

COA # 42060-1

NO. 84912-9

THE SUPREME COURT
STATE OF WASHINGTON

KIMBERLY SUE MILES

Respondent,

v.

ANTHONY HAROLD MILES,

Appellant,

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. INTRODUCTION1

B. STATEMENT OF ISSUES.....2

C. STATEMENT OF THE CASE.....3

D. AUTHORITY AND ARGUMENT5

 I. THE COURT SHOULD DENY REVIEW BECAUSE THE
 REQUIREMENTS OF RAP 4.2(a) ARE NOT SATISFIED6

 II. THE COURT SHOULD DENY REVIEW BECAUSE MILES
 CANNOT RAISE THE RELOCATION ISSUE FOR THE FIRST
 TIME ON APPEAL.....6

 III. THE COURT SHOULD DENY REVIEW BECAUSE MILES
 DID NOT SEEK REVIEW OF THE 2003 RELOCATION
 ORDER UNTIL 2010.....9

 IV. THE COURT SHOULD DENY REVIEW BECAUSE THE
 RELOCATION ORDER WAS A PROPER EXERCISE OF
 THE TRIAL COURT’S DISCRETION9

 V. THE COURT SHOULD DENY REVIEW BECAUSE THE
 DENIAL OF ADEQUATE CAUSE UPON THE 2010
 PETITION TO MODIFY THE PARENTING PLAN WAS A
 PROPER EXERCISE OF THE TRIAL COURT’S
 DISCRETION.....11

 VI. THE COURT SHOULD AWARD REASONABLE ATTORNEY
 FEES AND EXPENSES.....13

E. CONCLUSION13

TABLE OF AUTHORITIES

CASES

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2010).....6,8
State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....6,7
State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999)6,8
Momb v Ragone, 132 Wn.App 70, 130 P.3d 406 (2006).....7
Parentage of R.F.R., 122 Wn. App. 324, 93 P.3d 951 (2004).....7
State v. Johnson, 119 Wn.2d 167, 829 P.2d 1082 (1992).....7
In re Rosier, 105 Wn.2d 606, 717 P.2d 1353 (1986).....7
Schaeferco, Inc. v. Columbia River Gorge Comm., 121 Wn.2d 366, 849 P.2d 1225 (1993).....9
In re Marriage of McDole, 122 Wn.2d 604, 859 P.2d 1239 (1993).....10
In re the Marriage of Kovacs, 121 Wn.2d 795, 854 P.2d 629 (1993)10
State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)10
In re Marriage of Fiorito, 112 Wn. App. 657, 50 P.3d 298 (2000).....10
In re Marriage of Pennamen,
135 Wn. App. 790, 798, 146 P.3d 466 (2006).....11
In re Parentage of Jannot, 149 Wn.2d 123, 65 P.3d 664 (2003).....12
In re marriage of Lemke, 120 Wn. App. 536, 85 P.3d 966 (2004)12
In re Marriage of Healy, 35 Wn. App. 402, 406, 667 P.2d 114 (1983). ...13

STATUTES

RCW 26.09.4309
RCW 26.09.48010
RCW 26.09.50010
RCW 26.09.27011

COURT RULES

RAP 4.2(a)5,6
RAP 2.5(a)6
RAP 2.5(a)(3).....6,7
RAP 5.2(a)9
RAP 5.2(e)9
RAP 18.1(a)13
RAP 18.9(a)13
RAP 18.1(d).....13

A. INTRODUCTION

Appellant Anthony Miles seeks direct review of the final parenting plan entered on January 3, 2003 following a trial, which final order designated Kimberly Miles as the primary residential parent for the parties' son, and confirmed Ms. Miles' April, 2002 relocation to New Jersey with the child upon Temporary Orders following Mr. Miles' perpetration of acts of domestic violence upon Ms. Miles. Appellant Anthony Miles did not appeal the trial court's dispositive orders in 2003. Additionally, Anthony Miles seeks review of the superior court's July 16, 2010 denial of adequate cause in response to his petition to modify the parenting plan in the above case. The Court should deny review because none of Anthony Miles' claims have merit nor meet the requirements for direct review by this Court. Further, Anthony Miles did not raise the relocation issue at trial and cannot raise it now for the first time on appeal. Moreover, Anthony Miles' appeal of the orders entered in 2003 is not timely, being seven years late. Should the Court address the underlying merits, review should be denied because Anthony Miles did not file any objection to the proposed child relocation in the 2002 trial and the evidence presented at trial supported the parenting plan as entered as well as the relocation. Thus, the court's order in effect confirming the relocation was a proper exercise of discretion. Finally, the Court should

affirm the superior court's denial of adequate cause in 2010 as a proper exercise of the trial court's discretion amply supported by the facts.

