Supreme Court No. 102515-7
Court of Appeals No. 83082-1-I

Supreme Court of the State of Washington

Amanda Cowan,

Respondent,

v.

Joshua T. Cowan,

Petitioner.

Petition for Review

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1. Identity of Petitioner

Joshua Cowan, Appellant at the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

Cowan v. Cowan, No. 83082-1-I (August 28, 2023) (published). Joshua filed a timely motion for reconsideration, which was denied by order filed September 26, 2023. Copies of the opinion, motion, and order are provided in the appendix.

3. Issues Presented for Review

1. An error is not harmless where there is any reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. **Did the Court of Appeals err in finding the trial court's errors harmless?**

2. Relocation Factor Four is based on the parenting plan in place prior to relocation. There were no §191 restrictions in the original parenting plan. **Did the trial court abuse its discretion in its analysis of Factor Four?**

3. Relocation Factor Seven compares the current and intended residences of the children and relocating parent. The trial court used an unauthorized relocation as the "current" residence. **Did the trial court abuse its discretion in its analysis of Factor Seven?**

4. Statement of the Case

4.1 Introduction

Joshua and Amanda Cowan were divorced in 2020, with an agreed, shared parenting plan. When Amanda's new boyfriend moved to Utah, Amanda wanted to follow with the children. She sought a DVPO against Joshua based on alleged excessive spanking and filed notice of intent to relocate.

Amanda used the DVPO process to obtain unfair advantages in the relocation proceedings. She convinced the trial court that the DVPO was res judicata, barring Joshua from presenting evidence at the relocation trial to disprove the allegation of abuse. She convinced the trial court to impose new §191 findings[1] and restrictions based on the DVPO. She convinced the trial court to base its relocation factor

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[1] "§191 findings" refers to findings and restrictions made against a party in a parenting plan, pursuant to RCW 26.09.191.

analysis on the DVPO and the improper §191 findings. The trial court then entered those improper findings and restrictions in a modified parenting plan, without the statutory prerequisites for a modification. The trial court granted relocation of the children to Utah with Amanda.

The Court of Appeals held that the DVPO was not res judicata in the relocation trial and could not be the basis for applying the presumption in favor of relocation. However, the court found these errors harmless and affirmed the relocation order. The court held that the trial court did not have authority to modify §191 findings pursuant to relocation and reversed the modified parenting plan.

This case presents an opportunity for this Court to address the trend of strategic use of protection orders to gain unfair advantage in family law actions, and to condemn the practice.

4.2 Amanda accused Joshua of child abuse before filing notice of intent to relocate.

Joshua and Amanda Cowan were married in August 2009. 1 CP 28.[2] They had three children. 2 CP 752. The divorce was finalized with an agreed parenting plan in September 2020. 1 CP 28.

The plan provided for "equal 50/50 share custody," but also included a default calendar in which Joshua had 12 overnights and Amanda had 16. 1 CP 33. The plan contained no § 191 findings against either party. 1 CP 29.

Amanda started dating Benjamin Vinton in May 2020. 2 RP 157, 168. Vinton moved to Mapleton, Utah, in February 2021. 2 RP 168.

In March 2021, Amanda accused Joshua of excessively spanking their youngest child, leaving a

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[2] The record in this case consists of multiple volumes of clerk's papers and verbatim reports. This petition will follow the pattern of citation established in Joshua's Court of Appeals briefs. *See* Br. of App. 7-8.

bruise. 1 CP 5-6. The children were removed from Joshua's home and a CPS investigation was opened. 1 CP 11. Joshua told police that the last time he spanked the child was weeks before and denied ever leaving a bruise. 1 CP 224-25.

Amanda filed a petition for a Domestic Violence Protection Order, based primarily on the spanking allegation. 1 CP 1, 6. Amanda then filed notice of intent to relocate with the children. 1 CP 72. She claimed to have been offered a job in St. George, Utah. 1 CP 73. Joshua objected to relocation. *See* 1 CP 116.

4.3 The trial court denied Amanda's motion for temporary relocation prior to trial, finding her motives suspect.

The trial court held a hearing on whether to allow temporary relocation. RP (7/15/21) 1. Amanda had already sold her house in Maple Valley and moved with the children to her parents' home in Union, WA. RP (7/15/21) 5-6, 15.

The trial court found that Amanda's relocation to Union violated the law. RP (7/15/21) 17; 1 CP 117. The trial court also found Amanda's abuse allegations "suspect." RP (7/15/21) 18-19, 21. The trial court was suspicious that Amanda was "trying to manipulate the process in order to get a desired result." RP (7/15/21) 19.

