

FILED

APR 25 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

GRANT COUNTY CAUSE NO. 01-3-00374-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

IN RE THE MARRIAGE OF)
)
 LANCE A. LINDERMAN,)
)
 Respondent/Petitioner,)
)
 and)
)
 HEIDY (LINDERMAN) MCWAIN,)
)
 Appellant/Respondent.)

APPEAL NO. 283330-III

MOTION FOR HEARING ON THE MERITS

BARBARA J. BLACK
 ATTORNEY AT LAW
 WSBA #23686
 P.O. BOX 1118
 MOSES LAKE, WA 98837
 (509) 765-1688

1:30x

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COMES NOW the Respondent/Petitioner, LANCE A. LINDERMAN (hereinafter "Linderman"), by and through his attorney of record, Barbara J. Black, and pursuant to RAP 18.4 moves this court for a hearing on the merits of the appeal of Appellant/Respondent HEIDY MCWAIN (hereinafter "McWain").

1. Statement of The Relief Sought

Linderman requests that the trial court's decision finding no adequate cause from a separately-filed Petition for Modification filed 12/11/08 (the same date as her filed Objection to Relocation/Modification of Parenting Plan) is affirmed, and that McWain's appeal of the trial court's discretionary decision finding no adequate cause to proceed lacks merit and is denied.

2. Reference to Relevant Portions of Proceedings

The parties are using the current Final Parenting Plan, which is dated 04/18/03, and was entered at the time of dissolution. CP 1-6. Linderman, the father, is the primary custodian of the female child, now 12 years old. In November, 2008, Linderman filed a Notice of Relocation, advising that he would be moving from Othello, Washington to Cottonwood, Idaho, an approximate 3+ hour drive from Othello. No Clerk's Papers have been provided for this Notice, and it is only peripherally part of this appeal.

An Objection to Relocation/Petition for Modification of Parenting Plan was filed by McWain 12/11/08, which had only to do with the Relocation matter. CP 20-44 . On that same date, McWain filed a separate Petition for Modification of Parenting Plan, which is the subject of this appeal. That document contained an improper and erroneous annotation added to that caption under the header which states “Pursuant to Objection to Relocation.” CP 45-52. Although in her appeal, McWain alleges that this second Petition for Modification seeks only a “minor modification,” the Petition in fact moves under RCW 26.09.260(1), (2), and indicates that it is seeking a change in the child’s environment due to “detriment.” CP 48. The Proposed Parenting Plan filed the same date in conjunction with this Petition clearly seeks a change in custody of the child, placing her primarily with McWain, making the matter a major modification. CP 53-62. However, the same Petition for Modification also includes a request for relief under Paragraphs 2.10, RCW 26.09.260(5)(a) and (b), which allege, **to the contrary** that it is a *minor* modification and *does not change the residential schedule of where the children reside the majority of the time*; is not more than 24 full days in a year; and is based upon a change of residence of the parent with whom the child does not reside a majority of the time (which was not the case). CP 48-49. Additionally, that Petition sought relief under

RCW 26.09.260(5)(c), alleging that the existing parenting plan, which has been in place since 2003, now suddenly does not provide reasonable time with the non-primary residential party, McWain. CP 49.

At the hearing to restrain or allow the temporary relocation (based on the initial Objection/Petition), after consideration of all the factors pursuant to RCW 26.09.520, and finding that there was a likelihood that on final hearing the court would approve the intended relocation, the court allowed the relocation and made findings that there were no temporary changes needed to the existing final parenting plan based upon Linderman's relocation which would affect McWain's residential time in any way. CP 63-66. An Order Allowing Temporary Relocation was entered on 1/23/09. CP 67-69. An Order Denying Respondent's Motion for Revision of this decision was entered by the court on 04/10/09. CP 110-111. However, these decisions and motions were on the Relocation matter only, and were not based on any other separately-filed Petition for Modification. The trial on relocation took place on March 29-31, 2010, at which the court allowed the relocation, and made two slight changes to the residential provisions of the existing parenting plan which were sought by McWain, based upon the stipulation of Linderman.

