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JUL 19 2017

**COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**Division III**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Court of Appeals No. 350673  
Stevens County Superior Court No. 12-3-02229-0

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**In re:**

**ANNE MONOSKIE (MARSHALL),**

**Appellant,**

**and**

**PHILLIP (CLIFF) MONOSKIE,**

**Respondent.**

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RESPONSE BRIEF

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

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## I. STATEMENT OF ISSUES

The mother has framed her case as requiring the resolution of four issues.

Because the legal questions that have been raised by the mother in her brief are narrower than the issues she formulated, the father has organized his brief with the following reformulation of the issues:

***A. Did the trial court misunderstand Washington law?***

This section responds to the mother's assumption that the trial court misunderstood the law. The record does not support this conclusion.

***B. Is there any basis in Washington law for this Court to change placement on appeal?***

This issue responds to the mother's second and third issues, which imply by their formulation that this Court can alter the parenting plan on appeal without remand based on the application of the Washington law with respect to modification and relocation. There is no authority for the mother's assertion.

***C. Should the trial court have granted the mother's request for reconsideration?***

This is the same question as raised by the mother's fourth issue.

## II. STATEMENT OF THE CASE

The parties divorced in 2013; they entered a final parenting plan that separated the children between the parents by agreement. (CP 52.) After the parties' divorce, the mother had been the primary parent of the two oldest boys, and the father had been the primary parent of the two youngest girls; the youngest child split residential time with both parents. (CP 53.)

The mother moved to South Carolina, and the father remained in Spokane, Washington. (CP 51.) In June of 2015, both parties filed a *Notice of Intent to Relocate* with respect to themselves and the children in their care. (CP 51.) The father indicated his intention to relocate to Ohio, and the mother indicated her intention to relocate to Olympia, Washington. (CP 51.) Both parents filed an objection to the other parent's requested relocation. (CP 51.) A Guardian ad Litem was appointed. (CP 51.) At the time of trial, the father lived in Ohio, and the mother lived in Washington. (CP 52.)

The final parenting plan at issue had been entered by the parties in 2013 by agreement; the plan anticipated that the parties would return to court to modify the residential schedule for the youngest child when he reached school age; in so doing, the parties waived the necessity for a finding of adequate cause prior to modifying the 2013 parenting plan as to the youngest child. (CP 53.) At trial, the court found that the competing objections to relocation meant that the statute did not require either party to establish adequate cause prior to modifying the parenting plan as to the other four children, either. (CP 53.) Neither party requested a finding of adequate cause in the underlying proceeding.

Based on that analysis, the trial court considered the evidence presented pursuant to Washington relocation statute (RCW 26.09.520) with respect to the four older children and pursuant to Washington's establishment statute (RCW 26.09.187) and Washington's modification statute (RCW 26.09.260) with respect to the parties' youngest child. (CP 54-87; explicit references to statute located at CP 54 and 75.)

At trial, the court indicated its frustration with the parties' previous decision to separate the children:

I believe that all the parties understood from my questions whether there was anything I could do to reunite all these children. I think it goes without question that what I'd like to do is put all five of these children together. Based upon the testimony that I got at trial, frankly I can see no reason for why these children were separated in 2013. None whatsoever, other than the parents, the selfish nature of the parents themselves. I use that term and apply it to both parents; selfish. These children were put in a position that was not in their best interests, but it was in the best interest of the parents at the time. That is very frustrating. I asked both parties that question, and frankly, neither of them denied that it was not in the children's best interest to split them at the time but neither party did anything to prevent it.

That is what is frustrating for me; the parties took the easy out. They each took two children and they sent a baby, a one-year-old, flipping and flopping back and forth. I can think of nothing worse for those children. The reason I put that on the record is because when I establish an initial parenting plan, the statutory requirements that I must go through and meet are vastly different than the statutory parameters at a relocation.

This is one of the reasons why I asked both attorneys to brief this issue. I was really hoping there was some legal authority or some way for me to put these children back together. I don't believe that I have that authority, even based on the briefing provided by these attorneys. The parents are the only one with that authority. The parents can do whatever they deem best, they have the authority to do this, but I am constrained by the statute. And what I have the legal authority to do today is not what I had the authority to do in 2013.

I want to make it very clear to both parents; by copping out in 2013, you two have created the problem for these children. I want you both to understand that. I place the blame equally on both parents because I'm very frustrated with the order that I'm going to be putting into place with regards to this matter.

(CP 72-74.)

