

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Garrett Lail, Respondent,
and
Kimberly Briggs, Appellant.

RESPONSE BRIEF OF APPELLANT

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I. Response to Statement of the Case

RAP 10.3 (a)(5) defines the statement of the case section of a brief to be a “ A fair statement of the facts and procedure relevant to the issues presented for review, without argument. References to the record must be included for each factual statement.”

Although there are some statements in Mr. Micheau’s statement of the case that are true and correct, there are several statements made that are not accurate and do not conform to the previously stated RAP Rule 10.3 and these statements should be disregarded.

The first statement I take issue with is on Page 2 of the Respondent’s Brief. It states “The parties then both resided in Cosmopolis, WA area.” There is no citation to the record and therefore the appellate court cannot verify the validity of this statement. Subsequently, the statement made on page 3 that purports, “Briggs did not mention that her residence was already in a different town, Hoquiam as opposed to Cosmopolis, and she was thus already in a different school district than the original parenting plan.” (Resp. Brief, 2) should be appropriately disregarded as it is based on the previously unsubstantiated claim. In addition, the Order on Objection to Relocation from the May 22nd, 2009 relocation proceeding that Mr. Micheau quoted in his brief acknowledges Mr. Lail and I had

prior agreements in regards to relocation parameters in Finding 2.3.2 (CP 117). Given the fact I had moved to Olympia (55 miles from Cosmopolis) in July of 2006 (1 ½ months after the original parenting plan was signed) and then to the residence in Elma in July 2007 (30 miles from Cosmopolis) without any objection from Mr. Lail, I think it is apparent that those distances were acceptable to him. Therefore, I think it was safe to assume my relocation to Hoquiam (a city adjacent to the Aberdeen/Cosmopolis area) would be undisputed by Mr. Lail as well. Also, given the fact I had resided in Hoquiam for 6 months prior to filing my Notice of Relocation (RP 6/22/11 Testimony, 6), it would be safe to assume Mr. Lail would naturally be aware of Mason's new residence due to the extensively involved nature of the relationship Mr. Lail has with Mason as Mr. Micheau repeatedly emphasizes (Resp. Brief, 2).

The next statement that should be disregarded is on page 3 of the Respondent's Brief and it states, "Briggs did not appeal, and returned from Spokane to reside in Grays Harbor County within a few weeks after the relocation was denied. Along with not having any record to substantiate the claim that I did not return to Grays Harbor for "a few weeks", this claim is completely false and could be proven to be so if this court finds it appropriate to remand this case back to trial court for further proceedings. (In addition, if remanded for further proceedings in lower court, the

court's incorrect assumption that I "in effect abandon[ed] this child" as a result of the 2009 relocation case could be disproved)

The next statement in Mr. Micheau's Respondent's Brief that does not conform to RAP Rule 10.3 can be found on page 3. It states, "She did not have, or perhaps refused to provide, either a new address or a new mailing address in her notice." He is correct in stating that I "did not have" a new address as I had not relocated or had any intention of relocating if my petition for relocation was denied as shown in the various verbal indications found throughout my testimony on June 22nd (RP Testimony 6/22/11, 26, 27, 30, 31) and therefore I did not feel it was appropriate or necessary secure housing in the Olympia/Lacey area until I was permitted to do so by the courts. The part of that statement that I do have issue with is the unfair (along with untrue) insinuation that I "refused" to provide this information in my notice (Resp. Br., 3). Since this is an objective statement based on fact it should be disregarded as such.

The next issue I have with the Statement of the Case can be found in Mr. Micheau's summarizations of Mr. Lail's Objection to Relocation and Petition for Modification (CP 124). Section (d) states part of Mr. Lail's basis for modification includes, "creation of a safe and secure environment for the child centered around the father's home and custody as compared

to the mother's ever changing circumstances being a detriment to the well-being of the child" and there was absolutely no reference made to the "creation of a safe and secure environment" with Mr. Lail or any language indicating any specific detriment to Mason due to my supposed "circumstances" (Resp. Brief 4-5). Even if there had been specific allegations to this effect in either of these documents or Mr. Micheau had included citations from these documents to substantiate these statements, due to the fact they are merely prima facie allegations, they do not qualify as "fair statements" and I feel border the classification of argument, both of which are not permitted by RAP Rule 10.3 in the Statement of the Case section.

