

FILED

MAY 23 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30557-1-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

In re the Marriage of

SANDRA LEA MCKERNAN,

Respondent,

v.

DANIEL DAVID MCKERNAN,

Appellant.

Brief of Respondent

Erika Balazs
Attorney for Respondent

3206 W. Connaught Drive
Spokane WA. 99208
(509) 999-6985
WSBA No. 12952

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I. INTRODUCTION

This is an appeal of a Relocation Order pursuant to RCW 26.09.520. Trial was held on January 3rd and 4th, 2012. (CP 80) The trial court approved the relocation and allowed the child to move with his mother from Spokane to Kennewick, Washington. The father appeals.

II. RESTATEMENT OF ISSUES ON APPEAL

When hearing a case on relocation pursuant to RCW 26.09.520, did the trial court properly exercise its discretion in limiting the use of an unsworn “report” of a counselor and declining to interview a 12 year old child about the relocation?

When ruling on a relocation matter, is it sufficient for the trial court to enter written findings on all of the statutory factors, or must the trial court also address all the relocation factors orally?

Did the trial court in this case properly exercise its discretion in allowing the relocation of the child in light of the evidence before the court?

III. RESPONSE TO STATEMENT OF THE CASE

This is a relocation proceeding involving a move from Spokane to Kennewick, Washington by a 12 (now 13) year old boy.

Sandra¹ and Daniel McKernan were married in August, 1985 and have three children, who were 24, 21 and 12 at the time of trial. (RP 24) The parties separated in November, 2009 and the youngest child, Matthew, resided primarily with the mother, although the father enjoyed

¹Sandra McKernan remarried and will be referred to in the remainder of this brief by her new name, Mrs. Sandra Maine.

liberal visitation. (RP 33) Mrs. Maine filed for dissolution in July, 2010. (RP 37) The parties came to an agreement and the Decree of Dissolution and Parenting Plan were entered in January 2011. (CP 86-94) The Parenting Plan awarded primary custody to the mother, with significant visitation with the father.

Mrs. Maine had received her bachelor's degree in speech therapy in May, 2010. (RP 97, 100) She began looking for a job in her field in January, 2010, well before graduation, but to no avail. (RP 98-99) It was difficult to get a job in her field with just a bachelor's degree. *Id.* In September, 2011, Mrs. Maine learned that the Kennewick School District hired those with bachelor's degrees in speech therapy. (RP 99-100) She applied and was hired. She let Mr. McKernan know of the possible move during the application process and gave formal Notice of Intended Relocation on September 30, 2011. (RP 101 and CP 30-33) Thus, the primary reason for the move was to enable the mother to find employment in her field. The father objected and a hearing was held in October. (CP 34-42.

At the hearing on temporary order, the court commissioner stayed the move. (CP 61-62) The commissioner also suggested the parties work together to find a counselor to discuss the move with Matthew. (Brief of Appellant, Appendix 1, page 10)

In January, 2012, the parties went to trial. The court heard numerous witnesses. Mr. McKernan attempted to introduce the “report” of a counselor. (RP 10) Mrs. Maine’s attorney objected because the witness had not been qualified, and the report was hearsay, and the report was not sworn, but counsel agreed the court could consider it for illustrative purposes. (RP 12 and 13) Mr. McKernan then asked the trial court to interview the child pursuant to RCW 26.09.210. (RP 15-16) The court declined because it did not want to put the child in that difficult position and because it was fairly clear what the child would say. (RP 20) At the close of trial, the judge held that Mr. McKernan failed to produce sufficient evidence to rebut the presumption in favor of allowing relocation. (RP 201-202) The court made a significant oral ruling and was mindful of the factors set forth in RCW 26.09.520, but did not make an oral finding on each factor. (RP 202) The court then made changes in the Parenting Plan to compensate for the relocation and directed counsel to draft the final documents. (RP 202 -210) The final documents were entered on January 10, 2012. (CP 1-8) Mr. McKernan filed his Notice of Appeal on January 25, 2012. (CP 95)

IV. SUMMARY OF ARGUMENT

This is an appeal of an Order on Relocation. By statute, there is a rebuttable presumption in favor of relocation. To rebut this presumption,

the objecting party must demonstrate the detrimental effect of relocation outweighs the benefit of the change to the child and the relocating parent, giving consideration to the factors set forth in RCW 26.09.520. In this case, the trial court heard the evidence, considered the factors, and ruled in favor of relocation. Mr. McKernan, as objecting party, has failed to demonstrate that this decision was an abuse of discretion. Therefore, his appeal must be denied.

