95591-3

Division Three Case No. 350673-III

SUPREME COURT
FOR THE STATE OF WASHINGTON

Anne Marshall (Monoskie), Appellant

v.

Phillip ("Cliff") Monoskie, Respondent

PETITION FOR DISCRETIONARY REVIEW
RAP 13.4

Craig Mason, WSBA#32962
Attorney for Appellant
W. 1707 Broadway
Spokane, WA 99201
509-443-3681

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I. IDENTITY OF THE PETITIONER

Anne Marshall (Monoskie) is the Petitioner seeking discretionary review under RAP 13.4 of a decision terminating review.

II. COURT OF APPEALS DECISION TO BE REVIEWED

The court of appeals denied the appeal on 11/30/17 and denied reconsideration on 1/25/18. Copies of the rulings are attached.

III. ISSUES PRESENTED FOR REVIEW

A. Issue No. 1: Once the court has determined that placing all five of the parties' children with Anne Marshall would be in the children's best interest, and once the court has determined that the children living apart in two different households is detrimental to the children, should the presumption in favor of relocation (of two of the children) under RCW 26.09.520 prevent the trial court from placing all of the children together with Anne Marshall? Answer: No, the presumption in favor of relocation does not require the court to make a decision detrimental to the children.

B. Issue No. 2: Should the "presumption in favor of continuity" become a high bar to the court serving the best interest of the children? Answer: No.

C. Issue No. 3: Should the court of appeals have addressed this issue rather than searching for another basis in the record for upholding the trial court? Answer: Yes. The presumptions in RCW 26.09, and in RCW

26.09.520 specifically, should not become a high bar to the court serving the best interests of the children.

D. Issue No. 4: As Anne Marshall had also filed an RCW 26.09.260 modification petition, should the trial court, based upon the findings of the trial court after trial, have placed all five children with Anne Marshall? Answer: Yes. The unchallenged findings of the trial court show that the trial court erred in not consolidating the children in Anne Marshall's home.

IV. STATEMENT OF THE CASE

A. Introduction: The Judge Made an Error of Law as to Her Power

Here the trial court clearly states what it believes would be the best decision:

> I think it goes without question that what I'd like to do is put all five of these children together.

Oral Ruling of 10/28/16 at CP:72, lines 16-18. The Oral Ruling of 10/28/16 was incorporated into the Findings of Fact in final orders at CP: 153 and CP: 154.

Next, the trial court explains why it asked the attorneys to provide additional legal authority that might allow the judge to serve the best interests of the children over the RCW 26.09.520 statutory presumption in favor of relocation:

> This is one of the reasons why I asked both attorneys to brief this issue. I really was hoping that there was some legal authority or some way for me to put these children back together. I don't believe I have that authority, even based upon the briefing provided by these attorneys... I am constrained by the statute.

Ruling of 10/28/16 at CP:73, lines 15-23.

To serve this end, Anne Marshall had presented this, among other, legal authority:

> Turning from the *Marriage of Horner* to *In re Parentage of R.F.R.*, the ultimate decision still rests upon 'an overall consideration of the best interests of the child' (emphasis added):
>
> > The parental relocation act governs the trial court's decision on whether to allow a parent with primary custody to relocate his or her child. *See* RCW 26.09.405–.560. Under the act, courts have the authority to allow or disallow relocation based on an overall consideration of the best interests of the child. *In re Marriage of Grigsby,* 112 Wash.App. 1, 7, 57 P.3d 1166 (2002).
>
> *In re Parentage of R.F.R.*, 122 Wash. App. 324, 328, 93 P.3d 951, 954 (2004).

Petitioner's Post-Trial Memorandum on Relocation, CP: 26-27, with entire Memorandum at CP 25-39.

State Supreme Court Review is necessary to define and delineate the scope of the presumption under RCW 26.09.520.

B. Factual and Procedural Summary

The court's oral ruling of 10/28/16 (CP: 49-95) summarizes the facts of this case in detail. These facts regarding the five children of Anne Marshall and Cliff Monoskie, who divorced in 2013, are sketched, below:

After the 2013 divorce, Anne Marshall lived in South Carolina with her two male children (W.M. and P.M.), who were in junior high, and she and W.M. and P.M. lived in South Carolina with Anne's new husband, Shane Marshall.

