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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By________

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

NO. 313484-III

IN RE THE MARRIAGE OF:

MONIQUE A. MCDEVITT, APPELLANT

v.

DAVID A. DAVIS, RESPONDENT

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not exceed its scope of authority as propositioned and pursuant to the Order On Adequate Cause and/or under statutory authority. The basis on which the court considered the parenting plan review and modification was not pursuant to the minor modification provisions of RCW 26.09.260(5). Further, it was unnecessary for the court to make any specific findings to grant relief under the minor modification statute as asserted.

2. The trial court had the authority to modify the prior parenting plan of Judge Leveque dated September 1, 2009. Either by virtue of the relocation of the mother which had already actually occurred, or that the trial court properly exercised its authority under the review provisions of the prior original parenting plan, the trial court did not err. In reference to the trial court determination that the matter was the subject of a review, and the Appellant contention that such review had already been conducted, it was in the

discretion of the trial court to address provisions of the plan/residential schedule where there were ongoing review orders prior and subsequent to the February 2012 relocation, as to expanded overnight contact along with issues reserved as to holidays and summers. This assignment of error is inconsistent with the record. Further, the issue that a review had already occurred was not an issue raised with the trial court at the time of full evidentiary hearing.

3. Likewise, the trial court did not err or exceed its authority in modifying the decision making provisions and other non-residential provisions of the parenting plan. The trial court found no basis on which to place restrictions or limitations on the rights of the father.

4. The trial court did not err in entering the modified parenting plan. The trial court was not required to dismiss the modification action at the time of trial based on the subsequent attempt to withdraw the request to relocate. The effort to withdraw the

relocation notice was disingenuous and not in good faith based on the Appellant mother's testimony at the time of trial.

RESPONSE TO STATEMENT OF THE CASE

The final Decree of Dissolution and Parenting Plan entered September 1, 2009, was unmistakably entered based on the infancy and location of the children. CP 1-6. A prior temporary order allowing the mother to relocate to Hawaii prior to the dissolution trial in mid-2009 indicates the effort made to inhibit the father's ability to have contact with the children except by traveling to that state. The observation has continually been made that travel costs and the logistics involved in the father's contact with the children in Hawaii created a significant barrier to the father's relationship with them. CP 31-33. The provision that the matter would be reviewed at age two was clearly designed to allow review without a necessary adequate cause determination. Further, the plan provided for the requirement that the mother notify the father if she traveled to the

continental U.S. but without stating what the rights of contact might be. CP1-6. Independent of the provisions of the plan, it could be modified should the mother relocate from Hawaii.

The observation that there was a post-dissolution trial reconsideration motion by the father appears an irrelevant point (other than it demonstrates the concerns over the court failing to specifically provide for his right of contact). CP7-8, CP 9-24. When the matter was postured for further review in 2012 after a series of hearings, it would have contemplated the ongoing circumstances and an evidentiary hearing conducted absent agreement. CP 67-68. The court had ordered mediation which was unsuccessful. CP 56. This was also in view of where the mother would then reside as the court had reason to believe that the mother would at some point move to the continental U.S. which in fact she did pursuant to her relocation. CP190-194.

When the father commenced his enforcement and modification/review efforts in November 2010 with regard to the parenting plan, the issue was raised as to whether the mother had in fact been in the

continental U.S. but failed to notify the father. CP 151-153, CP 181-189. In the order of January 25, 2011, the court addressed a variety of issues relating to the father's travel to Hawaii. CP 31-33. It is unmistakable that the court specified holiday and summer residential time "to be determined at a further hearing," and for future compliance review with the reference of "TBD." This was a proper basis for Respondent to allege the reason to file a petition to modify in November 22, 2011. CP 34-43. This petition and an amended petition were filed following a significant period of time when the mother was in the north Idaho/Spokane County area during which time the father continually exercised residential time. CP 57-64.

The order of January 24, 2012, initially denying adequate cause by Court Commissioner Jolicoeur indicating a review had occurred was based on the perception of review provisions based upon the fact that the mother remained in Hawaii. CP 55-56. In spite of the recitation that a review had occurred, Court Commissioner Jolicoeur made subsequent rulings to provide additional

rights of contact when it was announced the mother would relocate. CP 170-175. A hearing was conducted and relief granted given the circumstances relating to the fact that the mother had relocated to Colorado and the father began overnight contact in April 2012 when the father traveled to see the children in Colorado. CP 195-196, CP 197-205.