Believing it was without power to undo Amanda's unauthorized move to Union, the trial court ordered her not to move the children from Washington pending trial. RP (7/15/22) 17, 19-22; 1 CP 117, 119.

4.4 At the DVPO hearing, the trial court found that Joshua had excessively spanked the child.

At the DVP● hearing, a commissioner considered the written pleadings and oral argument of the parties, without live testimony. RP (DVP●) 6.

The commissioner found that Joshua used excessive corporal punishment meeting the definition of domestic violence. RP (DVP●) 35. However, the

commissioner also questioned whether a DVPO was even the correct tool to deal with the situation. RP (DVPO) 35-36. So, while the trial court did enter a DVPO, it also provided Joshua weekend visitation with supervised overnights. RP (DVPO) 36-37; 1 CP 186-89.

4.5 The trial court denied Joshua's motion to vacate the DVPO based on new evidence.

Later, Joshua moved to vacate or terminate the DVPO based on new evidence that had not been available at the time of the hearing. 2 CP 5-14, 214. He argued that the new evidence seriously undermined the factual basis for the DVPO. *E.g.,* 2 CP 11, 12-14 (quoting Dr. Wigren's report, opining that the bruise was not caused by spanking, 2 CP 317-55). The trial court denied the motion. 2 CP 228-31.

4.6 The trial court barred Joshua from presenting any evidence at trial related to the spanking allegation.

Prior to the relocation trial, Amanda moved to prohibit Joshua from contesting the DVPO, on the

basis that the DVPO was res judicata. 2 CP 475-76; 2 RP 54-55. She also asked the trial court to exclude all testimony from Joshua's new expert witnesses, Dr. Wigren and Dr. Marsha Hedrick, who would have offered opinion testimony that the factual basis for the DVPO was questionable. 2 CP 476-77.

The trial court concluded that the DVPO was res judicata as to the finding that Joshua had committed an act of domestic violence by excessively spanking the child. 2 RP 64-65. The trial court barred Joshua from presenting any evidence or argument that would challenge the DVPO or its central finding of fact. 2 RP 66. The trial court excluded Dr. Wigren, finding his testimony related only to the spanking allegation. 2 RP 65. The trial court allowed Dr. Hedrick to testify regarding the effects of relocation on the children but barred any testimony related to the spanking allegation. 2 RP 66.

4.7 The trial court started its relocation analysis by making §191 findings against Joshua based on the DVPO's finding of excessive spanking.

At trial, Amanda argued that the trial court should consider §191 findings first. 2 CP 556. She argued that the reference to §191 in the relocation factors (RCW 26.09.520) required the trial court to consider new §191 findings or restrictions as part of the relocation factor analysis. 2 RP 82. Joshua argued that modification of a parenting plan due to relocation only allowed changes to the residential schedule and that new §191 restrictions could not be ordered. 2 RP 77-78. The trial court agreed with Amanda. 2 RP 82, 84, 121, 125; 3 RP 544-45.

The trial court's oral ruling began with the relocation factors. 4 RP 923. Noting that one of the factors is "whether there are 191 restrictions," the trial court stated, "And so I need to decide if there are going to be 191 restrictions in a new parenting plan before I move on to decide how [the factors] apply…" 4 RP 923.

The trial court found that the DVPO was res judicata of the fact of excessive spanking. 4 RP 928. Based on this, the trial court made a §191 finding of assault of a child. 4 RP 929. The trial court found that Joshua abusively used conflict. 4 RP 931-32. The trial court also made §191(2)(n) findings that continued contact between the father and children would not cause harm to the children. 4 RP 930-31.

4.8 The trial court applied the presumption favoring relocation, based on the DVPO.

Before returning to the relocation factors, the trial court considered application of the statutory presumption in favor of relocation. 4 RP 932-34. The parties had argued which "court order" could serve as the basis for determining whether the presumption applied. 4 RP 885-86, 890-91, 905-06. The trial court found that the DVPO was "the court order" and applied the presumption. 4 RP 933-34.

In the alternative, the trial court found that under the 2020 parenting plan, Amanda would still get the presumption. 4 RP 934. The trial court also indicated it would consider what the outcome should be without the presumption. 4 RP 934.

4.9 The trial court found that the factors favored granting the proposed relocation.

The trial court determined that the first factor favored Amanda because she had always been the primary parent. 4 RP 934-36; 2 CP 653. The trial court found that the second factor did not apply because the parties' agreement to move to a 50/50 schedule was abandoned. 4 RP 936-38; 2 CP 654. The trial court found that the third factor, like the first, favored Amanda. 4 RP 938-39; 2 CP 654.

