

No. 36479-8

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

Keri Orate, n/k/a Shrewsberry,
Respondent,

and

Scott Orate,
Appellant

APPEAL FROM THE SUPERIOR COURT
IN AND FOR YAKIMA COUNTY
HONORABLE BLAINE GIBSON

BRIEF OF RESPONDENT

By: Robert G. Velikanje
WSBA 22317
205 N 40th Ave, Ste#104
Yakima, WA 98908
(509)573-4900
bobvlaw@yvn.com

Attorney for Respondent, Keri Shrewsberry

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. RESPONSE ARGUMENT.....	3
A. CR 55 is not applicable in the instant case.....	3
B. Attorney fee award.....	6
III. CONCLUSION.....	7

TABLE OF AUTHORITIES

CASES

In re Marriage of Pennamen 135 Wn.App. 790 (2006).....4

STATUTES

RCW 26.09.5002, 3, 4, 5

RCW 4.72.0503, 6

RCW 26.09.010(1)3

RCW 26.09.5206

COURT RULES

CR 553, 4, 5

CR 603, 6

CR 116, 7

I INTRODUCTION

This matter concerns the relocation of Jackson Orate, now age 7, DOB 11/29/2011, and the procedural wrangling that has occurred prior to and subsequent to mother's request to relocate with Jackson. A final parenting plan was entered in Yakima County Superior Court on behalf of Jackson as part of an agreed dissolution action on March 26, 2015, Jackson was 3 years old at the time. Of importance to this appeal (and contrary to father's continued litigation), the final parenting plan of March 26, 2015, contained the following express provision:

The parties agree that the child will be educated in a school system other than Sunnyside where both parties presently reside. Therefore, it is intended that the mother will relocate the child at some point before he starts school and father has no objection concerning this relocation of the child. Mother shall not move the child's residence more than 75 miles from his present address without father's consent. (CP 2).

That agreed parenting plan remained in place, despite two failed attempts by father to modify it for reasons unrelated to relocation issues, until Jackson's current parenting plan was entered on May 31, 2018, when final pleadings in mother's relocation request were entered on an ex-parte basis. (CP 24-40).

The mother in this action, Keri Shrewsberry, approached the father, Scott Orate, in the early spring of 2018 and notified him of an employment opportunity that existed in the Kennewick School District, commencing fall of 2018. Consistent with Paragraph 3.13 of the final agreed parenting plan, mother was informing father of the move and that it was within the 75 mile radius set forth in their agreement. He verbally objected to her move request. Mother then had him served with the appropriate Notice of Intent to Relocate and a Proposed Parenting Plan. (CP 1-21). Those documents were prepared pro-se and filed with the court. Father did not file a timely objection to her relocation request. Ms. Shrewsberry, having received no feedback on her notice, inquired of her former attorney's office as to what needs to be done if the deadline passes and no objection is received. She did not know how to present final pleadings to a court officer, nor did she know which pleadings were required to be presented. Mother retained counsel and final pleadings were prepared and presented to the court on the ex-parte docket May 31, 2018, consistent with RCW 26.09.500(5). (CP 23-40). Mother was never served with or mailed directly a Notice of Appearance from father's counsel. In fact, father's counsel only claims that a Notice of Appearance was "filed" not served. (Appellant's Opening Brief, pg 1).

Father's untimely objection to relocation and Motion to Vacate were denied by court order June 25, 2018. (CP 138). It is this order that should have been appealed, not the order from September, 13 2018. This appeal is untimely.

Counsel states "The September 13, 2018 order is as far as counsel can discern, the first place in the record that the court made a ruling regarding the applicability of CR 55." (Appellant's Opening Brief, pg, 2). The court rulings of June 25, 2018 and September 13, 2018 were essentially duplicate Motions to Vacate, neither of which presented any valid defense consistent with CR 60 or RCW 4.72.050. Both were appropriately denied, especially in light of the agreed final parenting plan language of March 26, 2015. Mother proceeded with relocation, just as the parties stipulated it should occur.

II RESPONSE ARGUMENT

A. **CR 55 is not applicable in the instant case.**

Civil Rule 55 does not apply, vis-à-vis the application of RCW 26.09.500(5), as is set forth in RCW 26.09.010(1):

Except as otherwise specifically provided herein, the practice in civil action shall govern all proceedings under this chapter, except that trial by jury is dispensed with. (emphasis added).

Specifically provided for in RCW 26.09.500(5) is the ability of a parent to obtain ex-parte relief in the exact factual scenario as set forth above. There is not an exception to the statute to accommodate a party that may have hired an attorney but not timely filed the required objection. Nor does the statute provide for an extension of the 30 day deadline in the event that a notice of appearance may have been filed. Such argument would make the statutory language of RCW 26.09.500(5) obsolete relative to the ability to obtain ex-parte relief. The statute is clear on its face, there is no tolling period. RCW 26.09.500(1) & (5) provide:

(1) Except for good cause shown, if a person entitled to object to the relocation of the child does not file an objection with the court within thirty days after receipt of the relocation notice, then the relocation of the child shall be permitted.

(5) Any party entitled to residential time or visitation with the child under a court order may, after thirty days have elapsed since the receipt of the notice, obtain ex parte and file with the court an order modifying the residential schedule in conformity with the relocating party's proposed residential schedule specified in the notice upon filing a copy of the notice and proof of service of such notice...