The trial court made findings with respect to each relevant statutory factor on the record, and it did so with respect to all the children and both parties; it concluded that (a) the two children who had been primarily placed with the mother by agreement would relocate with the mother, (b) the two children who had been primarily placed with the father by agreement would relocate with the father, and (c) the youngest child, for whom there was no agreed parenting schedule, would be placed with the mother. (CP 54-87.)

The mother made a motion for reconsideration and argued that the trial court had misunderstood its authority and that the father's behavior after trial had confirmed that he "learned nothing." (CP 184-188.) The trial court denied the motion. (CP 197-198.)

The mother appealed.

### III. ARGUMENT

#### ***A. The trial court did not misunderstand or misapply Washington law.***

The mother argues on appeal that the trial court misunderstood or misapplied Washington law; her argument is predicated on misstatement of the record.

##### *1. The trial court did not find that placement of all five children with the mother was in their best interests.*

The mother repeatedly argues that the trial court made a finding that placing all five children with the mother would be in their best interests. (*Opening Brief*, pgs. 3, 6, 16, 17, 19, 21, and 22.) Despite these frequent assertions, no such finding exists anywhere in the record.

The mother makes two citations to the record in support of this argument; the first is to a portion of the oral ruling wherein the trial court states that it would like to place all the children together:

I think it goes without question that what I'd like to do is put all five of these children together.

(CP 72, lines 16-18.)

Contrary to the mother's contention, however, the trial court never indicates that it would like to place all the children together *with the mother*.

The second citation provided by the mother references subsections "D" and "F" on page six of the *Final Order and Findings on Objection about Moving with Children and Petition about Changing a Parent/Custody Order (Relocation)*, (hereinafter, "*Final Order and Findings*") entered on December 16, 2016. (CP 151-166.) Those sections state:

- D. It is in the best interests of the children to be living together in the same household, and it is detrimental to them to be living apart from each other.
  
- F. In this case, the court lacks the legal authority to place the children all in one home, as the detriment of the children living apart from each other is insufficient to overcome the presumption in favor of the primary parent being able to relocate under RCW 26.09.520 and related statutes. This is the determining conclusion of the law. (Transcript of 10/28/16 at pp. 24-25.)

(CP 156.)

As before, the trial court makes no statement in this section to indicate a preference for placing the children together *with the mother*.

The mother's argument depends on her assertion of this fact, but no evidence of such a finding exists in the record; this argument should be rejected on appeal.

2. *The trial court did not find that the father's home was a detrimental environment for the parties' children.*

The mother repeatedly argues that the trial court entered a finding that the father's home was detrimental to the parties' children. (*Opening Brief*, pgs. 3-4, 6, 7, 11, 16, 18, 19, 20, and 21.)

The mother identifies support for this assertion in two ways. First, she cites to the trial court's written findings in the *Final Order and Findings*, and argues that the trial court adopted all the findings from the GAL's report; second, she synthesizes a finding by reconciling what she characterizes as "a logical inconsistency" in the trial court's ruling.

*Written Findings.* The mother cites to the following written findings in support of her assertion that the trial court made a finding that the father's home was detrimental to the children placed with him:

g(2): The GAL reported that Cliff is interfering with Anne's involvement in the girls' lives, and this would be a developmental detriment. (Transcript of 10/28/16 at pp. 15-16.)

(CP 155.)

P: The GAL reported concerns about whether Cliff would foster Colton's relationship with Anne; and the GAL reported concerns about Cliff's judgment in having Colby watch violent, R-rated movies, play violent video games, and participate in the "White Face" video.

(CP 157.)

Q: The court finds concerns about Cliff's willingness to foster a relationship between Colton and Anne; and the court finds concerns about Cliff's "parenting judgment" in regards to Colton. (Transcript of 10/28/16 at p.30, lines 17-20).

(CP 157.)

V: The testimony of the GAL regarding Cliff's approach to the relationship of the girls and Colby with Anne was not sufficient to overcome the presumption in favor of relocation; however, the weight of the evidence regarding Cliff impeding Anne's phone calls, impeding Anne's visitation with the children in Spokane, Cliff's disparaging Anne to Phillip in text messages, and Cliff's problems of parenting judgment regarding Colton is sufficient to lead the court to conclude that Colton should be placed with Anne. (Transcript of 10/28/16 at pp. 35-40.) Communication with all children will occur more freely and openly if Colton is placed with Anne. (Transcript of 10/28/16 at p. 40, lines 18-20.)