After the 2013 divorce, Cliff Monoskie continued to live in Spokane with his and Anne's two younger female children (K.M. and L.M.).

A third common child (C.M.) lived 50/50 with each parent, six months at a time.

Anne and Shane Marshall planned to relocate with W.M. and P.M. to Washington State, after his release from military duty, to be near the two younger female siblings (K.M. and L.M.) who lived with Cliff Monoskie, in Spokane.

Upon receiving email notice in January of 2015 that Ms. Marshall was moving back to the Pacific Northwest from South Carolina, Mr. Monoskie declared an intention to relocate to Ohio in June of 2015.

Ms. Marshall filed an objection to relocation under RCW 26.09.480-.520, and she pled a petition to modify the parenting plan under RCW 26.09.260(1) and (2), because of Cliff Monoskie's detrimental behavior toward the girls and toward her relationship with the girls, and due to the substantial change in Mr. Monoskie's household of his

remarriage and new children. (CP: 3-10: *Objection to Relocation/Notice of Relocation/ and Petition for Modification, filed 6/1/15.*)

Mr. Monoskie only filed an objection to relocation under RCW 26.09.480-.520. (CP: 19-24.)

After trial held on 9/19/16 to 9/21/16 (CP: 151), the trial court found that it would be in the best interests of the children if the court followed the Guardian ad Litem recommendation that all children be placed with Ms. Marshall. (CP:72, lines 16-18.) However, the trial court believed that the presumption in favor of Mr. Monoskie's relocation with K.M. and L.M. was an insuperable barrier to this result. (CP:73, lines 15-23, and Finding "F" on CP:156 in the *Findings and Final Order*.)

Thus, C.M., W.M., and P.M. were placed with Anne Marshall in Vancouver, WA, and Cliff Monoskie was allowed to relocate L.M. and K.M. to Ohio.

Given the detrimental behaviors of Mr. Monoskie, and given the findings of the trial court of detriment to the girls by not living with their brothers (CP: 156 at Finding "D"), appeal was brought to correct the trial court's error of law on appeal, and relief was sought to place all five children with Anne Marshall in Vancouver, WA.

The court of appeals then refused to address the error of law of the the trial judge believing she lacked the legal authority to place all five

children together. The appellate court recast this "desire" to consolidate the children in one household as if it was only the desire of a party (Anne):

> However, it is the law of this case that the desire to place all five of the parties' children in one household is not, by itself, sufficient to justify a contested modification petition.

Matter of Marriage of Monoskie, No. 35067-3-III, 2017 WL 5905764, at *3 (Wash. Ct. App. Nov. 30, 2017).

The trial court had "the desire" but the issue for appeal is did the trial court have the power or authority to place all children in one household?

C. Standard of Review: De Novo as to Issues of Law

The standard of review in any parenting plan action is typically highly deferential to the trial court:

> We review a parenting plan for a manifest abuse of discretion, which occurs when the trial court's " 'decision is manifestly unreasonable or based on untenable grounds or untenable reasons.' " *In re Marriage of Chandola,* 180 Wn.2d 632, 642, 327 P.3d 644 (2014) (quoting *In re Marriage of Katare,* 175 Wn.2d 23, 35, 283 P.3d 546 (2012)). We treat the trial court's findings of fact as verities on appeal so long as they are supported by substantial evidence. *Id.* Evidence is "substantial" when it is "sufficient to persuade a fair-minded person of the truth of the matter asserted." *Id.* We do not review the trial court's credibility determinations or weigh conflicting evidence "even though we may disagree with the trial court in either regard." *In re Welfare of Sego,* 82 Wn.2d 736, 740, 513 P.2d 831 (1973).

In re the Marriage of: RACHELLE K. BLACK, Petitioner, & CHARLES W. BLACK, Respondent., No. 92994-7, 2017 WL 1292014, at *6 (Wash. Apr. 6, 2017).

