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Court of Appeals No. 72228-0-I

COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

In Re The Marriage Of:

JONATHAN PHILPOTT,

Respondent/Appellee,

v.

LINDSEY WRIGHT FKA PHILPOTT,

Respondent

RHEA ROLFE

Appellant

INITIAL REPLY BRIEF OF JONATHAN PHILPOTT

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COURT OF APPEALS
STATE OF WASHINGTON

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I. INTRODUCTION

COMES NOW Respondent, Jonathan Philpott, by and through counsel of record, and replies to the Brief of Appellant as follows.

II. REPLY – ASSIGNMENTS OF ERROR

Assignment of Error 1. The court did not err in filing an Amended Petition without leave of court; even if it did, the error was harmless, because the court's reasoning was based on the Amended Petition having been filed and argued.

Assignment of Error 2. The court did not err in concluding its authority was limited to modification of the parenting plan only to accommodate the relocation. The court had earlier found that adequate cause did not exist for a major modification; that order was not appealed and was res judicata for a major modification; filing an amended petition objecting to the relocation did not change the fact that Lindsey was seeking the change in custody which had just been denied.

Assignment of Error 3. The trial court did not err in dismissing the amended petition for modification. The trial court heard a great deal of evidence from Lindsey. But her request for a major modification had already been denied; this was a patent attempt to relitigate the Florida
REPLY BRIEF OF RESPONDENT 1

divorce, and the denial of adequate cause. It was not, in reality, a new claim; it was a fairly transparent attempt to re-litigate primary custody of the children.

Assignment of Error 4. The court did not err in finding the objection to relocation was made in bad faith. The court had already ruled against her major modification of the parenting plan. Lindsey and Rolfe did not ask the court to make Jonathan move back to Florida. The only relief they requested was a change in primary custody to her. This was, again, a transparent attempt to get around the denial of adequate cause, and to re-litigate the Florida divorce. The “relocation” objection was not an attempt to deal with the actual relocation to Colorado at all.

Assignment of Error 5. The court did not err in finding that Lindsey and Rolfe’s objection was not well grounded in fact, and was not warranted by existing law or a good faith argument. The relocation to Colorado did not affect the long distance Florida parenting plan one iota; in fact, it made it easier for Lindsey Philpott to see the children. Again, her major modification had been denied; yet she spent the entire trial arguing that she should have custody. There was no attempt to deal with a parenting plan in Colorado; and she did not want the children to go back to Florida.

Assignment of Error 6. The trial court did not err by sanctioning Rhea Rolfe. Jonathan had asked for attorney fees from the beginning of the case. She and Lindsey were on notice this was an issue. CR 11 does not require any particular notice or due process; case law holds that there is sufficient notice when the opposing party asks for attorney fees under CR 11 at the beginning of the case.

Assignment of Error 7. The trial court erred in dismissing the original petition for lack of adequate cause. The court correctly found there was no substantial change in circumstances created by the move to Colorado, when Lindsey did not live in Florida. But as well, an Order Denying Adequate Cause is a final order with respect to a major modification. That order was not appealed and is res judicata. Orders not timely appealed may not be used as errors in later appeals; the time to appeal that decision was 30 days after Judge Robinson entered the order, not now.

III. STATEMENT OF THE CASE – BACKGROUND

While much of Appellant's statement of the case is accurate, Ms. Rolfe ignores most of the actual evidence in the case.

a. The Florida Divorce Is Improperly Argued Where The Trial Court Did Not Consider It. As an initial matter, we object to the lengthy

recitation of the original divorce and the Florida trial. Here, as at trial, Rolfe and Lindsey want very badly to relitigate the divorce. But the Florida decision was not appealed, and the Findings and Decree are verities on appeal. Roller v. Dep't of Labor & Indus., 128 Wash.App. 922, 927, 117 P.3d 385 (2005); Malang v. Dep't of Labor & Indus., 139 Wash.App. 677, 683–84, 162 P.3d 450 (2007). Washington courts had a responsibility to enforce the foreign decree. Tostado v. Tostado, 137 Wash.App. 136, 144, 151 P.23d 1060 (2007). The Florida Decree acts as collateral estoppel with respect to the facts in the relocation case.

The trial court did not allow any testimony with respect to the Florida divorce or trial. That was not raised as an error here, and we object to Appellant (once again) trying to present it.

b. Jonathan's And the Children's Situation Was Much Better in Colorado. After the divorce trial, the children came to stay with him in June 2013, after school let out in Washington. Lindsey never appealed the Florida decision.

After the move to Florida, she never once visited the children. June 3 RP at 32-39. She had not been to Florida since 2012. June 3 RP at 32-39. She testified that she would move to Florida only if the court ordered the

children to return there. June 3 RP at 32-39. She had no ties to Florida.

June 3 RP at 32-39.

Jonathan's living situation was poor. His job was precarious. May 28 RP at 78. He and the children lived in a small 2 bedroom apartment. May 28 RP at 78, Trial Exhibits 110, 111. He had to use friends for daycare. May 28 RP at 80. Lindsey was not paying any child support or helping to pay any child-related expenses. May 28 RP at 76, 81. (The Florida court had reserved the issue of child support.)

Lindsey claimed – and claims here – that Jonathan was cutting her off from the children, in violation of the Florida order. In fact, the evidence showed the children called their mother almost daily, both while they were in Florida and once they got to Colorado. May 28 RP at 86-102; Trial Exhibits 69, 198.

In August 2013, he lost his job. May 28 RP at 104. He had enough money to either pay rent, or drive home to Colorado. May 28 RP at 104-105 He chose to go home to his parents' house. May 28 RP at 104-106. There was no time to formally notify Lindsey. She had a Protection Order against Jonathan and he could not contact her directly. He had their daughter call and tell her when they were on the road. May 28 RP at 110-112. The children talked to their mother daily, for up to 45 minutes a day,

while they were on the road to their grandparent's house in Colorado. May 28 RP at 110-117, Trial Exhibit 128.

Lindsey initially claimed – in her ex parte motion and declaration – that she did not know where they were living in Colorado, and Jonathan was hiding the children from her. CP at 110. In fact, the children talked to her daily while they were on the road, for between 15 and 45 minutes at a time. RP at 110-117, Ex. 109. 59, 69. The children called and talked to her when they were enrolled in school. June 3 RP at 54-58, 64-65. It was impossible to believe that she did not ask them where they were living, how Grandma and Grandpa were doing, or going to school.

Once he got to Colorado, his and the children's situation was substantially better. He had far fewer financial worries. May 28 RP at 59. There was no rent payment. The children had a house and their own bedrooms. May 30 RP at 58. They were right around the corner from their school. May 28 RP at 59; RP at 59. They spent time with friends and family, at cabins in the mountains, and fishing, among other outdoors activities. May 30 RP at 35.

They made good friends in the neighborhood, May 28 RP at 59; RP at 125-127. Trial Exhibits 110-111. They had extended family: grandparents, great grandparents, aunts and uncles and cousins to spend

time with. RP at 190. Sunday afternoons, the children playing with their friends. RP at 195-196; May 30 RP at 35-37. They had many friends in the neighborhood that they played with. RP at 196-199; 200-202. May 30 RP at 35-37. Trial Exhibits 110-111.

Jonathan had made sure the children had relationships with both his and Lindsey's family. May 28 RP at 84. The kids regularly saw Lindsey's sister and played with her children (their cousins). May 28 RP at 84, 128. They frequently saw their great-grandmother, May 28 RP at 199, and Jonathan's mother made sure they did service projects for her. May 30 RP at 35-36. Lindsey's brother and his wife, Will and Shari, were a major part of their life. May 28 RP at 127, Trial Exhibit 111, 110.

They were being taught to help others. Their grandmother, Sandi Philpott, made sure of that. May 30 RP at 35-36. They had strong relations with both sides of the family. Lindsey's own sister, Bridget Ochs, watched the kids – with her own kids – weekly. May 28 RP at 84, June 2 RP at 85-87, 96-98. Trial Exhibits 110-111. (As an indicator of Lindsey's and Rolfe's desire to create litigation, Lindsey had actually filed a contempt motion, asking that Jonathan be held in contempt, for not getting her approval for Bridget – her own sister – to watch the kids during the day. May 28 RP at 86. That count of contempt had been denied. Trial Ex. 58.

They spent Sundays and afternoons playing with their friends. May 28 RP at 125-126. The daughter's best friend, Hailey, lived across their back yard. May 28 RP at 125-126. They had birthday and other parties, May 28 RP at 126, 135, 197-198, Trial Exhibits 110-111. The children had a normal, happy childhood going on.

They were doing well in school. Their report cards showed they were not having problems and were getting good grades. Trial Ex. 53.

Lindsey also claimed that the entire family in Colorado was a hotbed of sexually abusive, physically abusive, religious people. May 30 RP at 9; June 3 RP at 78-79.

In fact, the household was not terribly religious. Jonathan's father, Lynn Philpott, went to a different church than Jonathan's sister. May 28 RP at 141. Jonathan and the children went to church only once a week at most, and sometimes not even that. May 28 RP at 130, 142. The household did not have daily scripture studies, May 28 RP at 144. They didn't even say grace before dinner every day. May 28 RP at 144. None of the household went to church during the week. May 28 RP at 143. Jonathan read them books such as "Captain Underpants" and "Dork Diaries" for bedtime. May 28 RP at 138. There were no guns in the house. May 28 RP at 144.

There was little corporal punishment at all. May 30 RP at 11. May 28 RP at 149-151. May 28 RP at 203-204. There was no evidence that the children were abused in any way.

While Jonathan's sister and brother in law "witnessed" to others, the rest of the family did not, May 28 RP at 148-149, and the children did not go, May 28 RP at 194. Jonathan's sister, Christine Bauer, testified that her husband was the head of the household, May 28 RP at 210, but they both agreed this was a partnership, a team, and she testified he didn't make decisions without her approval. May 28 RP at 210. The children were doing well in school, and were performing at grade level. Trial Exhibit 47. The photos and videos showed happy, well-adjusted children surrounded by an extensive and loving family.

His new home in Colorado was around the corner from the kid's school. May 28 RP at 59. Lindsey knew precisely where the school was. June 3 RP at 57-58. She agreed that during and after the children moved to Colorado she talked to them daily. June 3 RP at 55-58. She had lived with the Philpotts herself, and knew exactly where their elementary school was. June 3 RP at 59-60.

c. Ms. Wright Did Not Object to The Move to Colorado.

Lindsey had no real objection to Jonathan moving to Colorado; this was merely a pretext to seek a change of custody.

By August 2013. Lindsey still had her attorney in Florida. June 3 RP at 33-34. When Lindsey found out they were moving, she never consulted her attorney in Florida. Jonathan never got any queries from Lindsey's Florida attorney. May 28 RP at 121. She never tried to file an objection to the relocation in Florida. May 28 RP at 121. Instead, she called the police, to see if he had violated the DVPO by moving closer, May 28 RP at 91-92, and then almost immediately started working with her Washington attorney, Rhea Rolfe, to use the move as a basis to change custody. May 28 RP at 121; Trial Exhibit 98. Rolfe's billing records show that almost immediately they began planning on trying to change custody. May 28 RP at 121, Trial Exhibit 98.

From that point on, Ms. Rolfe and Lindsey worked to get the kids. Lindsey sought and obtained an ex parte restraining order, claiming that Jonathan had threatened homicide, CP at 110; she did not know where the children were living or going to school; and he would hide them from her. CP at 110. In fact, she talked to the children daily during the trip, June 3

RP at 53-54, and the children had told her they would be living with Grandma and Grandpa.

Cole Gross testified that from the beginning, when they found out Jonathan had moved to Colorado, he and Lindsey worked with Ms. Rolfe to get the kids to Washington and modify the parenting plan. June 2 RP at 5-8; Trial Ex. 70. Cole Gross never testified that he or Lindsey had any intention of making the children move back to Florida; the entire intent of their action was to get custody of the children.

Rolfe and Lindsey continually attempted to get in evidence that was, arguably, relevant to a major modification, but not to a relocation. She called a counselor Lindsey had hired to talk to the children, Rochelle Long, and asked to testify about how the children felt about living with their father. June 2 RP at 27-29. The court warned Rolfe – again – that this case was about relocation, not about sidestepping the denial of adequate cause. June 2 RP at 28-29; 50.

In her own client’s testimony, Rolfe attempted to re-litigate the Florida divorce. June 2 RP at 71-72.

d. The Move to Colorado Was Not A “Significant Change in Circumstances”.

Initially, Lindsey did not formally object to the relocation to Colorado. She made no attempt to file anything in Florida. Instead, she filed for a major modification in Washington. This was clearly because she wanted the children. Her own Petition alleged that the move to Colorado was a “significant change of circumstances”, and the environment was detrimental to the children. CP at 88.