One month after the hearing allowing temporary relocation, with no intervening hearings, McWain filed yet another Motion and Affidavit for

Temporary Order, CP 70-72, with yet another Proposed Parenting Plan, CP 73-81, again proposing a change in custody, which is a major modification to the existing Parenting Plan. Although CP 112 is listed as an “Order Re Appointing of GAL,” that Order also contained the “Order on Motion for Temporary Order Pursuant to Relocation,” which was the court’s denial of McWain’s latest motion to change custody, stating that the court “had already ruled on this issue” and that “the issue was not properly back before the court” again, mainly because there had been no hearing or findings on adequate cause to proceed. It was indicated by the court commissioner at that time that the Relocation factors had already been considered and ruled upon, and that, because McWain had not separately noted her other Petition for Modification for a hearing on Adequate Cause, which the court determined was necessary to do, there was no finding of adequate cause upon which the court could proceed to hear that matter, and denied the motion. CP 112.

The hearing on Adequate Cause which is the subject of the appeal before this court was finally held on 06/05/09 on the separate Petition for Modification (annotated by Respondent as “Pursuant to Objection to Relocation”) CP 45-52, and an Order Re Adequate Cause - Denied, was entered that same date by the commissioner. CP 118-119. Once again,

McWain also brought a Motion for Revision of this decision, which was heard and denied by the superior court judge on 07/10/09, a transcript of which is provided. RP dated July 10, 2009. During that hearing, in denying the motion, the presiding superior court judge properly considered the often-cited case of In re Marriage of Roorda, 25 Wn.App. 849, 611 P.2d 794 (1980), which holds that adequate cause requires more than just prima facie allegations which if proven might permit inferences sufficient to establish grounds for a custody change, and discussed the cumulative allegations and their insufficiency for an adequate cause finding. Counsel for Appellant McWain admitted to being unfamiliar with the Roorda case. RP dated 07/10/2010, page 14, lines 4-12. The trial court also determined that McWain lacked adequate cause to proceed on her Petition for Modification, whether it be major or minor, and an Order Denying Revision was entered that date. CP 148-149.

This appeal followed. CP 150-157.

3. Statement of The Grounds For Relief Sought, With Supporting Argument

The appeal of the trial court's discretionary decision denying a finding of Adequate Cause on McWain's Petition for Modification is without merit. Procedurally, this matter has become confusing and hopelessly intertwined

with the other Objection to Relocation/Petition for Modification filed at the same time, with argument by McWain's counsel which consistently and intentionally confuses the two petitions, both of which were supported by identical pleadings. It has required an unimaginable and outrageous amount of court time on duplicated hearings without proper basis to proceed, wasted judicial resources, and subsequently wasted finances of Linderman. He seeks an award of his fees on appeal based on intransigence, and RCW 26.09.550.

McWain has, at all times pertinent to this appeal, resided in California. Her residential parenting time under the court-ordered parenting plan was not affected by Linderman's move from Washington to Idaho in any way. This was recognized by the court early on, and his Temporary Motion to Relocate was granted over McWain's Objection to Relocation/Petition for Modification. Because Linderman, the custodial parent, was relocating, the Relocation Statute, RCW 26.09.405-550, does not require a Hearing on Adequate Cause to be held. The matter is presumed to have adequate cause to proceed, and the temporary relocation matter was held on affidavits and argument only. That petition is not part of this appeal, although counsel for appellant apparently argues that it is.

McWain also moved separately on the same date by bringing a second Petition for Modification, which is the subject of this appeal. It is both a

major modification seeking to change custody and a minor modification, and confusingly - and erroneously - she annotated her pleading caption to include the language "Pursuant to Objection to Relocation." This was in an apparent effort to "bootstrap" her matter onto the Relocation matter, thereby avoiding the requirement of meeting the burden of finding Adequate Cause upon which to proceed. Either the addition of this language to the caption is an indication that the factors which McWain seeks the court to consider can all be presented to the court at the relocation trial, making no necessity for a second, duplicated, Petition for Modification, or the second Petition for Modification is considered separately and must stand alone, which requires it to have a separate finding of adequate cause in order to proceed. McWain consistently argues that, regardless of the annotated caption heading, the second Petition stands alone, that it is a separate modification, and further, that it is a *minor* modification, regardless of its requests to change custody. Adding to the confusion with the two petitions, McWain's supporting pleadings in this second matter were the same ones she used in her Objection to Relocation, and made allegations which did not support a finding of "detriment" or harm to the child or her environment in her father's home. The most consistent complaint made by McWain was the fact that Linderman was relocating and would be living with his girlfriend.

