP 513-515, 526.

Dain disputes he had “an inconsistent work history during or after the parties’ relationship.” Resp. at 3. However, he himself testified he was

¹ Dain also claims the court only referred to Shelby having an “alternative lifestyle” twice in its opinion. Resp. at 1. In fact, the court mentioned lifestyle twice more. CP 293, 296.

unemployed in the fall of 2010 (perhaps from August to January), which was when he and Shelby began their relationship while living on a communal farm. RP 425, 509. Shelby noted other periods when Dain was unemployed. RP 32, 193. Dain's testimony likewise revealed an inconsistent work history (i.e., switched jobs frequently every few years during their relationship). RP 465-466, 509-512.

Similar misstatements, exaggerations, and omissions appear in his discussion of Shelby. For example, he claims Shelby's employment "was sporadic at best and at most times non-existent." Resp. at 3. Not only does he exaggerate, he completely devalues and trivializes Shelby's work as E.B.'s primary caregiver. Like many parents, Shelby prioritized caring for E.B. and his brother as her primary work; however, she also earned some income from work outside the home. RP 42, 180-188.

Dain also claims that since he and Shelby separated in April 2015, he "has spent every day he has not been working exclusively with E.B." Resp. at 7. Shelby disputed that point; Dain ignores how Shelby made it possible for him to spend "non-working" days with E.B. by agreeing (without formal court orders) to a residential schedule accommodating his work schedule (RP 34, CP 232), underscoring Shelby's prioritization of E.B.'s interests in maintaining the father-son relationship.

Dain also claims to have “dutifully” paid child support without a formal child support order. Resp. at 4. In fact, he withheld support payments for a period in 2017, resulting in being ordered in August 2017 to make back payments of nearly \$1800. CP 30, 35, RP 34-35.

2) Dain mischaracterizes an October 2018 hearing.

Dain wrongly claims Shelby misled the court at a hearing on 10/05/18 where the court considered her motion for a revised temporary parenting plan and Dain’s motion for a temporary order to prevent Shelby from relocating with E.B. before trial. Op. Br. at 8, 34-35. Shelby informed the court that while she continued to maintain her home in Jefferson County, she was also traveling between Jefferson County and Skalitude for work (CP 238-239); she also informed the court that she wanted to enroll E.B. temporarily in preschool near Skalitude, but would do “whatever the court says.” CP 231.

Dain argues Shelby misrepresented her living situation pretrial. Resp. at 11-12. Dain misstates the record and omits key facts. First, Dain expressed doubt at this hearing that Shelby continued to maintain a residence in Jefferson County, saying he understood “she has rented her yurt to somebody else and that there’s someone else living there.” CP 235. The court then asked Shelby whether she had “essentially moved to the Methow Valley.” CP 238. Shelby responded that “I maintain my residence

in Jefferson County. I do have current responsibilities with the job I have been given at Skalitude Retreat, and I'm back and forth between there and here. I have not rented out my yurt in Jefferson County." CP 238. The court replied by stating "Well, okay. To say you maintain a residence here is a little bit different than saying you live here." CP 238-239. Shelby replied: "I do live here. I still have my home in Jefferson County, and I have also been spending time at Skalitude in the Methow Valley." CP 239. Countless people have similar arrangements.

Yet Dain insists Shelby somehow misled the court at this hearing. *See, e.g.* Resp. at 12, 37-38. In fact, as the record plainly shows, Shelby disclosed she had been traveling with E.B. between Jefferson County and Skalitude and that she wanted to enroll him temporarily in preschool near Skalitude. Thus informed, the court expressed its view Shelby had already "chose to essentially move over to Winthrop." CP 242. Nonetheless, the court declined to restrain Shelby from commuting or from enrolling E.B. in preschool near Skalitude before trial, while making clear the orders could change if problems arose impeding on the father's time. CP 242. In short, Shelby was forthright with the court at this hearing.