V. ARGUMENT

A. The Trial Court Properly Exercised its Discretion in Refusing to Admit a Hearsay Letter and Declining to Interview a Minor Child in this Relocation Proceeding

Mr. McKernan complains that the trial court erred in admitting Exhibit R 101 for illustrative purposes only. As the record demonstrates, the trial court properly exercised its discretion in refusing to admit this exhibit as substantive evidence.

Exhibit R 101 is a two page document, signed, but not sworn, by Jeanne Ekenberg, a clinical social worker. The document purports to set forth her interview with the minor child, Matthew McKernan. The document is not only hearsay; it is hearsay within hearsay as it is an out of court statement of Ms. Ekenberg offered to prove the out of court statements of Matthew. Hearsay is an out of court statement offered to prove the truth of the matter asserted and is not admissible unless provided

by other rule or statute. ER 801 and 802. Mr. McKernan cites no rule or authority as an exception to the general rule that hearsay is not admissible. If Mr. McKernan desired testimony from Ms. Ekenberg, he should have arranged to offer her as a witness. His failure to do so does not permit the trial court to admit otherwise inadmissible evidence.

Mr. McKernan places great weight on the contention that this report was procured in compliance with Commissioner Ressa's Order of October 12. (Brief of Appellant, p, 7) Not only does he fail to explain why this is even relevant to the evidentiary ruling, it is not entirely correct. Commissioner Ressa wanted the child interviewed by a third party but made no indication the results of the interview could be conveyed to the trial court in rank hearsay. Moreover, she specifically suggested the parents try to agree on a a counselor, yet Mr. McKernan chose one without consultation. (RP 11 and Brief of Appellant, Appendix 1, pages 14-15) Thus, the document does not in fact comply with the Commissioner's direction.

But more importantly, the document was clearly inadmissible as substantive evidence. Evidentiary rulings are reviewed for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P3d 583 (2010) The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.* Here, it was not an

abuse of discretion for the trial court to enforce the long-standing rules prohibiting the admission of hearsay. The fact the trial judge would admit the report only for illustrative purposes was not error and certainly does not justify reversal on appeal.

Mr. McKernan also assigns error to the court's decision to not interview the child as permitted by RCW 26.09.210. This decision was a proper exercise of discretion.

First, it is not even clear the statute applies to relocation proceedings. On its face, RCW 26.09.210 applies to parenting plans, not relocation proceedings. Relocations are governed by RCW 26.09.405-560. Notably, those statutes do not specifically permit an interview with the child. Nor does counsel know of any case law that has independently imposed such a requirement.

Second, even assuming the statute applies, it states that the trial court *may* interview the child. RCW 26.09.210. Thus, the decision to interview the child rests with the sound discretion of the trial court. The record in this case indicates the well-considered exercise of discretion. The trial court judge in this case not only has significant judicial experience with domestic matters, he also has significant practice experience. (RP 19) He knew he could interview the child but was also aware of the severe strain this puts on the child. (RP 19) In addition, the trial court was already

advised of what the child would say; he had the counselor's statement, even though it was admitted for limited purpose. It indicated the child did not want to move. (Ex R. 101) There was no attempt by the mother to dispute this. Nor does the father's brief suggest that the child would offer anything in addition to what was already known. Given these facts, the trial judge was quite correct in its decision not to put the child in the middle of these difficult proceedings. It was certainly not an abuse of discretion to decline to interview the child.

In summary, the trial court in this case exercised appropriate discretion in its evidentiary rulings. It properly refused to admit hearsay and it properly declined to interview the minor child. There was no error.

B. The Trial Court Properly Instructed Counsel for the Prevailing Party to Draft Proposed Findings Without a Detailed Oral Ruling on Each Statutory Factor.

Mr. McKernan next contends that the trial court erred by failing to articulate its findings orally, relying on *In re Marriage of Horner*, 151 Wn.2d 884, 93 P3d 124 (2004). Ironically, the portion of the opinion quoted in the father's brief establishes his own error – it is only when the written findings are inadequate does the appellate court look to the oral ruling for further findings on the necessary factors. *Id.* at 896. Here, the written findings are adequate and the absence of oral findings is of no consequence.