The next statement that I disagree with is found on page 5 of the Respondent's Brief. Mr. Micheau incorrectly posits, "The existing parenting plan did not include any language giving either parent a preferential right or obligation to care for Mason while the other parent was working or otherwise occupied." (Resp. Brief, 5) Section IV of the May 16, 2006 parenting plan allows for joint decision making with no restrictions between Mr. Lail and myself (CP 112-113). This section not only allows but obligates Garrett and I to cooperate in making major decisions regarding Mason's upbringing and child care would be a major

decision under that section although there was no language in this parenting plan specifically addressing childcare decisions.

The final statement I take issue with in the Respondent's Statement of the Case is on page 6 and it states, "Due to **several delays requested or caused by Briggs**, no written order derived from the June 22 oral decision was entered until August 8, 2011." (Resp. Brief, 6) The section I have in bold is another untrue and objective statement made by Mr. Micheau. The June 27th, 2011 hearing is the only date I requested a continuance because I wanted time to consult with an attorney (RP 6/27/11, 1). All other subsequent continuances were sua sponte decisions of the court due to the inability of both parties in reaching an agreement to a parenting plan (RP 8/8/11, 11). The court placed the responsibility in working out this "liberal" parenting plan that was supposed to work around my schedule on Mr. Micheau and his client at both the June 22nd and June 27th hearings (RP 6/22/11 Ruling, 6-7; RP 6/27/11, 3-4). The following parenting plans proposed by Mr. Micheau and Mr. Lail allowed me only 3 overnight visitations per month. I did not feel these proposed parenting plans qualified as liberal given the circumstances (RP 6/27/11, 2; CP 77). Therefore, since Mr. Micheau and his client were responsible for drafting a liberal parenting plan per the court's instruction and they did not do so, it is an unfair statement to say that I caused these delays.

To summarize, there are several statements Mr. Micheau makes throughout his statement of the case that do not conform to RAP Rule 10.3 and should be disregarded at the very least. I feel a more appropriate remedy would be to defer to the statement of the case included in my opening brief as it strictly conforms to the guidelines set forth in RAP Rule 10.3.

II. Response to Argument

A. The court did not follow statutory procedures and

considerations in the decision to deny relocation and this constitutes abuse of discretion requiring reversal of the trial court's decision.

- a. Although it is not necessarily reversible error for the court to not have entered findings on all 11 statutory factors for relocation, it is a requirement for the court's decision to be supported by substantial evidence in the record and that threshold had not been met in this case.

After a thorough review of Mr. Micheau's response brief, it appears to me that the crux of his argument under this section can be summarized by his own statement from page 14 that states, "In the case at hand, it is conceded that the trial judge did not, at any of the several

hearings, walk through a point by point discussion of the eleven statutory factors. It is not conceded, however, that the record is so deficient as to justify either a finding of abuse of judicial discretion, or to otherwise call for reversal of the trial court decision.” (Resp. Brief, 14)

As a threshold matter, I would like to address a statement made by Mr. Micheau under this section that is completely erroneous. He states, “The mother’s debt situation, while perhaps an unusual consideration, was in fact, a primary justification presented by the mother in support of her relocation request.” (Resp. Brief, 15) In my notice of intended relocation, the only reference to any financial benefits of relocation is the fact that over \$500 in commuting expenses per month would be eliminated if relocation was granted. There was no reference to any debt that I had (CP 2). The first time that my debt situation was mentioned was during the court’s examination of me at the evidentiary hearing which I am assuming the court discovered in reviewing the financial statements I was required to submit for child support modification (RP 6/22/11 Testimony, 35). However, the court did not make specific reference to exactly which documents were being referenced so I am unable to verify.

Mr. Micheau cites two cases to support his argument that the court’s denial followed statutory procedure and that the judge was within

his discretion to deny relocation although he did not specifically address all eleven factors. The first being the Washington State Supreme Court opinion in *Horner v. Horner* which Mr. Micheau includes a direct citation from which outlines the appellate court procedure for determining whether a trial court abused discretion in documenting its considerations of all eleven factors. *Horner v. Horner* 151 Wn.2d. 884, 896 (2004). In this citation, the Supreme Court held that if **specific** findings of fact were not entered on **all** eleven factors, the reviewing court will defer to the oral articulations and/or review the record to determine if substantial evidence was presented to support the trial court's decision. The other case he referenced was the *Croley* case that was cited by the Supreme Court in the *Horner* opinion. Mr. Micheau summarizes the court's opinion in that case as "it is not necessarily reversible error to fail to enter specific finding of fact on each factor" which is only partially correct. He fails to recognize the other part of the court's considerations in that case were based off of the review of the trial courts oral opinion as well as a review of the record for substantial evidence. *In re Marriage of Croley* 91 Wn. 2d 288, 292, 293 (1978).