B. STATEMENT OF ISSUES

I. Whether Mr. Miles may seek direct review in the Supreme Court of when none of the requirements for direct review set forth in RAP 4.2(a) are satisfied.

II. Whether Mr. Miles may seek direct review of the final orders entered January 3, 2003 when Mr. Miles (1) did not object to relocation or raise the issue at trial; and (2) did not file a notice of appeal until August 4, 2010.

III. Whether relocation was a proper exercise of the trial court's discretion when (1) Ms. Miles filed the required statutory Notice of Intent to Relocate; (2) Mr. Miles did not file any objection to relocation, neither within 30 days as required by statute, nor at any time prior to trial; and (3) Mr. Miles did not raise the issue at trial.

IV. Whether the trial court's denial of adequate cause on July 16, 2010 was a proper exercise of discretion when (1) the 2003 parenting plan required Mr. Miles to complete a domestic violence parenting class before seeking modification; and (2) Mr. Miles did not complete at least the required parenting class.

C. STATEMENT OF THE CASE

Appellant Anthony Miles and Kimberly Miles (hereinafter referred to as “Anthony” and “Kimberly” respectively for ease of reference) were married January 7, 1995. RP2¹ 67; CP 124. On March 29, 2002, Anthony severely assaulted Kimberly in the presence of the parties’ then-2 year old son, punching Kimberly in the face 10 – 12 times. RP2 42. During the assault, Anthony fractured Kimberly’s nose, cut her forehead, caused a large hematoma to her jaw, and caused multiple bruises to her buttocks, hip and arms. RP2 43. Kimberly also suffered significant emotional harm from the assault. RP2 43. Further, Kimberly was diagnosed with post traumatic stress disorder resulting from the assault. RP2 58. Kimberly filed a petition for dissolution April 5, 2002 upon which temporary orders were addressed in the trial court April 26, 2002. RP1 1. The court granted a temporary parenting plan allowing Kimberly to relocate to New Jersey. RP1 13. The court found living in New Jersey is necessary for her ongoing treatment and well being. RP2 61. At that hearing, the court ordered Kimberly to file notice of relocation as required by RCW 26.09.430. RP1 14. The notice was filed June 18, 2002. CP 29-31.

¹ Three reports of proceedings were provided to respondent. RP1 consists of the hearing on 4/26/2002; RP2 consists of the trial on 12/18/2002 and the entry of findings on 1/3/2003; RP3 consists of hearings 8/28/09 and 7/16/2010

Anthony did not file any objection to the notice of relocation. He first raised the issue after trial as the court was entering findings on January 3, 2003. RP2 142. The court found that Anthony had never objected to the notice, and as such, the issue was not properly before the court. RP2 144. Court did however state that had an objection been made, the court would have ruled in favor of relocation. RP2 144. The final orders were signed, and no appeal taken of these orders. CP 115-134. The final Parenting Plan contained restrictions because of Anthony's acts of domestic violence and abusive use of conflict. CP 116. Section 3.13 of the Parenting Plan specifically provided as follows:

Upon the child attaining at least six (6) years of age, the father's satisfactory completion of a court-approved Domestic Violence Perpetrator's Program and recommended treatment as well as a Domestic Violence Perpetrator's Parenting Class, the father may apply to the Court for unsupervised visits with the child and minor modification of the residential schedule, provided he can demonstrate to the Court that he will not likely expose Shane to the cycle of violent behavior.

CP 119.

In June of 2010, Anthony petitioned the court for modification of the 2003 parenting plan. On July 16, 2010, adequate cause was denied because Anthony did not complete a condition precedent to review, namely the domestic violence parenting class mandated in the original parenting plan. CP 135-136; RP3 25; RP2 24. Notice of appeal to this Court via a Petition for Direct Review was filed August 4, 2010. CP 55;

Kimberly filed her Answer to the Petition for Direct Review in this Court on August 24, 2010.

D. AUTHORITY AND ARGUMENT

A party may seek review in the Supreme Court of a decision of a superior court only when (1) a statute authorizes direct review in the Supreme Court; (2) the trial court has held a statute invalid as unconstitutional; (3) there is an issue in conflict among decisions of the Court of Appeals; (4) the case involves a fundamental and urgent issue of broad public import which requires prompt and ultimate determination; (5) the action is against a state officer; or (6) the death penalty has been decreed. RAP 4.2(a). Review in this case should be denied because none of the above requirements are met. Further, review should be denied as Anthony cannot raise the relocation issue for the first time on appeal, and his request for review was seven years late. Finally, review should be denied because Anthony did not object to the proposed child relocation in the 2002 trial, and the superior court's denial of adequate cause in 2010 was a proper exercise of its discretion.