B. CUSTODIAL CONTINUITY IS NOT ONLY RELEVANT IN CHILD RELOCATION ACT CASES BUT IS A KEY CONCERN.

Shelby previously noted the CRA's rebuttable presumption reflects a preference for continuity of a child's relationship with the person who has been their primary caregiver. Dain disputes the Legislature has expressed this preference for custodial continuity, going so far as to suggest that Shelby's role as E.B.'s primary caregiver for his entire life was "irrelevant" in this case. Resp. at 23, 28, 40.

In fact, continuity is a pillar of our state's policy toward children whose parents have separated, of which the CRA presumption is but one facet. RCW 26.09.002 flatly declares "the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." Still, Dain maintains continuity is irrelevant to CRA cases, though citing only cases predating enactment of the CRA in 2000. *See* Resp. at 21-23. He also suggests custodial continuity is relevant only in cases involving the modification of a permanent parenting plan under RCW 26.09.260, not in CRA cases where no permanent plan has yet been entered. Resp. at 22-23. In fact, as the statute indicates, it is always relevant, including, as courts have found, in CRA cases where permanent

parenting plans had not been previously entered. *See, e.g., In re Marriage of Kim*, 179 Wn. App. 232, 317 P.3d 555 (2014); *In re Parentage of R.F.R.*, 122 Wn. App. 324, 93 P.3d 951 (2004); *see also In re Pellanda*, No. 48338-6-II, 2017 WL 499470 (Wn. App. Feb. 7, 2017); *In re Parenting & Support of K.B.K.*, No. 43560-8-II, 2013 WL 5230677 (Wn. App. Sept. 10, 2013).²

C. THE FATHER FAILS TO ADDRESS KEY ERRORS BY THE TRIAL COURT IN DENYING RELOCATION.

1) The father ignores fundamental errors by the trial court in applying the first CRA factor.

The first CRA factor requires a court to consider 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.” RCW 26.09.520(1). The court found this factor to be “neutral.” But as Shelby noted in her opening brief, a “neutral” factor does nothing to rebut the CRA’s presumption that relocation should be allowed; as a result, a “neutral” factor weighs in favor of relocation. Op. Br. at 26. Notably, Dain does not dispute this point.

Dain likewise ignores the court’s error in focusing its analysis of this factor on the court’s views regarding each parent’s “overall” stability,

² Pursuant to GR 14.1(a), the latter two unpublished decisions are cited for their persuasive value only.

rather than analyzing what the plain language of the statute actually requires: a focus on the relative “stability of the child’s relationship with each parent.” Op. Br. at 24. This is not a dependency proceeding; the governing statute foregrounds the parent-child relationship, not the parent.

While ignoring the necessary inquiry, Dain misdirects to points irrelevant to this factor, such as claiming Shelby was dating Pixie “and others” (i.e., one other) following separation; however, even overstated, this point does not relate to E.B.’s relationship with his mom.

Dain also attempts to defend the trial court’s conclusory finding that E.B. and his half-brother H.B. will “remain close” if Shelby is no longer the primary residential parent for both boys. He claims the trial court’s parenting plan provides the boys would both be with Shelby every other weekend, for half of winter and spring breaks, and for “all of the summer.” Resp. at 28, 40. In fact, during summer, E.B. is with the father (and away from his brother) for three days every other weekend, as well as during an uninterrupted two-week vacation. CP 251. In any case, the father fails to point to any evidence supporting the court’s finding that E.B. and his brother will “remain close.” This was wishful thinking, at best, devoid of analysis regarding how E.B. would maintain his close relationship with his brother when they would be living apart most of the time and more than they ever had before.

- 2) The court erred in finding that disrupting E.B.'s contact with his mother would be less disruptive than disrupting his contact with his father.

The next relevant CRA factor requires the court to consider the “[w]hether disrupting the contact between the child and the person seeking relocation would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation.” RCW 26.09.520(3). Once again, Dain’s response ignores key arguments and focuses on the wrong questions.