On the fourth factor, the trial court found, "The current parenting/custody order includes limitations under RCW 26.09.191 on a parent." 2 CP 655. In doing so, the trial court actually considered the new §191

restrictions that it intended to impose in a modified parenting plan if relocation was granted. 4 RP 939; 2 CP 655. The trial court found that this factor would not be determinative but it did slightly favor Amanda's position. 4 RP 939; 2 CP 655.

The trial court found, under the fifth factor, that both parties had good faith reasons for seeking or objecting to relocation. 4 RP 940; 2 CP 655. The trial court also found that Amanda had originally relocated in violation of law and was "less than forthcoming" at the time. 4 RP 939-40; 2 CP 655. The trial court found this factor favored Joshua. 4 RP 940; 2 CP 655.

The trial court found that the sixth factor favored Joshua because the children emotionally would lose access to Joshua, both sets of grandparents, and other significant people in their lives. 4 RP 941; 2 CP 656. The trial court found under the seventh factor that the quality of life for Amanda would be significantly improved based on her romantic relationship with Mr.

Vinton. 4 RP 942-43; 2 CP 656-57. The trial court found that quality of life for the children would be roughly the same between Mapleton, Utah, and their temporary home in Union, Washington. 4 RP 942; 2 CP 656. On balance, the trial court found this factor favored relocation. 4 RP 943; 2 CP 657.

Under factor eight, the trial court found that there were alternatives for contact between Joshua and the children but that none could be equal to denying relocation. 4 RP 943; 2 CP 657. This factor favored Joshua. 4 RP 943; 2 CP 657. The trial court found that there were no feasible or desirable alternatives to relocation, and the ninth factor favored Joshua. 4 RP 944-45; 2 CP 657.

On the tenth factor, the trial court found that there would be significant financial impacts from relocation, particularly travel expenses for visitation, given the parties' incomes. 4 RP 945; 2 CP 657. On the other hand, Amanda would incur significant financial

impacts if she were not allowed to relocate. 4 RP 945-46; 2 CP 657-58. The trial court found this factor to be neutral. 4 RP 946; 2 CP 658.

The trial court granted relocation. 4 RP 946-48.

4.10 The trial court modified the parenting plan and imposed §191 findings.

The trial court proceeded to enter a modified parenting plan. 4 RP 948. The trial court entered §191 findings of child abuse and abusive use of conflict. 4 RP 948; 2 CP 752-53. The trial court imposed a slew of restrictions on Joshua related to these findings. 4 RP 948-50; 2 CP 753-54. The trial court found that with these restrictions in place, there would be no need to limit Joshua's residential time. 4 RP 949; 2 CP 753.

Nowhere in the trial court's oral ruling or written orders did the trial court find that there had been a substantial change in circumstances. The trial court believed that it had the authority to enter new §191 findings as part of the relocation decision, without a

petition for modification or a finding of substantial change in circumstances. 2 RP 121; 3 RP 544-45; 4 RP 923.

Joshua appealed the final orders. 2 CP 634. This appeal was consolidated with Joshua's prior two appeals, from the DVPO and the trial court's denial of his motion to vacate the DVPO.

4.11 The Court of Appeals reversed in part and affirmed in part.

The Court of Appeals agreed with Joshua that the trial court erred in finding the DVPO res judicata on the spanking allegation and excluding Joshua's evidence rebutting the DVPO finding. App. 11-17. The court agreed with Joshua that the trial court erred in modifying the parenting plan to add §191 findings without the statutory prerequisites. App. 17-20, 25. The court agreed with Joshua that the DVPO could not be used to establish the presumption favoring relocation. App. 23-25.

However, the Court of Appeals held that these errors were harmless as to the relocation decision and affirmed relocation. App. 22, 25. The court reversed the unauthorized modifications to the parenting plan. App. 20, 25.

The Court of Appeals held that the trial court had properly applied relocation factors four and seven, which Joshua had challenged. App. 20. The court held that factor four, "[w]hether either parent ... is subject to limitations under RCW 26.09.191," allows trial courts to go beyond limitations in the existing parenting plan and consider new evidence of §191-like conduct as relevant to the question of whether the detrimental effects of relocation outweigh its benefits. App. 21.

The court held that, even though Amanda moved the children from King County to Union in violation of the relocation act, the trial court did not abuse its discretion when it allowed Amanda the benefit of

considering Union as the "current" residence when comparing the "current and proposed geographic locations" under factor seven. App. 22-23.

Joshua seeks further review.

5. Argument

A petition for review should be accepted when the case involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). Abuse of Domestic Violence Protection Orders to gain a tactical advantage in family court is an issue of substantial public interest that this Court should address.