Further, the modification petition filed by the father November 22, 2011, was not defended on the basis that there had already been a review and no dismissal was sought on this basis. In fact, there were no mandatory form responses to the petition or the amended petition filed by the father. CP 57-64. Instead, the mother filed her Notice of Intention to Relocate with the court. CP 190-194. Notwithstanding the order entered initially denying adequate cause, but not dismissing the petition, the court conducted a further adequate cause hearing which upon stipulation was granted based upon the mother's notice to relocate. CP 67-68. A proposed parenting plan filed by the father contemplated that the father would travel to where the mother

resided, but that he would have the children in his care during holidays and summers, and the parties prepared for trial based upon the circumstances that presented. CP 69-76, CP 77-86, CP 176-178, and CP 179-180. It should be noted and **corrected** as to the Order Re Adequate Cause of February 22, 2012, by insertion of counsel for the mother that adequate cause was "not determined as to a minor modification." CP 67-68. The implication of this was to recognize that relocation allowed for a review and modification of a parenting plan in addition to the prior original parenting plan provision calling for a review.

When the matter proceeded to trial before Judge Cozza, the court entered its written decision. CP 87-89. In the context of the motion for reconsideration, the mother's blatant attempt was to raise the issue of her intention to return to Hawaii, and therefore, to defeat the court's ruling and order regarding the parenting plan. CP 90-93. Appellant counsel references the array of pleadings filed in the wake of the court's decision and presentment for entry of the

parenting plan. Altogether this demonstrates the mother's continuing efforts, even acknowledged by the trial court concerning her lack of good faith, to prevent the father from having rights of contact, and to compel him to make trips back and forth to Hawaii and giving the indication that is where she would reside. CP 98-107, CP 112-113, and CP 114-117. At the time of trial testimony was offered concerning her plans to perhaps spend Christmas 2012 in Hawaii, but to reside with her husband where he would be employed. RP 23, 51-52. For example, reference is made in declaration and in testimony regarding the indigence of the mother, yet her reference to her legal expenses, her coming and going from Hawaii, and even this appeal of the trial court ruling indicates her ability to the contrary, and how she has come to fund this litigation. RP 39.

While the record on appeal is unavailable as to events occurring since the time of the modified parenting plan, the record supports either the basis on which the review of the parenting plan could be made given the age and development of the children, and/or events transpiring since the time

of the original parenting plan. Alternatively, on the basis of a relocation which actually had occurred, the court could modify the plan based upon the circumstances that the mother remained the primary parent. While there was uncertainty about the mother in Hawaii on an interim basis until reemployment was found by her husband, as numerous comments made reflect, life would go on.

RESPONSE TO ISSUES/ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN ENTERING A PARENTING PLAN WHICH DETERMINATION WAS WITHIN THE SCOPE AND AUTHORITY ALLOWED BY LAW. THE TRIAL COURT WAS NOT BOUND BY THE LIMITATIONS OF RCW 26.09.260(5).

The particular issue and argument that the court violated the statute RCW 26.09.260(5) is misplaced. From the occasions when the father first began his efforts at enforcement and review of the parenting plan after the children attained two years of age, in motion and/or petitions, to when the judicial officers had view of the ongoing circumstances, the trial court relied on the review provisions of the original parenting plan.

CP 57-64. Respondent's contention is that throughout the proceedings the mother's posture, from the time that he asserted that she was in the continental U.S. but failed to notify him as ordered, to the time that she came to the Inland Northwest for a significant period in 2011, to the Notice of Intention to Relocate after the amended petition to modify parenting plan was filed, the mother was a "moving target." As to the situation reflected in the testimony, the trial court made consideration in reviewing the plan to address what was needed to comprehensively provide for the father's rights. Instead, the argument is made as to the plan and in tracking the days which is asserted exceed what is provided as a statutory minor modification limitation. The contention is that the court was limited in the scope of the modification, and exceeded that scope does not serve the best interests of the children, citing Marriage of McDole, 122 Wn.2d 604 (1993). The concept that the best interests of the children must be the controlling consideration in any custody decision is an obvious legal tenet, and no doubt when heard and the decision rendered, this

was foremost in the mind of the trial court. No evidence is referenced that the modified plan ordered would somehow be detrimental to the children, and a case characterized by the trial court as "decidedly 'garden variety'." CP 87-89. As well, reference to the procedures related to modifying parenting plans as statutorily prescribed and compliance therewith mandatory is apparent, Appellant citing Marriage of Shyrock, 76 Wn. App. 848 (1995). However, the procedure undertaken here was under the review provisions as well as by reason of relocation.

Under the petition and statute pled, the terms of an adequate cause order and the substance of a parenting plan are the supposed basis on which Appellant contends exceed the minor modification provisions of the statute. To reiterate, the adequate cause order provides that "hearing the petition has not been established for a minor modification." CP 67-68. The case law and arguments are contrary to the necessary and contemplated review of the parenting plan based upon the age and development of the children and which in fact serves their best interests. The

provisions of the parenting plan should not be disturbed on appeal. This court should give deference to the trial court in conducting a full and evidentiary hearing absent an abuse of discretion. Coggle v. Snow, 56 Wn. App. 499 (1990).