This choice of pleading was not some kind of mystery, as Ms. Rolfe now claims. Her Petition went into some length in laying out why the move was a substantial change in the children’s circumstances. CP at 88. She argued this position in every motion until the court denied adequate cause. She never tried to file an objection to the relocation until the court denied adequate cause, which of course was well after the relocation had occurred. Even then, she did not ask the court to restrain the relocation; her only request for relief was a change in primary custody to Lindsey.

But it was clear from the beginning that the move was not either a substantial change in circumstances or detrimental to the children. Moving to a better, more stable home, with better finances, with better care for the children, where the children had a grandmother for a daycare provider, a

home they came home to from school every day, and a wide circle of friends and family, is hardly a “detriment” to the children.

e. Jonathan’s Criminal Plea Did Not Constitute a “Change in Circumstances” or Form a Basis for An Automatic Change in Custody. The criminal charges stemmed from a series of text messages he had sent Lindsey back in 2011, when they had separated. May 28 RP at 63 - 65. Those were the basis for the DVPO, which he had agreed to. Trial Exhibit 103, May 28 RP at 63 - 65. He had never denied sending the text messages. Those were in front of the court in the Washington DVPO, and were dealt with specifically in the Florida divorce. Trial Exhibit 105. The criminal trial had been stayed by agreement until after the Florida divorce. Jonathan had always disputed whether those text messages constituted a crime. May 28 RP at 64-65. Finally, he pled guilty, to get the case resolved and to get on with life. May 28 RP at 64-65. But the underlying actions had already been raised by Lindsey in the Florida trial; evaluated by the Florida parenting evaluator, Trial Exhibit 105, and the Florida court clearly felt Lindsey had behaved much worse. Pleading guilty was not a “new” act of domestic violence; it was a resolution of an existing case over a set of actions that had already been considered.

f. Throughout the Trial, Rolfe’s Entire Case Was An Attempt To Re-litigate the Florida case and, Despite the Denial of Adequate Cause, Argue a Major Modification of the Parenting Plan and Change Custody.

Nowhere in her case was there any request that the children should move back to Florida. Lindsey herself tapdanced around the question, June 3 RP at 29, 37-38. She had not been in Florida since January of 2012. Yet she had filed a Motion for Contempt against Jonathan, for not giving her the 4th of July, when she was living in Washington. Trial Ex. 125, June 3 RP at 30-32.) She had never told any court that she intended to move back to Florida. June 3 RP at 35-37. She was NOT asking the court to return the children to Florida, unless – and only unless – the court gave the children back to her. June 3 RP at 37. She was not going to move to Colorado, to be closer to the children. June 3 RP at 38-39. It was very, very clear that the only thing she wanted was a change in custody, and for Jonathan to have greatly restricted visitation. June 3 RP at 39-40. The “objection to relocation” was just a pretext, a subterfuge to allow her to get the modification into court.

She tried to introduce a number of exhibits whose sole purpose was to either re-litigate the divorce, or show the Colorado environment was

detrimental to the children. During the trial, she actually filed a new Petition for Modification in the case. June 3 RP at 23, CP at 1072. The new Petition was filed on May 29, in the middle of trial.

Even in her closing arguments, she argued the Florida court had been incorrect, June 3 RP at 107, and said that Lindsey's attorney in Florida had filed a CR 60(b) motion to set aside the original Florida divorce. While she was making closing arguments, she was simultaneously filing a Florida motion, and had filed and served a new Petition for Modification in King County. **This was an incredible amount of litigation.**

IV. ARGUMENT

a. S tandard of Review. Generally, a trial court's rulings in dissolutions are reviewed for abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 975, 801, 854 P.2d 629 (1993). A trial court abuses its discretion when its decision is arbitrary, manifestly unreasonable, or based upon untenable grounds. A twood v. Shanks, 91 Wn. App. 404, 409, 958 P.2d 332 (1998). A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard. In re Marriage of Fiorito, 112 Wn. App. 657, 664, 50 P.3d 298 (2002). It is based on untenable grounds if the factual findings are unsupported by the

record. Fiorito, 112 Wn. App. at 664. A trial court necessarily abuses its discretion if its ruling is based upon an erroneous view of the law. Atwood, 91 Wn. App. at 409.

Undisputed facts are verities on appeal. Roller v. Dep't of Labor & Indus., 128 Wash.App. 922, 927, 117 P.3d 385 (2005); Malang v. Dep't of Labor & Indus., 139 Wash.App. 677, 683–84, 162 P.3d 450 (2007).

b. Ms. Rolfe Throughout The Case Consistently Made Arguments Not Supported by Law.

An example is her argument that the Florida Relocation Law was a basis for a change of custody. Lindsey argued – at length, originally – that Jonathan had violated the Florida Relocation Statute, and the Washington court should change custody to her for that basis alone. She argued that in her Objection to Relocation as well. That is simply not supported by the Florida statute or the case law.

The Florida Statute, FSA § 61.13001(3)(e), states:

(e) Relocating the child without complying with the requirements of this subsection subjects the party in violation to contempt and other proceedings to compel the return of the child and may be taken into account by the court in any initial or postjudgment action seeking a determination or modification of the parenting plan or the access or time-sharing schedule as:

1. A factor in making a determination regarding the relocation of a child.

2. A factor in determining whether the parenting plan or the access or time-sharing schedule should be modified.
3. A basis for ordering the temporary or permanent return of the child.

FSA § 61.13001(3)(e). (At Appendix 1.)

The case law in Florida – similar to Washington – does not support an automatic change in custody either. In Edgar v. Firuta, App. 100 So.3rd 255, 2012 Fla. App. LEXIS 19146; 37 Fla. L. Weekly D 2596 (2012), (at Appendix 1), the Florida court made it clear that the trial court could not modify a parenting plan and award sole parental responsibility to one parent, as a sanction for the mother fleeing the state in violation of a court order, without determining whether the change was in the children’s best interests. (Which is much the same test used in Washington.) And in that case, both the parents actually lived in Florida.

Similarly, in this appeal, Ms. Rolfe argues the Florida decision was wrong; and then assigns error to the Washington court’s denial of adequate cause, when that denial was never appealed.

c. Ms. Rolfe Throughout The Case Insisted on Relitigating the Florida Divorce.

The case is replete with examples of Ms. Rolfe constantly trying to re-litigate the Florida divorce. She told the court that the court had to consider how the Florida court was wrong. May 28 RP at 10-11. She

told the court that she wanted the court to essentially reconsider the Florida case and change custody.

Rolfe wanted to re-litigate virtually everything in the case. She threatened to renew her contempt motion that she had lost just months earlier, on the same grounds as she had originally. May 28 RP at 8. She told the court she was filing a 60(b) motion to vacate the adequate cause denial. May 28 RP at 39, 52. During the case, Lindsey filed a 60(b) motion in Florida to vacate the divorce. CP at 1195.

Midway through the case, she actually filed and served a new Petition for Modification – on the same grounds as her original Petition was – and asked the court to consolidate the two cases, continue the trial, and appoint a GAL. May 28 RP at 52. (Her motion was denied and the new Petition ultimately dismissed.) She insisted on bringing in witnesses and evidence about what had happened prior to the divorce trial. May 28 RP at 10, 35, 39, 41, 54,

d. Ms. Rolfe Filed For A Major Modification Because That Was What She Wanted.

Filing for a major modification of the Parenting Plan, instead of filing an Objection to Relocation, was purposeful. It was not a mistake of one form over the other. In the adequate cause, she argued strongly that the combination of the move from Florida, plus the various parenting issues she complained about, constituted a substantial change in circumstances. December 13, 2013 RP at 5.

The court should note that the “facts” she claimed in December, were a substantial change in circumstances, were the exact same “facts” that she presented in trial, as a basis to modify the parenting plan under the Relocation statute. The only change was a new claim that his criminal plea constituted a substantial change in circumstances.

Filing for a major modification was on purpose, because objecting to the relocation, was only available to Rolfe and Lindsey in Florida, and at all costs she did not want to file in Florida. She had just lost the divorce case there, in spectacular fashion. Her remedy in Florida, at best, would have meant Jonathan would move back to Florida; and her actual intent was to get custody, **no matter what the cost in litigation.**

At the time of the relocation, in mid-August, **there was no Washington case.** The prior Washington divorce had been dismissed two years earlier. The only divorce case was in Florida, and if she wanted to object to relocation, or claim he had failed to give proper notice, she had to file the objection in Florida. She had no jurisdiction in Washington to argue the objection: Washington – at the time, at the beginning of August 2013 – did not have UCCJEA jurisdiction. The Relocation Statute presumes a Washington order governing notice, and that did not exist in mid-August 2014.

Given that she had lost the divorce in Florida, and above all did not want the children to move back to Florida, she could not file it in Florida and hope to change custody.

Her best chance to seize the children, and argue the Florida decision was wrong, was to argue it in Washington. So she registered the Florida order in Washington; and then proceeded to file for a major modification. The entire object was to get around the Florida Decree, at that point not even a year old, and get the children. This was in bad faith.

At the adequate cause hearing, Judge Robinson specifically noted that violation of the relocation statute, in and of itself, did not constitute adequate cause. Dec 13 RP at 37. She found there was no change in circumstances. Dec 13 RP at 38. She then allowed Rolfe to amend the Petition to an Objection to Relocation. Dec 13 RP at 38. There is no indication – none – that she contemplated that allowed a change in custody. There is no evidence that she was concerned about the children’s life in Colorado at all. Dec 13 RP at 38. It is impossible to believe that Judge Robinson denied adequate cause; but intended Lindsey and Rolfe to pursue the exact same remedy, under a different name, than she had just denied.

e. The Trial Court Properly Considered Only Residency in Colorado or Florida.

Rolfe claims the court improperly found that the relocation trial was only concerned with residency of the children in Washington or Florida, and did not consider her argument the court should change custody.

The court was correct. There is no case law that supports the argument that an Objection to Relocation, in and of itself, allows the court to change primary custody without an adequate cause finding.

Appellants cite two cases: Marriage of Raskob, 183 Wash.App. 503, 334 P.3d 30 (2014), and McDevitt v. Davis, 181 Wash.App. 765, 326 P.3d 865 (2014), for the proposition that a relocation notice is sufficient grounds for a change in custody. Neither case supports her argument.

Marriage of Raskob is a case where the mother relocated without notice to a residence more than 30 minutes away from the father, triggering an agreed clause in their parenting plan.

The court found that a hearing to determine adequate cause shall not be required so long as the request for relocation of the child is being pursued. RCW 26.09.260(6).

That is quite different from this case, where there was no Objection to Relocation filed by Ms. Rolfe. She filed under RCW 26.09.260, which is not the Relocation Statute. By the time she actually filed an Objection, the relocation was no longer being sought; it was over.

Lindsey herself caused the issue. At the time Jonathan moved to Colorado, in the beginning of August 2013, she did not file an Objection in Florida, which at the time had jurisdiction. There was no case in Washington; no Washington parenting plan; and hence no objection could have been filed in Washington. Since she chose NOT to file in Florida, she waived her ability to object to a relocation that had occurred under another's state's jurisdiction.

McDevitt v. Davis is a case where the wife relocated to Hawaii, without any objection. McDevitt found it was appropriate for the court to enter a parenting plan which reflected the changed realities of the situation, and entered a plan which gave the father more time.

McDevitt is quite different from this case. The wife had moved closer to the husband; she was not trying to change custody.

Both of these cases are distinguishable from the present case. But they are also irrelevant: neither Raskob nor McDevitt deal with cases where adequate cause for a change had just been denied.

f. The Denial Of Adequate Cause Is Res Judicata for A Major Modification.

An adequate cause hearing is similar to a summary judgment motion, with respect to modification of a parenting plan. Roorda v. Roorda, 25 Wash.App. 849, 853, 611 P.2d 794 (1980).

The presumption in an adequate cause is that the parenting plan will not be modified; to proceed with the case, the court must find
REPLY BRIEF OF RESPONDENT 22

adequate cause. In an adequate cause motion, the quantum of evidence required to proceed is more than that required to win in a summary judgment motion. Roorda held that adequate cause required “something more than prima facie allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change. Roorda at 852. Thus an adequate cause hearing is even more stringent a standard than a standard summary judgment hearing.

A denial of adequate cause, like a successful summary judgment motion, is a final judgment and is appealable. It is by definition res judicata as to those issues actually adjudicated or which might have been adjudicated. In re Estate of Black , 116 Wash.App. 476, 487, 66 P.3d 670, 676 (Wash.App. Div. 3, 2003).