The written findings in this case address the eleven statutory factors found in RCW 26.09.520. The court found that Matthew had a good relationship with both parents, that there were no agreements about relocation, that it would be more detrimental to disrupt his contact with his mother than his father, that there were not limitations under RCW 26.09.191, that relocation was sought in good faith, that Matthew would be able to adapt to the change, that the quality of life would marginally be better with the move, that the Parenting Plan would have to be altered, that it was not feasible for the father to relocate and that the financial impact of the move would be minimal because the move was only a 2 and ½ hour drive. (CP 80-85) Based on these findings, the court found that the father had not shown that the detrimental effect of the move would outweigh the benefit of the change to the mother and therefore the presumption for relocation applied. Thus, the trial court made its ruling and supported that ruling with findings on all factors. There is no basis to reverse simply because the court did not make a more detailed oral ruling.

It is clear the father, acting pro se, simply does not understand that it is customary for the trial court to issue an oral ruling on the main points and instruct the attorneys to work out the details in the proposed findings and conclusions. In fact, according to local rule, the attorney for the prevailing party is obligated to draft proposed findings and conclusions.

Spokane County LCR 52. The Civil Rules provide a simple procedure by which one party presents proposed findings and the other parties may make challenges and corrections. CR 52, 54 and 58. Thus, the fact the findings are drafted by counsel is of no consequence; once signed, the Findings of Fact and Conclusions of Law are those of the trial court. There is no need to declare them in an oral ruling. There was no error.

C. The Trial Court's Findings Support the Order of Relocation and the Findings are Supporteded by the Evidence.

As a preliminary matter, it is unclear if the father is challenging the sufficiency of the evidence as well as the trial court's ultimate conclusion. Although page 13 of the Brief of Appellant suggests that the findings are not "in agreement with the testimony," the Brief fails to set forth the disputed findings as required by RAP 10.3(g). Moreover, most of the argument has to do with the weight given to a particular factor or piece of testimony, not the lack of evidence to support a finding. Nevertheless, in addressing these arguments, Mrs. Maine will show the evidentiary support for the trial court's factual findings.

This is a case involving the relocation of a minor child. As such, the procedure is defined by statute and the standard of review is well settled. Pursuant to RCW 26.09.520, there is a rebuttable presumption that an intended relocation with a minor child will be permitted. *In re*

Marriage of Pennamen, 135 Wn.App. 790, 801, 146 P.3d. 466 (2006)

This presumption may be rebutted by proof that the detrimental effect of the relocation outweighs the benefit to the child and the relocating adult. RCW 26.09.520. In making this determination, the trial court must weigh 11 factors as the trial court deems appropriate. *Id.* The decision to allow relocation is reviewed for abuse of discretion. *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004) and *Bay v. Jensen*, 147 WnApp. 641. 651, 196 P.3d 753 (2008). The trial court's factual determinations are reviewed for substantial evidence. Here, the trial court's ruling is supported by the facts and the facts are supported by the evidence.

Looking at the statutory factors, the first factor the court must consider is the relative strength and quality of the child's relationship with each parent. RCW 26.09.520(1) The trial court's finding on this factor suggests a draw, noting a good relationship with both parents and both families. (CP 81) It is supported by the record, as both parents testified extensively about their relationship with Matthew and the families.

The father argues that the trial court gave too much weight to certain considerations and not enough to others. But these are matters uniquely within the discretion of the trial court. For example, he complains the court failed to adequately consider the fact Matthew had siblings at the father's home. But these siblings were 24 and 21 years old, or at least

nine years older than Matthew, and the brother was admittedly at college, transitioning away from the family home. (RP 24, 110-111) The trial court was within its discretion in discounting the importance of those relationships.

The father also complains that too much was made of the relationships with the extended family in Kennewick. This was proper in this case. One of Mrs. Maine's significant concerns, as addressed by the Commissioner's order, was the amount of time Matthew would be unsupervised due to the hours Mr. McKernan might be required to work. (CP 62, paragraph 2.5) The trial court could and should consider the support network that would be available to Mrs. Maine and Matthew in the new location.

