

No. 45042-9-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

James Dunn, Respondent,
and
Melissa Dunn, Appellant.

BRIEF OF APPELLANT

Melissa Dunn
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Melissa Dunn

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I. Introduction

This action arose from my request to relocate to Kitsap County for the purposes of employment and financial reasons. Mr. Dunn objected to the relocation and requested a modification of the current parenting plan changing primary residential placement of DLD from myself to Mr. Dunn. The court temporarily changed custody to Mr. Dunn at the initial hearing regarding Temporary Relocation on August 1, 2012 pending final hearing that took place on January 30, 2013. At this hearing, the court verbally denied relocation and awarded custody of DLD to Mr. Dunn. The court entered a final parenting plan reflecting this change of custody on April 8, 2013. I appeal this order.

II. Assignments of Error

a. Assignments of Error

1. The trial court erred in orally denying relocation at the Final Hearing on January 30, 2013
2. The trial court erred in changing primary custody to Mr. Dunn

b. Issues Pertaining to the Assignments of Error

1. Whether the trial court erred in verbally denying relocation without addressing the 11 statutory factors required by RCW
2. Whether the trial court erred by ordering a change in primary residential placement of a minor child without a proper finding of adequate cause pursuant the denial of a relocation

III. Statement of the Case

On November 30, 2007 a Decree of Dissolution (CP 87-94) and a Final Parenting Plan designating me as primary residential custodian of DLD (CP 95-105) was entered in regards to the marriage of Mr. Dunn and myself.

On February 3, 2013 I obtained an ex parte restraining order against Mr. Dunn (CP 109, 115) and submitted a petition for modification of the current parenting plan due to the substantial change of circumstances of Mr. Dunn (CP 106-110). These changes included illegal wiring resulting in a fire at father's home, an

attack on my live in boyfriend, adverse behavior towards myself and my live in boyfriend and endangerment of DLD by Mr. Dunn during his visitations (CP 109). The court held a hearing regarding these issues and entered an order continuing the restraining order in full force and effect except as to DLD, a temporary order regarding visitations and appointment of GAL. In the order, the court addressed my concerns regarding Daisha by requiring overnight visitations to be held at Mr. Dunn's mom's house until proof of electrical inspection was provided to GAL and she was satisfied it is not an electrical hazard, Mr. Dunn was to have no guns in his house pending trial and was to surrender then to the Grays Harbor County Sheriff and Mr. Dunn was restrained from taking DLD on his Sea Doo in the winter or cold weather. Furthermore the court required that Mr. Dunn only be allowed email correspondence with me for purposes of facilitation the parenting plan when necessary. The court also made a finding of adequate cause for that particular action. (CP 115-116)

After several continued hearings, Mr. Dunn and I were able to agree to a parenting plan which was signed and filed on June 8,

2012 which still retained the residential placement of DLD with me and incorporated the safety provisions in regards to DLD and myself that were outlined in the February 8, 2012 temporary order. (CP 121-128)

On July 24, 2012 I filed a Notice of Intended Relocation of Children in which I was asking the court to allow me to relocate DLD to Kitsap County (CP 129-131). One of the reasons for pursuing this relocation is that the Sunday prior to me filing my Notice of Relocation, I had found out the rental home DLD and I had resided in for over 3 years was being foreclosed on and auctioned off due to the owners not paying their mortgage despite my timely monthly rent payments and we had to move out by July 31, 2012 (Johnston VRP 9, CP 130, 133, 134). In addition to this, the full time job I had secured after several months of diligently applying for jobs in the Grays Harbor and Thurston County areas was located in Kitsap County (Johnston VRP 10, 15, 36 CP 130, 133). I was pursuing the relocation at that time as I would not have to spend as much time and money on commuting to and from work and there were educational, housing and recreational resources as

well as career opportunities available to me that would ultimately improve the lifestyle for DLD and myself. (CP 130, 134) In addition, the relocation would not have required a change in the parenting plan (CP 130)

On July 26, 2012 Mr. Dunn submitted an Objection to Relocation/Petition for Modification of Parenting Plan (CP 142-148).