The issue in the adequate cause hearing was Lindsey’s major modification: changing primary custody to Lindsey, and putting 26.09.191 restrictions on Jonathan. This is the same issue that Lindsey and Rolfe sought in their “objection” petition. The denial of adequate cause was not appealed. The denial was and is res judicata as to that issue.

As well, the denial of adequate cause, with respect to a major modification, is the law of the case. Decisions of law that are not excepted or assigned error, become the law of the case. Cresap v. Pacific Inland Nav. Co. 2 Wash.App. 548, 556-557, 469 P.2d 950, 955 - 956 (Wash.App. 1970). The finding, in the denial of adequate cause,

that there are no grounds for a major modification, is the law of this case.

Under either res judicata or law of the case, the issue of a major modification was not part of the modification that the court had the ability to decide. The court was correct in that it could only consider the residential schedule with the father in Colorado or Florida.

The use, later on, of subsection (6) is irrelevant. The question what pleading was used is not the question. The question is, what was the issue? The issue here, was whether the court should modify the parenting plan, and change custody to the mother. That issue was decided in the adequate cause hearing. It was denied. Filing an “Amended Objection”, does not change the issue.

Ms. Rolfe completely ignored the problem, and argued that somehow, magically, the Objection allowed her to ignore the previous order and have another bite of the apple. There was no argument, at all, as to why merely refiling a claim, under an Objection, made any difference to the fact the issue had already been decided. She insisted on going through the entire multi-day trial, when there was no basis to her claims. This was in violation of CR 11.

g. Even If The Court Had Allowed The Modification Under RCW 26.09.260(6), The Parenting Plan Would Not have Been Modified.

Rolfe argues that the court erred in not allowing her a second bite of the apple. Even if that was correct, there was no rational basis to modify the parenting plan.

It is true that RCW 26.09.260(6) does not include a standard for the trial court to apply.

However, other sections do give guidance. Subsection 1 and 2 state:

Subsections (1) and (2)(c) state:

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

*4 (2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

...

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child....

RCW 26.09.260(1) and (2).

The question here is whether Subsection (6) displaces one or both of these.

Under subsection (6), the objecting parent may move to modify the parenting plan “without a showing of adequate cause other than the proposed relocation itself.” So that displaces subsection (1).

But it does not replace subsection (2). When a court gets to (6)'s modification standards, the court must return to the second standard, and must find that "the modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1).

In applying the best interest standard, under RCW 26.090.260(2)(c), the court "shall retain the residential schedule...unless the child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." RCW 26.09.260(2), (c).

In this case, the father's environment in Florida, by definition, was a suitable environment for the children. That was determined by the Florida court, and was a verity. To win, Rolfe had to show the environment in Colorado was detrimental to the children's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the children.

Logically, she had to show that (1) the Colorado home was detrimental to the children; and (2) that it was worse than the Florida home.

This was impossible. The testimony was overwhelming: their Colorado home was not only good for them; it was far superior to

Florida. The physical home was better; there was no financial stress; there was no worry about not paying rent or buying food. The father could rely on Grandma and their aunt to provide daycare, at no cost to him or Lindsey. They had numerous close friends and extended family all around them, unlike Florida. They went camping and fishing. They were doing well in school. The photos and video were irrefutable. The move to Colorado was clearly in their best interest. **There was no basis to modify the parenting plan.**

h. An Award of Attorney Fees Was Appropriate Either Under Intransigence or CR 11.

An award of CR 11 sanctions is reviewed under the abuse of discretion. Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). The range of choices of sanctions is a question of law and the judge abuses their discretion if the discretionary decision is contrary to law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). But the appellate review is not de novo. The court can only reverse a trial court's sanction decisions if the decision is manifestly unreasonable or based on untenable grounds. Wash. State Physicians Ins. Exch. v. Fisons Corp, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993).

CR 11 deals with two types of filings: baseless filings and filings made for improper purposes. MacDonald v. Korum Ford, 80 Wash.App. 877, 883, 912 P.2d 1052 (1996). This case is, we feel, is both a baseless filing and a filing made for improper purposes.

A filing is “ ‘baseless’ ” when it is “ ‘(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.’ ” MacDonald, 80 Wash.App. at 883–84, 912 P.2d 1052 (quoting Hicks v. Edwards, 75 Wash.App. 156, 163, 876 P.2d 953 (1994), *review denied*, 125 Wash.2d 1015, 890 P.2d 20 (1995)).

In this case, there was no basis in law for Rolfe’s insistence on having a case over a five day period, to argue a claim which had already been decided. Rolfe continued to argue the same position as she had in the adequate cause hearing. Her Objection to Relocation – filed on 12/16/13 – stated “This is a petition for modification...” CP at 413. . There was no case law cited as to why res judicata did not apply.

In this case, there is no evidence that Rolfe actually researched filing the amended Petition. Her Amended “Objection” was almost exactly the same as her original Petition for Modification. CP at 413.

There is no evidence that Rolfe bothered to look at the case law either, or cared about it. The doctrines of res judicata and law of the case obviously apply; she completely ignored those. She simply pretended that they did not exist.

There is also no evidence that she did any factual investigation at all. Her ex parte motion claimed that Jonathan was, essentially, going to hide the children, when in fact – as Lindsey knew – they were living at the grandparents’ house. She claimed Jonathan was cutting them off

from their mother; when in fact the children talked to their mother almost daily. She claimed that Jonathan had the children living in an abusive religious cult; when in fact that was not remotely true. She claimed Jonathan had threatened to kill people; when if she had actually have read the Florida trial transcripts, she would have known that was false.

But they were also improper. The court found in its oral ruling that Rolfe had pursued the case to increase the cost of litigation, and to re-litigate the Florida trial. Both of these are improper reasons for taking a case to trial.

i. The Court's Decision Comported with Due Process.

We agree that CR 11 motions must comport with due process. Bryant v. Joseph Tree Inc., 119 Wash.2d 2109, 829 P.2d 1099 (1992); *recon.den.* 1992. But due process does not require any specific procedure. It only requires that a party receive notice of possible proceedings, and an opportunity to present its position.

Courts have held that requesting fees in an initial filing is sufficient notice. Stiles v. Kearney, 168 Wash. App. 250, 264, 277 P.3d 9 (2012). Similarly, the court in Biggs v. Vail, 124 Wash.2d 193, 199, 876 P.2d 448 (1994), held that the fact that sanctions are contemplated are sufficient for

the later imposition of CR 11 sanctions. Biggs at 199, citing Lepucki v. Van Wormer, 765 F.2d 86, 88 (7th Cir.), *cert. denied sub nom. Hyde v. Van Wormer*, 474 U.S. 827, 106 S.Ct. 86, 88 L.Ed.2d 71 (1985). See also Shrock v. Altru Nurses Registry, 810 F.2d 658 (7th Cir.1987).

Rolfe had notice Jonathan was seeking fees, if not for CR 11 specifically, certainly attorney fees for intransigence. May 28 RP at 34. He had asked for attorney fees in his trial brief. CP at 920. Rolfe herself argued that she deserved attorney fees for intransigence. May 30 RP at 40. It is impossible to believe that Ms. Rolfe had no warning.

Rolfe had notice of the court's CR 11 decision. The court handed down its oral ruling, and awarded attorney fees. Rolfe responded to the imposition with a Declaration arguing why the court should not impose fees. CP at 1181.

V. REQUEST FOR FEES

Jonathan Philpott requests an award of attorney fees, under RAP 18.1(d), CR 11, and 26.09.140.

Fees are available at the appellate level if they are appropriate under the statute applicable to the underlying case. The court may also award fees to the substantially prevailing party. RAP 14.2.

As well: “As an independent ground we may award attorney fees and costs based on intransigence of a party, demonstrated by litigious behavior, bringing excessive motions, or discovery abuses.” In re Marriage of Wallace, 111 Wn.App. 697, 710, 45 P.3d 1131 (2002). If intransigence is established, the court need not consider the parties' resources. *Id.* A party's intransigence also authorizes an award of attorney fees on appeal. In re Marriage of Mattson, 95 Wn.App. 592, 606, 976 P.2d 157 (1999).

In this case, we argue that Mr. Philpott should be awarded fees under CR 11. The court clearly found that the entire trial, after the denial of adequate cause, was frivolous, given that she only wanted the change of custody. But they should also be awarded for intransigence, and under RAP 14.2.

We also argue fees under RCW 26.09.140. Mr. Philpott has no assets or income to pay fees. This appeal is brought by Rhea Rolfe, who arguably has funds to pay attorney fees. The court found that Rolfe and Wright are jointly and severally responsible for the abusive pattern of litigation, and therefore both of their financial ability to pay fees should be a factor in the “need and ability to pay” analysis.

Ms. Rolfe may argue that RCW 26.09.140 only applies to parties. Yet the court’s findings were that Ms. Rolfe was integrally involved in

planning and carrying out the litigation that was sanctionable. She is the party appealing the decision. She essentially stands in the shoes of Lindsey Wright. As such, the fee shifting provisions of RCW 26.09.140 should apply to her as well.

We do not know her financial position. We do know that she has been able to post a cash bond in the registry of the court. She arguably has the ability to pay fees.

VI. CONCLUSION

At the end of the day, this is a case where the mother decided, in partnership with Rhea Rolfe, to at any cost to the court system or to the father, to get the children back.

Lindsey did not think up this plan. Rolfe's billing statements show she was actively planning the Washington litigation from almost the day Jonathan drove to Colorado. She drafted and filed pleadings which were factually incorrect initially. She filed a motion for contempt, on mostly frivolous grounds. She argued and lost on adequate cause.

Rolfe's response to that, was not to appeal, but to file the exact same action over again, under a slightly different procedural subsection, with the exact same claims; the exact same issues; and the exact same claim for relief.

Then – when the trial court indicated she was wrong, her response was to double down: she filed a new Petition for Modification AND had Lindsey file a motion to set aside the Florida Decree – in the middle of trial.

There is no doubt that Rolfe was the driving force behind this extraordinary litigation. She told the court she would do it. She thought out the plan; wrote the briefs; filed the motions and the various Petitions. All of this was without any basis in case law, and was designed to drive the cost of litigation so high Jonathan Philpott would have to give in.

This is clearly in bad faith and a violation of CR 11.

We would ask the court to deny the appeal and award the father attorney fees under RAP 18.1.

RESPECTFULLY SUBMITTED this 5th day of February, 2015.



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Appendix 1

Philpott v. Wright

FSA § 61.13001(3)(e).



LexisNexis (R) Florida Annotated Statutes
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*** Statutes and Constitution are updated with all 2014 legislation, including 2014 Special Session A ***

Title VI. Civil Practice and Procedure. (Chs. 45-88).
Chapter 61. Dissolution of Marriage; Support; Time-sharing.
Part I. General Provisions.

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Stat. § 61.13001 (2014)

§ 61.13001. Parental relocation with a child.

(1) Definitions. -- As used in this section, the term:

(a) "Child" means any person who is under the jurisdiction of a state court pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act or is the subject of any order granting to a parent or other person any right to time-sharing, residential care, kinship, or custody, as provided under state law.

(b) "Court" means the circuit court in an original proceeding which has proper venue and jurisdiction in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act, the circuit court in the county in which either parent and the child reside, or the circuit court in which the original action was adjudicated.

(c) "Other person" means an individual who is not the parent, but with whom the child resides pursuant to court order, or who has the right of access to, time-sharing with, or visitation with the child.

(d) "Parent" means any person so named by court order or express written agreement who is subject to court enforcement or a person reflected as a parent on a birth certificate and who is entitled to access to or time-sharing with the child.

(e) "Relocation" means a change in the location of the principal residence of a parent or other person from his or her principal place of residence at the time of the last order establishing or modifying time-sharing, or at the time of filing the pending action to establish or modify time-sharing. The change of location must be at least 50 miles from that residence, and for at least 60 consecutive days not including a temporary absence from the principal residence for purposes of vacation, education, or the provision of health care for the child.

(2) Relocation by agreement.

(a) If the parents and every other person entitled to access to or time-sharing with the child agree to the relocation of the child, they may satisfy the requirements of this section by signing a written agreement that:

1. Reflects consent to the relocation;
2. Defines an access or time-sharing schedule for the nonrelocating parent and any other persons who are entitled to access or time-sharing; and
3. Describes, if necessary, any transportation arrangements related to access or time-sharing.

(b) If there is an existing cause of action, judgment, or decree of record pertaining to the child's residence or a time-sharing schedule, the parties shall seek ratification of the agreement by court order without the necessity of an evidentiary hearing unless a hearing is requested, in writing, by one or more of the parties to the agreement within 10 days after the date the agreement is filed with the court. If a hearing is not timely requested, it shall be presumed that the relocation is in the best interest of the child and the court may ratify the agreement without an evidentiary hearing.