I. THE COURT SHOULD DENY REVIEW BECAUSE THE OF THE REQUIREMENTS OF RAP 4.2(a) ARE NOT SATISFIED

Neither Anthony's statement of grounds nor his brief set forth any basis in fact or in law that would satisfy any criterion of RAP 4.2(a).

Anthony does not cite a statute that authorizes direct review of any of his claims. The trial court did not invalidate any law in the proceedings below.

Anthony cites no authority in conflict across divisions of the Court of Appeals or in conflict with the facts in his case. Anthony does not demonstrate in any manner how the parenting plan entered in 2003 by the superior court involves an urgent issue of broad public import requiring prompt determination. Finally, the case involves neither a state officer nor the death penalty. As such, this Court should not grant review.

II. THE COURT SHOULD DENY REVIEW BECAUSE MILES CANNOT RAISE THE RELOCATION ISSUE FOR THE FIRST TIME ON REVIEW

Anthony did not raise the relocation issue at trial; thus, he failed to preserve the issue for review. This Court should not consider a claim of error raised for the first time on appeal unless the appellant shows it is a "manifest error affecting a constitutional right". RAP 2.5(a); RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2010); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). The manifest constitutional error exception to the general rule is a narrow one. *State v.*

WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); *McFarland, supra.*, 127 Wn.2d at 333. To show manifest error under RAP 2.5(a)(3), the appellant must identify a constitutional error and show how, in the context of trial, the claimed constitutional error actually affected the party's rights—"it is this showing of actual prejudice that makes the error manifest, allowing appellate review." *McFarland, supra.*, 127 Wn.2d at 333. Miles cannot satisfy either prong of the test.

Anthony does not articulate a specific constitutional error. His brief references several constitutional doctrines, but is somewhat vague as to what specific constitutional right(s) were impinged in the proceedings below. Generally, Washington courts have upheld the relocation statutes as constitutional. *Momb v Ragone*, 132 Wn.App 70, 80, 130 P.3d 406 (2006)(finding the statutes facially constitutional and not violative of the right to privacy, equal protection, commerce clause or freedom to travel); *Parentage of R.F.R.*, 122 Wn. App. 324, 330, 93 P.3d 951 (2004)(upholding the statute in a substantive due process challenge).

Parties raising constitutional issues must present considered arguments to the Court. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). "Naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364,

1366 (8th Cir.1970)). As Anthony has not articulated or supported a finite constitutional argument, the Court should not find a constitutional violation.

Moreover, Anthony cannot demonstrate prejudice. Essential to the determination of actual prejudice is the necessity of a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. *WWJ Corp., supra.*, 138 Wn.2d at 603. Absent an affirmative showing of actual prejudice, the error is not “manifest,” and thus, is not reviewable under RAP 2.5(a)(3). *O'Hara, supra.*, 167 Wn.2d at 99; *McFarland, supra.*, 127 Wn.2d at 334. Anthony cannot demonstrate any prejudice that the court chose not to exercise its discretion.

As noted above, Anthony failed to object to the notice of relocation at trial. When the issue was raised at the hearing on presentment of the final pleadings following the trial, the trial judge stated plainly, “If I was to make a ruling, it would be adverse to your interests, and I would rule that the child could be relocated to New Jersey.” RP2 144. On this statement, prejudice cannot be found. This claim cannot be raised before this Court for the first time at this juncture.

III. THE COURT SHOULD DENY REVIEW BECAUSE ANTHONY DID NOT SEEK REVIEW OF THE 2003 DECREE OF DISSOLUTION AND FINAL PARENTING PLAN UNTIL 2010

Anthony's claims are time barred. A notice of appeal must be filed 30 days after the entry of the decision an appellant wants reviewed. RAP 5.2(a). This 30-day time limit may be prolonged by the filing of "certain timely post-trial motions" specified in RAP 5.2(e). *Schaefco, Inc. v. Columbia River Gorge Comm.*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993). Here, the orders Anthony wants reviewed, the Decree of Dissolution and Final Parenting Plan, were entered January 3, 2003; his notice of appeal was filed August 10, 2010. Anthony provides no authority that would support review more than seven years after the entry of the final parenting plan at issue. Further, none of the exceptions allowed by RAP 5.2(e) apply. His petition is grossly untimely, and review should not be granted.