In summary, Mr. McKernan has failed to show that the trial court erred in its consideration of this factor. As the trial court indicated, Matthew was lucky to have two supportive families and this factor was neutral.

The second factor to be considered is whether there were prior agreements about relocations. RCW 26.09.520(2) The trial court found there were no prior agreements, which is consistent with the Parenting Plan and the Commissioner's Ruling. (CP 82, paragraph 2.3.2 and Brief of Appellant, Appendix 1, page 10). At trial, Mr. McKernan admitted that there was not a written agreement concerning relocation but he testified

promises had been made. (RP 52) The trial court obviously decided not to believe this testimony and entered a contrary finding. This is well within the discretion of the trial court, especially when the father failed to dispute the commissioner's finding of no agreement at the earlier hearing.

The third factor is the relative impact of the disruption on the relationship with the parents. RCW 26.09.520(3). The trial court found that it would be more detrimental to the child to disrupt his contact with his mother and primary household than to disrupt his contact with his father. (CP 82, paragraph 2.3.3) Mr. McKernan does not challenge the evidence to support this important finding, arguing only that the trial court failed to "give the proper weight" to the evidence. Given the testimony of the relationship between the parties, this finding is supported by the record and strongly weighs in favor of the relocation.

The fifth² factor is the reason and good faith for the relocation. RCW 26.09.520(5). The trial court found the move was predicated on the mother's search for employment in her field after being able to locate such employment in the Spokane area. (CP 82, paragraph 2.3.5) Mr. McKernan disputes this finding but it is supported by extensive testimony. Prior to the dissolution, Mrs. Maine had sought and obtained a bachelor's

² The parties agree the fourth factor, limitations under RCW 26.09.191, does not apply to this case.

degree in speech therapy. She found her graduate work too difficult in the middle of the divorce. (RP 98) When she sought work in her field in Spokane, she found it difficult to find work with only a bachelor's degree. (RP 99) She searched for several months and made several applications, even some outside her field. *Id.* She learned that the Kennewick School District would hire a speech therapist with just a bachelor's degree so applied. (RP 100) Her new husband was able to transfer to the Tri-Cities. (RP 134-135) Thus, the record supports the trial court's finding that Mrs. Maine exercised good faith and decided to move only after a fruitless search for employment in her field in Spokane.

Mr. McKernan argues that Mrs. Maine did not engage in an adequate job search in Spokane. However, Mrs. Maine testified to a significant number of applications and the trial court was entitled to believe this testimony. He also complains, in essence, that the new job was not a good enough job to justify the move because it has too few hours and low pay. But this ignores the fact it was the only job Mrs. Maine was able to find in her field of study. In addition, because her work is tied to the school day and school year, it allows her to work outside the home and still be available for Matthew. Thus, there was sufficient evidence to allow the trial court to conclude Mrs. Maine acted in good faith in deciding to move to further her career.

The sixth factor is the needs of the child and the impact relocation will have on the child's development. RCW 26.09.520(6) The trial court found that Matthew was well adjusted and would be able to adapt well with the aid of his parents. (CP 81-82). Mr. McKernan does not dispute the sufficiency of the evidence to support this finding but urges a different conclusion, claiming there would have been a different decision if the court had given more consideration to the counselor's report and interviewed the child. He also argues the trial court should have given more consideration to the importance of the father-son relationship. But once again, he is simply asking this court to re-weigh the factors and interfere with the trial court's exercise of discretion.

The final factor Mr. McKernan disputes is the eighth factor, the alternative arrangements available. RCW 26.09.520(6). The trial court found it would be necessary to allow more time during school breaks to make up for the time during the school week and adjusted the Parenting Plan accordingly. (CP 83, paragraph 2.3.8) While Mr. McKernan states this is "unacceptable" it is in fact a reasonable and typical way to deal with a relocation of this distance. There is no showing the trial court abused its discretion.