(3) Petition to relocate. -- Unless an agreement has been entered as described in subsection (2), a parent or other person seeking relocation must file a petition to relocate and serve it upon the other parent, and every other person entitled to access to or time-sharing with the child. The pleadings must be in accordance with this section:

- (a)** The petition to relocate must be signed under oath or affirmation under penalty of perjury and include:
1. A description of the location of the intended new residence, including the state, city, and specific physical address, if known.
 2. The mailing address of the intended new residence, if not the same as the physical address, if known.
 3. The home telephone number of the intended new residence, if known.
 4. The date of the intended move or proposed relocation.
 5. A detailed statement of the specific reasons for the proposed relocation. If one of the reasons is based upon a job offer that has been reduced to writing, the written job offer must be attached to the petition.
 6. A proposal for the revised postrelocation schedule for access and time-sharing together with a proposal for the postrelocation transportation arrangements necessary to effectuate time-sharing with the child. Absent the existence of a current, valid order abating, terminating, or restricting access or time-sharing or other good cause predating the petition, failure to comply with this provision renders the petition to relocate legally insufficient.
 7. Substantially the following statement, in all capital letters and in the same size type, or larger, as the type in the remainder of the petition:

A RESPONSE TO THE PETITION OBJECTING TO RELOCATION MUST BE MADE IN WRITING, FILED WITH THE COURT, AND SERVED ON THE PARENT OR OTHER PERSON SEEKING TO RELOCATE WITHIN 20 DAYS AFTER SERVICE OF THIS PETITION TO RELOCATE. IF YOU FAIL TO TIMELY OBJECT TO THE RELOCATION, THE RELOCATION WILL BE ALLOWED, UNLESS IT IS NOT IN THE BEST INTERESTS OF THE CHILD, WITHOUT FURTHER NOTICE AND WITHOUT A HEARING.

(b) The petition to relocate must be served on the other parent and on every other person entitled to access to and time-sharing with the child. If there is a pending court action regarding the child, service of process may be according to court rule. Otherwise, service of process shall be according to chapters 48 and 49 or via certified mail, restricted delivery, return receipt requested.

(c) A parent or other person seeking to relocate has a continuing duty to provide current and updated information required by this section when that information becomes known.

(d) If the other parent and any other person entitled to access to or time-sharing with the child fails to timely file a response objecting to the petition to relocate, it is presumed that the relocation is in the best interest of the child and that the relocation should be allowed, and the court shall, absent good cause, enter an order specifying that the order is entered as a result of the failure to respond to the petition and adopting the access and time-sharing schedule and transportation arrangements contained in the petition. The order may be issued in an expedited manner without the necessity of an evidentiary hearing. If a response is timely filed, the parent or other person may not relocate, and must proceed to a temporary hearing or trial and obtain court permission to relocate.

(e) Relocating the child without complying with the requirements of this subsection subjects the party in violation to contempt and other proceedings to compel the return of the child and may be taken into account by the court in any initial or postjudgment action seeking a determination or modification of the parenting plan or the access or time-sharing schedule as:

1. A factor in making a determination regarding the relocation of a child.
2. A factor in determining whether the parenting plan or the access or time-sharing schedule should be modified.
3. A basis for ordering the temporary or permanent return of the child.
4. Sufficient cause to order the parent or other person seeking to relocate the child to pay reasonable expenses and attorney's fees incurred by the party objecting to the relocation.
5. Sufficient cause for the award of reasonable attorney's fees and costs, including interim travel expenses incident to access or time-sharing or securing the return of the child.

(4) Applicability of public records law. -- If the parent or other person seeking to relocate a child, or the child, is entitled to prevent disclosure of location information under a public records exemption, the court may enter any order necessary to modify the disclosure requirements of this section in compliance with the public records exemption.

(5) Objection to relocation. -- An answer objecting to a proposed relocation must be verified and include the specific factual basis supporting the reasons for seeking a prohibition of the relocation, including a statement of the amount of participation or involvement the objecting party currently has or has had in the life of the child.

(6) Temporary order.

(a) The court may grant a temporary order restraining the relocation of a child, order the return of the child, if a relocation has previously taken place, or order other appropriate remedial relief, if the court finds:

1. That the petition to relocate does not comply with subsection (3);
2. That the child has been relocated without a written agreement of the parties or without court approval; or
3. From an examination of the evidence presented at the preliminary hearing that there is a likelihood that upon final hearing the court will not approve the relocation of the child.

(b) The court may grant a temporary order permitting the relocation of the child pending final hearing, if the court finds:

1. That the petition to relocate was properly filed and is otherwise in compliance with subsection (3); and
2. From an examination of the evidence presented at the preliminary hearing, that there is a likelihood that on final hearing the court will approve the relocation of the child, which findings must be supported by the same factual

basis as would be necessary to support approving the relocation in a final judgment.

(c) If the court has issued a temporary order authorizing a party seeking to relocate or move a child before a final judgment is rendered, the court may not give any weight to the temporary relocation as a factor in reaching its final decision.

(d) If temporary relocation of a child is approved, the court may require the person relocating the child to provide reasonable security, financial or otherwise, and guarantee that the court-ordered contact with the child will not be interrupted or interfered with by the relocating party.

(7) No presumption; factors to determine contested relocation. -- A presumption in favor of or against a request to relocate with the child does not arise if a parent or other person seeks to relocate and the move will materially affect the current schedule of contact, access, and time-sharing with the nonrelocating parent or other person. In reaching its decision regarding a proposed temporary or permanent relocation, the court shall evaluate all of the following:

(a) The nature, quality, extent of involvement, and duration of the child's relationship with the parent or other person proposing to relocate with the child and with the nonrelocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life.

(b) The age and developmental stage of the child, the needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

(c) The feasibility of preserving the relationship between the nonrelocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful relationship between the child and the nonrelocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent or other person once he or she is out of the jurisdiction of the court.

(d) The child's preference, taking into consideration the age and maturity of the child.

(e) Whether the relocation will enhance the general quality of life for both the parent or other person seeking the relocation and the child, including, but not limited to, financial or emotional benefits or educational opportunities.

(f) The reasons each parent or other person is seeking or opposing the relocation.

(g) The current employment and economic circumstances of each parent or other person and whether the proposed relocation is necessary to improve the economic circumstances of the parent or other person seeking relocation of the child.

(h) That the relocation is sought in good faith and the extent to which the objecting parent has fulfilled his or her financial obligations to the parent or other person seeking relocation, including child support, spousal support, and marital property and marital debt obligations.

(i) The career and other opportunities available to the objecting parent or other person if the relocation occurs.

(j) A history of substance abuse or domestic violence as defined in *s. 741.28* or which meets the criteria of *s. 39.806(1)(d)* by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(k) Any other factor affecting the best interest of the child or as set forth in *s. 61.13*.

(8) Burden of proof. -- The parent or other person wishing to relocate has the burden of proving by a

preponderance of the evidence that relocation is in the best interest of the child. If that burden of proof is met, the burden shifts to the nonrelocating parent or other person to show by a preponderance of the evidence that the proposed relocation is not in the best interest of the child.

(9) Order regarding relocation. -- If relocation is approved:

(a) The court may, in its discretion, order contact with the nonrelocating parent or other person, including access, time-sharing, telephone, Internet, webcam, and other arrangements sufficient to ensure that the child has frequent, continuing, and meaningful contact with the nonrelocating parent or other person, if contact is financially affordable and in the best interest of the child.

(b) If applicable, the court shall specify how the transportation costs are to be allocated between the parents and other persons entitled to contact, access, and time-sharing and may adjust the child support award, as appropriate, considering the costs of transportation and the respective net incomes of the parents in accordance with the state child support guidelines schedule.

(10) Priority for hearing or trial. -- An evidentiary hearing or nonjury trial on a pleading seeking temporary or permanent relief filed under this section shall be accorded priority on the court's calendar. If a motion seeking a temporary relocation is filed, absent good cause, the hearing must occur no later than 30 days after the motion for a temporary relocation is filed. If a notice to set the matter for a nonjury trial is filed, absent good cause, the nonjury trial must occur no later than 90 days after the notice is filed.

(11) Applicability.

(a) This section applies:

1. To orders entered before October 1, 2009, if the existing order defining custody, primary residence, the parenting plan, time-sharing, or access to or with the child does not expressly govern the relocation of the child.

2. To an order, whether temporary or permanent, regarding the parenting plan, custody, primary residence, time-sharing, or access to the child entered on or after October 1, 2009.

3. To any relocation or proposed relocation, whether permanent or temporary, of a child during any proceeding pending on October 1, 2009, wherein the parenting plan, custody, primary residence, time-sharing, or access to the child is an issue.

(b) To the extent that a provision of this section conflicts with an order existing on October 1, 2009, this section does not apply to the terms of that order which expressly govern relocation of the child or a change in the principal residence address of a parent or other person.

HISTORY: S. 2, ch. 2006-245, eff. October 1, 2006; s. 9, ch. 2008-61, eff. Oct. 1, 2008; s. 5, ch. 2009-21, eff. July 7, 2009; s. 4, ch. 2009-180, eff. Oct. 1, 2009.

NOTES:

Revisor's note.

Section 9, ch. 2008-61, Laws of Florida, amended s. 61.13001 without publishing existing subsection (8). Section 61.13001 was reenacted by s. 5, ch. 2009-21 to confirm that the omission was not intended.

Amendments.

The 2008 amendment by s. 9, ch. 2008-61, effective October 1, 2008, in (1)(b), inserted "kinship"; deleted former 1(f) and (g), defining "Person entitled to be the primary residential parent of a child" and "Principal residence of a child," respectively, and redesignated the remaining paragraph accordingly; and, throughout the section, substituted references to parents or either parents for references to primary residential parent and other parent, "time-sharing" for "visitation," deleted references to principal or primary residence, substituted references to the parenting plan or time sharing schedule for references to the designation of the primary residential parent and visitation arrangements; in (5), substituted "must" for "shall" twice; and made stylistic changes throughout the section.

The 2009 amendment by s. 4, ch. 2009-180 rewrote the section.

Florida Statutes references.

Chapter 61. Dissolution of Marriage; Support; Time-Sharing, *F.S. § 61.125*. Parenting coordination.

Chapter 61. Dissolution of Marriage; Support; Time-Sharing, *F.S. § 61.13002*. Temporary time-sharing modification and child support modification due to military service.

LexisNexis (R) Notes:

CASE NOTES

1. While the trial court erred in applying *Fla. Stat. § 61.13001* to a mother's request to relocate the parties' child, because that provision applied to orders entered before October 1, 2009, if those orders did not expressly govern relocation of the child, this error did not deprive the trial court of jurisdiction; nor did the instant order have to be reversed because the trial court determined that the criteria set forth in § 61.13001 had been met, as that provision encompassed all of the requirements of the law previously governing relocation requests, *Fla. Stat. § 61.13(2)(d)*, and then some. However, the appellate court was unable to discern from either the order or from the record whether a substantial change in circumstances had occurred to justify modification, and reversal and remand were required for this reason. *Guizzardi v. Guizzardi*, 89 So. 3d 967, 2012 Fla. App. LEXIS 6837 (Fla. 3rd DCA 2012).

2. Because a trial court had authority under *Fla. Stat. § 61.516(2)* of the Uniform Child Custody Jurisdiction and Enforcement Act to modify a Georgia judgment of divorce, and because the trial court had discretion under *Fla. Stat. § 61.13001(7)* to do so, it properly granted the mother's request to relocate with the children to *Chicago*. *Norris v. Heckerman*, 972 So. 2d 1098, 2008 Fla. App. LEXIS 820 (Fla. 1st DCA 2008).

3. Order that a husband pay \$ 500 per month for his share of counseling expenses was not authorized under the provision authorizing a court approving a temporary relocation to require the person relocating the child to provide reasonable security, financial or otherwise, and guarantee that the court-ordered contact with the child not be interrupted or interfered with by the relocating party as counseling costs were not security; while such an order was within the court's discretion under *Fla. Stat. § 61.13*, the order here was improper as there was no evidence as to the cost of counseling. *Vazquez v. Vazquez-Robelleo*, 2014 Fla. App. LEXIS 18004 (Fla. 2nd DCA Nov. 5, 2014).

4. Trial court abused its discretion in granting a wife's motion to relocate to another state with the parties' minor child because the decision was not supported by competent substantial evidence regarding the wife's financial and housing situation, how the child's general quality of life would be improved, or how the substitute visitation schedule would foster a continuing meaningful relationship between the husband and the child; hence, the grant of the request for relocation by the court was reversible error. *Cecemski v. Cecemski*, 954 So. 2d 1227, 2007 Fla. App. LEXIS 5804 (Fla. 2nd DCA 2007).