However, errors of law are an abuse of discretion. "Untenable reasons include errors of law." *Council House, Inc. v. Hawk,* 136 Wash. App. 153, 159, 147 P.3d 1305, 1307 (2006), citing *Estate of Treadwell v. Wright,* 115 Wash.App. 238, 251, 61 P.3d 1214 (2003); *Lawrence v. Lawrence,* 105 Wash.App. 683, 686, 20 P.3d 972 (2001).

And errors of law are reviewed de novo. *Curhan v. Chelan Cty.,* 156 Wash. App. 30, 35, 230 P.3d 1083, 1085 (2010).

D. Unchallenged Findings are Verities on Appeal

Unchallenged findings are a verity on appeal. *Cowiche Canyon Conservancy v. Bosley,* 118 Wash. 2d 801, 808, 828 P.2d 549, 553 (1992), citing *Nearing v. Golden State Foods Corp.,* 114 Wash.2d 817, 818, 792 P.2d 500 (1990).

The factual findings by the court are not challenged in this appeal. While Ms. Marshall does not agree with all the findings, she concedes that they all have sufficient evidence to sustain them. Both parties are bound by the trial court findings that are supported by substantial evidence. *In re Marriage of Kim,* 179 Wash. App. 232, 244–45, 317 P.3d 555, 562 (2014).

In an appellate decision that was maximally deferential to the trial court on relocation, the *In re Marriage of Kim* court wrote:

> A trial court's decision to permit relocation is necessarily subjective. *In re Marriage of Grigsby,* 112 Wash.App. 1, 14, 57 P.3d 1166 (2002). Our task on review is limited to determining whether the court's findings are supported by the record and whether they, in turn, reflect consideration of the appropriate factors. *Horner,* 151 Wash.2d at 896, 93 P.3d 124. We do not reweigh the evidence. *In re Marriage of Kovacs,* 121 Wash.2d 795, 810, 854 P.2d 629 (1993).
>
> We uphold trial court findings if they are supported by substantial evidence. *In re Marriage of McDole,* 122 Wash.2d 604, 610, 859 P.2d 1239 (1993). " 'Substantial evidence' exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *In re Marriage of Fahey,* 164 Wash.App. 42, 55, 262 P.3d 128 (2011).
>
> The trial court here entered findings of fact for each of the 11 factors listed in the relocation statute. Mr. Kim assigns error to all of the court's findings of fact in the court's oral decision "to the extent they provided for relocation and denied shared parenting." Appellant's Br. at 4. However, Mr. Kim does not offer argument on all the assignments of error. We will not review assignments of error not supported by legal argument. *Herring v. Dep't of Soc. & Health Servs.,* 81 Wash.App. 1, 13, 914 P.2d 67 (1996).

In re Marriage of Kim, 179 Wash. App. 232, 244–45, 317 P.3d 555, 562 (2014). Neither party to the appeal challenged any findings of fact.

V. ARGUMENT UNDER RAP 13.4(b)

A. RAP 13.4(b)(4): An Issue of Substantial Public Interest

Parenting issues are inevitably of substantial public interest, and the questions here are the weight of two presumptions: (1) The presumption in favor of the parent's wishes in RCW 26.09.520 versus the

weight of the best interests of the children, and (2) the judicial interpretation of RCW 26.09.260 creating a "presumption of continuity" as to just how much weight that presumption is to carry in a modification (and/or to feed back into relocation decisions).

When a judge, as in this case, has a decision that she would clearly prefer to make, but believes the state of the law prevents her from serving the best interests of the children, then a clear statement of policy, the weight of the presumptions, and their relationship to the best interests of the children should be made by the State Supreme Court.

B. RAP 13.4(b)(2): Conflict with Other Appellate Authority

As the Division Two court summarized in the published portion of *In re Marriage of Wehr,* the best interests of the children still matter in a relocation decision (emphasis added):

> After the hearing, the trial court has authority "to allow or not allow a person to relocate the child" based on an overall consideration of the RCW 26.09.520 factors and the child's best interests. RCW 26.09.420; *In re Parentage of R.F.R.*, 122 Wash.App. 324, 328, 93 P.3d 951 (2004); *In re Marriage of Grigsby,* 112 Wash.App. 1, 7–8, 57 P.3d 1166 (2002).