In summary, the court in both cases concluded that it is a necessary for substantial evidence to be present in the record that support the court's decision if specific findings of fact are not orally articulated or

if not properly recorded in the Order on Objection. If the record does not contain evidence of a sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise, substantial evidence does not exist. *In re marriage of Fahey* 164 Wn. App 42, 262 P. 3d 128 (2011) Without substantial evidence present in the record to support a finding of detriment to both the relocating party and the child, the court's decision to deny relocation is an abuse of discretion.

In the current case at hand, the Order on Objection to Relocation addresses only six of the eleven factors in which those six factors are not supported by **substantial** evidence in the record (CP, 101-102). In addition, throughout Mr. Micheau's brief he acknowledges that the court did not specifically address all eleven statutory factors either (Resp. Brief, 5, 7, 14, 18). In support of his argument, however, he references several presumptive statements made by the court (Resp. Brief, 15-18), all of which are cited and discussed in my opening brief as well throughout my argument in Section A (Appellant Brief, 12-31). Mr. Micheau feels these statements prove that "Clearly, Judge Godfrey was conducting a balancing test based on the statutory relocation factors." Mr. Micheau further contends these statements are supported by evidence available in the record. At no point during Mr. Micheau's argument does he illustrate to this court what specific factors, if any, are addressed by these statements

and at no point does he make reference to any of the supposed evidence that is available in the record to support the trial court's presumptions. In argument both parties should direct the court to the portions of the record containing support for their respective positions. *Structurals N.W. v Fifth Park Place (1983)* 33 Wash. App. 710, 658 P. 2d 679. Since Mr. Micheau does not properly support his contentions with specific citation to the record, they should not be considered by this court. *Bruce v. Bruce (1956)* 48 Wash. 2d 229, 292 P. 2d 1060

To summarize, I feel it would be appropriate for this court to conduct a thorough review of the trial court record to determine whether or not the decision to deny relocation was supported by substantial evidence. The opening brief I have provided directs this court to the specific citations in the record that pertain to the applicable statutory factors and their relevance in determining detriment to Mason or myself in regards to the court's decision to allow or disallow the relocation. If, in fact, this court does not find there is substantial evidence to support the trial court's decision, I am asking this court to reverse the decision and allow the relocation or, if the court feels it is more appropriate, remand back to trial court for another evidentiary hearing on this matter.

- B. The court did not properly address the statutory considerations for changing primary residential placement of a child from the parent designated as primary custodial parent in the parenting plan to the non-custodial parent therefore requiring reversal of the trial court's decision to do so.
 - a. Adequate cause, shown by evidence of a significant change in circumstances, did not exist to justify the court's decision change primary residential placement to Mr. Lail.

In this section, Mr. Micheau contends that the court's entry of a temporary parenting plan placing Mason in the custody of Mr. Lail "consistent with the recent practices of the parties but inconsistent with the prior parenting plan, followed statutory procedures" (Resp. Brief, 18). It, in fact, did not as there was no adequate cause to warrant a change in custody as required by RCW 26.09.270. Furthermore, since the temporary order from June 22nd was erroneous, any custody decision subsequent to that would be invalid without holding a formal hearing on adequate cause. This would render the trial that is pending the decision on this matter null and void.

The contention that the court had adequate cause at the first hearing to move ahead with modification of custody (Resp. Brief, 22) is incorrect as I had made clear through the various statements indicating I did not intend to move if relocation was denied during my testimony (RP Testimony 6/22/11, 26, 27, 30, 31) at the June 22nd hearing in which the court originally ordered the change of custody to Mr. Lail. As outlined by the Grigsby case, relocation was not being pursued at that point therefore requiring a showing of substantial change of circumstances. *In re Marriage of Grigsby* 112 Wn.App. 1, 57 P.3d 1166.