5. Where a mother sought leave to relocate with her children, the court did not state that any substitute visitation plan had to duplicate current visitation, but that the father's close relationship with his daughters had to be preserved; by rejecting the plan that the mother put forth to retain the closeness of that relationship, the trial court did not misapply the factor regarding whether the move would be likely to improve the general quality of life for both the residential parent and the child, nor did it abuse its discretion in denying the mother's petition. *Alexander v. Alexander*, 2007 Fla. App. LEXIS 2789 (Fla. 4th DCA Feb. 28, 2007), dismissed, 2007 Fla. App. LEXIS 21688 (Fla. 4th DCA Apr. 26, 2007).

6. Final judgment in a dissolution of marriage proceeding which awarded one spouse primary residential custody of the parties' minor child and allowed permanent relocation to the United Kingdom of that spouse and the child was affirmed because sufficient evidence supported the trial court's decision that to once again relocate the minor child and require the child to acclimate to another new school and friends in Florida was not in the child's best interests. The spouse testified that the parties' child was performing well and had adjusted and appeared to be happy in the child's school in the United Kingdom, the spouse had become involved in a serious relationship and a healthy and positive relationship existed between the spouse's significant other and the minor child, and the child was involved with the extended families in the United Kingdom of both of the spouses. *Wraight v. Wraight*, 71 So. 3d 139, 2011 Fla. App. LEXIS 13413 (Fla. 5th DCA 2011).

7. Parental relocation statute, former Fla. Stat. § 61.13(2)(d) (now Fla. Stat. § 61.13001), did not violate a mother's right to privacy under Fla. Const. art. I, § 23, because the father, who had "shared parental responsibility" for the children as defined by Fla. Stat. § 61.046, had the same fundamental right as she did to decide where the children lived. *Fredman v. Fredman*, 960 So. 2d 52, 2007 Fla. App. LEXIS 9511 (Fla. 2nd DCA 2007), cert. denied, 552 U.S. 1243, 128 S. Ct. 1481, 170 L. Ed. 2d 297, 2008 U.S. LEXIS 2330 (U.S. 2008).

8. Under former Fla. Stat. § 61.13(2)(d) (now Fla. Stat. § 61.13001), a primary residential parent must obtain permission to relocate with the children because relocation would affect the secondary residential parent's fundamental right to parent and would limit that parent's access to the children; to the extent that a primary residential parent must seek court permission to relocate while the other parent need not, the parties are not similarly situated, and therefore, former Fla. Stat. § 61.13(2)(d) (now Fla. Stat. § 61.13001) does not violate the *Equal Protection Clause*. *Fredman v. Fredman*, 960 So. 2d 52, 2007 Fla. App. LEXIS 9511 (Fla. 2nd DCA 2007), cert. denied, 552 U.S. 1243, 128 S. Ct. 1481, 170 L. Ed. 2d 297, 2008 U.S. LEXIS 2330 (U.S. 2008).

9. When a primary residential parent seeks to relocate with a child, former Fla. Stat. § 61.13(2)(d) (now Fla. Stat. § 61.13001) requires the court to consider the competing interests, with an appropriate focus on the parents' rights, along with the best interest of the child; therefore, former Fla. Stat. § 61.13(2)(d) (now Fla. Stat. § 61.13001), does not violate the right to travel of the parent who wishes to relocate. *Fredman v. Fredman*, 960 So. 2d 52, 2007 Fla. App. LEXIS

9511 (*Fla. 2nd DCA 2007*), cert. denied, 552 U.S. 1243, 128 S. Ct. 1481, 170 L. Ed. 2d 297, 2008 U.S. LEXIS 2330 (U.S. 2008).

10. Denial of a mother's request to relocate to Texas with the parties' child was supported by substantial competent evidence under *Fla. Stat. § 61.13001(7)(c)*, as the mother's substitute timesharing arrangement would not allow the father to maintain a continuing meaningful relationship with the minor child and such relationship was not in the child's best interest, given the father's extremely involved role in the child's life. *Rossmann v. Profera*, 67 So. 3d 363, 2011 Fla. App. LEXIS 11755 (*Fla. 4th DCA 2011*).

11. Contrary to the trial court's conclusion, the relocation statute applied even in the absence of the designation of a primary residential parent; thus, the trial court had to strike the court-imposed relocation restriction from the final judgment and exercise its discretion in light of the determination that the relocation statute applied. *Scariti v. Sabillon*, 16 So. 3d 144, 2009 Fla. App. LEXIS 4208 (*Fla. 4th DCA 2009*).

12. Order directing that a mother return the parties' child to Florida premised on a finding that the mother had violated *Fla. Stat. § 61.13001* by relocating the child was error because, if the mother had already moved before father filed the petition, she was not subject to § 61.13001; there was no competent substantial evidence before the trial court to find that the mother was living in Florida at the time the order approving the mediated agreement was entered. *Essex v. Davis*, 116 So. 3d 445, 2012 Fla. App. LEXIS 9073 (*Fla. 4th DCA 2012*).

13. Trial court erred by treating a mother's proposed timesharing schedule as a relocation agreement under *Fla. Stat. § 61.13001(2)*, because it was not a signed writing and the parties had not agreed to the schedule. *Zepeda v. Zepeda*, 32 So. 3d 679, 2010 Fla. App. LEXIS 3900 (*Fla. 2nd DCA 2010*).

14. Order granting the husband permission to have the parties' minor child relocate with him to another state was inappropriate because, while the evidence might have supported a finding that a move to another state was in the husband's best interest, it was insufficient to establish that it was in the children's best interest. The wife had a strong bond with her sons, yet the trial court made no finding regarding the feasibility of preserving the relationship between the wife and her sons through substitute time-sharing arrangements. *Albanese v. Albanese*, 135 So. 3d 532, 2014 Fla. App. LEXIS 5012 (*Fla. 5th DCA 2014*).

15. Trial court did not abuse its discretion in finding that ordering the return of the child to Florida was in the best interests of the child because it heard the allegations of abuse, as well as the child's circumstances in the other state, and the father's testimony as to his interaction with the child and his ability to provide for the child in Florida. *Shiba v. Gabay*, 120 So. 3d 80, 2013 Fla. App. LEXIS 12363 (*Fla. 4th DCA 2013*).

16. Because a mother failed to comply with § 61.13001, *Fla. Stat.*, prior to relocating to New York with the parties' minor child, the trial court erred in permitting the child's relocation, even if temporary. Remand was required for a determination of the child's best interests and relief to the father based on the mother's noncompliance. *Milton v. Milton*, 113 So. 3d 1040, 2013 Fla. App. LEXIS 8925 (*Fla. 1st DCA 2013*).

17. Decision that a mother could relocate out of state with the parties' child upon the child reaching three years of age was quashed because the proper review of the petition for relocation under *Fla. Stat. § 61.13001*, entailed a best interests determination at the time of the final hearing, or a present-based analysis as the trial court could not predict if a change in any of the statutory factors would occur. *Arthur v. Arthur*, 54 So. 3d 454, 2010 Fla. LEXIS 41 (Fla. 2010).

18. Punishment of a parent for violation of a Florida court order forbidding the relocation of a child by moving the child to North Carolina may have affected, but did not conclude, the inquiry regarding the trial court's assessment of the best interests of the child for purposes of *Fla. Stat. §§ 61.13* and *61.13001*. Accordingly, reversal and remand were necessary because the final judgment also lacked evidentiary findings regarding the other requirement for a modification, that a substantial change of circumstances occurred from the entry of the previous custody order that was not reasonably contemplated when the previous order was entered. *Edgar v. Firuta*, 100 So. 3d 255, 2012 Fla. App. LEXIS 19146 (Fla. 3rd DCA 2012).

19. Order granting the husband permission to have the parties' minor child relocate with him to another state was inappropriate because, while the evidence might have supported a finding that a move to another state was in the husband's best interest, it was insufficient to establish that it was in the children's best interest. The wife had a strong bond with her sons, yet the trial court made no finding regarding the feasibility of preserving the relationship between the wife and her sons through substitute time-sharing arrangements. *Albanese v. Albanese*, 135 So. 3d 532, 2014 Fla. App. LEXIS 5012 (Fla. 5th DCA 2014).

20. Former wife was not entitled to relocate to Indiana with the parties' child because, inter alia, the former wife did not inform the former husband or the court of her intention to relocate, completely disregarded court orders about returning the child, and went into the relocation proceeding with "unclean hands"; the former husband sought to enforce the time-sharing schedule set forth in the parties' California judgment, which provided for equal time-sharing once he moved to Florida. *Fetzer v. Evans*, 123 So. 3d 124, 2013 Fla. App. LEXIS 16186 (Fla. 5th DCA 2013).

21. Because a mother failed to comply with § 61.13001, Fla. Stat., prior to relocating to New York with the parties' minor child, the trial court erred in permitting the child's relocation, even if temporary. Remand was required for a determination of the child's best interests and relief to the father based on the mother's noncompliance. *Milton v. Milton*, 113 So. 3d 1040, 2013 Fla. App. LEXIS 8925 (Fla. 1st DCA 2013).

22. Trial court abused its discretion in permitting a mother to relocate to another county with her child as nothing in the record showed that the trial court evaluated any of the factors, as no evidence was presented at all on most of them. Though the mother stated that her sole reason for moving was the availability of the house in the other county, that home did not provide any stable housing for her and the child as, at the time the court permitted relocation, she did not have the money to make her share of the mortgage payments, and there was no evidence that she could make the payments on the mortgage. *Eckert v. Eckert*, 107 So. 3d 1235, 2013 Fla. App. LEXIS 3199 (Fla. 4th DCA 2013).

23. Order directing that a mother return the parties' child to Florida premised on a finding that the mother had violated *Fla. Stat. § 61.13001* by relocating the child was error because, if the mother had already moved before father filed the petition, she was not subject to § 61.13001; there was no competent substantial evidence before the trial court to find that the mother was living in Florida at the time the order approving the mediated agreement was entered. *Essex v. Davis*, 116 So. 3d 445, 2012 Fla. App. LEXIS 9073 (Fla. 4th DCA 2012).

24. While the trial court erred in applying *Fla. Stat. § 61.13001* to a mother's request to relocate the parties' child, because that provision applied to orders entered before October 1, 2009, if those orders did not expressly govern

relocation of the child, this error did not deprive the trial court of jurisdiction; nor did the instant order have to be reversed because the trial court determined that the criteria set forth in § 61.13001 had been met, as that provision encompassed all of the requirements of the law previously governing relocation requests, *Fla. Stat. § 61.13(2)(d)*, and then some. However, the appellate court was unable to discern from either the order or from the record whether a substantial change in circumstances had occurred to justify modification, and reversal and remand were required for this reason. *Guizzardi v. Guizzardi*, 89 So. 3d 967, 2012 Fla. App. LEXIS 6837 (Fla. 3rd DCA 2012).

25. Trial court erred as a matter of law in requiring the temporary custody order for relocation to Australia to stay in effect for three years because § 61.13001(6)(b), (10), Fla. Stat. (2011) provided that temporary orders were preliminary short-term orders and that final a hearing had to occur within 90 days of a notice of nonjury trial. *Alinat v. Curtis*, 86 So. 3d 552, 2012 Fla. App. LEXIS 6171 (Fla. 2nd DCA 2012).

26. Final judgment in a dissolution of marriage proceeding which awarded one spouse primary residential custody of the parties' minor child and allowed permanent relocation to the United Kingdom of that spouse and the child was affirmed because sufficient evidence supported the trial court's decision that to once again relocate the minor child and require the child to acclimate to another new school and friends in Florida was not in the child's best interests. The spouse testified that the parties' child was performing well and had adjusted and appeared to be happy in the child's school in the United Kingdom, the spouse had become involved in a serious relationship and a healthy and positive relationship existed between the spouse's significant other and the minor child, and the child was involved with the extended families in the United Kingdom of both of the spouses. *Wraight v. Wraight*, 71 So. 3d 139, 2011 Fla. App. LEXIS 13413 (Fla. 5th DCA 2011).

27. Trial court properly granted a mother's Fla. Stat. § 61.13001 petition to relocate the parties' child to California because, inter alia, the parties had agreed that the mother would have been a stay at home mother, the child had an excellent and extremely close relationship with the mother, the mother had been the primary caretaker of the child since birth and had been involved in the day to day care and attention of the child, and the child was to have been physically cared for by the mother and was to have been living with her two siblings; the father was able to communicate with the child via internet, webcam and telephone and the mother had offered to pay for all travel expenses for the child to visit the father in South Florida. The relocation would have enhanced the general quality of life for the mother in that if she would have been able to be a stay at home mother and care for her children on a full time basis. *Valqui v. Rodriguez*, 75 So. 3d 751, 2011 Fla. App. LEXIS 13230 (Fla. 3rd DCA 2011).