In re Marriage of Wehr, 165 Wash. App. 610, 612, 267 P.3d 1045, 1046–47 (2011) (published in part – quote from published portion). And see from Division Two:

> The parental relocation act governs the trial court's decision on whether to allow a parent with primary custody to relocate his or

> her child. *See* RCW 26.09.405–.560. Under the act, courts have the authority to allow or disallow relocation based on an overall consideration of the best interests of the child. *In re Marriage of Grigsby,* 112 Wash.App. 1, 7, 57 P.3d 1166 (2002).

In re Parentage of R.F.R., 122 Wash. App. 324, 328, 93 P.3d 951, 954 (2004). And see from Division One:

> Following a three-day trial, the court made extensive findings of fact, considering the statutory factors in RCW 26.09.520. The court found that relocation was not in the best interests of the children and restrained Rice from relocating the children.

In re Marriage of Grigsby, 112 Wash. App. 1, 6, 57 P.3d 1166, 1168 (2002).

In this case, the trial judge made an error of law that she could not follow the best interests of the child, and the appellate court also raised the "presumptions" to too high of a bar from serving the best interests of the children. It is not credible that the legislature intended to lead the courts far from the best interests of the children with the Relocation Act.

The *Grisby* court clearly stated that the purpose of the Child Relocation Act (CRA) was to free up the court's ability to prevent relocation, <u>to increase the court's discretion</u>, not to handcuff the court as the legislature explicitly overruled by statute the *Pape* and *Littlefield* cases (emphasis added):

> Under the provisions of the notice requirements and standards for parental relocation, RCW 26.09.405 through RCW 26.09.560, courts have the authority to "allow or not allow a person to

> relocate the child." RCW 26.09.420. In enacting these provisions, the Legislature specifically stated that its intent was to supersede the Supreme Court's decisions in *In re Marriage of Littlefield* and *In re Marriage of Pape*.[4]
>
> In *Littlefield,* the court held that a court may not prohibit a parent from relocating a child unless relocation would harm the child. The court further held that the harm to the child must be "more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships which predictably result from a dissolution of marriage."[5]
>
> The decision in *Pape* further restricted the authority of courts to prohibit a parent from relocating a child. In *Pape,* the court held that while a court making an initial residential placement determination should consider the best interests of the child, a court determining whether to allow relocation must presume that the best interests of the child require the primary placement remain intact. The effect of this holding is that a primary residential parent will be able to relocate a child unless circumstances aside from the relocation would favor a change in the residential schedule of the child.
>
> In a modification action the presumption is in favor of "custodial" continuity, not environmental stability or environmental continuity. It is only where the nonprimary residential parent overcomes that presumption by showing continued placement with the other parent is not in the child's best interest that the principal residence of the child may be changed.[6]
>
> The Relocation Act of 2000 reflects a disagreement with the rationale of these cases and gives courts the authority to allow or disallow relocation based on the best interests of the child.

In re Marriage of Grigsby, 112 Wash. App. 1, 6–7, 57 P.3d 1166, 1169 (2002) (footnotes omitted).

Division III, in the present (Monoskie) case, should have explicitly addressed the trial court's error of law that the trial court lacked the legal authority to place all of the children with Anne Marshall.

> The lower courts' inconsistent application of RCW 26.09.520 demonstrates that our guidance is necessary.

In re Marriage of Horner, 151 Wash. 2d 884, 892, 93 P.3d 124, 129 (2004).

In *Horner* the issue was the failure to make findings on all factors under RCW 26.09.520. In the present case the issue is that the court made findings that showed (a) detriment to the children in living part, and (b) a statement that the trial court lacked the authority to cure that detriment.

The practical consequence of substantial public importance is that the appellate courts and the trial courts are starting to treat "presumptions" as irrebuttable. That is not consistent with good policy, nor with legislative intent.

VI. CONCLUSION

Division III wrote in the current (Monoskie) case (emphasis added):

> A presumption of continuity applies and either party wishing to disrupt the current residential schedule will face a difficult presumption against modification, as set forth in RCW 26.09.260.