Rather than recognizing the evidence presented to the trial court supporting the father's request for rights secured by the parenting plan entered November 15, 2012, Appellant relies on the scope of the minor modification provisions of the statute to argue that the trial court exceeded its authority. Implicit in the court's written decision as incorporated into the Order re Modification, the court observed that the existing orders did not provide reasonable residential time for the father. CP 129-131. The finding of the court under 2.4 of the order re modification references not only relocation but the contemplation of review, and that the modification is in the best interests of the children. If there are any provisions of the Order re Modification as impediments to an effective review of the

residential schedule is a matter that could be taken up by the trial court if necessary, on remand, but this is unwarranted and unnecessary.

The court should reject the argument that the procedures undertaken and the trial outcome violated RCW 26.09.260(5). Appellant in the post-trial reconsideration argued this issue when it was not raised at trial, and the adequate cause order indicated that the hearing was not in the nature of a minor modification. CP 90-93. There was a sufficient basis to address the father's rights of residential time with the children. This court is requested and is allowed to affirm the trial court decision if it is sustainable on any theory within the pleadings and the proof. See Weber, Family And Community Property Law, Wash. Prac. Volume 21, § 51.25.

2. THE TRIAL COURT DID NOT ERR BY HEARING THE MATTER ON THE BASIS OF A REVIEW AS CONTEMPLATED BY THE ORIGINAL PLAN, AND THE MATTER WAS DESERVING OF A FULL EVIDENTIARY HEARING ASIDE FROM THE RELOCATION ISSUE, AND THE ISSUE WAS PROPERLY BEFORE THE TRIAL COURT AND THE TRIAL COURT DID NOT EXCEED ITS SCOPE OF AUTHORITY.

It was within the sound discretion of the trial court to conduct the review on the basis of the age of the children, and considering the father's rights of contact when he either traveled to where the mother resided, or when the mother traveled to the continental U.S., and subsequently when the mother relocated to Colorado, and in particular upon the court commissioner reserving the issue of residential time regarding holidays and summer contact. CP 31-33. These proceedings indicate the degree to which the parties were cognizant that review of the residential time of the father was ongoing and before the court.

The decisions made by Court Commissioner Jolicoeur were meant to further the interest in arriving at a parenting plan that would serve the needs of the children in providing for residential time with both parents. CP 195-196 and CP 197-205. The contention that the father received his review hearing and that the Superior Court Judge was without authority to conduct a further review hearing is an absurdity. If the court accepts the proposition that a review had already occurred, as of January 25, 2011, it not only rejects the

subsequent orders (not appealed from), it maintains that the father's rights are limited in some form based on the original plan as embellished on by the order of January 25, 2011. CP 31-33.

The petitions to modify filed in light of the Commissioner ruling as to the basis for modification when the mother remained in Hawaii, must be seen in the context in which the father sought to address matters with the Commissioner under the local procedures, with the design to have the matter ultimately heard at an evidentiary hearing. CP 34-43 and CP 163-169. After the mother's notice of relocation, the parties prepared for trial with proposals and witness lists. CP 179-180 and CP 176-178. The proposition that the Superior Court has authority to address issues notwithstanding the prior Commissioner determination must be answered in the affirmative.

As to the review of a parenting plan as provided by a prior original decree, it is submitted that provisions of a plan may be deferred or postponed for the matter to be

reviewed after a specified period of time following a decree. Marriage of Possinger, 105 Wn. App. 326 (2001); Marriage of Little, 96 Wn.2d 183 (1981). The Commissioner had no justification to declare a limitation or bar on the extent of review (just days prior to filing her notice of intention to relocate). Notably, the Commissioner at a temporary hearing on April 10, 2012, took up the need to provide for the father to have "quality time," and increased his time to multiple overnights. CP 197-205. The relief granted again confirms the ongoing manner in which a review process was contemplated. This case authority makes clear that the comprehensive review of the parenting plan was contemplated and proper.

3. THE TRIAL COURT DID NOT ERR IN MODIFYING THE DECISION MAKING PROVISIONS AND OTHER NON-RESIDENTIAL PROVISIONS OF THE PRIOR PARENTING PLAN.

The contemplation of a change in the non-residential aspect of the parenting plan is evident by virtue of the fact that there are no restrictions or limitations either in the prior plan entered after the dissolution trial, or upon review/modification hearing. CP 1-6. The

provision of the statutes RCW 26.09.184 and .187 is that without restrictions or limitation mutual decision making is warranted. The original parenting allocation of that authority solely to Petitioner was without a proper basis in fact or law, and thus, subject to review and determination by the trial court. CP 87-89 and CP 118-128.

4. THE TRIAL COURT DID NOT ERR BY FAILING TO DISMISS THE MODIFICATION ACTION BASED UPON THE ATTEMPT TO WITHDRAW THE NOTICE TO RELOCATE.