28. Denial of a mother's request to relocate to Texas with the parties' child was supported by substantial competent evidence under Fla. Stat. § 61.13001(7)(c), as the mother's substitute timesharing arrangement would not allow the father to maintain a continuing meaningful relationship with the minor child and such relationship was not in the child's best interest, given the father's extremely involved role in the child's life. *Rossmann v. Profera*, 67 So. 3d 363, 2011 Fla. App. LEXIS 11755 (Fla. 4th DCA 2011).

29. Denial of the mother's petition to relocate to California with the child was erroneous, where the parties previously agreed to move to California, the mother obtained a dental license and job in California, the mother had been the primary and sometimes exclusive parent, the father evidenced no concern as to what was in the child's best interest and refused to have anything to do with the child, the father misrepresented his income to lessen his child support obligation, and the father's claim that he spent considerable time with the child was undercut by a video showing a nanny caring for the child when the father claimed he was the caregiver. *Orta v. Suarez*, 65 So. 3d 988, 2011 Fla. App. LEXIS 10161 (Fla. 3rd DCA 2011).

30. Order granting a mother permission to relocate with the parties' child was error because the mother failed to comply with the Fla. Stat. § 61.13001(3), threshold requirement of properly filing a sworn petition with the trial court; the mother's hand-delivery to father of her unsworn notice of intent to relocate with the child one day before relocating was insufficient. The mother did not file any form of documentation with the court, despite the statute's explicit directive to

file a sworn petition, and, thus, she failed to comply with the statute and should not have been granted permission to relocate. *Raulerson v. Wright*, 60 So. 3d 487, 2011 Fla. App. LEXIS 5420 (Fla. 1st DCA 2011).

31. Trial court erred by treating a mother's proposed timesharing schedule as a relocation agreement under Fla. Stat. § 61.13001(2), because it was not a signed writing and the parties had not agreed to the schedule. *Zepeda v. Zepeda*, 32 So. 3d 679, 2010 Fla. App. LEXIS 3900 (Fla. 2nd DCA 2010).

32. Decision that a mother could relocate out of state with the parties' child upon the child reaching three years of age was quashed because the proper review of the petition for relocation under Fla. Stat. § 61.13001, entailed a best interests determination at the time of the final hearing, or a present-based analysis as the trial court could not predict if a change in any of the statutory factors would occur. *Arthur v. Arthur*, 54 So. 3d 454, 2010 Fla. LEXIS 41 (Fla. 2010).

33. Denial of the mother's motion to relocate to Atlanta, Georgia with the child was erroneous, because the mother met the mother's initial burden under Fla. Stat. § 61.13001, by showing that the mother had been the child's primary caregiver since birth, the mother's new husband worked and lived in Georgia, the mother did not have much of a future in Florida, and the mother had a job offer from a member of the new husband's family in Georgia; when with the father, the child was often cared for by the paternal grandmother, who had an unfenced swimming pool and a transient renter. *Miller v. Miller*, 992 So. 2d 346, 2008 Fla. App. LEXIS 15114 (Fla. 3rd DCA 2008).

34. Because a trial court had authority under Fla. Stat. § 61.516(2) of the Uniform Child Custody Jurisdiction and Enforcement Act to modify a Georgia judgment of divorce, and because the trial court had discretion under Fla. Stat. § 61.13001(7) to do so, it properly granted the mother's request to relocate with the children to Chicago. *Norris v. Heckerman*, 972 So. 2d 1098, 2008 Fla. App. LEXIS 820 (Fla. 1st DCA 2008).

35. Trial court's order granting a mother's petition to relocate with the parties' child to Colorado was error where the record was devoid of corroborating facts supporting nearly every subsection of paragraph (7). *Muller v. Muller*, 964 So. 2d 732, 2007 Fla. App. LEXIS 11793 (Fla. 3rd DCA 2007).

36. Relocation statute was inapplicable in a father's emergency motion to compel the mother to return the parties' minor children from Georgia to Florida because the mother had moved to Georgia before the father filed for a dissolution of their marriage, such that she did not have to seek permission to move there. *Rolison v. Rolison*, 144 So. 3d 610, 2014 Fla. App. LEXIS 11919 (Fla. 1st DCA 2014).

37. Trial court's decision regarding the child's residence upon reaching kindergarten age was not a ruling on a relocation request as neither parent sought to move from his or her principal place of residence, and, under the ordered parenting plan, neither parent would be changing his or her residence; the parenting plan in the amended final judgment did not involve "relocation" but rather ordered that the father become the primary residential parent once the child began kindergarten. *Krift v. Obenour*, 2014 Fla. App. LEXIS 17909 (Fla. 4th DCA Nov. 5, 2014).

38. Order that a husband pay \$ 500 per month for his share of counseling expenses was not authorized under the provision authorizing a court approving a temporary relocation to require the person relocating the child to provide reasonable security, financial or otherwise, and guarantee that the court-ordered contact with the child not be interrupted or interfered with by the relocating party as counseling costs were not security; while such an order was within the court's discretion under Fla. Stat. § 61.13, the order here was improper as there was no evidence as to the cost of counseling. *Vazquez v. Vazquez-Robledo*, 2014 Fla. App. LEXIS 18004 (Fla. 2nd DCA Nov. 5, 2014).

39. Punishment of a parent for violation of a Florida court order forbidding the relocation of a child by moving the child to North Carolina may have affected, but did not conclude, the inquiry regarding the trial court's assessment of the best

interests of the child for purposes of *Fla. Stat. §§ 61.13* and *61.13001*. Accordingly, reversal and remand were necessary because the final judgment also lacked evidentiary findings regarding the other requirement for a modification, that a substantial change of circumstances occurred from the entry of the previous custody order that was not reasonably contemplated when the previous order was entered. *Edgar v. Firuta*, 100 So. 3d 255, 2012 Fla. App. LEXIS 19146 (Fla. 3rd DCA 2012).

40. Former wife was not entitled to relocate to Indiana with the parties' child because, inter alia, the former wife did not inform the former husband or the court of her intention to relocate, completely disregarded court orders about returning the child, and went into the relocation proceeding with "unclean hands"; the former husband sought to enforce the time-sharing schedule set forth in the parties' California judgment, which provided for equal time-sharing once he moved to Florida. *Fetzer v. Evans*, 123 So. 3d 124, 2013 Fla. App. LEXIS 16186 (Fla. 5th DCA 2013).

41. Trial court did not abuse its discretion in finding that ordering the return of the child to Florida was in the best interests of the child because it heard the allegations of abuse, as well as the child's circumstances in the other state, and the father's testimony as to his interaction with the child and his ability to provide for the child in Florida. *Shiba v. Gabay*, 120 So. 3d 80, 2013 Fla. App. LEXIS 12363 (Fla. 4th DCA 2013).

42. Trial court erred as a matter of law in requiring the temporary custody order for relocation to Australia to stay in effect for three years because § 61.13001(6)(b), (10), Fla. Stat. (2011) provided that temporary orders were preliminary short-term orders and that final a hearing had to occur within 90 days of a notice of nonjury trial. *Alinat v. Curtis*, 86 So. 3d 552, 2012 Fla. App. LEXIS 6171 (Fla. 2nd DCA 2012).

43. Visitation schedule which treated a wife's time with the parties' child as "visitation" was error because the wife was assigned residential responsibility of the child, and, pursuant to *Fla. Stat. §§ 61.13(4)*, *61.13001(2)(a)*, only a noncustodial parent could have visitation; as a result, various parts of order, including "make-up" visitation award, were improper. The visitation provisions also contained internal conflicts which were a result of the error in deeming the wife's time with the child as "visitation." *Lombard v. Lombard*, 997 So. 2d 1188, 2008 Fla. App. LEXIS 19261 (Fla. 2nd DCA 2008).

44. Visitation schedule which treated a wife's time with the parties' child as "visitation" was error because the wife was assigned residential responsibility of the child, and, pursuant to *Fla. Stat. §§ 61.13(4)*, *61.13001(2)(a)*, only a noncustodial parent could have visitation; as a result, various parts of order, including "make-up" visitation award, were improper. The visitation provisions also contained internal conflicts which were a result of the error in deeming the wife's time with the child as "visitation." *Lombard v. Lombard*, 997 So. 2d 1188, 2008 Fla. App. LEXIS 19261 (Fla. 2nd DCA 2008).

45. Trial court did not abuse its discretion under former Fla. Stat. § 61.13(2)(d) (now *Fla. Stat. § 61.13001*) in denying a mother's request to relocate to Texas with the parties' children on grounds that relocation was not in their best interest, as the evidence supported its finding that she failed to show that the proposed move would improve the children's school, family, or even home life. *Fredman v. Fredman*, 960 So. 2d 52, 2007 Fla. App. LEXIS 9511 (Fla. 2nd DCA 2007), cert. denied, 552 U.S. 1243, 128 S. Ct. 1481, 170 L. Ed. 2d 297, 2008 U.S. LEXIS 2330 (U.S. 2008).

46. Because the parties' children had been separated and living in the primary residence of their respective parents for more than four years, the trial court properly continued separation of the children; because the detailed evidence necessary to make a proper child support calculation under *Fla. Stat. § 61.30* was overlooked, the judgment was to be controlled by the provisions of *Fla. Stat. § 61.13001*. *Matias v. Matias*, 948 So. 2d 1021, 2007 Fla. App. LEXIS 2607 (Fla. 2nd DCA 2007).

TREATISES AND ANALYTICAL MATERIALS

1. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 32 Parental Responsibility and Timesharing, Part I. Legal Background, C. Basis for Determinations of Parental Responsibility and Timesharing, § 32.21 Factors Considered by Court.*

2. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 32 Parental Responsibility and Timesharing, Part I. Legal Background, D. Effect of Shared Parental Responsibility and Timesharing Determinations, § 32.30 Rights and Duties of Parents.*

3. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 32 Parental Responsibility and Timesharing, Part I. Legal Background, E. Procedure for Obtaining Adjudication or Alternative Dispute Resolution of Parental Responsibility and Timesharing, § 32.40 In Marital Dissolution Action.*

4. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 32 Parental Responsibility and Timesharing, Part I. Legal Background, F. Timesharing, § 32.50 Parent's Timesharing Rights.*

5. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 32 Parental Responsibility and Timesharing, Part II. Practice Guide, B. Preliminary Determinations, § 32.111 Action for Shared Parental Responsibility.*

6. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 33 Child Support, Part I. Legal Background, § 33.03 Criteria for Establishing Child Support.*

7. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 50 Representing Clients in Dissolution Cases, Part I. Legal Background, B. Initial Client Interview, § 50.15 Overview of Dissolution Proceeding.*

8. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 50A Representing Military Dependents, Part I. Legal Background, § 50A.07 Modification of Active Servicemember's Timesharing.*

9. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 54 Temporary Relief, Part I. Legal Background, B. Temporary Parental Responsibility and Timesharing, § 54.26 Relocation.*

10. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 56 Marital Settlement Agreements, Part I. Legal Background, C. Drafting and Executing the Marital Settlement Agreement, 2. Specific Provisions, § 56.42 Child Support, Care, and Visitation Clauses.*

11. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 56 Marital Settlement Agreements, Part II. Practice Guide, D. Drafting Guide, § 56.131 Child Support, Parental Responsibility, and Visitation.*

12. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 56 Marital Settlement Agreements, Part III. Forms, § 56.200 Marital Settlement Agreement--General Form.*

13. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 71 Enforcement of Parental Responsibility and Timesharing, Part I. Legal Background, B. Contempt, § 71.10 Nature of Contempt.*

14. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 71 Enforcement of Parental Responsibility and Timesharing, Part I. Legal Background, C. Habeas Corpus and Injunctive Relief, § 71.21 Injunctive Relief.*

15. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 81 Modification of Parental Responsibility and Timesharing, Scope.*

16. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 81 Modification of Parental Responsibility and Timesharing, Part I. Legal Background, § 81.03 Standard for Modification.*

17. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 81 Modification of Parental Responsibility and Timesharing, Part I. Legal Background, § 81.04 Alternatives to Substantial-Change Test.*

18. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 81 Modification of Parental Responsibility and Timesharing, Part I. Legal Background, § 81.11 Modification Under Relocation Statute.*

