

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

No. 276376

**Benton County Superior Court Case No. 06-3-01010-9
The Honorable Judge Carrie Runge
Superior Court Commissioner**

FILED

AUG 07 2009

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____**

In Re:

CRAIG MCDONALD, PETITIONER

V

MEGAN MCDONALD, RESPONDENT

APPELLANT'S BRIEF

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I. FACTS

Mr. and Mrs. McDonald were married and living in the Tri-Cities when they began having marital difficulties. They have two children, Brantley, age 5, and Makenzie, age 3. Mrs. McDonald was a graduated nurse who worked at Kadlec and Lourdes Hospitals in the Tri-Cities, and Mr. McDonald worked as well. On one occasion while Mrs. McDonald was at work she expressed a desire to potentially change careers and she began discussing this with coworkers. RP 196. While having this friendly discussion on her unit at the hospital, a doctor she knew overheard her discussion and he told her that he knew of a potential job with a medical instrumentation company that she could check into. He then gave her a name of who to contact. RP 197. Mrs. McDonald contacted this person and went through a series of business interviews and meetings, and was eventually hired and trained by Boston Scientific (Boston hereafter), a cardiology instrumentation company. RP 203 & 208. Much of Mrs. McDonald's training with Boston took place outside the Tri-Cities. RP 212-213. After she was hired, she had to keep mixed hours and could be called out at a moment's notice to check on a heart machine or other medical instrument. RP 213. After a while, this new job and her schedule demands became a major source of marital contention. RP 212-233

The contention over Mrs. McDonald's new job eventually led Mr. McDonald to file for divorce. *Id.* The court then heard their respective motions for temporary orders and a temporary parenting plan was entered. RP 233-235. Mrs. McDonald's employment continued to keep her out of town either on call, or fixing local heart machines. These trips took her to virtually all the Southeastern Washington cities, and some Oregon towns such as Hermiston. RP 225. During these emergencies and times away from home, she would turn to Mr. McDonald and

his mother to help with their children. RP 227-233. This schedule, as she explained, was somewhat interfering and she approached her supervisor at Boston for other more flexible options. RP 232. Nothing changed so she began looking for nursing jobs in the Tri-Cities, but passed them up because she did not apparently find anything to suit her needs. RP 231-232. She approached her supervisor at Boston again and told him that she had to look for a less demanding job; however, Boston indicated to her that she was still very important to them, and that since they had invested almost \$250,000 in her training, they did not want to lose her. RP 232. Eventually she received a new offer from Boston to move to the Portland area as a “contract employee”. RP 233. Mrs. McDonald filed a relocation notice and a motion for a Temporary Order allowing her to move. A hearing was held on her request and the Commissioner allowed her to leave because of the flexibility of the new position, since this new position allowed her to work in both the Tri-Cities and the Portland area, and was less demanding. RP 234. She then signed a new employment contract with Boston for the Portland area on June 30th, 2008. Id.

Mrs. McDonald actually moved to Lake Oswego, Oregon a suburb of Portland. Id. When asked about this new position at trial she indicated that it was of paramount importance for her career, and allowed a more flexible schedule. RP 417. She further stated that this Portland position was her “dream job,” with all the things she needed, and included the luxury of maintaining a good salary of approximately \$70,000 a year in salary. RP 303, 320-326.

As the trial went on it was clear that the focus of much of the testimony and examinations were about the mother’s employment with Boston, and her search for the right job to accommodate her needs. RP 383-400. This testimony also focused on the fact that this was a full time position and that this meant that her husband had to take more and more responsibility

for the children. RP 213 & 228. When she needed him, Craig McDonald was always there for her and the children. RP 229. However, there was never any indication that she would quit this job. RP generally.

One part of Mrs. McDonald's testimony was of significance with regard to the good or bad faith reasons for relocating to Oregon, under the Relocation Statute. In a later trial session Mrs. McDonald, while under cross examination, admitted that she was having a very serious relationship with a fellow named Ron, who also just happened to live in Oregon and was originally from Portland. RP 450-460. She admitted that this was a romantic relationship toward a real possibility of marriage. Id. This relationship existed during the temporary order period and was still in existence at the time of trial. Id.