Matter of Marriage of Monoskie, No. 35067-3-III, 2017 WL 5905764, at *3 (Wash. Ct. App. Nov. 30, 2017).

Division III then imported this "difficult presumption" into RCW 26.09.520, stating (emphasis added):

> While the relocation context streamlines a decision on the merits by avoiding the threshold requirement of adequate cause, a party seeking modification must still demonstrate that a change to the residential schedule is in the best interests of the child. This is no easy burden. "Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification." *McDole*, 122 Wn.2d at 610. The presumption of residential continuity is set forth at RCW 26.09.260(2).

Matter of Marriage of Monoskie, No. 35067-3-III, 2017 WL 5905764, at *2 (Wash. Ct. App. Nov. 30, 2017).

What Division III did was ignore the judge's own statement of what would be in the best interests of the children. And Division III imported an unreasonably high bar ("strong presumption"/"difficult presumption") into RCW 26.09.260, which it then imputed into RCW 26.09.520. No wonder the judge believed her hands were tied!

But are they? Only if this court fails to accept review.

Finally, having created a very high bar to rebut the presumptions under RCW 26.09.520 and .260, Division III said that the trial court had no obligation to consider Anne Marshall's 26.09.260 (separate) Petition, separately:

> But ultimately Ms. Marshall failed to show modification was warranted. There was no need for the court to reconsider its analysis under the auspices of a separate modification proceeding with a heavier evidentiary burden.

Matter of Marriage of Monoskie, No. 35067-3-III, 2017 WL 5905764, at *3 (Wash. Ct. App. Nov. 30, 2017).

First, the issue avoided by Division III is that the trial court itself made a determination that the best interests of the children was something that she could not do:

> Failure to exercise discretion is an abuse of discretion. *State v. Pettitt*, 93 Wash.2d 288, 296, 609 P.2d 1364 (1980).

Bowcutt v. Delta N. Star Corp., 95 Wash. App. 311, 320, 976 P.2d 643, 648 (1999). Second, RCW 26.09.260 was separately pled by Anne Marshall and should have been separately considered.

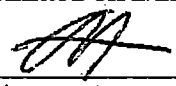
However, the truly important issues for review are: (a) the presumption in favor of relocation and how it relates to the best interests of the children, and (b) the "presumption of continuity" that is becoming "irrebuttable." And then in this case in particular, the issues are: (c) the judge believing that she lacked authority to serve the best interests of the children, and (d) the appellate court importing the "difficult presumption"/"strong presumption" of "continuity" that they find in RCW 26.09.260 back into RCW 26.09.520.

Clarification in the law is needed in general, and reversal in particular is requested.

Discretionary review is respectfully requested, and it is requested that the trial court's determination as to the best interests of the children be implemented, and all five children be placed with Anne Marshall.

This relief is respectfully requested.

Submitted on 2/22/18,



Craig A. Mason
WSBA#32962
Attorney for Anne Marshall
W. 1707 Broadway
Spokane, WA 99201
509-443-3581
masonlawcraig@gmail.com

VI. APPENDIX

RCW 26.09.520 (Relocation)

Basis for determination.

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating 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. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

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

(2) Prior agreements of the parties;

(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;

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

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

(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;

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

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

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

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

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

RCW 26.09.260

Modification of parenting plan or custody decree.

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or9A.40.070.

(3) A conviction of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070shall constitute a substantial change of circumstances for the purposes of this section.

(4) The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only

a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

(a) Does not exceed twenty-four full days in a calendar year; or

(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or

(c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

(6) The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

(7) A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191 (2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.

(8)(a) If a parent with whom the child does not reside a majority of the time voluntarily fails to exercise residential time for an extended period, that is, one year or longer, the court upon proper motion may make adjustments to the parenting plan in keeping with the best interests of the minor child.

(b) For the purposes of determining whether the parent has failed to exercise residential time for one year or longer, the court may not count any time periods during which the parent did not exercise residential time due to the effect of the parent's military duties potentially impacting parenting functions.