The relief which she sought in her second Petition was also unclear, and not factual. She moved first under RCW 26.09.260(1), (2) and alleged that the child's environment was detrimental to her, and proposed a parenting plan changing her custody, then at the bottom of the very same page, she indicated that the Petition was only a minor modification that did not change the residence of the child (which it did) and was not more than 24 days in a calendar year (which it was), and was based upon a change in her residence making the existing parenting plan "impractical to follow" (she had not moved from California). None of these things were factual taken in consideration to the other allegation(s), and appeared to simply be a "shoot at the barn" type of approach to modification.

Prior to noting the matter for a Hearing on Adequate Cause, McWain attempted to come back to court at least twice to change the primary custody of the child after the court had already ruled on and allowed the child's relocation. McWain was advised that since she had brought a separate petition - outside the Relocation Objection - and was making allegations of the "detriment" factors under RCW 26.09.260(1) and (2) which resulted in a major modification, then she would be required to note the matter for an Adequate Cause hearing before the court could consider the request to change

custody. Although she clearly disagreed that it was required, counsel for McWain finally noted the matter for a hearing on adequate cause.

At the hearing on Adequate Cause, heard on affidavits and argument, the court again declined to find any basis to proceed with a major or minor modification of the parenting plan *outside of that which might be required* in connection to the Linderman Relocation matter (and therefore still pending before the court for trial), finding no supporting basis which would require any changes to the current plan to serve the needs or best interests of the child. The underlying - and original - matter in this case, the Relocation action of Linderman, was decided at trial on March 29 - 31, 2010 in Grant County Superior Court, and allowed the child's relocation. That judge also, based upon Linderman's stipulation to do so, made some minor adjustments to the existing residential provisions of the parenting plan.

At the trial on Relocation, counsel for McWain argued that the statutory modification factors which she sought in the second petition, RCW 26.09.260, the lack of adequate cause for which is now before this court, and the factors used to determine an *initial establishment* of a parenting plan, RCW 26.09.187, were all at issue in that matter *as well as* the factors the court must consider under RCW 26.09.520 for relocation. That theory was summarily rejected by the Grant County Superior Court, who ruled that

the two petitions were, in fact, separate petitions, and that the second one, now on appeal before this court, would not be addressed by him, as it had been previously dismissed by the court for lack of adequate cause.

I. LEGAL ARGUMENT

1. To effectively challenge the trial court on appeal, the trial court's decision must have been a manifest abuse of its discretion.

Threshold determinations for modification of parenting plans are reviewed under a manifest abuse of discretion standard. In re Parentage of Jannot, 149 Wn.2d 123, 65 P.3e 664 (2003); In re Marriage of Maughan, 113 Wn.App. 301, 53 P.3rd 535 (2002). The court has broad discretion in ruling on all issues in a dissolution action, and will be reversed only upon a showing of a manifest abuse of discretion. In re Marriage of Landry, 103 Wn.2d 807, 699 P.2d 214 (1985).

A manifest abuse of discretion is present if the court's discretion is exercised on untenable grounds or for untenable reasons. In re Marriage of Stachofsky, 90 Wn.App. 135, 951 P.2d 346 (1998). An appellate court can sustain a trial court judgment on any theory established by the pleadings and proof, even if the trial court did not consider it. Weiss v. Glemp, 127 Wn.2d 726, 730, 903 P.2d 455 (1995). When the superior court denies a motion for revision, it adopts the commissioner's findings, conclusions and rulings as its

own. RCW 2.24.050. State ex. rel. J.V.G. v. Van Gilder, 137 Wn.App. 417, 423, 154 P.3d 243 (2007). Even if the superior court judge did not set out his own specific findings and simply entered an order denying the motion on revision, he has declined to revise the commissioner's decision, and he has adopted her Order on Adequate Cause - Denied - as his own.

The Court of Appeals looks for a manifest abuse of discretion on a case-by-case basis. The question is whether the record substantially supports the findings. And if the answer to that question is yes, there is no basis for appeal, and no basis upon which to find any trial court decisions "manifestly unreasonable." Because the record indicates that the superior court judge in this matter clearly and properly considered the factors in Roorda, and made specific findings that McWain had not done more than make allegations of changes to the circumstances of the parties which did not support a finding of adequate cause, his discretionary decision is supported by the record. He has not abused his discretion.