The party's trial was piecemealed over several days in January and February 2009. See RP generally. After trial, the court made its ruling in favor of allowing Mrs. McDonald to have the children primarily in her care, and ordered a final parenting plan which was fashioned to accommodate her relocation to Lake Oswego [Portland], Oregon. RP 840-855. A review of the court's oral ruling indicates that the primary law used by the court was RCW 26.09.187, with the court even stating that "this is not a relocation trial", even though the primary issue for almost 6 days of trial was the relocation of Mrs. McDonald to Oregon for her new job. Id. There is no indication that the judge ever analyzed this case by use of the mandatory 11 factors in the Relocation Act to determine if her move was appropriate in light of her ruling that she would be the primary caretaker. Id.

After the court's oral ruling, and before the presentment of final orders, Mr. McDonald found out that his wife actually did not renew her contract with Boston, and that she

was now working for her boyfriend Ron. This made Mr. McDonald suspect that there was more to the relocation than just a better job. RP 2-15 of the 10/24/08 proceeding (hereinafter referred to as “RMT” for reconsideration motion transcript). Armed with these new facts, Mr. McDonald filed a Motion for Reconsideration because this change of employment was not only new information that was not available before trial, it was significant regarding her reasons for leaving the Tri-Cities. His attorney asked for time to do further discovery of this new important fact, however, this motion was denied. RMT-RP 28-30.

Mr. McDonald has appealed the judges ruling, not only because the court did not apply the Relocation Act factors in the decision, the court failed to allow a new trial to deal with this important new evidence under CR59.

II. Error by the Trial Judge

The trial judge committed error as follows:

1. By failing to incorporate the significance of the mother’s relocation to Oregon in its application of the Parenting Act standards;
2. By failing to also analyze the mother’s relocation and whether it should be allowed by applying the 11 factors outlined at RCW 26.09.520 in its decision;
3. By failing to allow a new trial under CR 59 on the issue of the good and bad faith of the mother’s relocation, given the following facts: that she first claimed that the job with Boston was her “dream job”; that Boston had spent \$250,000 training her; that she virtually hand picked this job so she could have more flexibility for the children; that she was earning \$70,000 and was a great employee; then, just after the court made its oral ruling, she mysteriously lost that job and now works for her Oregon

boyfriend; who she admitted she will possibly marry.

III. Argument

- A. The mother's move to Oregon was of great significance in this case and should have been given the greatest weight in its decision.

In the case of *In re Marriage of Combs*, 105 Wn.App. 168, 19 P.3d 469 (2001), the court made it clear that it was error for the trial judge to fail to consider the fact that Mrs. Combs indicated that she “might” move to the East Coast either just before trial or soon thereafter. They said,

“Relocation of a child to a different state certainly will affect his or her physical surroundings and thus would be directly relevant to factor (v)[of RCW 26.09.187(3)]. Depending on the circumstances, such a move also may be relevant to other factors, particularly (iii) and (iv). A plan to relocate a child to another state would be directly relevant to a determination of the child's best interests.” *Id. at p 175-176*

As the *Combs* court said, the fact that the mother, who was named the primary custodian at trial, wanted to possibly move out of state should have been a significant factor in the court's decision, even when applying the Parenting Act factors. [It should be noted that the Relocation Act was not made law until after their trial was over].

In this case, although the judge seemed to give Mrs. McDonald's relocation lip service in her oral opinion, her focus was on applying RCW 26.09.187 and an analysis as to who was the children's primary caretaker during their marriage, to the complete exclusion of the Relocation Act. Even without the Relocation Act, the judge's failure to give this important fact of her move the weight it deserved appears to be a direct contradiction to the warnings in *Combs*.

- B. The court failed to apply the 11 factors outlined at RCW 26.09.520 to the approval of Mrs. McDonald's relocation, which improperly skewed

the court's ruling away from the one fact that seemed to be at the heart of this important custody case .