(9) A parent with whom the child does not reside a majority of the time who is required by the existing parenting plan to complete evaluations, treatment, parenting, or other classes may not seek expansion of residential time under subsection (5)(c) of this section unless that parent has fully complied with such requirements.

(10) The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child. Adjustments ordered under this section may be made without consideration of the factors set forth in subsection (2) of this section.

(11) If the parent with whom the child resides a majority of the time receives temporary duty, deployment, activation, or mobilization orders from the military that involve moving a substantial distance away from the parent's residence or otherwise would have a material effect on the parent's ability to exercise parenting functions and primary placement responsibilities, then:

(a) Any temporary custody order for the child during the parent's absence shall end no later than ten days after the returning parent provides notice to the temporary custodian, but shall not impair the discretion of the court to conduct an expedited or emergency hearing for resolution of the child's residential placement upon return of the parent and within ten days of the filing of a motion alleging an immediate danger of irreparable harm to the child. If a motion alleging immediate danger has not been filed, the motion for an order restoring the previous residential schedule shall be granted; and

(b) The temporary duty, activation, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer residential placement from the parent who is a military service member.

(12) If a parent receives military temporary duty, deployment, activation, or mobilization orders that involve moving a substantial distance away from the military parent's residence or otherwise have a material effect on the military parent's ability to exercise residential time or visitation rights, at the request of the military parent, the court may delegate the military parent's residential time or visitation rights, or a portion thereof, to a child's family member, including a stepparent, or another person other than a parent, with a close and substantial relationship to the minor child for the duration of the military parent's absence, if delegating residential time or visitation rights is in the child's best interest. The court may not permit the delegation of residential time or visitation rights to a person who would be subject to limitations on residential time under RCW 26.09.191. The parties shall attempt to resolve disputes regarding delegation of residential time or visitation rights through the dispute resolution process specified in their parenting plan, unless excused by the court for good cause shown. Such a court-ordered temporary delegation of a military parent's residential time or visitation rights does not create separate rights to residential time or visitation for a person other than a parent.

(13) If the court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court shall assess the attorney's fees and court costs of the nonmoving parent against the moving party.

1 Wash.App.2d 1034
Only the Westlaw citation is currently available.
NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

In the MATTER OF the MARRIAGE OF Ann **MONOSKIE** n/k/a Anne Marshall, Appellant, and Phillip C. **Monoskie**, Respondent.

No. 35067–3–III
FILED NOVEMBER 30, 2017

Appeal from Spokane Superior Court, 12–3–02229–0, Honorable Julie M. Mckay, Judge.

Attorneys and Law Firms

Craig A. Mason, Mason Law, 1707 W Broadway Ave, Spokane, WA, 99201–1817, for Appellant.
Julie Christine Watts, The Law Office of Julie C. Watts, PLLC, 108 N Washington St. Ste 302, Spokane, WA, 99201–5127, for Respondent.

Opinion

UNPUBLISHED OPINION

Pennell, J.

*1 The trial court approved relocation notices filed by former spouses Anne Monoskie(n/k/a Anne Marshall) and Phillip Monoskie. As part of the relocation process, the court declined to modify the parties' existing residential placement schedule, explaining it lacked broad authority to change the pre-existing placement designations. Ms. Marshall appeals, contending the trial court misunderstood its modification authority. We disagree and affirm.

FACTS

The parenting plan agreed to by Anne Marshall and Phillip Monoskie in 2013 split up the couple's five children. Ms. Marshall moved to South Carolina with two of the children, Mr. Monoskie stayed in Spokane with two of the children, and the youngest child spent six months of each year with one parent. The parenting plan reserved the right to return to court, without a showing of adequate cause, for placement of the parties' youngest child once the child reached school age.

In 2015, both parents filed relocation notices. Ms. Marshall sought to return to Washington, and Mr. Monoskie sought to move to Ohio. Each parent (1) opposed the other's relocation and (2) requested all five children be placed with them. Following a hearing, the trial court approved both proposed relocations. The court also determined the existing residential placements should remain in place and that the youngest child would be placed with Ms. Marshall. Ms. Marshall appeals.

