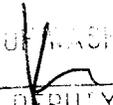


No. 41140-7 II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

DIANA DRISKILL, Appellant Petitioner,

v.

CHRISTOPHER ROGERS, Respondent

BRIEF OF PETITIONER

Laura M. Groves
Attorney for Appellant Petitioner
600 1st Ave, Ste 435
Seattle, WA 98104

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A. Assignments of error

Assignments of Error

1. The trial court erred in denying the relocation of the child with the mother when it did not apply the presumption that the relocation would be allowed under RCW 26.09.520
2. The trial court erred in denying relocation when any harm done by the relocation would be nothing more than mere normal distress suffered due to the logistics of a move.

Issues Pertaining to Assignments of Error

Whether the trial court abused its discretion in not applying the presumption that relocation will be granted under RCW 26.09.520 when the court finds that the factor weighs neither for nor against relocation?

Whether the trial court abused its discretion in denying relocation when it did not find that any harm done by the relocation would be more than normal distress suffered due to travel, infrequent contact of a parent, or other hardships which predictably result from dissolution of marriage?

B. Statement of the Case

On May 25, 2009, the Petitioner served the Respondent with her Notice of Intended Relocation. CP 2. The Petitioner made her decision to relocate herself and her child based on the several factors. RP 54 – 59. One, her current husband, Rickie Driskill, was having a difficult time finding employment in Washington due to the economy and ability to transfer his Paramedic license from Kentucky to Washington. RP 55. Mr. Driskill did everything he could to obtain the necessary credentials in

Washington; however, the requirements are difficult to fulfill for an individual not trained in Washington. RP 55. Due to the financial difficulties that occurring as a result of Mr. Driskill's inability to find adequate and lasting employment in Washington, moving to Kentucky was the better financially sustainable option. RP 55. Mr. Driskill had employment opportunities available to him in Kentucky, not in Washington. RP 55. In addition, the Petitioner had employment opportunities available to her in Kentucky, which would have put them in a financially secure situation that they could not obtain in Washington. RP 55.

In addition, Mr. Driskill has parent's who are in poor health and need to assistance taking care of themselves and their 250 acre farm land. RP 57. Even though Mr. Driskill has other family members that are available in Kentucky, Mr. Driskill has always been the primary care taker. RP 58.

These two factors were the driving force in the Petitioner's decision to relocate her child and current husband to Kentucky. RP 54 – 59. The Petitioner has always been the primary caretaker for her daughter, who suffers from ADHD. RP 36.

On June 26, 2009, the Respondent filed his objection. CP 1. On November 19 and 20, 2009, the trial was held, which resulted in the court denying the relocation. CP 292 – 299. The court found that four factors weighed in favor of the Respondent and the remaining six factors weighed neither for nor against the relocation. RP 176 – 182.

C. Argument

In most cases, a trial court's rulings on the provisions of a parenting plan are reviewed for abuse of discretion. *In re the marriage of Horner*, 151 Wash.2d 884,893, 93

P.3d 124 (2004). “Abuse of discretion occurs ‘when the trial court’s decision is manifestly unreasonable or based upon untenable grounds or reasons.’” *Id.*

RCW 26.09.520 allows the residential parent a rebuttable presumption that a relocation will be allow. The non-relocating parent has the burden to 1) timely object to the relocation and 2) rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating parent". *Id.* The statue provides eleven factors for the court to determine at trial whether a relocation would have a detrimental effect on the child. In this case only the first ten factors are relevant because the eleventh factor only applies to temporary orders. *Id.* The legislature did not weight the relocation factors, but this does not preclude a court from focusing on factors that are more relevant in a given case." *Marriage of Pennamen*, 135 Wn. App. 790, 804, 146 P.3rd 466 (2006). The court is required to enter findings on each factor or, in absences of written findings, orally articulate the determinations of each factor.

THE TRIAL COURT ERRED IN DENYING THE RELOCATION OF THE CHILD WITH THE MOTHER WHEN IT DID NOT APPLY THE PRESUMPTION THAT RELOCATION WOULD BE ALLOWE UNDER RCW 26.09.520

The trial court did not apply the presumption granted to the relocating parent under RCW 26.09.520 to factors that weighed neither for nor against the relocation.

The court is not precluded from focusing on factors that are more relevant in a given case. *Marriage of Pennamenn*, at 804. The legislative intent of the factors was to give each fact equal weight and to require the court to make the determinations of each factors weight in ruling for or against a relocation. *See* RCW 26.09.520. However, the lack of weight initially given to the factors does not remove the presumption that allows

relocation. The statute specifically states that the detrimental effect must outweigh the benefits of the relocation based on factors provided by the statute. *Id.* The court's decision about whether the detrimental effects of relocation outweigh the benefits to the children and the relocating parent is inherently subjective. *Marriage of Pennamenn*, at 802.