First, Dain does not dispute the trial court erred by finding Shelby had cared for E.B. only a “slight” or “small” majority of the time. Op. Br. at 26-27. Nor does Dain address the trial court’s error in, again, improperly focusing on each parent’s “stability” under this factor. Instead, the plain language of the statute requires the court to consider a different question: the relative detriment of disrupting each parent’s “contact” with the child. Shelby is not attempting to second-guess the trial court’s weighing of evidence, as Dain suggests. She is arguing that the court failed to consider what the CRA requires in evaluating this factor.

Dain also suggests, as he had before, that Shelby’s role as E.B.’s primary caregiver is “irrelevant” to this factor. Resp. at 28. However, he again cites no CRA cases to support this argument. And as Shelby noted in her opening brief, her role as E.B.’s primary caregiver for his entire life is

directly relevant to the question the CRA requires courts to evaluate: whether disrupting the child's contact with her would be more disruptive to the child than disrupting contact with the other parent.

3) The court erred in weighing a neutral factor against relocation.

The next CRA factor requires a court to consider “[w]hether either parent ... is subject to limitations under RCW 26.09.191.” RCW 26.09.520(4). As Shelby noted, the court erred by weighing this factor against relocation because neither party sought nor was subject to limitations under 26.09.191. Op. Br. at 28-29. It is neutral.

Dain argues the court's refusal to credit Shelby's concerns about his alcohol use and other behavior is relevant to Shelby's “good faith in seeking the relocation which is one of the factors the court must address.” Resp. 30. But while the court may consider each parties' good faith in seeking relocation under a different CRA factor, it simply is not a relevant consideration in weighing this particular (“191”) factor.

4) The father ignores fundamental errors by the trial court in analyzing the fifth CRA factor.

The fifth CRA factor requires the court to consider “[t]he 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.” RCW 26.09.520(5). Shelby argued the court erred in its consideration of this factor by focusing exclusively on its views of E.B.'s interests, ignoring the

mother's interests in relocating as required by the CRA. Op. Br. at 29-30. Once again, Dain does not address this fundamental point in his response. Nor does Dain dispute Shelby's point that as a fit parent, it is presumed she was acting in E.B.'s best interests.

Instead, Dain focuses on arguments that are largely if not entirely irrelevant to the actual questions this factor requires courts to consider. Resp. at 31-38. While many of Dain's arguments do not warrant a reply because of their irrelevance, Shelby briefly corrects at least some of the most serious errors and omissions in the father's response.

First, under the plain language of the statute, the relevant considerations under this factor are Shelby's reasons for wanting to relocate to Skalitude and whether her relocation request is made in good faith. Dain does not suggest that Shelby engaged in bad faith by joining her co-investors in the purchase of Skalitude or question that she believed this move would improve her quality of life, her economic opportunities, and her marriage and family. The court did not find these reasons were made in bad faith.³

Instead, Dain argues Skalitude is not a financially viable business. Notably, he does not dispute Skalitude was operating at a profit within the

³ The court did refuse to credit an additional reason that Shelby offered for wanting to relocate (i.e., to live farther away from Dain to get some space from their contentious relationship and hostile interactions). CP 293, 296.

first months of ownership by Shelby and her co-owners. Op. Br. at 32 n.9. However, he claims Skalitude's "historical gross income" was insufficient to make loan repayments, pay business expenses, and pay Shelby and Pixie salaries. Resp. at 32-33. But the only citation Dain offers for this assertion (RP 238) does not support his claim; instead, it reflects Shelby's testimony that expenses for Skalitude in a single year (2016) were likely higher than usual because the owner was spending money to make improvements to the property in anticipation of sale. RP 238-240; see also RP 345 (prior owner put property on market in Fall 2016). Those expenses included professional fees to run the property, expenses that would now be paid to Shelby and Pixie. RP 238-240; see also RP 350 (prior owner notes 2017 expenses of \$15,000 included caretaker payments). Dain further disputes Shelby and her co-investors made a feasibility study with promising results. Resp. at 33. But this is mere argument; in fact, a real estate agent, attorney, and financial planner assessed feasibility. RP 252.