ANALYSIS

Standard of review

When making family law decisions regarding child placement, trial courts enjoy broad discretion. *In re Parentage of Jannot*, 149 Wn.2d 123, 127–28, 65 P.3d 664 (2003). A child's strong interest in finality dictates that appellate courts will not overturn a trial court's placement decision, absent an abuse of discretion. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993); *In re Marriage of Kim*, 179 Wn. App. 232, 240, 317 P.3d 555 (2014). Our deferential review is limited to whether the trial court's findings of fact are supported by the record and whether they reflect a consideration of the appropriate statutory factors. *Kim*, 179 Wn. App. at 244.

Relocation

Relocation requests are governed by RCW 26.09.520. This statute creates a presumption favoring relocation. *In re Marriage of Pennamen*, 135 Wn. App. 790, 801, 146 P.3d 466 (2006). To rebut the 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 on factors listed in the statute. RCW 26.09.520; *see also In re Marriage of Grigsby*, 112 Wn. App. 1, 7–8, 57 P.3d 1166 (2002).

In analyzing the competing relocation notices, the trial court here recognized the presumption favoring relocation and reasonably concluded both parents were entitled to move forward with their plans. In its oral ruling and written findings, the court properly analyzed each of the relocation factors set forth in RCW 26.09.520. In summary, the court determined the parties enjoyed strong positive relationships with the children in their primary care. RCW 26.09.520(1). Because of these strong relationships, disrupting the children's residential placements would do more harm than good. RCW 26.09.520(3). Both parents' requests for relocation were made in good faith. RCW 26.09.520(5). Nothing peculiar to the children's ages, developmental needs, or access to resources weighed against relocation. RCW 26.09.520(6), (7). Because of the unavoidable distance between the parents, the court was not provided with any realistic and affordable alternatives to relocation that would have better fostered the children's relationships with their nonprimary parent. RCW 26.09.520(8), (9), (10).

*2 As noted by the trial court, it made little sense to disapprove either parent's request for relocation. Because the parents were living in different states prior to relocation, little would be gained by denying relocation. The objecting parent would still be faced with the challenges of a long distance parent-child relationship. This unavoidable difficulty would simply be exacerbated by the

fact that the primary parent would be forced to live in an undesired location, without adequate financial resources and familial support.
While proceedings before the trial court were initiated as requests for relocation, the parties' real dispute was over residential placement and whether the circumstances surrounding relocation justified modifying the parenting plan so that all five children could be placed together. The court's modification decision involved a separate legal determination, guided by a different standard.
Modification
The relocation context provides parties a unique opportunity to seek modification of an existing parenting plan. Normally, a major modification to a parenting plan requires a threshold showing of adequate cause, including a substantial change in circumstances. RCW 26.09.260(1). However, this prerequisite does not apply in the context of a relocation. RCW 26.09.260(6). If a relocation notice has been filed and a decision has been made with respect to relocation, the trial court may address the merits of a party's request for modification without any threshold evidentiary hurdles. *Id.; Grigsby*, 112 Wn. App. at 15–16; *In re Marriage of McDevitt*, 181 Wn. App. 765, 769–73, 326 P.3d 865 (2014).
While the relocation context streamlines a decision on the merits by avoiding the threshold requirement of adequate cause, a party seeking modification must still demonstrate that a change to the residential schedule is in the best interests of the child. This is no easy burden. "Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification." *McDole*, 122 Wn.2d at 610. The presumption of residential continuity is set forth at RCW 26.09.260(2). Pertinent to this case, this provision requires a court to retain the parties' current residential schedule "unless ... [t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." RCW 26.09.260(2)(c).
The trial court's decision was justified under this provision. As previously noted, the court determined the children were well cared for and closely bonded with their primary residential parent. Although the court voiced some minor criticisms of Mr. Monoskie'sparenting decisions, the same was true of Ms. Marshall. None of the court's criticisms were particularly significant. There was never a determination that the children's present environments were detrimental to their physical, mental, or emotional health.