19. *Florida Family Law, Division IV Dissolution of Marriage, Chapter 81 Modification of Parental Responsibility and Timesharing, Part I. Legal Background, § 81.15 Procedure.*

20. *Southeast Transaction Guide, Unit V. Personal Transactions, Division 2. Family Affairs, § 362.02 State Statutes.*

21. *Southeast Transaction Guide, Unit V. Personal Transactions, Division 2. Family Affairs, § 362.29 Florida--Parental Relocation with Child.*

STATE BAR PUBLICATION

1. *Annual Reports of Florida Bar Committees, by Committee Chairs, June, 2008, 82 Fla. Bar J. 34.*

2. *Annual Report of Florida Bar Committees: Family Law Rules, J. Fraser Himes, Chair, June, 2007, 81 Fla. Bar J. 30.*

3. *Age-Appropriate Time Sharing for Divorced Parents, by Dr. Andrea Corn and Howard Raab, June, 2007, 81 Fla. Bar J. 84.*

4. *Florida Proceedings After Dissolution of Marriage, 2 Jurisdiction, Venue, and Service of Process, I. Introduction, A. [§ 2.1] In General.*

5. *Florida Proceedings After Dissolution of Marriage, 2 Jurisdiction, Venue, and Service of Process, I. Introduction, B. [§ 2.2] Commencement of Proceedings.*

6. *Florida Proceedings After Dissolution of Marriage, 2 Jurisdiction, Venue, and Service of Process, II. Jurisdiction, B. Parental Responsibility, 2. [§ 2.15] Relocation.*

7. *Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, (1) [§ 5.19] In General.*

8. *Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, (2) [§ 5.20] Relocation Defined.*

9. *Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, (3) [§ 5.21]* Relocation By Agreement.
10. *Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, (4) [§ 5.22]* Petition To Relocate.
11. *Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, (5) [§ 5.23]* Consequences Of Relocation Without Permission.
12. *Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, (6) [§ 5.24]* Objecting To Relocation.
13. *Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, (7) [§ 5.25]* Temporary Order.
14. *Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, (8) [§ 5.26]* Factors To Determine Contested Relocation.
15. *Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, (9) [§ 5.27]* Hearing And Order.
16. *Florida Dissolution of Marriage, 6 Temporary Relief, IX. Other Proceedings, B. [§ 6.31]* Temporary Relocation.
17. *Florida Dissolution of Marriage, 11 Parental Responsibility, VII. Residency Restrictions and Relocation, B. Florida Law, 1. [§ 11.68]* In General.
18. *Florida Dissolution of Marriage, 11 Parental Responsibility, VII. Residency Restrictions and Relocation, B. Florida Law, 2. [§ 11.69]* Relocation Defined.
19. *Florida Dissolution of Marriage, 11 Parental Responsibility, VII. Residency Restrictions and Relocation, B. Florida Law, 3. [§ 11.70]* Relocation By Agreement.
20. *Florida Dissolution of Marriage, 11 Parental Responsibility, VII. Residency Restrictions and Relocation, B. Florida Law, 4. [§ 11.71]* Petition To Relocate.
21. *Florida Dissolution of Marriage, 11 Parental Responsibility, VII. Residency Restrictions and Relocation, B. Florida Law, 5. [§ 11.72]* Objection To Relocation.
22. *Florida Dissolution of Marriage, 11 Parental Responsibility, VII. Residency Restrictions and Relocation, B. Florida Law, 6. [§ 11.73]* Temporary Order.
23. *Florida Dissolution of Marriage, 11 Parental Responsibility, VII. Residency Restrictions and Relocation, B. Florida Law, 7. [§ 11.74]* Factors To Determine Contested Relocation.
24. *Florida Dissolution of Marriage, 11 Parental Responsibility, VII. Residency Restrictions and Relocation, B. Florida Law, 8. [§ 11.75]* Hearing And Order.
25. *Florida Dissolution of Marriage, 21 Representing Battered Spouses, II. Initial Interview, G. [§ 21.15]* Relocation Issues.

LAW REVIEWS

1. Nowhere To Run: Custody, Relocation, and Domestic Violence in Florida, Patricia A. Mckenzie, Winter 2007, *31 Nova L. Rev.* 355.

Philpott v. Wright

Edgar v. Firuta, App. 100 So.3rd 255,
2012 Fla. App. LEXIS 19146;
37 Fla. L. Weekly D 2596 (2012)



Patricia Edgar, Appellant, vs. Edward Firuta, Appellee.

No. 3D11-1182

COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

100 So. 3d 255; 2012 Fla. App. LEXIS 19146; 37 Fla. L. Weekly D 2596

November 7, 2012, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication November 26, 2012.

PRIOR HISTORY: [**1]

An Appeal from the Circuit Court for Monroe County. Lower Tribunal No. 10-1425. Tegan Slaton, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee father filed a supplemental petition in the Circuit Court for Monroe County (Florida), to modify a parenting plan. The court granted the father custody of the parties' children, found appellant mother in contempt, directed the mother to pay monthly child support to the father, and assessed the father's attorney's fees and costs against the mother. The mother appealed. Custody of the children was restored to the mother pending appeal.

OVERVIEW: The parties had four children when they divorced in North Carolina. The North Carolina judgment but did not include any provisions regarding custody, parental responsibility, visitation, or child support. The parties began living together in Florida, but the mother moved to North Carolina with the three oldest children. The mother challenged the trial court's rulings. On appeal, the court found that the trial court had jurisdiction, under § 61.517, Fla. Stat. (2011), over the father's petition for sole parental responsibility over the youngest child. Further, punishment of the mother for violation of a court order by moving the youngest child to

North Carolina may have affected, but did not conclude, the inquiry regarding the trial court's assessment of the best interests of the child for purposes of §§ 61.13 and 61.13001, Fla. Stat. (2011). The final judgment also lacked evidentiary findings regarding the other requirement for a modification, that a substantial change of circumstances occurred from the entry of the previous custody order that was not reasonably contemplated when the previous order was entered. The remaining issues were to be considered by the court on remand.

OUTCOME: The final judgment modifying the prior order on parental responsibility, visitation, and timesharing was reversed and remanded for further proceedings. The termination of the existing child support obligation and the award of attorney's fees were reversed.

CORE TERMS: youngest, relocation, custody, emergency, parental responsibility, visitation, parenting, final judgment, contempt, modification, child custody, minor children, attorney's fees, best interest, time-sharing, notice, temporary, child support obligations, arrearage, removal, siblings, timesharing, minor child, supervision, terminated, scheduled, withdraw, modify, arrest, older

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses >

Classifications > Felonies

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Domestic Offenses > Custodial Interference > Elements

[HN1] *Section 787.03, Fla. Stat.* (2011), provides generally that interference with a parent or guardian's lawful custody of a minor child is a third-degree felony.

Family Law > Child Custody > Modification > General Overview

Family Law > Child Custody > Modification > Change of Residence

[HN2] *Section 61.13001(3)(e), Fla. Stat.*, expressly provides that a parent's relocation of a minor child without complying with the statute may be taken into account by a court in considering a petition for modification or relocation.

Family Law > Child Custody > Awards > Standards > Best Interests of Child

Governments > Courts > Authority to Adjudicate

[HN3] Vindication of a trial court's authority is subordinate to a child's welfare.

COUNSEL: Debra Kay Cohen, for appellant.

Samuel J. Kaufman (Key West), for appellee.

JUDGES: Before SHEPHERD, SALTER, and EMAS, JJ.

OPINION BY: SALTER

OPINION

[*256] SALTER, J.

Patricia Edgar (Mother) appeals a final judgment granting her former husband's (Father's) motion for contempt and his amended petition to modify their parenting plan and child support obligations. We affirm in part, reverse in part, and remand for further proceedings.

I. Procedural History

The parties were married in 1996. They had four children at the time of their divorce in North Carolina in 2005. Although the North Carolina judgment identified the four children--then ages ten, nine, seven, and four

years old--it did not include any provisions regarding custody, parental responsibility, visitation, or child support. So far as the record reflects, there was no parenting plan.

At some point in 2007, the Mother and Father resumed living together with the children in various locations in and near Key West, Florida. The Mother and Father did not remarry. In 2009, the Department of Children and Families (DCF) office in Monroe County sought and obtained protective supervision [**2] over all four children. In 2010, finding that the Mother had complied with her case plan, DCF sought (and the circuit court granted) an order terminating protective supervision.

In the latter part of 2010, the Father filed a "supplemental petition to modify parenting plan and other relief"¹ in the Monroe County circuit court, attaching a copy of the 2005 North Carolina "Absolute Divorce Judgment." The Father's petition did not ask for any relief regarding the three older children. It alleged that the current parenting plan for the youngest child (then ten years old) was "shared parental responsibility," that the youngest child wished to stay with the Father in Key West, and that the Mother was engaging in erratic behavior and placing the child in dangerous situations. The petition sought sole parental responsibility of the youngest child for the Father, with limited supervised visitation for the Mother. Finally, the Father's petition sought a temporary injunction to prevent removal of the youngest child from the jurisdiction, based on a fear that the Mother or others would take the child to North Carolina.

¹ As noted, however, there was no written or court-ordered parenting plan in a [**3] dissolution judgment then in effect that could be modified.

The following day, the Monroe County circuit court entered a form order for a case management conference and prospective referral to the general magistrate. The day after that, November 3, 2010, the Mother filed an emergency motion to enforce her alleged custody of the youngest child and another minor child. The Mother alleged that she had custody of all four children under the final order and case plan in the DCF dependency case, and that the Father was refusing to return two [*257] of the children to the Mother after visitation. In a Uniform Child Custody Jurisdiction and Enforcement Act

(UCCJEA) Affidavit filed with her emergency motion, the Mother reported that all four children had resided with her since October 1, 2010, at a residence in Kill Devil Hills, North Carolina.

On November 9, 2010, the parties and their attorneys appeared in the circuit court for a hearing on the Mother's emergency motion to enforce custody. Although it does not appear that a written order was entered, the court minutes prepared by the deputy clerk and made a part of the record state that the trial court declined to change any custody (so that the youngest [**4] child would remain with the Father) until the trial court had a chance to speak with the child and to consider a psychological evaluation of the child. At a hearing a week later, the court denied the Mother's emergency motion for contempt, authorized time-sharing visitation, and ordered that the youngest child "cannot leave State at this time."²

² A written order was entered to this effect on November 16, 2010. The order also directed the Father to arrange a visit between the youngest child and a child psychologist.

A series of allegations and cross-allegations over visitation details, with nearly weekly hearings, followed. On November 30, 2010, the Mother filed a "notice of intent to relocate with children," proposing that the youngest child join the Mother and the other three minor children at their home in North Carolina. The notice included specifics regarding the proposed relocation, pursuant to *section 61.13001, Florida Statutes* (2010), as well as a detailed parenting plan. The Father filed written objections and a request for a temporary order "restraining the relocation of the child pending final hearing." A mediation to resolve all issues impassed, and the court directed the [**5] parties to attempt again to mediate, with particular emphasis on visitation and travel during the upcoming December holidays. After yet another emergency hearing, the trial court entered an order on December 17, 2010, authorizing the Mother to have time-sharing in North Carolina with the youngest child from December 20, 2010, through January 2, 2011, with the Father to have daily Skype communication with the children during that time, and authorizing the Father to have time-sharing with the older three children in Key West during their spring break.

Meanwhile, a Key West psychiatrist interviewed the youngest child and both parents, and provided a relocation evaluation report to the court. The psychiatrist

reported that: the youngest child wanted to live with her mother and siblings in North Carolina; "it is not recommended to separate siblings at her developmental stage"; the Father, his girlfriend, and the youngest child were then in a one bedroom apartment in Key West, with no plan for what the arrangements might be when the Father's lease ended; and a mediated settlement allowing relocation of the child to North Carolina, with reasonable visitation terms and abstinence from alcohol [**6] on the part of the Mother (with monitoring), would be in the best interest of the child.

In January 2011, there were additional cross-motions for contempt for alleged violations of time-sharing directives. In early February, the trial court appointed an experienced former chief circuit court judge as a special magistrate to interview the youngest child and provide a report to the court. The special magistrate interviewed the child in camera and filed a report and recommendation on February 7, 2011, that the court consider the child's preference "to live with her mother and be with her [**258] siblings in North Carolina" in ruling on the request for relocation. A hearing scheduled before the special magistrate for the afternoon of February 10, 2011, was abruptly taken off the calendar when the Father filed a written objection to the assignment of the special magistrate.