Moreover, Pixie testified he would hire Shelby to work for Pixie Honey, explaining she would take on work (including collecting plants for his products at Skalitude) previously outsourced to contractors and vendors, at substantial cost. RP 362-365; see also RP 369 (Pixie to pay Shelby wages in the future). Dain disputes Pixie Honey would be able to

pay Shelby. The point remains Pixie has a viable company generating income for the family. RP 361-362.

Dain also claims that Shelby lacked the “education, experience, or skills” to perform any functions as the manager/caretaker for Skalitude. Resp. at 34. Dain offers no citations to the record to support this argument. Although Dain suggested at trial that Shelby lacked the mechanical knowledge to maintain farm equipment, solar generation power systems, plumbing, and irrigation systems (RP 485), he later acknowledged these tasks could obviously be handled by Shelby calling in a mechanic to address as needed. RP 543-544. He also acknowledged that he knew nothing about the specifics of Skalitude’s systems. RP 484-485.

Dain next tries to discount that one of the co-owners of Skalitude (William Dickey) was willing and able to invest additional funds in the business. Though not obliged to do so, Dickey, like most investors was willing to help as needed so the venture would succeed. CP 567-568, 575.

Dain also attempts to defend the trial court’s negative reliance on Shelby’s marital status at the time of trial, citing *In re Marriage of Grigsby*, 112 Wn. App. 1, 57 P.3d 1166 (2002) to argue that this was a proper consideration. Resp. at 36-37. But the facts in *Grigsby* were quite different. Here, unlike in *Grigsby*, Shelby and Pixie had a ceremonial marriage with the children present and planned to marry legally later.

Moreover, here E.B. had spent considerable time with Pixie (see, e.g., RP 387), whereas the Grigsby court's primary concern was that the children had never lived with their mother's fiancé and "had very little contact with him in the past few years." *Id.* at 12. Simply, the dispositive facts in Grigsby do not support Dain's argument.

Dain also asserts Shelby ignored E.B.'s best interests in seeking to relocate; however, the only argument he offers is that she "created a situation which required him to spend significant time traveling between Irondale and Skalitude." *Resp.* at 38. However, there was no evidence E.B. was harmed by this travel. In any case, most relocations will necessarily require travel. See, e.g., *In re Marriage of Fahey*, 164 Wn. App. 42, 262 P.3d 128 (2011) (approving relocation of mother from Edmonds to Omak).

Still Dain turns the reality of increased travel into a criticism of Shelby as a mother to her older child, who remained at Skalitude before trial while Shelby traveled between Skalitude and Jefferson County. *Resp.* at 38. In making this argument, Dain seems to suggest the children's interests are best served if residing primarily with Shelby, with which she would agree. By arguing that Shelby failed to serve H.B.'s best interests by having him live at Skalitude, he also tacitly acknowledges Shelby continued to reside in Jefferson County during this pretrial period. In any

case, under the CRA, the analysis depends on some detriment other than the inevitable effects of increased distance between the parents.

5) Analysis of the sixth relocation factor cannot be based merely on the trial court’s “training and experience.”

The sixth relocation factor requires the court to consider “[t]he 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.” RCW 26.09.520(6). Shelby argued the court erred by reducing this factor to a preference for E.B. to live in a more populated area, rather than analyzing evidence relevant to this factor. Op. Br. at 35-36.

In response, Dain argues the court may base its analysis of this factor on its “training and experience.” Resp. at 38-39. This argument is startling, as it seems to suggest the court’s assessment of this factor need not be based on the evidence in the record. In any case, this Court has made it clear that a trial court may not base CRA findings on its own opinion of the relative merits of two locations, rather than on the evidence. *Parenting & Support of K.B.K.*, No. 43560-8-II, 2013 WL 5230677, at *10 (Wn. App. Sept. 10, 2013) (court erred by basing finding on “court’s own subjective opinion about the quality of life in Texas and Washington”).⁴

⁴ Pursuant to GR 14.1(a), this unpublished case is cited for its persuasive value only.

Dain also claims that because Shelby observed in her opening brief that both parents “live in the country,” Shelby is “finally admitting to the court that she ‘lives’ at Skalitude which she has consistently denied since the commencement of the proceedings.” Resp. at 39-40. This is quite a stretch. Shelby “would” live in the country if granted relocation, an outcome she argues the law requires. Styling of this sentence does not change the record of Shelby’s candor on this subject all along.