On August 1, 2012 an emergency hearing was held regarding my request to allow temporary relocation pending further trial (Johnston VRP 2-51, CP 160). As a result of this hearing, Judge Godfrey changed residential placement of DLD to Mr. Dunn temporarily and temporarily denied relocation and reappointed Jamie Bates as the GAL on the case (CP 161-162). Judge Godfrey also gave me specific instruction to me that “you are going to go up there and get set up so the guardian ad litem can visit and figure out what kind of house we got, and what the schools are like.” despite the fact I had indicated I would only move if the judge allows it (Johnston VRP 11) and not choose to move outside of McCleary if the relocation

was denied by the court. (Johnston VRP 50) Judge Godfrey also ordered that we schedule another hearing at the beginning of November for final resolution of the issues (Johnston VRP 49, 51).

At the hearing scheduled on November 2, 2012 (Johnston VRP 52-54), Judge Godfrey ordered that a new hearing was to be scheduled for a week or two after the conclusion of the trial my boyfriend, Robert Enriquez, and Mr. Dunn were both involved with at the time. Judge Godfrey who was also the presiding judge on that case stated, "I don't know if the young lady is going to be residing with a convicted felon of a violent crime, or, I don't know if she is going to be living with a gentlemen who has been wrongfully charged with a crime." (Johnston VRP 53) and later stated, "And, whatever a jury does is going to possibly affect what I am going to do." (Johnston VRP 53) Mr. Enriquez' first trial resulted in a hung jury/mistrial (Johnston VRP 52, 55 and Prante VRP 67) and the second trial resulted in a not guilty verdict (Johnston VRP 55, 94 and Prante VRP 71)

The full day final hearing scheduled January 24, 2013 was cut short to only a half day of testimony at the request of Mr. Dunn's attorney due to scheduling conflicts (Johnston VRP 104-106) and was continued to January 30, 2013 (Prante VRP 3-75) in which more testimony was heard and Judge Godfrey orally articulated his final decision on both the relocation and custody issues ultimately denying relocation of DLD with me to Kitsap County and changing the primary residential placement of DLD to Mr. Dunn. In doing this the court stated its decision was based on, "Number 1, stability. This child was born and raised in McCleary. She goes to the same school, has the same friends, ta da, ta da, ta da. That's where she's going to keep going to school." and further stated, "My second criteria is honesty with the court. And you weren't. And so therefore, it is I believe in the best interest of this child to continue to reside with his-with her father." (Prante VRP 73)

IV. Argument

A. The trial court erred in verbally denying relocation without addressing the 11 statutory factors required by RCW 26.09.520

In the Washington State Supreme Court case decision in *Horner vs. Horner*, the court stated, “The Child Relocation Act (RCW 26.09.405-.560) creates a rebuttable presumption that relocation will be permitted. To rebut this presumption, an objecting party must demonstrate ‘that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors.’ and list the 11 factors that must be considered. The court goes on to say, “When this court considers whether a trial court abused its discretion in failing to document its consideration of the child relocation factors, we will ask two questions. Did the trial court enter specific findings of fact on each factor? If not, was substantial evidence presented in each factor, and do the trial court’s findings of fact and oral articulations reflect that it that it considered each factor? Only with such written documentation or oral articulation can we be certain that the trial court properly considered the best interests of the child and the relocation person within the context of the competing interests and circumstances required by the CRA.” *In re marriage of Horner*, 151 Wash.2d 884, 93 P. 3d 124, (2004). If the trial court fails to specifically address each factor, the record does not support that substantial evidence was presented on each relocation factor, and the

trial court's written findings and oral ruling do not reflect that it considered each factor, "we cannot review the trial court decision because its basis is unclear," and we must "remand to the trial court for entry of specific findings of fact or oral articulations of the child relocation factors." Horner, 151 Wn.2d 897.

In this case, no written findings of fact were entered and when reviewing the Verbatim Report of the court's ruling, it is evident that all 11 factors were not addressed.

The following sections are a list of all 11 statutory factors and references to the record of the statements made by the court in support of its decision to deny relocation and/or the corresponding evidence (or lack thereof) to illustrate the fact that all 11 factors were in fact not properly considered by the lower court in support of a remanding this case for new trial.

