
IN THE UTAH COURT OF APPEALS,
450 S. State Street, Salt Lake City. Utah 84078
(801) 578-3900

MACAELA DANYELE DAY, :
Appellee, : APPELLANT’S REPLY BRIEF
vs. :
TYLER BARNES, : Case No. 20190277
Appellant. :

APPEAL FROM FINAL ORDER REGARDING RELOCATION

THE HONORABLE DAVID M. CONNORS PRESIDING
ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii-iii

ARGUMENT

 I. MACAELA’S DUE PROCESS ARGUMENT WAS PRESERVED. . . 1-5

 II. TYLER’S SUFFICIENCY/MARSHALING ARGUMENT FAILS... 5-10

 III. REVERSAL IS WARRANTED FOR ERIC BARNES’S ACTIONS. 10-12

CONCLUSION 12 -13

CERTIFICATE OF COMPLIANCE 13

TABLE OF AUTHORITIES

CASES

Day v. Barnes, 2018 UT App. 143, 427 P.3d 1272 2

Farley v. Utah County, 2019 UT App 45, 440 P.3d 856 9

Hudema v. Carpenter, 1999 UT App. 290, 989 P.2d 491 8

Paryzek v. Paryzek, 776 P.2d 78 (UT App. 1989) 6

Pledger v. Cox, 626 P.2d 415 (UT 1981) 3

Robertson v. Robertson, 2016 UT App. 55, 370 P.3d 569 6, 8

Sterling Fiduciaries, LLC v. JPMorgan Chase Bank, 2017 UT App. 135, 402 P.3d 130 10

United States v. Parker, 101 F.3d 527 (7th Cir. 1996) 1, 2

STATUTES

U.C.A. § 30-3-10 5
U.C.A. § 30-3-10.2 5
U.C.A. § 30-3-37 3
UCCJEA, i.e., U.C.A. §78B-13-101 1, 5

COURT RULES

Utah Rules of Professionalism and Civility 14-301(3) 1
Utah R. Civ. P. 108 5
Rule 4-903, Operation of the Courts 5, 8, 12
Rule of Professional Conduct 4.2 7, 11

by speculating without proof of Macaela's improper motives as stated in her arguments. However, Macaela preserved this issue at great length during her oral argument post remand before the District Court (R. 2758 - 2770). She also preserved the issue originally during the evidentiary hearing on relocation (R. 2221, 17-25; R. 2222, 6-7; R. 2225-26; R. 2227, 1-18; R. 2228, 4-5, 9-10, R. 2228, 15-18, R. 2231, 1-17; R. 2564, 18-25, 2565, 1. 1-10; R. 1323). Therefore, Tyler's first argument materially misstates Macaela's preservation of the issue and should be disregarded for that reason.

Nevertheless, assuming that the Court views *Parker* as helpful (because it is clearly not controlling), *Parker* actually states: "If the [remanding] opinion identifies a discrete, particular error that can be corrected on remand without the need for a determination of other issues, the court is limited to correct that error." *Id.*

However, *Parker*'s materiality is questionable for the following reasons. First, *Day v. Barnes*, 427 P.3d 1272, ¶20 (UT App. 2018) ordered the District Court to make independent findings and conclusions without imposing an erroneous burden of proof on Macaela, and without addressing any other issue raised in the parties' initial briefs. Therefore, since the District Court ruled on the relocation issue for a second time upon remand, if the District Court denied due

process again by its independent findings, the issue of due process is preserved per se. Indeed, there is even a secondary basis for a due process violation because the District Court stated in the preamble to its findings that it only reviewed unspecified “appropriate portions of the live testimony presented by the parties during the evidentiary hearing” held on March 20 and 21, 2014. R. 2741. This issue was alluded to by the District Court during oral argument post remand. R. 2756, 9-10. Therefore, it is unclear as to whether the Court’s ruling is arbitrary – by focusing only on parts of some witnesses’ testimonies while ignoring other, material parts. The District Court’s decision appears to be arbitrary because its findings do not state that any of the parties’ witnesses testimonies should not be considered. Furthermore, the District Court’s footnote 3 for its conclusions of law fails to address at least two, material factors stated in the relocation statute (U.C.A. § 30-3-37), e.g., the reasons for the relocation, and the willingness and financial wherewithal of Macaela’s family to pay for travel costs so that the parties could enjoy a joint custody arrangement. R. 2746 (on which Macaela provided substantial evidence as discussed *infra*). Therefore, this Court needs to review the record to determine whether due process was violated again post remand.