However, Mr. Micheau contends this showing of substantial change had occurred as a result of the residential schedule Garrett and I had mutually agreed to for the six months prior to my relocation petition deviated from the original parenting plan so significantly as to qualify as an integration as outlined in RCW 26.09.260 (2)(b). (Resp. Brief, 4, 19, 22) He states, “[I]ntegration with consent is, by itself a substantial change of circumstances”. (Resp. Brief, 23) In his brief, he supports his argument of this supposed “integration” on a calendar that was admitted into evidence at trial that he feels shows Mason residing with Mr. Lail (Resp. Brief 19).

Mr. Micheau's argument that substantial change had been demonstrated is incorrect as that the actual residential schedule Mr. Lail and I had verbally agreed to and carried out for the previous six months does not qualify as "integration **with consent**". "Consent," in the context of a motion to modify based on the integration of the children into the noncustodial parent's home with the consent of the custodial parent, refers to a voluntary acquiescence to surrender of legal custody that may be shown by evidence of the relinquishing parent's intent, or by the creation of an expectation in the other parent and in the children that a change in physical custody would be permanent. *In re Marriage of Taddeo-Smith and Smith* (2005) 127 Wash.App. 400, 110 P.3d 1192. There is no evidence in the record to support that I intended this arrangement to be permanent or that Mason had an expectation of this.

He further supports his "integration with consent" argument by stating, "The prior parenting plan did not contain any language either obligating or offering the opportunity for the father to spend extra time with the child when the mother was working or otherwise unavailable." (Resp. Brief, 5, 19) which is incorrect as well.

This argument appears to be an effort by Mr. Micheau to discredit the argument from my opening brief in which I suggest to this court the Fahey

rationale for calculations of residential time should be applied to this current case (Appellant Brief, 15-18). As stated previously in this response brief, Garrett and I both have joint decision making privileges for major decisions in the final parenting plan and therefore childcare is a major child-rearing decisions and should be included under that section although there is not specific language in regards to this in the current parenting plan. This would result in Mr. Micheau's calculations to be incorrect, as the time Mr. Lail provided care for Mason while I commuted to and from work would not count towards his time therefore not allowing him to count the subsequent day before and after those times that I was normally scheduled to have Mason in the parenting plan based on the Fahey rationale. *In re marriage of Fahey*, 164 Wn. App 42, 262 P. 3d 128. This methodology for calculating actual residential time, which is discussed in further detail in my opening brief (Appellant Brief, 15-18), would result in a showing of Mason residing with me well over 50% of the time despite the deviation from our original parenting plan. Therefore, Mr. Micheau's argument in regards to a substantial change due to integration with consent are not valid.

Futhermore, the court does not reference the above stated reasoning in it's oral opinion to support the change in primary residential

placement so it is not proper to argue the court had adequate cause based on this reasoning.

- b. The issuance of an indefinite temporary parenting plan issued in the absence of a pending court action and without proper finding of adequate cause is not permissible based on statute and case law and is therefore an abuse of discretion.

Mr. Micheau states “Temporary orders **in conjunction with modification of custody petitions** are clearly contemplated and permissible...” citing RCW 26.09.270. (Resp. Brief 23). I think Mr. Micheau accurately summarizes the legislative intent behind the issuance of temporary parenting plans in the text I have in bold. This intent is clearly addressed in RCW 26.09.197 which sets forth the criteria for the issuance of a temporary parenting plan. Section (2) states one of the criteria for consideration as “Which parenting arrangements will cause the least disruption to the child’s emotional stability **while the action is pending.**” As mentioned previously in my opening brief, there was no pending action in the trial court on June 22nd at the time the court ordered the temporary parenting plan as relocation had already been denied and there was no hearing set for final disposition on the proposed major

modification at that time (Appellant Brief, 34). The court only allowed for a discretionary review for an undetermined date in the future. As discussed in my opening brief, the criteria set forth by the court at the June 22nd hearing that would allow me to request discretionary review, could potentially take up to nine years for me to achieve (Appellant Brief, 35). It does not seem this “temporary” arrangement would best serve the stated goal of causing the least disruption to Mason’s emotional stability.