- i. **(1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant person in the child's life;**

In regards to the court's actual oral articulations on its basis for denying relocation under this factor, the court stated, "My decision is based basically on two things: Number 1, stability. This child was born and raised in McCleary. She goes to the same school, has the same friends, ta da, ta da, ta da. That's where she's going to keep going to school. I'm not going to change the program to allow this child to be relocated to a strange community to live in the basement of Mr. Enriquez's home." (Prante VRP 73).

This statement clearly shows the court's only consideration under this factor were the connections DLD had with "other significant persons" in her life up to that point (ie. school and friends) with no regard for parent, sibling connections or even any other familial connections.

Under the Child Relocation Act, the courts involvement in relocation actions is triggered only when the relocation being pursued is outside of the child's current school district. In most cases involving a child that has resided in the same area and attended school for any substantial amount of time, the child has naturally formed social connections

especially within the school environment. Therefore basing a decision to deny relocation on the sole basis of the child changing to a new school and the potential impact on these school connections is improper as it completely negates the statutory presumption allowing relocation for most parties seeking relocation in this state.

Although the court did not address the familial connections DLD has in the McCleary area in its decision, it would have been proper to address those under this factor as there was evidence present in the record to do so. These familial connections include Mr. Dunn, my mother, Dixie Cox (Johnston VRP 26), and my oldest child Dustin Chadwick (Johnston VRP 34, 114). Although the record shows familial connections in the area, no detriment to DLD was actually ever shown under this factor as she would still have regular contact with her extended family as they were all in support of the relocation (Johnston VRP 20, 23, 25, 26, 27, 35, Prante VRP 5, 59) and all indicated they would make arrangements to maintain regular visitation with us (Johnston VRP 26, 37, Prante VRP 5, 6, 59). In addition, the relocation with a distance of only an hour and ten minutes away from McCleary did not require a change in the parenting plan so the stability of the

relationship between DLD and Mr. Dunn would be preserved at the same level as it had been since the original parenting plan was filed (Johnston VRP 15, 16).

ii. (2) Prior agreements of the parties;

As there were no prior agreements regarding relocation that I am aware of so the court could have legitimately addressed this factor by stating it was not relevant to our case or that it does not apply but it did not indicate it considered this factor at all.

iii. (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;

This factor was not addressed in the courts oral articulations but was a relevant factor that should have been addressed. As mentioned previously in the discussion of factor (1), the parenting plan did not

require a change so there was no need to disrupt contact between either parent. The residential provisions would have stayed the same.

iv. (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;

This factor does not apply as there are no limitations under RCW 26.09.191 but nevertheless, the court did not provide any oral or written indication it had considered this factor.

v. (5) The reasons of each person for seeking or opposing the relocation and good faith of each of the parties in requesting or opposing relocation;

In the lengthy colloquy preceding the court's decision to deny relocation, the court did make statements regarding what I suppose would be his opinions about my good faith in requesting the relocation. He stated, "In this case, if I take a look at it, there was parenting plan entered in June. And in my opinion you were not honest with the court,

Ms. Dunn. You came in you agreed to a parenting plan, et cetera and you knew you already had a job elsewhere. You knew you weren't going to be living in McCleary, you knew you were going up the road. So I can only conclude you misled the opposing party, you misled the attorneys." The court's opinion that I knew I was not going to be living in McCleary and I was "going up the road" is not substantiated by evidence in the record as I had informed the court in my notice to relocate (CP 130) and statement in support of relocation (CP 133 and 134) as well as later on in testimony (Johnston VRP 9) that I had been notified on July 22, 2012, the Sunday prior to filing my Notice of Intended Relocation on July 24, 2012, the rental in McCleary I had resided at for over 3 years was finally being foreclosed on and auctioned off leaving me without housing after July 31, 2012. Although I was aware the house was going into foreclosure, I was not aware at the time of signing the parenting plan on June 8, 2012 that this would require me to move out of the residence as I had also stated on record and in one of my declarations, I was under the impression I might be able to stay in the home even after auction but found out only on July 22nd this was not in fact going to be the case.

vi. (6)The age, developmental stage, and needs of the child and the likely impact the relocation or its prevention will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child;

The court's actual oral articulations regarding its basis for denying relocation under this factor are addressed in the courts comment, "My decision is based basically on two things: Number 1, stability. This child was born and raised in McCleary. She goes to the same school, has the same friends, ta da, ta da, ta da. That's where she's going to keep going to school. I'm not going to change the program to allow this child to be relocated to a strange community to live in the basement of Mr. Enriquez's home." (Prante VRP 73).