(CP 157.)

X. The court finds that Anne is more likely to foster Colton's relationship with Cliff, than Cliff is likely to foster it with Anne. (Transcript of 10/28/16 at p. 40.)

(CP 158.)

The trial court does not mention the word "detriment" outside of its acknowledgement of the GAL's report in subsection g(2), which merely describes the evidence and opinions reported by the GAL. The transcript confirms that the trial court intentionally declined to make the same finding:

Guardian ad Litem did make a comment that she is concerned that the girls do need their mother in their life, and that need is not being met by Mr. Monoskie based upon interfering with

contact. The guardian ad litem's belief is that the lack of contact would negatively affect their emotional development.

What I *can* make a finding to is that all of these children need to have free and unfettered access to both of their parents. They also need access to their siblings.

(CP 66-67; emphasis added.)

In fact, on several occasions, the trial court recited the evidence presented by the GAL and explicitly indicated that it did not arrive at the same conclusion. (See, e.g., CP 16.)

*Synthesized Findings.* Alternatively, the mother explains on page 18 of her *Opening Brief*, that she believes this Court can *infer* detriment based on "... the fact that the court applied all of Cliff's detrimental behaviors regarding the girls, as well as his bad judgment regarding [the youngest] as a basis to place [the youngest] with Anne." She argues:

[The synthesized finding of detriment] addresses a logical inconsistency that the court applied its findings of detriment in Cliff's home, regarding his harm to the girls(!), as the basis to place [the youngest], but the trial court did not apply these findings of Cliff's detrimental behavior to the placement decision regarding the girls, likely due to application of the wrong legal standard, as outlined, above.

(*Opening Brief*, pg. 18.)

Contrary to the mother's argument, however, the trial court explained its findings in its oral ruling, and there is no logical inconsistency.

The trial court identified behaviors by both parents of which it strongly disapproved, but it made no finding of *detriment* as to either parent; rather, the trial court explicitly stated that it had only identified specific failures of judgment

by the father to “break a tie between two good parents,” when it awarded placement of the youngest primarily with the mother. (CP 83-86.)

The mother’s argument depends on a finding of detriment, and the trial court made no finding of detriment.

**B. There is no basis in Washington law to change the children’s placement on appeal.**

The mother cites to Washington’s modification statute (RCW 26.09.260) to argue that because she filed a petition for modification to the parenting plan based on grounds that she believes would be independently sufficient regardless of the relocation requests, there is legal basis for placing all the children with her on appeal.

- 1. The mother’s petition for modification was filed pursuant to RCW 26.09.480(1)(a) and proceeded to trial without a finding of adequate cause; the mother’s petition was therefore not a separate proceeding.*

The filing of a petition for modification is not a “separate” or “independent” proceeding from the proceeding to resolve relocation requests and objections; rather, a petition for modification is specifically identified as a method by which an objecting parent may make his/her objection to the request to relocate. RCW 26.09.480(1)(a). The fact that the mother filed her parenting plan in the context of her objection to the father’s relocation confirms its inclusion in the relocation proceeding. This is further confirmed by the fact that no hearing on adequate cause was ever requested, yet the mother’s petition proceeded to trial. If a party requests a major modification under RCW 26.09.260, the matter cannot proceed to trial without a finding of adequate cause.

2. *The issue of adequate cause is not properly before the Court.*

In her petition for modification, the mother alleged that there had been a substantial change of circumstances in the father's home and that, as a result, his home was detrimental to the girls who had been primarily placed with him. (*Opening Brief*, pg. 10.) On appeal, the mother argues that because the court made negative findings at trial during its consideration of the youngest child's placement, *this Court* should deem those findings to be legally equivalent to an explicit finding of "detriment" with respect to two different children in the father's care. There is no support for the mother's argument.

First, the mother herself takes pains in her brief to admit that she does not challenge any of the findings of fact on appeal. That being so, the mother did not assign error to the trial court's failure to find detriment, and the issue is therefore not properly before the Court on appeal. The absence of findings on an issue for which a party had the burden of proof is presumed to be a negative finding that results from a lack of proof on the issue. *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); *Fettig v. Dep't of Social & Health Servs.*, 49 Wn.App. 466, 478, 744 P.2d 349 (1987).

The mother provides no authority for the suggestion that a party may request a finding of adequate cause for the first time on appeal; this Court, therefore, should not consider this argument. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

If the mother had intended to file a petition for modification that was entirely independent of the relocation proceeding, she should have moved for a finding of adequate cause as required by Washington law. Having failed to do so, the issue is not properly before this Court.

