

No. 41140-7 II

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

DIANA DRISKILL, Appellant Petitioner,

v.

CHRISTOPHER KAYE ROGERS, Respondent

BRIEF OF RESPONDENT

Christopher Kaye Rogers
Respondent, Pro Se
17617 155th Ave SE
Yelm, WA 98597

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Christopher Kaye Rogers
Respondent, Pro Se
17617 155th Ave SE
Yelm, WA 98597

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Respondent, Pro Se
17617 155th Ave SE
Yelm, WA 98597

A. Statement of the Case:

On November 19 & 20, 2009, this relocation action was tried before the Honorable Eric B. Schmidt, sitting as judge pro tempore by stipulation of the parties. Following trial of this matter, the Court entered an Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule in accordance with the standard form. CP 292 – 299.

The foregoing Order contained written Findings of Fact as to all ten statutory factors required following a relocation trial pursuant to RCW 26.09.520. Although Appellant attempts to edit the factual predicate before this Court, no alternate findings were tendered by Appellant/Mother to the Trial Court, nor has she challenged the Findings entered by the Trial Court upon this appeal. The Findings of the Trial Court thus are verities upon this appeal and provide the totality of the factual predicate which is before this Court.

In an Order denying Reconsideration, the Trial Court explained that the first statutory factor weighed slightly against relocation, while the sixth, eighth, and ninth factors weighed against relocation. All remaining factors were neutral: weighing neither for nor against relocation. CP 312-314. (The ten statutory factors appear as Sub-Paragraphs 2.3.1 through 2.3.10 of this Order. The final digit corresponds to the ordinals cited above.)

Appellant concedes that “[T]he 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). See Brief of Petitioner at Page 6. Notwithstanding the *Pennamen* rule that a Trial Court possesses

discretion to discern the weight which each factor should be given in a particular case, Appellant argued upon reconsideration, as she does upon neutral is actually a finding in favor of the party proposing relocation. No authority was provided either in the Court below or in Petitioner's brief to sustain that argument. As implicitly noted by the Trial Court, Petitioner's argument is contrary to the ruling in *Pennamen*.

The Trial Court denied the motion for reconsideration on two bases: (1) Even assuming *arguendo* that the factors found to be **neutral** are interpreted as supporting the presumption in favor of relocation, the findings on the four factors which weighed against relocation in this case carried enough weight to overcome the presumption in favor of relocation. (2) The facts supporting the Trial Court's findings as to the first, sixth, eighth, and ninth factors were fully considered by the Trial Court upon trial of this action and nothing had changed from the date of trial to the time of the motion for reconsideration to warrant a change in any of the findings made under those factors.

This appeal comes before this Court upon the unchallenged findings of the Trial Court, The weight accorded to the above four factors by the Trial Court is specifically within the discretion recognized by the *Pennamen* decision. None of the statutory factors supported relocation. The argument that a neutral factor is not really a neutral factor is unsupported by any citation of authority and contradicts the logic and teaching of the *Pennamen* decision. (Had the legislature intended that neutral factors be contorted into factors supporting relocation, it would most certainly have indicated the same in RCW 26.09.520, particularly after the *Pennamen* decision was published.) Even accepting the proposition for the sake of argument, it would not alter the result in this action, since the Trial Court found that the weight of the four factors supporting denial of relocation outweighed the remaining factors in any event.

B. Argument:

- 1. The Trial Court properly applied the rebuttable, statutory presumption that a proposed relocation is permitted and concluded that the Respondent/Father had sustained his burden of rebutting said presumption.**

Contrary to the assertions of the Appellant, the Trial Court properly applied the statutory presumption of RCW 26.09.520, concluded that the Respondent had rebutted that presumption, and restrained the relocation of the minor child. Appellant, however, seeks to avoid the Trial Court's ruling by arguing that any factor deemed to be neutral with respect to the proposed relocation is necessarily a finding in favor of relocation.

Nothing in the text of RCW 26.09.520 supports the interpretation advanced by Appellant in this regard. The statute itself states that the factors are not weighted and that no inference is to be drawn from the order in which the factors are listed. As noted in *Pennamen* at 804, the Trial Court has the discretion "...to focus on factors that are more relevant in a given case."

If the legislature intended triers of fact merely to add up the statutory factors and apply a mathematical summation to its decision, it could easily have done so. The legislature did not do so, nor did it amend RCW 26.09.520 following the *Pennamen* ruling that triers of fact may focus on factors which are more relevant in a given case.