The record in the case at bar contains a report of proceedings from hearings which clearly shows the court's consideration of the relevant factors in determining whether adequate cause exists on McWain's separately filed Petition for Modification, the subject of this appeal, after the temporary relocation determination had already been made and allowed. Based upon the

documents submitted and considered, many in duplicate form attempting to “bootstrap” onto the companion relocation matter, and the argument of counsel also attempting to “bootstrap” the modification argument, the commissioner’s decision, and that of the Superior Court judge who also did not find any supportable basis for adequate cause to proceed and denied the motion for revision of the commissioner’s decision, the trial court’s decision cannot be alleged to have been based or exercised on untenable or unreasonable grounds.

2. For a finding of adequate cause, the court must find something more than prima facie allegations which if proven might permit inferences sufficient to establish grounds for a custody change.

The court in In re Marriage of Roorda, 25 Wn.App. 849, 611 P.2d 794 (1980) determined that mere allegations were not sufficient for a court to make a finding of adequate cause. Roorda at 851. The argument by McWain was that allowing the child to wear makeup and shave her legs was somehow detrimental to her. The court disagreed. McWain argued that the fact that the child’s father would be living with his girlfriend upon his relocation was detrimental to the child. The court disagreed. Cohabitation, even with a partner married to someone else, is *not* sufficient to establish detriment. Wildermuth v. Wildermuth, 14 Wn.App. 442, 542 P.2d 463 (1975).

McWain argued that she suddenly needed more visitation time under a 7-year-old parenting plan in the summer and the spring and that was a substantial change in circumstances. The court disagreed. McWain argued that the child and the mother didn't spend enough time on the phone together, or that there were problems with the telephone contact, and that was detrimental to the child. The court disagreed. Even taken together, all these cumulative allegations simply did not rise to the level of a substantial change in circumstances which required a finding of adequate cause to proceed with any modification of the existing parenting plan. The court did not abuse his discretion.

3. The purpose of an adequate cause hearing is to weed out the actions which are not supported and which waste the court's time.

Although during the pendency of this action her second modification petition remained without amendment, McWain's argument on that petition changed from one seeking a major modification to one seeking only a minor modification. However, neither was supported by facts which justified any finding of adequate cause. The primary purpose of the threshold adequate cause requirement is to prevent movants from harassing non-movants by obtaining a useless hearing. In re Marriage of Lemke, 120 Wn.App. 536, 540, 85 P.3d 966, *rev. den.* 152 Wn.2d 1025 (2004). Unfortunately in this

case, McWain has brought the matter before the court so many times, that it long ago ceased to prevent the harassment to the non-moving party. It appears that McWain attempted to “blur the line” and to join this modification petition with the Objection to Relocation/Modification action filed the same date, specifically in order to avoid being required to obtain a finding of adequate cause to proceed, because of the fact that the Relocation actions do not require such a finding. When it appears it may benefit her, she argues that the changes she seeks are all tied into and fall under the relocation action and do not require adequate cause, yet when she is told that those issues will all be considered by the court in the trial on relocation, she then argues that her second petition is clearly a separate action, which seeks a separate remedy of minor modification. The denial of adequate cause did not stop McWain from continuing to argue for a “major and/or minor” modification at the trial on relocation taking place last week on March 29-31, 2010, further complicating that matter, and taking three full days to resolve, which harassed Linderman and was a waste of the court’s time.

4. The trial court’s decision will not be disturbed on appeal unless this court finds a manifest abuse of discretion present, which is found only if the discretion is exercised on untenable grounds.

The Court of Appeals must consider whether the decision by the trial court appears just and equitable, or whether it was based upon a manifest

abuse of discretion. This is only found if the discretion is based upon untenable grounds, meaning that, after hearing all the evidence, a reasonable person would have found differently. In re Marriage of Stachofsky, 90 Wn.App. 135, 951 P.2d 346 (1998). Both the commissioner and the superior court judge properly considered the requirement for a finding of adequate cause, and based upon the facts alleged, neither found the supporting basis to proceed with the petition for modification. It cannot be said that a reasonable person in this matter would have found differently, or that those decisions were based upon untenable grounds. The appeal of this finding is without merit, as it appeared that the second Petition for Modification now before this court on appeal was simply an attempt at an “end run” around the adequate cause requirement.