The previous discussion I have under section i. is relevant to apply under this section as well. In addition, there are several statements throughout the record in this case that indicate DLD has a very outgoing and adaptive personality (Johnston VRP 74, Prante VRP 4) and a change in environment most likely would not have a detrimental impact on her (Johnston VRP 74). In fact, none of the evidence present in the

record relevant to this section provides any indication that DLD would be detrimentally impacted as a result of a move to a new location and change in school environment. So although the court did address this factor in its oral articulations, it does not lend itself to a decision to deny relocation on this factor alone as the burden to overcome the statutory presumption has not been met by the evidence available in the record.

vii. (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic location;

This section is relevant and there is substantial evidence in the record regarding this and would need to have been addressed by the court in making a decision allow or restrain relocation. As mentioned previously from the beginning of my relocation action, I was pursuing relocation due to having obtained a job in Kitsap County after genuinely trying to obtain employment closer to McCleary in the Grays Harbor and Thurston County areas for several months prior to no avail. This job allowed for advancement opportunity and also the opportunity to earn

extra money in addition to my normal salary if I resided close to my actual place of employment. This career opportunity would have allowed me to improve the quality of life for DLD and myself had relocation been granted as it would have allowed me to retain more of the money I earned at my new job instead of having to spend a large portion on commuting (CP 130, 134).

In addition to participating in the same activities she was accustomed to in McCleary such as soccer and Girl Scouts, DLD had the opportunity to establish new friendships (Johnston VRP 21) and experience new recreational activities through her participation in the Kitsap County Boys and Girls Club Program which she had already been able to participate in and was quite successful at adapting to and enjoyed (CP 159, 201).

viii. (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;

This factor was not addressed in the courts decision to deny relocation but there was some discussion regarding this factor in the record. I had stated that Mr. Dunn would still be able to exercise his midweek visitations for the same duration as when I lived in McCleary if he chose to stay in the Kitsap area and take DLD to participate in activities. I even indicated I would be willing to help with transportation for midweek visitations if Mr. Dunn chose to exercise his visitation in the McCleary area. (Johnston VRP 18)

ix. (9) The alternative to relocation and whether it is feasible and desirable for the other party to relocate also;

Although the court did not indicate it considered this factor, there was evidence present in the record in regards to this. There was not much alternative for me in relocating other than choosing to reside in McCleary which I had indicated I was willing to do in order to retain custody of Daisha. As far as Mr. Dunn's ability to relocate, he is purchasing his home in McCleary and I would not imagine it is desirable at this point for him to relocate given that fact.

x. (10)The financial impact and logistics of the relocation or its prevention; and

As mentioned previously, the financial impact of the relocation would have been very substantial to myself and DLD as I would be able to keep more of my financial resources instead of spending a large portion on commuting to and from work and would have been able to earn more money at my job if I was resided in close proximity to my place of employment. Although, Mr. Dunn would have had to spend more than he was accustomed to on commuting to exercise visitations, his extra commuting for visitation would have been drastically lower than my everyday commuting to and from work.

xi. (11) For a temporary order, the amount of time before a final decision can be made at trial.

This was not based on a temporary order so this factor is not applicable in this case but the judge did not state that on the record or in writing as required.