The following day, the Mother filed an emergency motion to set a preliminary hearing on relocation, alleging that the parties had reached a mediated agreement allowing relocation (but the Father had refused to sign it) and that the Mother had been forced to remain in Monroe County while the three older children remained in North [**7] Carolina. The Father denied that an agreement had been reached and denied that he was intentionally delaying the proceedings. On February 15, 2011, the Father also filed a motion for the appointment of a guardian ad litem for the youngest child, asserting that her interests "are adverse to those of her mother." On February 18, 2011, the Mother supplemented her second motion for contempt with allegations that the Father was engaging in "self-help" and was willfully in violation of the time-sharing order. The Key West police were called and returned the youngest child to the Mother.

The significance of the many motions and cross-motions--and this opinion has omitted the scandalous allegations hurled by the parties against each other and by the Mother against the Father's

girlfriend--pales in comparison to what happened next. The Mother fled with the youngest child to North Carolina, a flagrant violation of the Florida court's order.

At a hearing scheduled for February 22, 2011, the Mother's counsel moved to withdraw from the case and informed the court that the Mother had taken the youngest child to North Carolina in violation of the court's prior rulings. The trial court attempted to reach [**8] the Mother by telephone, but the Mother did not answer. The court left a message on the Mother's voicemail that she had twenty-four hours to return the child to Florida or the court would issue a warrant for her arrest. On February 24, 2011, the court granted the Mother's counsel's motion to withdraw. Four days later, the court entered an order reporting that the child had not been returned to Florida, finding that the Mother had removed the child with malicious intent to deprive the Father of his right to custody, finding a violation of *section 787.03, Florida Statutes* (2011),³ authorizing the issuance of warrants for the arrest of the Mother, and holding her in contempt of court. The same day, the court also entered an order striking the Mother's petition to relocate, granting the Father's amended petition to modify the parenting plan, and granting his motion for attorney's fees.

3 [HN1] The statute provides generally that interference with a parent or guardian's lawful custody of a minor child is a third-degree felony.

In North Carolina, the Mother obtained counsel and on February 24, 2011, filed a verified civil complaint against the Father asking the court "to assume jurisdiction to determine [**9] custody of [all four] minor children" and superficially disclosing the existence of the pending Monroe County circuit court child custody case initiated by the Father. The North Carolina complaint did not disclose the order in the Monroe County circuit court case prohibiting removal of the youngest child from Florida without prior leave of court. On March 8, 2011, the North Carolina court entered an ex parte order awarding the Mother custody of all four minor children until a hearing on the merits could occur [**259] (scheduled for April 13, 2011). The order included a finding that "there appears to be no other proceeding concerning the custody of these children pending in any Court."

The Monroe County circuit court then set all of the pending matters for hearing and non-jury trial, and on

March 29, 2011, entered a four-page final judgment finding that: the Mother did not appear for the trial, nor did any attorney appear on her behalf; the youngest child had been returned to Florida as ordered; it was in the best interest of the youngest child that the Father be granted "sole parental responsibility and exclusive timesharing" with her, "with limited supervised time with [the Mother]"; and the [**10] other three minor children were to be returned to Monroe County to reside with the Father. The final judgment also reaffirmed the prior findings regarding the Mother's contempt, directed the Mother to pay \$515 per month in child support to the Father, and assessed the Father's attorney's fees and costs against the Mother. This appeal followed.

During the pendency of this appeal, the Mother voluntarily dismissed with prejudice her North Carolina complaint against the Father. In the Florida trial court, the Mother sought [redacted] or [redacted] interim custody pending appeal, alleging among other things that the Father had returned all four children to North Carolina to a member of his family. The trial court denied that motion, but the Mother's motion for review of that order by this Court was granted and the four children were restored to the custody of the Mother in North Carolina pending appeal. In April 2012, the oldest of the four children attained his majority.

II. Analysis

The Mother has raised six issues in this appeal. We consider them in order.

A. UCCJEA

The Mother argues that the North Carolina court properly assumed jurisdiction over the emergency child custody issues in February 2011. [**11] We disagree. The 2005 North Carolina dissolution of marriage judgment never addressed child custody. The North Carolina court was not fully advised of the pending Florida proceedings (and the Monroe County circuit court order prohibiting relocation of the children without court approval) when the Mother presented her emergency motion in 2011. North Carolina's counterpart to *section 61.517, Florida Statutes* (2011), "Temporary emergency jurisdiction," conforms to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in all pertinent respects. Florida was the "state having jurisdiction" for purposes of *section 50A-204(d) of the North Carolina General Statutes*. Had it been fully

apprised, the North Carolina court would no doubt have followed that statute's UCCJEA requirement to "immediately communicate with the court of [Florida] to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order."⁴

4 Ultimately the North Carolina and Florida judges did confer regarding jurisdiction. The Mother dismissed the North Carolina case before any further rulings by that court.

Instead, the North Carolina court's temporary [****12**] custody order inadvertently abrogated the Florida court's jurisdiction and existing orders--the very circumstance the UCCJEA was drafted and enacted to prevent. The Mother asserts that the Florida trial court should have followed the same provision in Florida's UCCJEA statutes by contacting the North Carolina court before [***260**] entering a judgment of contempt against the Mother, striking her Florida pleadings, and granting sole parental responsibility and exclusive timesharing with the youngest child.

We disagree. The Mother failed to comply with the UCCJEA, violated an unambiguous Florida court order, and obtained "emergency" relief in North Carolina by failing to disclose the complete state of facts. The Florida court correctly determined that it had jurisdiction over the 2010 relocation and child custody claims, and that it retained that jurisdiction despite the "emergency" order improperly obtained by the Mother in 2011 in the North Carolina case. We thus affirm the trial court's determination that it had jurisdiction over the Father's petition for sole parental responsibility over the youngest child.

B. Modification

The Mother argues that the Florida court abused its discretion by modifying [****13**] parental responsibility and establishing a parenting plan without addressing the requirements set forth in *section 61.13, Florida Statutes* (2011). It is undisputed in this case that: the children had lived their entire lives with the Mother, with visitation with the Father; the Department of Children and Families (DCF) approved sole parental responsibility for the Mother, as DCF found compliance with the Mother's parenting plan and terminated supervision; a former chief circuit court judge serving as special magistrate recommended that the court consider the preferences of

the youngest child, that "she loves her father but wants to live with her mother and be with her siblings in North Carolina;" and the Father later returned the children to North Carolina, albeit to the home of a relative other than the Mother, *after* the Florida court had granted the Father sole parental responsibility and denied relocation.

[HN2] *Section 61.13001(3)(e), Florida Statutes*, expressly provides that a parent's relocation of a minor child without complying with the statute "may be taken into account" by the court in considering a petition for modification or relocation. But in this case, it seems clear that the [****14**] trial court's ruling on modification and on the parenting plan were based on the Mother's contumacious removal of the children to North Carolina rather than on an evidence-based assessment of the twenty "best interests of the child" factors enumerated in *section 61.13(3)(a)-(t)*. Here, as in *Landingham v. Landingham*, 685 So. 2d 946 (Fla. 1st DCA 1996), [HN3] "vindication of the trial court's authority is subordinate to the child's welfare." *Id. at 950* (reversing a change of custody after custodial mother moved from Florida to Colorado with the child in violation of an injunction).

Punishment of the Mother for violation of a court order may affect, but does not conclude, the inquiry regarding the trial court's assessment of the "best interests of the child" for purposes of *sections 61.13 and 61.13001*. The final judgment also lacks evidentiary findings regarding the other requirement for a modification, that "a substantial change of circumstances occurred since entry of the previous custody order that was not reasonably contemplated when the previous order was entered." *Clark v. Clark*, 35 So. 3d 989, 991 (Fla. 5th DCA 2010).

The Mother's argument on this point is well taken. The final judgment modifying [****15**] the prior order on parental responsibility, visitation, and timesharing is reversed and remanded for further proceedings.

C., D. Contempt and Section 787.03, Florida Statutes

As noted, the Mother knowingly violated the Florida court's November 19, 2010, [***261**] order that she was not to remove the youngest child from Monroe County. The Mother's claim that she was not afforded due process (before the court ruled on the motion for contempt) is not persuasive.

The Mother has not yet been convicted of a violation

of section 787.03, *Florida Statutes* (2011), "Interference with custody," at least upon the record before us. The final judgment under review found that a knowing violation occurred and directed the issuance of an arrest warrant and bodily attachment against the Mother, but apparently she has not actually been arrested or brought to trial. For the sake of the children⁵ and the remand proceedings, the trial court and the parties may need to address that criminal charge as a precursor to considering interstate visitation terms and final resolution of the relocation and modification issues in the civil case. On remand, the trial court will also be able to consider the recent evidence regarding [**16] the Father's relocation of the children from Florida to North Carolina.

5 It should be noted that the oldest of the four children turned eighteen in April 2012, such that only three children remain subject to the Florida case and the parenting plan.

E. *The Stricken Pleadings*

The Mother's Florida counsel sought and obtained permission to withdraw after learning of the Mother's violation of the order precluding removal of the youngest child from Monroe County. The hearing on the Father's motion to strike the Mother's pleadings was held in her absence and, she claims, without prior notice to her. The Father has included in the supplemental record a notice indicating that notice of the hearing was mailed to her, but she had no opportunity to retain new counsel or present evidence before the trial court ruled.

On remand, should the Mother elect to continue the prosecution of her relocation petition, the Mother will have an opportunity to file responsive pleadings alleging the unusual and significant circumstances that have occurred since the modification case began. *Section 61.13001(3)(e)*¹ provides that the Mother's relocation of the youngest child in violation of the Florida court's order may [**17] be considered as "a factor" in determining the Mother's petition, but not the only factor.

F. *Child Support Arrearages and Attorney's Fees*

The final judgment awarded the Father child support and terminated his existing child support obligation (including an arrearage of approximately \$10,000). The arrearage was vested and not subject to termination or retroactive modification. *Kranz v. Kranz*, 661 So. 2d 876, 877 (Fla. 3d DCA 1995). We reverse that portion of the final judgment.

The award of attorney's fees and costs to the Father may have been warranted in part as a sanction, but the findings of fact and record are insufficient to sustain the award. There was no proof regarding the Father's need and the Mother's ability to pay. We therefore reverse the final judgment on this point as well.

III. *Conclusion*

The Mother invited swift and firm judicial action when she violated the Florida court's order in the relocation case and simply took the youngest child to North Carolina. Nevertheless, the guiding principle in the aftermath must continue to be the best interests of the children, a statutory mandate. We affirm those provisions of the final judgment sanctioning the Mother for her precipitous [**18] actions, but we reverse the final judgment insofar as it: (a) summarily granted sole parental responsibility [**262] of, and exclusive timesharing with, the youngest child, to the Father (with limited and supervised time with the Mother); (b) determined that Florida, rather than North Carolina, is the appropriate and best residential setting for the minor children; (c) terminated the prior child support order and arrearage payable to the Mother; and (d) entered a new child support obligation payable to the Father and awarded attorney's fees and costs to the Father, in each case without determining his need and the Mother's ability to pay. We remand this difficult case, in which the children have been shuttled between the two states several times, to the trial court for further proceedings.

Affirmed in part, reversed in part, and remanded.

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

In Re The Marriage Of:
JONATHAN PHILPOTT
Respondent,

vs.,
LINDSEY WRIGHT FKA PHILPOTT
Respondent.

RHEA J. ROLFE,

NO. 72228-0-I

DECLARATION OF
ATTORNEY RE: CASE
LAW APPENDIX

I certify that I am Craig Jonathan Hansen. I am over the age of 18,
and am competent to testify. I certify under penalty of perjury of the laws
of the State of Washington that the Florida case law attached to the Exhibit
1 are correct copies of the case law, from Westlaw.

Dated this 5th day of February 2015.


CRAIG JONATHAN HANSEN
WSB 24060
Attorney for Appellee/Respondent

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re The Marriage Of: JONATHAN PHILPOTT Respondent, vs., LINDSEY WRIGHT FKA PHILPOTT Respondent. RHEA J. ROLFE, Appellant	NO. 72228-0-I DECLARATION OF DELIVERY
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I certify that I am Craig Jonathan Hansen. I am over the age of 18, am competent to testify, and have personal knowledge of the facts of this case. On February 5, 2015, I caused to be delivered via ABC Legal Messengers or first class mail, postage prepaid, to:

Washington Court of Appeals, Div I	
Brendan F. Patrick 723 M. L. King Jr. Way Seattle WA 98122 <u>Brendan.patrick@gmail.com</u>	Lindsey M. Philpott PMB 6050/ PO Box 257 Olympia, WA 98507 Email: <u>blueblackpinkblue@gmail.com</u>

which were their last known addresses, containing Reply Brief of Appellant; and Declaration of Delivery, to be delivered not later than January 9, 2015.

Dated this 5th day of February 2015.



CRAIG JONATHAN HANSEN