IV. THE COURT SHOULD DENY REVIEW BECAUSE THE RELOCATION WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION.

The procedure related to child relocation is set forth in RCW 26.09.405, et seq. A person with whom the child resides a majority of the time shall notify every other person entitled to residential time of an intent to relocate. RCW 26.09.430. Kimberly issued her Notice of Intent to Relocate on June 18, 2002. A party objecting to the intended relocation of

the child or the relocating parent's proposed revised residential schedule is required to file the objection with the court. RCW 26.09.480. If a person entitled to object to the relocation of the child does not file an objection with the court within thirty days after receipt of the relocation notice, then the relocation of the child shall be permitted. RCW 26.09.500. Here, no objection was filed, thus the trial court's grant of relocation was not error.

Trial court decisions dealing with the welfare of children are reviewed for abuse of discretion. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). Abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *In re the Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).; *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; [and] it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the current standard.

In re Marriage of Fiorito, 112 Wn. App. 657, 664, 50 P3d 298 (2000.)

The facts and applicable legal standard in the present case are straight forward: Kimberly properly issued and filed the notice of relocation, Anthony did not properly object, nor did he present any evidence on the merits on the issue of relocation or even the parenting

plan in general at trial. The court then entered its final parenting plan upon the evidence presented, and in so doing confirmed the relocation. While the Court may have had the discretion to hear the relocation issue on the merits had Anthony raised it during trial (*see, In re Marriage of Pennamen*, 135 Wn. App. 790, 146 P.3d 466 (2006)), Anthony did nothing until well after the trial had been concluded. Applying the above standard here, abuse of discretion cannot be found, and the Court's decision to pass upon the issue in January, 2003 was proper.

V. THE COURT SHOULD DENY REVIEW BECAUSE THE DENIAL OF ADEQUATE CAUSE UPON THE 2010 PETITION TO MODIFY THE PARENTING PLAN WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION

Finally, the trial court's denial of Anthony's 2010 petition to modify the parenting plan for his failure to meet his burden on adequate cause was a proper exercise of its discretion. Under RCW 26.09.270,

[a] party seeking...modification of a custody decree or parenting plan shall submit together with his motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

A trial court's denial of adequate cause is reviewed for abuse of discretion. *In re Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P3d 664 (2003). “At the very minimum, ‘adequate cause’ [under RCW 26.09.270] means evidence sufficient to support a finding on each fact that the movant must prove in order to modify; otherwise, a movant could harass a nonmovant by obtaining a useless hearing.” *In re Marriage of Lemke*, 120 Wn.App. 536, 540, 85 P.3d 966 (2004.)

Here, the trial court denied adequate cause because it found Anthony had not completed the threshold requirements for review of the restrictions in the parenting plan, namely requiring proof of both the completion of the domestic violence perpetrators’ treatment program, and, particularly, the domestic violence parenting class. It was compelling to the Court that Anthony had had over seven years in which to comply. RP3 25. As this decision is neither untenable nor unreasonable, as the Parenting Plan laid out conditions precedent to a review of the restrictions in the form of completion of the domestic violence perpetrator’s treatment program and the domestic violence parenting class, and Anthony plainly did not satisfy at least one of those conditions, abuse of discretion cannot be found.

VI. THE COURT SHOULD GRANT REASONABLE ATTORNEYS FEES AND EXPENSES UNDER RAP 18.1, RAP 18.9

The Court may grant reasonable attorney fees and expenses where applicable law grants a party the right to recover them. RAP 18.1 This Court is authorized to order a person who files a frivolous appeal to pay terms or compensatory damages. RAP 18.9. An appeal is frivolous when the issues raised are so devoid of merit that there is no reasonable possibility of reversal. *In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114 (1983). Such is the case here. Miles has asked this Court to review an issue that (1) he failed to preserve, (2) is time barred by seven years, (3) is not supported by authority, and (4) is not authorized by RAP 4.2(a). The Court should award respondent reasonable attorney fees and expenses in an amount to be submitted by affidavit per RAP 18.1(d).

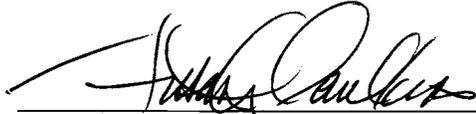
E. CONCLUSION

Review in this case should be denied because none of the requirements for direct review set forth in RAP 4.2(a) are met. With regard to the 2003 orders, review should be denied as Miles did not properly raise the issue at trial and cannot raise the issue now for the first time on appeal. Moreover, his notice of appeal was filed seven years late. The superior court's denial of adequate cause in 2010 should be affirmed as a proper exercise of its discretion. Finally, the Court should award

Respondent Kimberly Miles her reasonable attorney fees and expenses arising from Appellant Anthony Miles frivolous appeal.

RESPECTFULLY SUBMITTED this 3rd day of March, 2011

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