Secondly, on page 35 of Macaela’s pre-remand opening brief, she cited to *Pledger v. Cox*, 626 P.2d 415, 416 (UT 1981) for the notion that the District Court

had conducted a trial de novo “on the record” initially. *Pledger* stands for the principal that a court should “take testimony and examine into the facts” and give closer scrutiny than a mere review of an agency action. *Id.* *Pledger* is analogous, because the District Court limited the scope of Macaela’s witnesses’ testimonies during the relocation hearing, and may have only considered part of the testimonial evidence in ruling on relocation. R. 2222. Therefore, because the District Court had discretion to take additional evidence post-remand, and given Macaela’s oral argument of the prejudice associated with the Court restricting the scope of her witnesses’ testimonies during the relocation hearing (discussed *infra*), the court’s election not to take additional evidence and/or review all of the testimonies at the relocation and UUCJEA hearings implies a less than thorough review of the evidence and factors for relocation and a denial of due process.

Third, this conclusion is borne out by the fact that the District Court’s third conclusion of law states that Macaela “did not present evidence that was significantly different than what was presented to the Court during the evidentiary hearing that resulted in the April 25, 2014, order – without acknowledging that it restricted the scope of Macaela’s examination during the relocation hearing. R. 2745. The District Court then went on to conclude that because no new evidence was presented, it would simply find as it had previously. R. 2745.

Fourth, preserving the rights of a parent in the child custody context through a Civil Rule 108 objection is an important, due process issue since it involves a parent's fundamental liberty interest to raise her child. Therefore, guidance is needed as to whether due process is violated when a judge relies on previous, temporary findings in a UUCCJEA context (U.C.A. § 78B-13-101, et. seq.), and then restricts the scope of examination during a later relocation hearing. The statutory standards between a custody determination under the UUCCJEA and the relocation statute – although related to child custody – are materially different. That is, the UUCCJEA is primarily concerned with the child's home state and venue disputes between State forums, while relocation involves criteria set forth in the relocation statute, U.C.A. § 30-3-10 and 10.2, Rule 4-903 for the Operation of the Courts, and the Utah common law. For these reasons the Court should hold that the Court again violated Macaela's due process rights.

II. TYLER'S SUFFICIENCY/MARSHALING ARGUMENT FAILS.

Tyler next argues that this Court cannot review the evidence relating to the District Court's findings for the UUCJEA hearing entered on April 25, 2014. Since this Court never made a ruling on the legitimacy of the District Court's ruling regarding relocation in its remand opinion, Tyler's argument fails for that reason alone. That is, whether the District Court decided the relocation issue correctly

based on the evidence still needs to be decided.

Secondly, on page four of its ruling on relocation, the District Court stated that it considered “appropriate portions of the live testimony presented by the parties during evidentiary hearings before the Court on March 20 and 21, 2014 . . . ” R. 2741. Tyler argues that the evidence considered for relocation cannot be revisited on appeal due to the District Court entering findings of fact on that issue. Tyler’s argument ignores existing authority which states that to be adequate, a court’s findings need to be supported by substantial evidence – regardless of whether the evidence is stated in the findings of fact. *Paryzek v. Paryzek*, 776 P.2d 78, 82-83 (UT App. 1989).

Additionally, and more importantly, in the context of child custody and relocation cases, this Court generally reviews the District Court’s findings as they apply to the statutory factors under a clearly erroneous and/or abuse of discretion standard. *See Robertson v. Robertson*, 370 P.3d 569, 572-73. Here, although the District Court articulated the legal standards to apply at the beginning of its findings of fact and conclusions of law, it failed to consider many, significant statutory and Utah common law factors as they applied to the evidence. For example, despite a great deal of evidence presented by Macaela, the post remand findings do not address Tyler’s emotional instability (being on medications for