Aggravating this tangle, Dain then argues Shelby has never lived with Pixie. Resp. at 40-41 (claiming “Shelby and Pixie had never lived together in the same household” and Shelby and Pixie were not living together at the time of trial). So she must be living in Jefferson County, given that Pixie was living at Skalitude before trial.

Finally, Dain also claims “the evidence clearly demonstrated that E.B. has spent very little time with Pixie’s children” and that Pixie’s testimony that his son and E.B. are best friends is “dubious at best.” Dain provides no record support for this claim, perhaps because the record plainly shows otherwise. RP 355, 386-387.

6) The court erred in considering the seventh factor.

The seventh relocation factor requires courts to consider the “quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations.”

RCW 26.09.520(7). As Shelby has noted, the court fundamentally erred in its consideration of this factor because it ignored its obligation to consider the benefits of the relocation to Shelby, including the opportunity for improved housing, better economic opportunities and quality of life, and the chance to live with her now husband. Op. Br. at 37-38.

To this Dain offers no substantive response. He does not dispute the evidence in the record showed the relocation would benefit Shelby by providing better housing and the opportunity to live with Pixie. Instead, he argues that “Shelby’s position is that the court must simply accept whatever she says.” Resp. at 41. That is not Shelby’s position; rather, it is the CRA’s position that the court must take into account the benefits to Shelby from relocation.

7) Dain does not dispute that contact by phone and internet could help to maintain his relationship with E.B.

The eighth relocation factor requires the court to consider “the availability of alternative arrangements to foster and continue the child’s relationship with and access to the other parent.” RCW 26.09.520(8). Shelby observed in her opening brief that contact could have been maintained through increased communication by phone and by internet, a point Dain does not address and a reality for many families.

8) Dain and the court mistake what the ninth factor requires.

The ninth CRA factor requires courts to consider the “alternatives to relocation and whether it is feasible and desirable for the other party to relocate also.” As Shelby has observed, Dain offered no evidence at trial that it would not be feasible for him to relocate if Shelby was permitted to move to Skalitude with E.B., particularly in light of his history of frequent job changes in a variety of different types of employment and his lack of family ties or home ownership in Jefferson County. Op. Br. at 39-40.

Dain does not dispute these points. Instead, he suggests he had no burden to produce evidence on this factor and claims Shelby offers no legal authority to support her arguments. Resp. at 42-43. But Shelby’s arguments are based on the plain language of the statute. And as Shelby noted at several times in her opening brief, the burden of production and persuasion is on Dain as the party opposing relocation. *See, In re Marriage of McNaught*, 189 Wn. App. 545, 556, 359 P.3d 811 (2015) (CRA “shifts the burdens of persuasion and production to the party opposing relocation”).

9) The tenth factor did not weigh in favor of restraining relocation.

Finally, the tenth CRA factor looks at the “financial impact and logistics of the relocation or its prevention.” RCW 26.09.520(10). As Shelby has noted, her relocation to Skalitude would require travel

expenses whether or not she would be allowed to move with E.B. She also noted that if E.B. were to remain in Jefferson County with Dain, they would incur substantial day care expense, a point Dain does not dispute.

Dain ignores day care and claims Shelby's increased earnings at Skalitude would be eaten up entirely by travel costs. Resp. at 43.

However, he ignores evidence that Shelby would also be relieved of the expense of paying rent by relocating to Skalitude and would also enjoy additional economic benefits from Pixie Honey.

Dain further suggests that instead of relocating, Shelby would have been better off economically by staying in Jefferson County and taking a minimum wage job. Resp. at 43-44. While Shelby disagrees with that assertion, Dain's argument mistakes the point of this factor. The court is supposed to consider the different financial impacts if Shelby is allowed or restrained from moving with the child. Under the CRA, the court is not permitted to consider "whether the person seeking to relocate the child will forego his or her own relocation if the child's relocation is not permitted" in analyzing this (or any other) factor. RCW 26.09.530. As such, the court had to assume, for the purposes of analyzing this factor, that Shelby would relocate to Skalitude even if E.B. was not allowed to move with her. Inevitably, increased travel expenses would occur whether the move was allowed or restrained, since E.B. would have to travel

frequently between the two locations to spend residential time with both parents under either scenario the court was permitted to consider.