In the Supreme Court opinion of Horner, the court states in regards to the consideration of all statutory factors listed in RCW 26.09.520, “[C]onsideration of these factors is logical because they serve as a balancing test between many important and competing interests and circumstances involved in relocation matters. *Particularly important in this regard are the interests and circumstances of the relocating person.* Contrary to the trial court’s repeated references to the best interests of the child, *the standard for relocation decision is not only the best interests of the child.*” They go on to quote a statement from Division one of the Court of appeals that states, “Rather than contravene the traditional presumption that a fit parent will act in the best interest of the child,...the relocation statute establishes a rebuttable presumption that the relocation of the child will be allowed. Thus, the act both incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interest of her child. The burden of overcoming that presumption is on the objecting party, who can prevail only by demonstrating that the detrimental effect of the relocation upon the child outweighs the benefit of the change to *the child and the relocating person*” The Supreme Court, in giving its conclusion, states, “We adopt this reasoning and hold that trial courts

must determine whether the ‘detrimental effect of the relocation outweighs the benefit of the change to the child *and* the relocating person’ “ *In re marriage of Horner*, 151 Wash.2d 884, 93 P. 3d 124, (2004). Since the trial court in this case clearly did not address all 11 factors in a written order and/or in its oral articulations and the evidence present in the record does not clearly support a finding that allowing relocation would have been detrimental to DLD and myself, I am asking this court to reverse the trial court decision and remand for further proceedings as required in a case such as this. In addition, since the relocation decision prejudicially affects the modification decision, I am asking that decision be reversed as well.

B. The trial court erred by ordering a change in primary residential placement of a minor child without a proper finding of adequate cause pursuant to the denial of a relocation.

Normally, there must be an adequate cause hearing to justify a hearing on modification per RCW 26.09.270. A showing of adequate cause requires more than prima facie allegations, *In re Custody of B.J.B.*,

146 Wn.App. 1, 189 P.3d 800 (2008), review denied, 165 Wn.2d 1037, 205 P.3d 131 (2009). RCW 26.09.260(6) allows provisions for the non-moving party in a relocation proceeding to file for a parenting plan modification without an adequate cause hearing *so long as the relocation is being pursued*. However, the petition to relocate is not to be used as the sole basis for changing custody. The trial court is to first make a decision on the relocation and then only after denying the relocation can it enter a decision on the petition for modification. If the relocation is not being pursued at that point, the parent proposing modification of the parenting plan must show a substantial change in circumstances, considering the factors set forth in RCW 26.09.260(2). *In re Marriage of Grigsby* 112 Wash.App. 1, 57 P.3d 1166 (2002). This established process mandated by statute did not occur in my case.

During the trial in the present case, I indicated several times I would not relocate if the relocation was denied (Johnston VRP 11, 50). Instead of following the process outlined in RCW 26.09.260(2) and requiring Mr. Dunn to show adequate cause to justify a hearing on modification, the

court made the decision to deny relocation and simultaneously change primary residential placement of DLD to Mr. Dunn without a proper adequate cause hearing and finding of adequate cause despite the fact I had brought to Mr. Dunn's as well as the court's attention that there was no adequate cause for pursuing modification (CP 150). Since the statutory procedures were not followed requiring adequate cause to be found prior to warranting a full hearing on modification, I am asking this court to reverse the decision changing residential placement of DLD to Mr. Dunn and require previously I indicated I would not relocate in order to retain the residential placement of DLD with myself which I still fully desire.

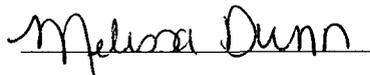
V. Conclusion

Due to the fact the court did not enter specific findings of fact or orally articulate on the record that it based its decision to deny the relocation of DLD on the 11 factors required by statute in making a relocation determination, I am asking this court to reverse the decision denying relocation. I am also asking the court to reverse the decision of the court in changing primary residential placement of DLD as the improper denial of the relocation prejudicially affects the custody determination in

addition to the fact that no proper finding of adequate cause was ever addressed permitting the trial court to proceed with a hearing to modify residential placement. I would like this court to remand back to trial court for a new trial addressing all factors required with instruction that specific finding of fact must be articulated orally or in writing preferably.

September 30, 2014

Respectfully Submitted,

A handwritten signature in cursive script that reads "Melissa Dunn". The signature is written in black ink and is positioned above a horizontal line.

Melissa Dunn, Pro Se

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Port Orchard, WA 98366

Certificate of Service

I, Melissa J. Dunn, hereby certify that I mailed via certified mail, a true and correct copy of this document to the Office of David Mistachkin at 120 East First Street Aberdeen, WA 98520 on September 30, 2014.