anxiety and being involuntarily committed to a juvenile facility) (R. 3148, 3-10; R. 3131, 11-14; Macaela's strong support system in Massachusetts and lack thereof in Utah for this young mother (R. 2416-17; 2864-65); the child's previous and positive custodial arrangements with Macaela's family in Massachusetts (R. 2233-34; R. 2307, 19-25), the effect Tyler's abandonment of the child and lack of support (emotional and financial) had on Macaela's ability to care for the child in Massachusetts (R. 2958, l. 13-15), Tyler's lack of moral character in terms of raping and sexually abusing Jaime and Macaela (R. 2936, 2-6; R. 2942, 12-15; Tyler's addiction to pornography (R. 1993, 12-25; 3215, 1-13; R. 3351, 12-25); Tyler's lewd behavior while living in the Day household rent free (R. 2942, 4-7); Macaela's reason for being pressured to turn over custody of the child to the Barnes family through the unethical actions of his lawyer/father, Eric Barnes, had effectively extorted custody of the child through threatening Macaela's mother with criminal prosecution based upon Tyler's lies about Jamie (R. 3155, 1-2; R. 3156, 1-5; R. 3182, 16; R. 3282, 7-12; R. 3348, 22-23; R. 3368, 18; R. 3368, 16-25; R. 691, 696, 698, 701) (discussed further *infra*), that Macaela was on a much faster path to financial independence so that she could support the child than Tyler (R. 2245, 2-7; R. 2476, 21-25; R. 2477, 24-25), that the child has had contact with the Day family in Massachusetts every six weeks since 2013, and maintained

regular contact thereafter (R. 2243, 17-25; R. 2270, 13-25) until Macaela relocated to Utah for one year where she served as the court ordered and agreed to primary caregiver, that the Day household had offered to pay for Tyler's and the child's transportation expenses so that Tyler could have enjoyed a joint custody arrangement (R. 2237-38), that no Utah college or university had the dance program that Macaela's college offered, i.e., teaching disabled children to dance (R. 2247, 1-17), and evidence that Tyler's parenting skills were below those of Macaela's (record in its entirety). This evidence is not only material but the statutorily defined criteria for a relocation determination under the authorities cited. The Court's findings don't address any of this evidence. Therefore, it is clear that under *Robertson* the Court's findings are clearly erroneous, and the court's decision regarding relocation needs to be reversed as a matter of law.

Furthermore, not all custody factors are on equal footing. *Hudema v. Carpenter*, 1999 UT App. 290, ¶26, 989 P.2d 491. Whether a party has served as a primary caregiver is a very important factor. *Robertson*, 370 P.3d at 574. Here, despite being 21 years old, the Court ratified the parties' stipulation in the UUCCJEA matter in 2015 (after the custody evaluator had provided his information to the parties at a Rule 4-903 conference), which allowed Macaela to serve as the child's primary caregiver with final say authority for one year between

the summer of 2015 and the relocation hearing in July of 2016 (R. 1531, ¶ 1, 5).

Macaela then took her non-dance college classes online at the time the Court held its relocation hearing (R. 2269-71). Nevertheless, the Court downplayed this very important evidence under *Robertson* in its findings. R. 2743, ¶13.

Regarding Tyler’s marshaling argument, this argument is inapplicable generally because the case involves child custody. *Robertson*, 370 P.3d at 572-73. Nevertheless, assuming arguendo that marshaling applies, Tyler does not articulate with specificity how his evidence was substantial on the relocation issue, and how it adequately refuted the evidence Macaela had presented. While it is true that a District Court need not state in its findings all evidence that was presented to it, the findings must be supported by substantial evidence, and the evidence is substantial if its quality persuades a reasonable mind that the court’s holding is correct. *Farley v. Utah County*, 2019 UT App. 45, 440 P.3d 856, ¶21-22. In so doing, this court also must consider and review all of the evidence presented, but need not weigh it anew – unless this Court has a concern with the District Court’s conclusion. *Id.*

Here, paragraph 26 of the findings states that because Macaela had a clear path to obtain joint custody of the child, and that she enjoyed final decision making authority if she returned to Utah, relocation was inappropriate (R. 2745). However, the Court’s conclusion is not the correct legal authority to be used regarding

relocation as stated *supra*, and effectively substituted the court’s opinion regarding the best interest of a young mother over her wishes to control her own destiny financially by choosing the career path which would provide her with the greatest chance of happiness while supporting her daughter. Thus, the Court’s largely bare bone, repetitive, and clearly erroneous findings do not substantially support the District Court’s ruling. Therefore, the relocation ruling must be overturned as a matter of law under the authorities cited.