In the recent case of *Bay v. Jensen*, 147 Wn App. 641 ___ P3d ___ (2009), the court clearly stated that at any time during any proceeding regarding custody where there is an issue of relocation, the court must use the 11 factors in the Relocation Act at RCW 26.09.520 to analyze whether the move should be granted. In this case the trial court completely ignored these 11 factors in her decision, and instead focused on the factors at RCW 26.09.187 for her decision. What she should have done was apply or use both statutes together in this decision, specifically using each factor. This was clearly error by the court and should be basis enough to reverse the ruling.

- C. The fact that Mrs. McDonald mysteriously “lost her job” with Boston, after the court made its oral ruling, and after it was clear that there was little or no possibility for this to occur, and then she started working for her Oregon boyfriend, should have been more than sufficient to cause the court to allow a rehearing on the issue of the good faith of her move to the Portland under CR 59.

CR 59 clearly indicates that after trial is over, either before the final orders are entered or within 10 days after, if one of the parties learns of facts unavailable before trial, that are of importance to the adjudication of the case, they may file for a reconsideration or new trial. In this case, there is no question that Mrs. McDonald's Portland area position with Boston was the single factor motivating her decision to move, as well as the court's initial allowance of her move. To come to some other conclusion after almost 6 days of examination on this issue would be to misinterpret the facts. One of the main factors in allowing a parent to relocate is the good and bad faith of their decision to move, or “their reason”. RCW 26.09.520(5) states that one of the court's

considerations in these cases should be, “The 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”. With this statute in mind, it is axiomatic that within that consideration is Mrs. McDonald’s testimony about her Boston job being her “dream job”, that she earned a great living there, that she had the flexibility she needed for the parenting plan, that they had spent almost a quarter million on training her, and now she gave no excuse for not resigning her Boston contract, but that she now had a job with her boyfriend’s company, whom she would likely marry. Since this occurred just after the judge’s oral ruling to allow her to be the primary parent and thus retain her relocation status, it seems very significant in this case. The judge should have at least allowed a new hearing after some discovery on this new important and material issue.

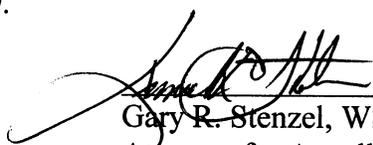
The case of *Prayton v King County*, 69 Wash. 2d 637, 419 P 2d 797 (1996) indicates that although it is within the sound discretion of the trial judge to not grant a CR 59 reconsideration or new trial, their decision must have some reasonable basis given the evidence. If the party shows that there is newly discovered evidence created immediately after trial, that is material and contrary to the testimony at trial, a new trial should be granted. *Id.* Unfortunately the Judge in this case provides no insight as to why she would not allow this reconsideration, other than she felt this was not an unusual thing to happen, given the testimony at trial. Taken from the reasonable person’s point of view, this conclusion is completely contrary to the facts in this case and the importance of the mother’s job in her decision to relocate. This clearly appears to be error and again should be a basis to over turn the court’s final orders.

IV. CONCLUSION

This case comes to the Court of Appeals because of the trial court's failure to properly consider and determine whether the mother's relocation to Oregon should be authorized under the law. Even if Mrs. McDonald was and is the primary caretaker of the children, the decision to relocate is so significant as to its impact on the children and Mr. McDonald that it had to be tested under all 11 Relocation Act factors. The trial court's failure to analyze this case under those factors was an abuse of discretionary powers and should be remedied by this court.

Finally, the trial court emphasized its failure to consider the relocation factors in this case when it turned a blind eye to what appears to be new facts, after the oral ruling showing that the mother may have orchestrated this entire move to be nearer to her boyfriend.

Dated this 7th day of August, 2009.


USB 31178 for
Gary R. Stenzel, WSBA#16974
Attorney for Appellant

CERTIFICATE OF SERVICE

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty to perjury pursuant to the laws of the State of Washington, that on the 29th day of July 2009, the foregoing document was filed with the Clerk of the Court and was delivered to the following persons in the manner indicated:

Mike Pickett
1030 N. Center Parkway Suite 321
Kennewick, WA 99336

- Via Regular Mail
- Via Fed Ex Overnight
- Via Certified Mail
- Via Facsimile

Hand Delivered

Dated this 7th day of August 2009.


Janet Kam