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OCT 02 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 369161

**Spokane County Superior Court Case No. 18-3-01614-1
The Honorable John Cooney
Superior Court Judge**

OPENING BRIEF

In Re:

MIRANDA GARRAHAN, APPELLANT/PETITIONER

v.

CODY NELSON, RESPONDENT

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I. Facts

A contentious trial regarding establishment of a permanent parenting plan and a request for relocation to Medical Lake, Washington was held on April 4, 2019. Both Appellant and Respondent appeared and argued pro se. Evidence was provided regarding the proposed relocation to Medical Lake and regarding the .RCW 26.09.191 restrictions sought against Respondent. **CP 24.**

On April 11, 2019 the Court issued its' written ruling in the form of a Final Order and Findings for a Parenting Plan and a final Parenting Plan. **CP 1-15.**

On April 22, 2019 a Motion to Reconsider the Courts Final Order and Final Parenting Plan was timely filed. It addressed the issues that the Appellant had with the final orders as prepared by the Court. **CP 23-36.**

The Court determined that the should the mother choose to reside outside of the Whitman Elementary district, she would immediately forfeit primary placement of the child. The definition of residing outside of Whitman district is defined below. **CP 4**

The Court found no basis for RCW 26.09.191 findings. **CP 1.**

Further the Court required that "*In order for the child to live with*

Miranda Garrahan, she must reside in the Whitman Elementary district (meaning the child must stay the night at a home in the district during the school week). CP 4.

The parenting plan provides that the father shall have all weekends during the school year, including all three day weekends. CP 4-7.

II. Statement of Errors by Judge

The Judge in this matter erred as follows:

1. Absent the imposition of .191 limiting factors, the Court should not impose a prospective modification of the Parenting Plan based on the Petitioner's possible future relocation, particularly without considering the entirety of RCW 26.09.187
2. Giving all weekends and extended weekends and extended weekends during the school year to one parent preventing the other parent from any none school/work time with the child
3. The court should have entered .191 restrictions against the Respondent due to his history of abusive use of conflict.

III. Law & Argument

A. Motion for Reconsideration was the appropriate remedy for the errors made by the court.

CR 59 allows the trial court to correct any mistakes after a final

judgment serves the interests of judicial economy and entry of an order regarding a request for reconsideration. In this case, all of the issues raised could have been addressed by granting the request to reconsider the errors made.

B. Absent the imposition of .191 factors, the Court should not require a prospective modification of the parenting plan based on the Appellants expressed desire to move without consideration of all the factors in RCW 26.09.187.

A trial court has broad discretion when developing a parenting plan. The development of such a plan is guided by RCW 26.09.184 which states the objectives of a parenting plan are to a) provide for physical care of the child, b) maintain the child's emotional stability, c) provide for the needs of the child as the child grows (in a way to lessen the need for future modifications), d) set forth the duties of each parent, e) encourages parents to meet their obligations through agreement rather than the courts. RCW 26.09.187 lists seven factors for consideration when creating a parenting plan. RCW 26.09.002 states that parenting plan must consider the best interests of the child when determining parental responsibilities. Absent .191 factors affecting a party's ability to

parent their child, the Court may not impose restrictions on either parent's time. The Court cannot implement restrictions in a parenting plan unless those restrictions are reasonably calculated to address any limiting factor identified by the court under RCW 26.09.191.

Relocations involving children for whom a parenting plan has been established are governed by RCW 26.09.187. The statute requires the trial court to consider seven enumerated factors as well as the existence of any limiting factors established under RCW 26.09.191 before making a determination that considers the interests of both the child and the parent requesting relocation. There is a rebuttable presumption that the parent requesting relocation shall be allowed to relocate with the child and the opposing parent bears the burden of offering sufficient evidence to the court that the challenges of the proposed relocation outweigh the benefits to both the child and the relocating parent. Case law requires the trial court to make an enumeration of each of these factors in its findings, or support a finding that sufficient evidence has been presented to the court to restrain the proposed relocation. As related to the final orders the court must find, "by a

preponderance of the evidence” that the relocation should be denied. *In re Marriage of Horner*, 151 Wn.2d 884, 895. The court recognizes that a fit parent will act in the best interest of the child.

Here the Appellant could have waited to introduce the idea of relocation until after the final parenting plan had been established but elected, instead to include her request in conjunction to establish a final parenting plan. The Appellant offered testimony from herself and other witnesses about her relationship with her significant other and his other children. Since October, 2018, the Appellant and the child have spent one night per week in the home of the significant other and the child has established a relationship with his children. There was no impact on Respondent’s relationship with the child or the temporary parenting plan as a result of this arrangement. The child did not miss school and his schedule had not changed.