III. REVERSAL IS WARRANTED FOR ERIC BARNES’S ACTIONS.

On page 47 of his brief, Tyler alleges without citing to the record that his attorney father “had a Massachusetts attorney representing him and the only pending case was in Massachusetts” at the time Eric Barnes spoke with Macaela about the case while she was represented by counsel. However, when a party alleges a fact in his brief, it must be cited to in the record. Utah R. App. P. 24(e)(1). There is no such citation to the record. The appropriate sanction is to not consider the allegation as true. *Sterling Fiduciaries, LLC v. JPMorgan Chase Bank*, 2017 UT App. 135, ¶31, 402 P.3d 130.

However, even assuming arguendo that Tyler or Eric Barnes were represented by a Massachusetts attorney in the Massachusetts custody action, Mr. Eric Barnes – an experienced bar member of the Utah State Bar – admitted that he

had spoken with Macaela about mediating the custody issue in Utah when he knew that she was represented by counsel shortly before representing Tyler in the mediation to resolve the custody issue (which upon termination resulted in the UUCCJEA suit) (R. 3156, 1-5; R. 3348, 22-23; R. 3368, 18). During this meeting with Eric Barnes, Macaela was only 18 years old (R. 3155, 1-2). Macaela became sad and emotional during the meeting (R. 3153, 23-25; R. 3154, 1-2). Eric Barnes then threatened Macaela's mother with prosecution for his son's lies about Jaime Day during the mediation, which resulted in Macaela deciding to change her position of primary custody to turning over custody (R. 3368, 16-25; R. 691, 696, 698, 701).

Thus, Eric Barnes's status as Tyler's father is a red herring, and did not absolve him as a member of the bar from his responsibility under Professional Rule 4.2(a). Indeed, the evidence shows that Eric Barnes was an interested lawyer who was trying to gain advantage for his client/son. Given the close time period in which the communication and the mediation took place, it is reasonable to infer that Eric Barnes was also representing Tyler's interests during his conversation with Macaela - despite his allegation to the contrary. Eric Barnes also entered his appearance in the UUCJEA matter on May 15, 2013 – a few weeks after the failed mediation. The fact that Macaela had given up custody of the child in the first

place by an admitted threat which Mr. Eric Barnes followed through with is material evidence pursuant to Rule 4-903(4)(F)(viii) for the Operation of the Courts and the Utah common law. Eric Barnes's interaction with Macaela implies coercion and/or trying to extort custody of the child from her by threat. Comment two of professional rule 4.2 states that it was created to protect a represented person from *possible* overreaching. Thus, Eric Barnes's actions clearly violated this rule, and the possible if not likely upshot of his actions was that a young mother lost custody of her small child by threat by an attorney who used his experience to gain custody by intimidation.

Eric Barnes also had Tyler report Jaime to the police without investigating the serious allegation of child molestation – knowing that his son had lied to him previously (R. 3351-52). Tyler later admitted that he had exaggerated the facts to the police during cross-examination (R. 3209, 14-16). Eric Barnes's actions in this regard also undoubtedly caused a great deal of unnecessary stress to Macaela's family, likely motivated by his desire to gain custody of the child.

Given the impact of Mr. Barnes's actions as it relates to custody, the Court should award custody of the child to Macaela as a sanction.

CONCLUSION

This is a case where the District Court failed to apply the law correctly to the

evidence in the context of relocation under the authorities cited. Essentially the Court preferred the highly immature if not criminal behavior of a Utah resident over a Massachusetts resident – despite awarding Macaela primary caregiver status and final say as a 20-year-old – but only if she lived in Utah. There is no great harm to the child in relocating to Massachusetts to join her mother now because the Court effectively found in paragraph 25 of its findings that the child had bonded to both parents. Indeed, because the child first lived with the Day household, has had continued contact with that family throughout her life, and has many contacts and family members living in Massachusetts, there should be no harm to the child in ordering relocation. Parent-time for Tyler should be ordered pursuant to the relocation statute.

Dated this 31st day of October, 2019. /s/ Theodore R. Weckel
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 24(f)(1), I certify that this brief contains 2,863 words by use of Word Perfect’s word counting application, and pursuant to Utah R. App. 21(g), this brief does not contain any private information.

Pursuant to Utah R. App. P. 24(g), there is no private information contained in this brief.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 2019, a true and correct copy of Appellant's opening brief was served upon counsel for the Appellee, Eric B. Barnes, by first class mail to the following address: 47 N. Main Street, Kaysville, UT, 84037, and by email at: eric@elderlaw-info.com.

/s/ Theodore R. Weckel