Ms. Marshall places great weight on the trial court's decision to grant her primary care of the couple's youngest child. According to Ms. Marshall, this decision indicated the court found Mr. Monoskie unfit to parent all of his children. We disagree.
The trial court faced a different task when addressing placement of the youngest child, as opposed to the other children. Unlike his older siblings, the youngest child did not have a primary residential parent. As a result, there was no presumption favoring one parent over the other and the trial court's

analysis fell under RCW 26.09.187(3) (governing initial placements) as opposed to RCW 26.09.260

(governing modifications). With an even playing field between the two parents, the trial court determined the youngest child would be better off residing primarily with Ms. Marshall, as opposed to Mr. Monoskie. In making this decision, the court did not find Mr. Monoskie unfit. To the contrary, the trial court noted both Mr. Monoskie and Ms. Marshall were "good parents." Clerk's Papers at 86. The trial court simply needed to make a decision and determined the balance slightly favored Ms. Marshall. No further significance can be accorded the trial court's decision.

*3 Ms. Marshall finally argues that since her petition for relocation referenced RCW 26.09.260(1) and (2), there were actually two separate proceedings and the court should have assessed modification separately from relocation. We disagree. As previously noted, the relocation context permitted the trial court to consider modification without the need for a separate proceeding. This consolidated process benefited Ms. Marshall, in that it freed her from having to establish adequate cause prior to the court's consideration of relief on the merits. But ultimately Ms. Marshall failed to show modification was warranted. There was no need for the court to reconsider its analysis under the auspices of a separate modification proceeding with a heavier evidentiary burden.

Ms. Marshall remains free to avail herself of relief under the modification statute, should a substantial change of circumstances arise in the future. However, it is the law of this case that the desire to place all five of the parties' children in one household is not, by itself, sufficient to justify a contested modification petition. As the trial judge emphasized in her ruling, it is unfortunate that the parties chose to separate their children in their original parenting plan. But that decision cannot be undone here. The children have now adjusted to life with their respective primary parent. A presumption of continuity applies and either party wishing to disrupt the current residential schedule will face a difficult presumption against modification, as set forth in RCW 26.09.260.

CONCLUSION

The trial court's orders are affirmed. We decline to award attorney fees to either party.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Fearing, C.J.

FILED
JANUARY 25, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Marriage of ANNE MONOSKIE n/k/a Anne Marshall, Appellant, and PHILLIP C. MONOSKIE, Respondent.	)	No. 35067-3-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant Anne Marshall's motion for reconsideration of this court's November 30, 2017, opinion, and the record and file herein;

IT IS ORDERED the motion for reconsideration is denied.

PANEL: Judges Pennell, Fearing and Lawrence-Berrey

FOR THE COURT:

GEORGE FEARING
Chief Judge

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Division Three Case No. 350673-III

SUPREME COURT
FOR THE STATE OF WASHINGTON

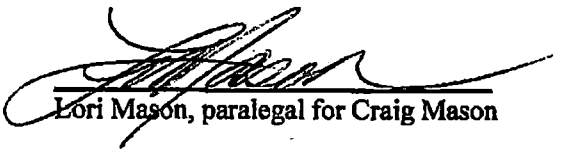
Anne Monoskie (Marshall),	)	DECLARATION OF SERVICE
	)	RE: Petition for Discretionary
Appellant,	)	Review RAP 13.4
and	)	
Phillip (Cliff) Monoskie,	)	
Respondent.	)	

I certify that on the 22nd day of February, 2018, I caused a true and correct copy of Appellant's Petition for Discretionary Review to be served on the following in the manner indicated below:

Julie Watts
The Law Office of Julie C. Watts, PLLC
108 N Washington St Ste 302
Spokane, WA 99201-5127

Emailed to: julie@watts-at-law.com
VIA Washington State Appellate Courts' Portal

Signed and Sworn on the date above.



Lori Mason, paralegal for Craig Mason

CERTIFICATE OF SERVICE

MASON LAW

February 22, 2018 - 6:44 PM

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Appellate Court Case Number:	35067-3
Appellate Court Case Title:	In re: Anne Marshall (Monoskie) and Phillip C. Monoskie
Superior Court Case Number:	12-3-02229-0

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