Even if this Court were inclined to accept the suggestion that it should make its own independent findings of detriment on appeal; the mother cannot explain how such a finding changes the outcome of the trial court's ruling. Given that a modification proceeding did, in fact, proceed to trial, it is not particularly useful to discuss whether the petition would have proceeded to trial in hypothetical alternative circumstances that never occurred.

3. *The trial court considered the mother's evidence, allegations of detrimental environment, and her arguments against placement of the children with the father.*

Regardless of the conjectures made with respect to adequate cause, it is undisputed that the trial court considered the mother's allegations of detrimental environment at trial, so the question of adequate cause for that review is irrelevant on appeal.

Therefore, the only relevance of "detriment" in this case would have been as it related to the court's analysis at trial. It is undisputed that the mother presented her evidence at trial. It is undisputed that the trial court explicitly found that despite the lapses in judgment or other problems that had been argued with respect to the father's parenting, it could not find that there was detriment in the father's home sufficient to overcome the detriment that would result from disrupting the children's placement with their father. (CP 74, 151-159.)

The mother is unable to explain how the trial court's decision would have been different had the matter been considered in the context of a modification proceeding based on a finding of adequate cause rather than in the context of a modification proceeding based on a relocation request.

The mother does not identify what evidence the trial court would have heard that differs from what the trial court actually did in fact hear.

She does not assign error to any of the trial court's findings of fact after its consideration of that evidence.

She acknowledges that the trial court must weigh one harm (relocation or an alleged detrimental environment) against another (changing placement) in either proceeding. She acknowledges that the court did, in fact, consider her allegations of detrimental environment during trial. She has failed to identify any benefit to be gained by reframing the proceeding on appeal.

The mother simply has no argument for an alternative outcome that does not entirely depend on a mischaracterization of the record, and her request that this Court reverse the trial court should be denied.

**C. The trial court did not err when it denied the mother's motion for reconsideration.**

Despite raising the denial of her motion for reconsideration as an issue, the mother does not argue or analyze this issue in her brief. This Court need not address issues that a party fails to discuss meaningfully with citation to authority in the brief. *Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 84, 180 P.3d 874 (2008), citing RAP 10.3(a)(6); *DeHeer*, 60 Wn.2d at 126.

In her motion for reconsideration, the mother referenced CR 59(a)(4), (8), and (9). CR 59(a)(4) governs “newly discovered evidence” which the party could not with reasonable diligence have discovered and produced at trial. The mother references this rule to argue that the father’s behavior after trial indicates that he “learned nothing” from trial, which should serve as a basis to modify the trial court’s previously ruling. The mother provided no authority for this argument in her motion or on appeal, and indeed, none exists. The trial court did not abuse its discretion when it denied the motion for reconsideration.

Pursuant to CR 59(a)(8), the mother argued that the trial court had made an error of law by misunderstanding the breadth of its authority. That argument has already been addressed above and is without merit. The trial court did not abuse its discretion when it denied the motion for reconsideration.

CR 59(a)(9) provides the basis for reconsideration when “substantial justice has not been done.” The mother made no meaningful argument in her motion or on appeal in furtherance of this assertion; therefore, the trial court did not abuse its discretion when it denied her motion for reconsideration and this Court should similarly deny her request for reversal.

#### **IV. ATTORNEY’S FEES**

An appeal is frivolous and an award of attorney fees may be appropriate when there are no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court's decision. Matheson v. Gregoire, 139 Wn. App. 624, 639, 161 P.3d 486 (2007).

The mother's factual argument on appeal is predicated on misstatement of the record. While the mother cites to a great deal of case law generally, she provides no authority for the gravamen of her argument.

The father requests attorney's fees pursuant to RAP 18.9 for having to respond to this appeal.

#### V. CONCLUSION

The mother's arguments have no merit, and her request to modify the parenting plan on appeal should be denied.

RESPECTFULLY SUBMITTED this 19th day of JULY, 2017,

  
\_\_\_\_\_  
JULIE C. WATTS/WSBA #43729  
Attorney for Respondent

**CERTIFICATE OF ATTORNEY**

I certify that I arranged for hand-delivery of a copy of the foregoing RESPONSE BRIEF to the office of Anne Marshall's attorney, Craig Mason, at 1707 W. Broadway, Spokane, WA, 99201 on July 19, 2017.

  
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