Mr. Micheau also argues that the courts issuance of a temporary parenting plan was permissible citing the opinion in the Marriage of Possinger. *In re Marriage of Possinger* Wn.app. 326 (2001). As stated in my opening brief, I would like to reiterate the fact that the Possinger case involves the determination of a final parenting plan as part of a dissolution proceeding where there is no parenting plan currently established. (Appellant Brief, 32) In the current case at hand, there is a final parenting plan on file which would require the court to adequately address the factors for a major modification set forth in RCW 26.09.260. . *In re Parentage of Schroeder*, 106 Wn.App. 343, 350, 22 P.3d 1280 (2001)

In addition, Mr. Micheau referenced RCW 26.09.270 which, just like RCW 26.09.260, requires a showing of adequate cause which requires a change of circumstances. At the time of the hearing and as stated

previously, there was not a change of circumstances as I did not intend on relocating if the relocation was denied.

In summary, since no adequate cause was properly found to justify the court's decision to change primary residential placement from myself to Mr. Lail and the issuance of an indefinite temporary parenting plan is not permissible by statute and case law, the court abused its discretion in doing so. Therefore, the court's decision should be reversed and primary residential placement of Mason should be reverted back to myself.

III. Conclusion

Due to the fact that much of Mr. Micheau's statement of the case does not conform to RAP Rule 10.3, this court should defer to the statement of the case included in the Appellant's Opening Brief. Furthermore, since there is not substantial evidence in the record to support the trial court's decision to deny relocation, the decision should be reversed with a possible remand for further proceedings if this court feels it is necessary. In addition, the trial court's decision to change primary residential placement of Mason from the parent designated as the custodial parent in the final parenting plan to the non-custodial parent is not supported by adequate cause and therefore did not follow the statutory procedures to

modify a parenting plan, this decision should be reversed as well, which would in turn place Mason back in my care.

RESPECTFULLY SUBMITTED this 14th day of September, 2011.


Kimberly Briggs, Pro Se

FILED
COURT OF APPEALS
DIVISION II
2012 SEP 17 PM 1:05
STATE OF WASHINGTON
BY _____
DEPUTY

**State of Washington Court of Appeals
Division II**

In re:		
Garrett Lail		No. 42698-6-II
	Respondent,	Return of Service (Optional Use) (RTS)
and		
Kimberly Briggs	Appellant.	

I Declare:

1. I am over the age of 18 years, and I am a party to this action.
2. I served the following documents to (name) Office of Jack Micheau:
 - summons, a copy of which is attached
 - petition in this action
 - proposed parenting plan or residential schedule
 - proposed child support order
 - proposed child support worksheets
 - sealed financial source documents cover sheet and financial documents
 - financial declaration
 - Notice Re: Dependent of a Person in Military Service
 - notice of hearing for _____
 - motion for temporary order
 - motion for and ex parte order
 - motion for and order to show cause re: _____
 - declarations of _____
 - temporary order
 - other: Motion for extension of time to file Appellant's Response Brief and Response Brief

3. The date, time and place of service were (if by mail refer to Paragraph 4 below):

Date: September 15, 2012 Time: 2:00 p.m.

Address: 106 F Street Cosmopolis, WA 98537 via USPS Lacey, WA

4. Service was made:

- by delivery to the person named in paragraph 2 above.
- by delivery to (name) _____, a person of suitable age and discretion residing at the respondent's usual abode.
- by publication as provided in RCW 4.28.100. (File Affidavit of Publication separately.)
- (check this box only if there is a court order authorizing service by mail) by mailing two copies postage prepaid to the person named in the order entered by the court on (date) _____. One copy was mailed by ordinary first class mail, the other copy was sent by certified mail return receipt requested. (Tape return receipt below.) The copies were mailed on (date) _____.
- (check this box only if there is a statute authorizing service by mail) by mailing a copy postage prepaid to the person requiring service by any form of mail requiring return receipt. (Tape return receipt below.) The copy was mailed on (date) 9/15/2011.

5. Service of Notice on Dependent of a Person in Military Service.

- The Notice to Dependent of Person in Military Service was served on mailed by first class mail on (date) _____.
- Other:

6. Other:

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

Signed at (city) Lacey, (state) WA (date) September 15, 2012.


Signature

Kimberly Briggs
Print or Type Name

Fees:
Service _____
Mileage _____
Total _____

(Tape Return Receipt here, if service was by mail.)

File the original Return of Service with the clerk. Provide a copy to the law enforcement agency where protected person resides if the documents served include a restraining order signed by the court.