In summary, Mr. McKernan is simply asking this court to reweigh the factors and come to a different conclusion. But as has been stated on

numerous occasions, the appellate courts do not re-weigh the factors in relocation cases to reach a different result. *In re Marriage of Pennamen*, 135 Wn.App. 790, 803, 1246 p3d 466 (2006). Rather, the appellate courts review the decision of the trial court on relocation for abuse of discretion. *In re Marriage of Horner*, 151 Wn.2d 884, 896, 93 P.3d 124 (2004). A trial court abuses its discretion if it does not examine all of the factors and either enter specific findings of fact on each, or demonstrate by its findings of fact and oral ruling that it did, in fact, consider each factor. *Horner*, 151 Wn.2d at 895-96. Here, the trial court considered the statutory requirements and found that Mr. McKernan failed to rebut the presumption in favor of relocation. The findings are based on the evidence and thus the trial court did not abuse its discretion. The appeal must be denied.

D. The Court Should Deny the Motion to Interview the Child

On appeal, Mr. McKernan asks this court to interview Matthew to ascertain his wishes for residential placement. Mr. McKernan cites no authority for such a drastic proposition. RAP 9.11 allows the Court of Appeals to take additional evidence on appeal, but the facts of this case do not remotely satisfy the requirements of the rule.

But more importantly, Mr. McKernan fails to explain why a thirteen year old boy should be subjected to this trauma. It is grossly unfair to put

the child in this position, and ask him to make a choice between his parents before a panel of appellate judges. Even accepting for argument that Matthew would indicate a preference to stay in Spokane, that would not change the result of the decision of the lower court. There is good reason the child does not get to decide custody matters. This case is an excellent example, where the record shows strong feelings by both parents and a child who should not be forced to make further statements about his preference. The motion to interview the child should be denied.

E. Argument in Support of Cross Appeal.

Mrs. Maine filed a cross appeal of the modifications to the Parenting Plan. This cross appeal was filed in part to seek modification of some of the changes to the Parenting Plan but also to preserve Mrs. Maine's right to modify other portions should this court reverse the decision of the trial court. That is, if this court should decide to reverse and remand, Mrs. Maine simply wanted such an order to include a remand of the Parenting Plan changes too.

Since filing the Notice of Cross Appeal, the parties have made an agreement regarding the disputed portion of the changes to the Parenting Plan. Thus, for purposes of this cross appeal, Mrs. Maine does not ask for any changes to the Parenting Plan. She simply asks that if the case is remanded, that the remand include the Parenting Plan.

F. The Court Should Award Mrs. Maine her Costs and Attorneys Fees Incurred in This Appeal

Mrs. Maine asks that this court order Mr. McKernan to pay her fees on appeal. RAP 18.1 permits the appellate court to award fees if permitted by applicable law. In dissolution matters, the court may award fees pursuant to RCW 26.09.140. When considering a fee request, the Court of Appeals should consider the arguable merit of the issues on appeal and the financial resources of the parties. *In re Marriage of Griffin*, 114 Wn.2d 772, 791 P.2d 519 (1990) These factors justify an award of fees in this case.

First, the issues raised on appeal involve abuse of discretion, a very difficult standard of review. While not necessarily frivolous, this court should consider the fact that Mr. McKernan has done little more than reargue the merits of his case.

Second, the affidavit of financial need will show that this dispute has cost Mrs. Maine thousands in fees, while her income is still that of an entry level employee because she was a homemaker much of her life. Mr. McKernan has not incurred any fees because he has acted pro se. But he has forced Mrs Maine to incur fees by opposing the relocation, appealing the trial court order, and filing emergency motions on appeal. He should be required to bear some of the costs he has required Mrs.

Maine to incur in this case. Based on the relative financial positions,

Mrs. Maine asks for an award of fees on appeal.

VI. CONCLUSION

Relocation are presumptively permitted. The trial court found that Mr. McKernan did not rebut this presumption. This decision was well within the trial court's broad discretion. The trial court should be affirmed and this Court should award Mrs. Maine's fees on appeal.

Respectfully submitted this 23rd of May, 2012.

A handwritten signature in black ink, appearing to read "Erika Balazs", written in a cursive style.

Erika Balazs WSBA #12952
Attorney for Respondent

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

PROOF OF SERVICE

I HEREBY CERTIFY that on the 23rd day of May, 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all parties and counsel of record as follows:

Mr. Daniel David McKernan
1220 s Best Road
Spokane, WA 99037

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)
- Via email

Mr. Gary Joseph Gainer
Richter-Wimberley PS
422 W Riverside Ave Ste 1300
Spokane, WA 99201-0304

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)
- Via email



ERIKA BALAZS