The Appellant currently resides with Respondents mother as a caretaker. Absent this position Appellant may not be able to afford housing in the Whitman Elementary school district. The Court’s order provides no alternatives for the Appellant should she lose her job and be forced to move some place where she can afford housing. If that happens, despite the fact that she has been recognized as the primary attachment

figure for the child, she will lose placement of the child. There is no evidence that such an action is in the best interest of the child, it appears punitive in nature against the Appellant.

By making this decision, the Court has preemptively quashed the provisions of both the Relocation Act and the statute governing modification of parenting plans. The final parenting plan clearly order the residential schedule to change upon the mother's move for any reason absent any considerations of the enumerated factors. The Appellant accepts that the court had the ability to deny her request for relocation at the time of trial but to prevent relocation ever and to take it one step further, essentially stop her from traveling ever during the school year is beyond what is allowed by the relocation act. The Respondent faces no such restriction on his time.

It is important to note that the Respondent does not live in Whitman Elementary school district. If the mother was forced to move and the father became primary custodian of the child, a change of school would be required. Less than one week after entry of the final orders the Respondent attempted to use this language to take custody of the child because the mother spent the night in Medical Lake rather than the home.

The effect of this is to force the Appellant to choose between her

child and her personal relationship. By contrast Respondent married, moved to another school district and continued his relationship with the child without reservation.

It is clear that a prospective denial of relocation and the denial of the ability to travel with should be removed from the final parenting plan.

C. It is inequitable to give all school year weekend time to one parent.

The final parenting plan signed by the court on April 11, 2019 includes provisions for the child to live with the parent who has the attached weekend for the majority of the Monday holidays that occur during the school year as well as for any three day weekends not assigned. The court's comment with regard to this decision was that sometime people like to travel on these holidays.

This creates an inequity in that Respondent receives all weekends during the school year. This means that during the school year Appellant has no ability to travel with or spend any vacation time with the child.

The Appellant is requesting that holiday weekends alternate between the parties to actually align with the trial court's stated position that this would allow both parties to travel with the child.

D. Imposition of .191 restrictions against the Respondent are appropriate due to his abusive use of conflict.

Abusive Use of Conflict is not well defined in RCW 26.09.191.

Specifically it refers to it a behavior “which creates the danger of serious damage to the child’s psychological development.” Abusive Use of Conflict does not require a showing of actual damage to the child’s psychological development, only a danger of such damage. *Burrill v. Burrill*, 113 Wn.App. 863, 56 P.3d 993 (2002).

The court does not have a specific set of criteria to determine the presence of Abusive Use of Conflict, but case law has determined that the mere existence of conflict between the parents by itself should not meet the standard. Findings such as parents involving the child in the situation, coaching children to make statements, making false reports to CPS and law enforcement, rigid inflexibility or refusal to cooperate with the other parent to coparent the child.

Here there was much evidence via text messages, repeated unfounded referrals to CPS all made by the Respondent demonstrating his abusive use of conflict. In fact, the temporary order in this matter indicated that Respondent had engaged in Abusive Use of Conflict.

While not dispositive for the trial court, some consideration to the

fact that another court had found restrictions appropriate. Indeed Respondent's behavior immediately after the entry of the orders, including a well-child check by police, contempt proceedings, seeking a Writ of Habeus requiring the child to be brought to court on April 19, 2019. Instead of trying to work out any issues, Respondent proceeded immediately to court to upend the child's life.

The final parenting plan requires the child to remain in counseling due to the damage that has occurred during this action. It is clear, based upon Respondent's actions before the ink was even dry on the ruling, that the issues stem from his behavior and the restrictions requested are entirely appropriate.

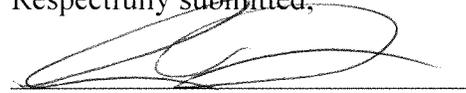
IV. Conclusion

This is an appeal of a CR 59 Motion for Reconsideration regarding a final parenting plan and a prospective relocation which was denied. The Motion for Reconsideration was based upon the fact that the court failed to include .191 factors despite testimony or abusive use of process. The relocation was denied without specific consideration of all relocations factors. The Appellant was denied any non-school day time with the child

for the entirety of the school year, despite the Court's statement that long weekends were important times to allow the child to travel with the parents.

For all of these reasons the Appellant asks the court to vacate the court's order denying the CR 59 and order the changes to the parenting plan.

Respectfully submitted,



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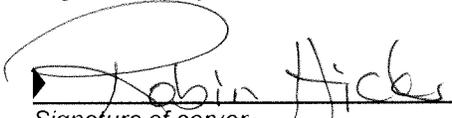
CERTIFICATE OF MAILING

1. I HEREBY CERTIFY that on October 2, 2019, I caused to be mailed and a true and correct copy of the foregoing to Cody Vern Nelson at his last known address. His last known address is 901 E. Holyoke Ave., #63, Spokane, WA 99208.

2. Other Information (if any): _____

Signed at (*city and state*): Spokane Valley, Washington

Date: October 2, 2019



Signature of server

Robin Hicks

Print or type name of server