The ruling in *In re Marriage of Pennamen* 135 Wn.App. 790 (2006) is distinguishable given the procedural circumstances of that case as compared to this case. CR 55 was applicable in *Pennamen* because the

objecting party, albeit late, filed responsive pleadings prior to a noted hearing by the relocating party. *Pennamen* at 798-799. No ex-parte request was made in *Pennaman*, rather a default hearing was noted on the merits, prior to any responsive pleadings being filed. In that case, rather than attempting to show “good cause” for the late filings, the court allowed a late objection given the fact that a hearing on the merits was noted but had not been decided yet. The ultimate holding in *Pennamen* was that even after 30 days had lapsed; a default relocation order was not mandated under the language of RCW 26.09.500(1), simply because an objection was filed but not timely filed and served within those 30 days, prior to affirmative relief being granted. *Pennamen* does not stand for the proposition asserted by father, (i.e. that it mandates the application of CR 55 regarding notice before ex-parte orders are entered).

Father has never asserted in this appeal there was “good cause” for his late filings. As set forth in *Pennamen*, good cause requires the late-filing party to show some external reason, not resulting from a self-created hardship, which prevented him from complying with the statutory requirements. *Id* at 798. No such showing has been argued or made by Mr. Orate. Substantively, there has been no showing of any detrimental effect upon the child as is required of an objecting party by statute.

There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors... RCW 26.09.520.

It is argued that notice of relocation was probably not even required in the instant action, given the language of the final parenting plan of March 26, 2015, authorizing relocation within a 75 mile radius. In an abundance of caution, mother provided the requisite notice and service. Notice of entry of her final pleadings on an ex-parte basis was not required under RCW 26.09.500(5), given the statutory authorization to proceed ex-parte when an objection has not been timely filed and served.

B. Attorney fee award.

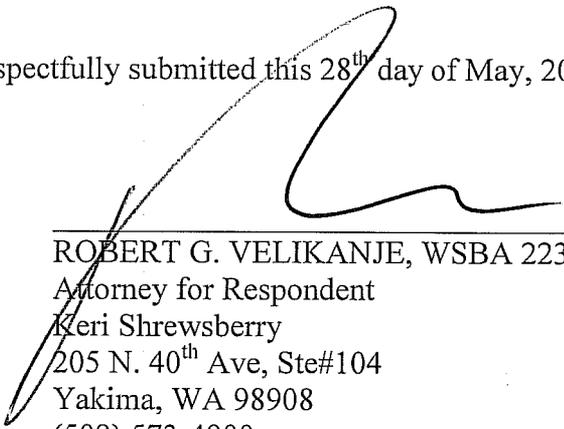
Fees awarded pursuant to the September 13, 2018 order were granted under CR 11 as sanctions against the father, given the nature of the second Motion to Vacate, wherein he still did not and cannot show a meritorious defense under CR 60 or RCW 4.72.050, Res Judicata applied. Furthermore, he could not demonstrate any detrimental effect upon the child in his relocation objection, as required by statute. RCW 26.09.520.

Fees were appropriately granted.

III CONCLUSION

Father is requesting that this court vacate final orders that allowed relocation of a child, a relocation the parties contemplated in their initial dissolution action. Mother complied with the statutory mandates regarding notice and proceeded ex-parte with final pleadings, having never received a required objection or the filed Notice of Appearance by opposing counsel. This appeal is untimely in that the order from June 25, 2018, should have been appealed, not a subsequent order entered on September 13, 2018. Relief was denied a second time because the doctrine of Res Judicata applied, given the first motion and ruling on the merits and fees were awarded under CR 11.

Respectfully submitted this 28th day of May, 2019.



ROBERT G. VELIKANJE, WSBA 22317
Attorney for Respondent
Keri Shrewsberry
205 N. 40th Ave, Ste#104
Yakima, WA 98908
(509) 573-4900
bobvlaw@yvn.com

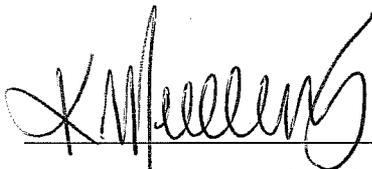
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 28, 2019, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals-Division III 500 N. Cedar Street Spokane, WA 99201	Via Electronic Filing
Kraig Gardner Attorney at Law PO Box 777 Ellensburg, WA 98926	Via electronic mail: kraiggardner@yahoo.com

Dated at Yakima, Washington this 28th day of May, 2019.



Katie Mullins, Legal Assistant to Robert G. Velikanje

LAW OFFICE OF ROBERT G. VELIKANJE

May 28, 2019 - 2:38 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36479-8
Appellate Court Case Title: In re the Marriage of Keri Orate n.k.a. Shrewsberry and Scott Orate
Superior Court Case Number: 14-3-00894-8

The following documents have been uploaded:

- 364798_Briefs_20190528143658D3466975_0127.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brief.pdf

A copy of the uploaded files will be sent to:

- kraiggardner@yahoo.com

Comments:

Sender Name: Katie Mullins - Email: bobvlaw@yvn.com

Filing on Behalf of: Robert George Velikanje - Email: bobvlaw@yvn.com (Alternate Email:)

Address:
205 N. 40th Ave., Ste. 104
Yakima, WA, 98908
Phone: (509) 573-4900

Note: The Filing Id is 20190528143658D3466975