10) Summary.

Dain's response fails to address many of Shelby's arguments. He also misstates evidence, ignores evidence, and makes factual assertions that contradict each other at times. Shelby has shown the trial court made errors in analyzing the CRA factors and denying her relocation.

D. THE COURT FURTHER ERRED BY ENTERING THE FINALPARENTING PLAN WITHOUT HEARING ADDITIONAL EVIDENCE FROM SHELBY AND BY SANCTIONING HER.

After incorrectly denying Shelby's relocation request, the court compounded its errors by disallowing additional evidence Shelby offered to prove she would remain in Jefferson County in light of the court's ruling. As Shelby has noted, the court's refusal to hear this evidence was contrary to RCW 26.09.530 and her due process rights. Dain says nothing in response, failing even to mention RCW 26.09.530 in his brief.

As Shelby noted, the Legislature has provided that when courts consider a parent's relocation request, courts may not consider evidence the parent will forego their move if the court denies the relocation request. RCW 26.09.530. Instead, courts may consider such evidence after issuing a decision on the relocation request. RCW 26.09.530.

The Legislature's inclusion of this provision in the CRA makes sense. A court cannot fairly consider a relocation request if the parent requesting relocation discloses (either voluntarily or through direct questioning) whether or not they will forego the move if the court denies relocation, quite possibly in recognition of the importance of continuity. Certainly, the Legislature plainly contemplates courts must first consider the relocation request by assuming the parent will move regardless of whether the court allows the parent to move with the child. But in cases where a court denies the relocation request, the Legislature then provides the court should allow the parent to present evidence they will forego their move in light of the relocation denial. Here, however, the trial court proceeded in a very different manner, committing multiple errors that fundamentally disserved both Shelby and E.B.

First, as Shelby has noted, the court committed clear error by finding "the parent who asked to move with the child is moving without the child." Op. Br. at 42, 45 (emphasis added) (citing CP 305). This finding simply is not true and is not supported by any evidence, much less substantial evidence. Dain offers no response on this critical point.

Second, as Shelby has also noted, the court erred by denying Shelby's request (through a motion for reconsideration or otherwise) to present evidence that in light of the court's denial of her relocation

request, she would forego her move and remain in Jefferson County. Op. Br. at 43-45. This is precisely the evidence that should be considered under both RCW 26.09.530, basic principles of due process, and in service to the best interests of the child. Again, Dain does not even attempt to address the provisions of RCW 26.09.530 or due process requirements in his response.

The court refused to consider this evidence through a motion for reconsideration despite that both the court and Dain had indicated at a post-trial hearing that Shelby could seek to present such evidence through such a motion – points that Dain again does not address. Op. Br. at 43. And on top of all this, the court sanctioned Shelby by requiring her to pay Dain’s attorney’s fees for filing the motion for reconsideration.

Dain’s response to cumulative errors is simply to claim that “[t]he court did not refuse to consider evidence” by denying the motion out of hand. Resp. at 46. In support, Dain points only to a statement by the trial court at the April 11th hearing where the court said “[b]ut at this point, given everything I’ve heard and so forth in connection with the trial, I have absolutely no reason to believe that the petitioner is making a sincere, genuine return to Jefferson County.” Id. But this statement by the court (which Shelby herself noted in her opening brief) reinforces Shelby’s point: the trial court did in fact refuse to consider evidence. It

shows that the trial court was prejudging the issue of whether Shelby would remain in Jefferson County, without affording her the opportunity under RCW 26.09.530 to present this evidence. This is not an improper attempt to have a “second bite at the apple,” as Dain suggests; instead, Shelby sought to present evidence that RCW 26.09.530 had prevented the court from considering at trial, but which the statute allows to be considered after the court has decided whether or not to permit the relocation.