The authority of the trial court to review and modify the parenting plan should negate the contention about the withdrawal of the relocation notice. However, if this court addresses the issue, the following response is provided.

Respondent submits that although no order to permit relocation was entered, the father's failure to object would permit the mother to seek an order allowing relocation. RCW 26.09.500. No proposed parenting plan was submitted in conjunction with the relocation notice to indicate a revised schedule. RCW 26.09.440. The actual entry of an order granting relocation should not

affect the outcome of this issue under the relocation statute. The court could conduct the hearing to modify the parenting plan under the provision of RCW 26.09.260(6) as no determination had to be made whether to allow relocation, in addition to the fact it had already occurred.

The mother sought to withdraw her notice to relocate based upon the trial court outcome. Her notice and decision to relocate had no bearing on her role of primary care parent. This is the feature which primarily distinguishes the case on appeal from Marriage of Grigsby, 112 Wn. App. 1 (2002). The policy behind the ability to withdraw the request to relocate is to permit the primary parent to maintain that role if a decision based upon the relevant statutory factors results in a denial of the request to relocate. This policy is not in play regarding the relocation. Here, no objection was made to relocation, and the distinguishing facts of Grigsby are that a post-decision announcement that the mother would not relocate from Washington was essentially because she would not do so without the children. This aspect of the usual contested relocation is the

reason for the statute to provide that as to the statutory factors whether or not a parent will still relocate if relocation is denied may not be considered. RCW 26.09.530.

Here, the announcement of the mother's decision to relocate to Colorado and that her withdrawal of notice was based upon the loss of her husband's job, meaning that residence would have been maintained but for the loss of employment. As was referenced in Grigsby, supra, at 17, the withdrawal of a request for relocation seen as disingenuous or made in bad faith was not reached. In reference to the intention of the mother in her attempt to revoke her notice to relocate, the court had considered the evidence without any contemplation other than that the mother would be living with her new husband where he was working and not retreating to Hawaii. Her withdrawal notice was made in light of a decision which the mother was not satisfied with made by the trial court after consideration of all the evidence and testimony presented.

5. ATTORNEY'S FEES SHOULD BE AWARDED TO RESPONDENT BASED UPON AN APPEAL WHICH IS FRIVOLOUS.

This appeal is based on ill-founded legal arguments, and disregards the legitimate basis for a review of the parenting plan. No facts are argued or exist as to the trial court failing to consider all evidence in making the decision to modify the prior parenting plan. This renders the appeal devoid of merit, and based upon the frivolous nature of the appeal an award of fees should be made to Respondent under RAP 18.1. Respectfully, the Appellant presents an appeal to further prevent father's ability to enjoy and have reasonable contact with his children. Based on the arguments asserted and the responses thereto, no debatable issues are presented. See Chapman v. Perera, 41 Wn. App. 444 (1985).

CONCLUSION

The apparent effort in this appeal to use technical arguments is in an effort to return to the same order entered when the children were in their infancy in view of the father's continuous and steadfast attempts to have a relationship with

his children. This would mean that the father would be forced to travel to Hawaii, and not have any holiday or summer contact. The effort to defeat the modification by arguing a lack of statutory authority or that a review had occurred, or the mother was somehow able to withdraw her notice and decision to relocate, is an obvious attempting to defeat the father's ability to expand his rights of contact. The mother had full opportunity to present evidence as to whether or not there was any basis to limit the father's contact. The trial court acted properly to address the father's parenting time and rights and in its discretion provided for his contact which was considered appropriate and consistent with the best interests of the children.

Lastly, given the provision of the adequate cause order, the statutory violation argument as to minor modification is a misconceived notion, and a variety of issues had been reserved for review post age two of the children, and the attempt to avoid the trial court outcome by withdrawing the relocation notice, all point up that this appeal is frivolous and without merit,

and Respondent should be awarded his attorney fees.

Respectfully submitted,

HERBERT J. LANDIS, WSBA #9483
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 5th day of August, 2013, she served a copy of this Respondent's Brief to the persons hereinafter named at the places of address stated below which is the last known address.

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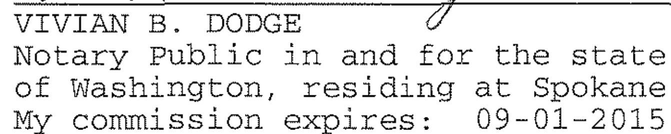
DAWN A. SANCHEZ

SUBSCRIBED AND SWORN TO this 5th of August, 2013.

VIVIAN B DODGE
Notary Public
State of Washington
My Commission Expires
September 01, 2015



VIVIAN B. DODGE
Notary Public in and for the state of Washington, residing at Spokane
My commission expires: 09-01-2015