In this case, the court concluded that four of the ten factors weighed against the relocation. RP 176 - 182. One of the four factors was found to be only slightly in favor of denying the relocation. RP 177. The remaining six factors were found to be neither for nor against the relocation. RP 177 – 182. The Petitioner argues that since all the factors standing without weight generally determine that the presumption should be applied, the factors that are found to be neutral should be determined with the same effect. Therefore, in this case, the court found that six of the factors were neutral, which should be interpreted as favoring the presumption. With the presumption applied to the six factors the court would have no other choice but to allow relocation as there would be more factors in favor of relocation as opposed to against relocation. Simply stating that a factor does not weigh neither for nor against relocation does not negate nor remove that factor from the analysis of whether relocation should be granted.

THE TRIAL COURT ERRED IN DENYING RELOCATION WHEN ANY HARM DONE BY THE RELOCATION WOULD BE NOTHING MORE THAN MERE NORMAL DISTRESS SUFFERED DUE TO THE LOGISTICS OF A MOVE.

Any harm done by allowing the relocation of the child would only be the normal harm cause by any move.

The court may not prohibit a parent from relocating a child unless the relocation would cause harm to the child. *In re the marriage of Littlefield*, 133 Wash.2d 39, 55, 940

P.2d 1362 (1997). The statute requires “more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships which predictably result from a dissolution of marriage.” *Id.*

In *Littlefield*, the mother moved from Washington to California. She was the primary residential parent of the child. After moving to California, the mother was ordered to return to Washington upon recommendation of an appointed psychologist/parenting evaluator. It appears that this was to help maintain the relationship between the child and her father. *Id at 45.*

In the present case, the Court deny relocation stating that the ruling was made from the child’s perspective. RP 175. The Court also states that disrupting contact between the child and her mother would be more detrimental than disrupting contact between the child and her father. RP 177 – 178. In addition, the Court states “ I find Rylee is of an age and developmental stage where relocation would negatively affect her emotional and psychological development because it would result in significantly reduced contact with Mr. Rogers, would reduce contact with Mrs. Driskill’s extended family, and ...would remove her to a locale where she has no other connections other than her mother and her step-father.” RP 179. The Court does not state anywhere in its ruling that this would be beyond the normal distress of any relocation for the child.

“The trial court does not have the responsibility or the authority or the ability to create ideal circumstances for the family. Instead, it must make parenting plan decision which are based on the actual circumstances of the parents and of the children as they exist at the time of the trial.” *In re the marriage of Littlefield*, 133 Wash.2d 39,57, 940 P.2d 1362 (1997). In the present case the Court attempted to craft a parenting situation,

in opposition of the best interests of the child. The court had testimony that the now-husband of the child's mother was unemployed and had been for some time. RP 54. The court had testimony that the mother had was unemployed and had employment waiting for her in Kentucky. RP 55. The Court also had knowledge that the mother had leased out her home with the intension of relocating. RP 181. Contrary to looking at the actual situation of the parents, the Court made an attempt to create an "ideal situation" for the child by denying the relocation. This decision, in turn created a situation, which, in fact, created more distress for the child and relocating parent, by putting the family in financial crisis. The Court failed to look at the reality of the situation.

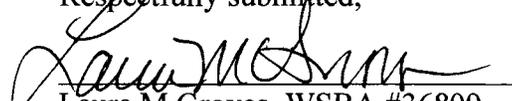
This is a situation where the distress caused by the move would have been less than the distress caused by staying in a financially critical situation. The denial of relocation is more detrimental than not allowing the relocation and Mr. Roger's, the father, did not meet his burden of rebutting the presumption that relocation would be allowed.

D. Conclusion

For the reasons set forth above the Appellant respectfully requests that the Court reverse the trial court's ruling and allow relocation.

March 4, 2011

Respectfully submitted,



Laura M. Groves WSBA #36809
Attorney for Appellant Petitioner

COURT OF APPEALS
DIVISION II
11 MAR 18 PM 4:30
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re:

DIANA DRISKILL,

Appellant

No. 41140-7 II

Declaration of Mailing
(DCLRM)

Vs

CHRISTOPHER ROGERS

Respondent

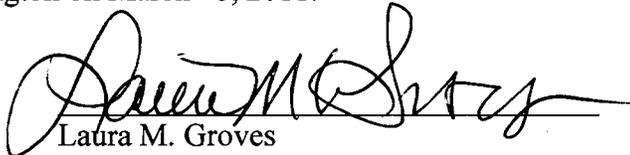
I, LAURA M. GROVES, declare that I am at least 18 years of age and not a party to this action and:

On March 18, 2011 I deposited into the U.S. Mail, first class, postage prepaid, a copy of the following documents:

- Appellant Brief
- Copy of Transcripts from Trial

I certify (or declare) under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington on March 18, 2011.



Laura M. Groves