The fact that RCW 26.09.520 contains ten, unweighted factors for consideration at trial, with some factors being more relevant under the particular circumstances of a given case, necessarily implies that the trier of fact must assess each factor, analyze the totality of the circumstances, and then conclude whether to permit or restrain a

proposed relocation.

Moreover, upon reconsideration, the Trial Court noted that “...even if the findings on the “neutral” factors are interpreted as supporting the presumption in favor of relocation, the findings on the four factors that weighed against relocation carried enough weight to overcome the presumption in favor of relocation.” Order Denying Reconsideration at 2; CP 312 – 314.

Thus, the Trial Court concluded that the more relevant factors in this action compelled a conclusion that the Respondent had rebutted the statutory presumption. The Trial Court’s conclusion was within its discretion under *Pennamen*.

2. The Trial Court specifically found that the detrimental effect of the proposed relocation outweighed the beneficial effect of relocation and that the father had rebutted the statutory presumption under RCW 26.09.520 in favor of the proposed relocation.

Appellant asserts that “[a]ny harm done by allowing the relocation of the child would only be the normal harm cause (sic) by any move.” Brief of Appellant at 7. This assertion is expressly contradicted by the unchallenged findings in this action.

In Sub-Paragraph 2.3.1 of the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule, the Trial Court found that the minor child had a strong bond with both parents, that her mother’s extended family is located in Washington, and that the minor child has no extended family in Kentucky, other than the family of her step-father. CP 292 – 299.

In Sub-Paragraph 2.3.6 of the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule, the Trial Court found that relocation would negatively affect the emotional development of the minor child, and that the minor child would be isolated in Kentucky from her extended families. CP 292 – 299.

In Sub-Paragraph 2.3.8 of the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule, the Trial Court found that alternative arrangements would not mitigate the loss of personal contact between the minor child and the father. The Trial Court further found that it did not appear that the mother and step-father could afford to fly the minor child back to Washington very often. CP 292 – 299.

In Sub-Paragraph 2.3.9 of the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule, the Trial Court found the mother had not shown that she could not obtain new employment in Washington, that the mother continued to own a house in Pierce County, Washington, that the step-father was not the sole source of care for his own parents, and that it was not realistic for the father to relocate to Kentucky, since he has established his professional reputation as a union glazier in Western Washington and there was no showing that he could obtain a job or transfer his union membership to Kentucky. CP 292 – 299.

In Sub-Paragraph 2.3.10 of the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule, the Trial Court found that restraining the proposed relocation would have a negative financial impact on the mother's family, however, the Trial Court further found that much of this situation was of the mother's own making: (a) the mother had resigned

from a very good job and (b) she had leased out her house for a two year period, prior to obtaining permission to relocate the minor child. Thus, while that factor would normally support permitting the relocation, the mother could not take advantage of her own conduct in this regard. Therefore, the Trial Court treated this factor as neutral with respect to the proposed relocation. CP 292 – 299.

In Sub-Paragraph 2.3.4 of the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule, the Trial Court found that the detrimental effects of the proposed relocation outweighed the beneficial effect of the relocation, and that the father had sustained his burden of rebutting the statutory presumption. CP 292 – 299.

Despite attempting to provide a contrary recitation of the facts of this action by way of selective review of the testimony at trial, the Appellant failed to challenge any of the foregoing findings. An unchallenged finding is a verity upon appeal. *In re Estate of Jones*, 152 Wn. 2d 1, 8, 93 P.3d 147 (2004); *Marriage of Akon and Awan*, Division III Docket No. 27922-7 [Published Opinion filed 02/10/2011].

The Trial Court reviewed all evidence tendered at trial and then entered the Findings of Fact set forth in the Order on Objection to Relocation/Modification of Custody Decree/Parenting Plan/Residential Schedule. CP 292 – 299. Appellant has not challenged any of the Findings entered by the Trial Court and is thus bound by those Findings. Her discussion of the evidence avails her nothing to the extent that she attempts to contradict the Trial Court's Findings.

The Trial Court's determination that relocation in this action should be restrained is supported by the unchallenged findings in this action.

C. Conclusion:

The Trial Court properly applied the statutory presumption that a relocation is permitted, analyzed all statutory factors and focused upon those factors deemed to be most relevant in this action, and concluded that the proposed relocation should not be permitted. For the reasons set forth above, the Respondent respectfully requests that this Court affirm the ruling of the Trial Court.

May 5, 2011

Respectfully submitted,

Christopher Kaye Rogers,
Respondent, Pro Se

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