Dain also appears to suggest Shelby’s motion for reconsideration failed to meet the standards of CR 59. Resp. at 47-48. However, as Shelby noted in her opening brief, the new evidence she presented in her motion clearly fell within the scope of CR 59(a)(4) (newly discovered evidence that could not have been presented at trial) and CR 59(a)(9) (substantial justice has not been done). Op. Br. at 47 n.16. The denial of relocation was new, after all. Once again, Dain does not try to respond to these points.⁵

Finally, Dain attempts to distinguish Grigsby, supra, in which the Court of Appeals held a trial court erred by modifying a parenting plan

⁵ Earlier in his response, Dain also suggests Shelby’s motion for reconsideration simply presented “the same facts she presented at the April 11th hearing.” Resp. at 17. This is incorrect. Shelby was not afforded the opportunity to testify at the April 11th hearing, while her motion for reconsideration included Shelby’s sworn declaration describing her decision to forego her move given the denial of her relocation request. CP 267.

after a mother was denied relocation under the CRA and informed the court post-trial she would abandon her move in light of the court's decision. Dain suggests Grigsby is inapplicable because it concerns modification of a parenting plan, rather than entry of a final parenting plan. But he fails to explain why that distinction matters, particularly in light of RCW 26.09.530. While it is true in this case the court needed to enter a final parenting plan, RCW 26.09.530 clearly contemplates a court should not do so until the parent is allowed to present evidence that he or she will forego the proposed move if denied relocation.⁶

E. THE FATHER'S REQUEST FOR ATTORNEY'S FEES ON APPEAL SHOULD BE DENIED

Dain requests attorney's fees on appeal, arguing Shelby's appeal is frivolous. This request should be denied. "An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, and there is so little merit that the chance of reversal is slim." *Kearney v. Kearney*, 95 Wn. App. 405, 416, 974 P.2d 872 (1999). This appeal is not frivolous. Shelby has pointed to multiple errors in this case, many of

⁶ Dain also complains that Shelby refers in her brief to RCW 26.09.187(3) (the statute concerning factors for establishing a parenting plan), claiming those references are inconsistent with her arguments in the court below that this case is governed by the requirements of the CRA. Resp. at 44-46. Dain misses the point. Shelby cited "187" in her argument concerning the reconsideration motion (i.e., Shelby not relocating). Op. Br. at 42-47. She also cited to this court's recent decision on similar facts (Pellanda). Critically, the statute focusses on the child's relationship with each parent as the most important consideration. That concern, and continuity, are the underlying themes here and, as Shelby argues, not given the appropriate weight.

which Dain does not even attempt to dispute. Finally, Dain’s accusation that Shelby “made decisions that a fit parent would not have made” (Resp. at 50) is not only untrue and inflammatory, but also contrary to his own testimony that “she’s a good mom.” RP 548.

III. CONCLUSION

For the foregoing reasons, Shelby seeks the relief identified in her opening brief.

Respectfully submitted this 21st day of February 2020.

/s Patricia Novotny, WSBA #13604
ATTORNEY FOR APPELLANT
3418 NE 65th Street, Suite A
Seattle, WA 98115
Telephone: 206-525-0711
Fax: 206-525-4001
Email: Patricia@novotnyappeals.com

NOVOTNY APPEALS

February 21, 2020 - 4:14 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53416-9
Appellate Court Case Title: Shelby Brighthouse, Appellant v. Dain Olsen, Respondent
Superior Court Case Number: 17-3-00067-4

The following documents have been uploaded:

- 534169_Briefs_20200221161233D2139525_8888.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Brighthouse-Pixie BIR FINAL.pdf

A copy of the uploaded files will be sent to:

- peggyann@bierbaumlaw.com

Comments:

Sender Name: Patricia Novotny - Email: patricia@novotnyappeals.com
Address:
3418 NE 65TH ST STE A
SEATTLE, WA, 98115-7397
Phone: 206-525-0711

Note: The Filing Id is 20200221161233D2139525