II. ATTORNEY’S FEES

The Respondent/Petitioner, Mr. Linderman, requests his costs and attorney’s fees on appeal for what he believes to have been a completely unnecessary and improper use of court time and resources, and a frivolous appeal pursuant to RCW 4.84.185, following the action in the Superior Court. An action is frivolous within the meaning of RCW 4.84.185 if it “cannot be supported by any rational argument on the law or facts.” Clarke v. Equinox Holdings, Ltd., 56 Wn.App. 125, 132, 783 P.2d 82, rev. den., 113 Wn.2d

1001, 777 P.2d 1050 (1989). RCW 4.84.185 is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance or spite. Skimming v. Boxer, 119 Wn.App. 748, 756, 82 P.3d 707 (2004). This appeal is a meritless claim.

Attorneys fees can also be awarded under an intransigence theory. Intransigence includes filing repeated unnecessary motions, or making the trial unduly difficult and costly by one's actions. In re Marriage of Bobbitt, 135 Wn.App. 8, 30, 144 P.3d 306 (2006).

Intransigence also includes making unsubstantiated, false and exaggerated allegations against the other parent concerning his fitness as a parent, which caused him to incur unnecessary and significant attorney's fees. In re Marriage of Burrill, 113 Wn. App. 863, 873, 56 P.3d 993 (2002), rev. den., 149 Wn.2d 1007 (2003). Clearly, that was McWain's effort in this matter in an attempt to support her cause.

Intransigence includes litigious behavior, bringing excessive motions, or discovery abuses, or pursuing meritless appeals for the purpose of delay and expense. Gamache v. Gamache, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965). Intransigence includes repeatedly filing unnecessary motions. Chapman v. Perera, 41 Wn.App. 444, 455-56, 704 P.2d 1224, rev. den., 104

Wn.2d 1020 (1985). After the countless motions and duplicated petitions, it is clear that all these things have occurred in this matter, resulting in huge unnecessary financial expense to Linderman, justifying an award of his costs and fees.

III. CONCLUSION

The commissioner and the trial court have the discretion to make a finding that the petition lacks adequate cause to proceed, which is reviewed for an abuse of discretion. Based upon the foregoing, no abuse of discretion can be found. For those reasons, McWain's appeal should be dismissed, the findings of the trial court should be affirmed, and Linderman should be awarded his attorney's fees and costs on appeal for having to defend a meritless, frivolous matter.

Respectfully submitted this 2nd day of April, 2010.

Attorney for Respondent/Petitioner
Lance A. Linderman



BARBARA J. BLACK
W.S.B.A. # 23686

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

IN RE THE MARRIAGE OF:) DIVISION III APPEAL NO. 283330
)
LANCE A. LINDERMAN,) NO. 01-3-00374-7
)
Petitioner/Respondent,) CERTIFICATE OF SERVICE
)
and)
)
HEIDY (LINDERMAN) MCWAIN,)
)
Respondent/Appellant.)
_____)

I certify that I am a citizen of the United States of America and of the State of Washington. I am over the age of eighteen (18) years, not a party to the above-entitled cause, and competent to be a witness therein.

On April 5, 2010, I served a copy of a *Motion for Hearing on the Merits* on the parties of this action by:

NO. 01-3-00374-7
APPEAL NO. 283330
CERTIFICATE OF SERVICE
PAGE 1 OF 2

Barbara J. Black
P.O. BOX 1118
MOSES LAKE, WA 98837
TELEPHONE (509) 765-1688

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Mail: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with the postage thereon fully prepared at Moses Lake, Washington, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposition for mailing. I certify that I placed a copy of each document listed above in an envelope properly addressed to

Court of Appeals, Division III *Ms. Amy Rimov*
500 N. Cedar Street *221 W. Main St., Suite 200*
Spokane, WA 99210-1905 *Spokane, WA 99201*

Personal Service: I caused such documents to be delivered by hand to the following address:

Court of Appeals, 500 N. Cedar Street, Spokane, Wa

Facsimile Transmission: By transmitting via facsimile at:

Amy Rimov at (509) 747-5692

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

SIGNED at Moses Lake, Washington on April 5, 2010.



Denise I. Cannon

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CERTIFICATE OF SERVICE
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Barbara J. Black
P.O. BOX 1118
MOSES LAKE, WA 98837
TELEPHONE (509) 765-1688