Joshua asks this Court to review the issues on which the Court of Appeals ruled against him. *See* Part 3, above. The trial court's errors were not harmless because they allowed Amanda to gain an improper tactical advantage in the relocation analysis, which can only be remedied by a new trial. The trial court's analysis of relocation factors four and seven was also in error for the same reason. This Court should accept review, reverse the Court of Appeals decision on these issues, and remand for a new trial.

5.1 Abuse of Domestic Violence Protection Orders to gain a tactical advantage in family court is an issue of substantial public interest.

"False allegations of abuse are an all-too-common phenomenon during divorce and child custody proceedings. … The frequency of false allegations in custody cases is not fully understood, with estimates ranging from 2% to 35% of all cases involving children. Whatever the percentage, attorneys, judges, and mental health experts all know firsthand that it is a vexing problem in court cases." Alan D. Blotcky, PhD, ***False Allegations of Abuse During Divorce: The Role of Alienating Beliefs***, Psychiatric Times, available at https://www.psychiatrictimes.com/view/false-allegations-of-abuse-during-divorce-the-role-of-alienating-beliefs (Nov. 23, 2021).

"The topic of false allegations of abuse is a complicated and thorny one that deserves much attention." Blotcky, ***False Allegations***. On the one hand, domestic violence protection orders are an important

and necessary tool for victims of abuse to secure their personal safety. On the other hand, parties and practitioners have learned that a DVPO can be obtained through exaggerated or even completely unfounded allegations and then leveraged to gain a tactical advantage in custody battles or divorce proceedings. *See, e.g., Id.*; Hemmat Law Group, ***Defending Wrongful Domestic Violence Accusations in Washington***, available at https://www.hemmatlaw.com/steps-to-take-if-you-are-wrongfully-accused-of-domestic-violence-in-washington/ (Nov. 7, 2022) ("Unfortunately, your ex can use a false allegation to gain leverage during a current or future divorce or custody battle."); Law Offices of Smith & White, PLLC, ***Domestic Violence Allegations Require a Strong Defense and Careful Response***, available at https://www.smithandwhite.com/domestic-violence/ (accessed Oct. 25, 2023) ("It is an unfortunate reality that in some cases, domestic violence allegations are

falsely made… One of the most common reasons for false allegations is to gain an upper hand in custody battles or divorce proceedings."); Alan D. Blotcky, PhD, ***The Weaponization of False Allegations of Abuse***, Psychiatric Times, https://www.psychiatrictimes.com/view/the-weaponization-of-false-allegations-of-abuse (Jul. 26, 2022) ("Why would a story of abuse be fabricated? The answer is clear: … The weaponization of false allegations can be successful.").

"In fact, many people are encouraged by their lawyers to seek this protection without cause because of the beneficial position gained by this strategic move." Joseph E. Cordell, ***Order of Protection: And Justice For All?***, available at https://www.huffpost.com/entry/order-of-protection-and-j_b_974970 (Sep. 23, 2011). "The misuse of orders of protection … is one of the more prevalent and unfortunate trends in family law. A system that was designed to protect against abuse is itself being abused." ***Id.***

"All allegations of abuse must be taken seriously. But during divorce proceedings involving child custody matters, false allegations of abuse ... can twist a case into a knot that cannot be easily untied." Blotcky, ***Weaponization***. The complicating effect of false allegations of abuse was recognized by the trial court and Court of Appeals in ***In re Marriage of Ohman***, 22 Wn. App. 2d 1034, 2022 WL 2236169, *9, 13 (2022) (unpublished, cited under GR 14.1) (after multiple unfounded allegations, "this case has spun out of control").

In 2006, the Court of Appeals attempted to quell such abuses when it held that the effects of a temporary order or DVPO could not be used to adversely affect the final determination of a parent's rights. ***In re Marriage of Watson***, 132 Wn. App. 222, 234, 130 P.3d 915 (2006). The court warned that to hold otherwise would invite abusive use of conflict by parties. ***Id.*** The court admonished, "a court may not

allow a protection order to serve as a de facto modification of a parenting plan." ***Id.***

The Court of Appeals has also recognized that false allegations constitute an abusive use of conflict that can create a risk of serious psychological damage to the children. ***In re Marriage of Rounds***, 4 Wn. App. 2d 801, 803, 423 P.3d 895 (2018); ***In re Marriage of Burrill***, 113 Wn. App. 863, 872, 56 P.3d 993 (2002).

Yet, despite such holdings by the Court of Appeals, abuse of DVPOs and temporary orders continues. *See, e.g.,* ***In re Marriage of Abbess***, 23 Wn. App. 2d 479, 482-83, 516 P.3d 443 (2022) (wife "immediately" brought allegations of alcohol and drug abuse, which proved unfounded, but not before she obtained restriction of husband's time with the children and trial court approval of her relocation based on the temporary residential schedule).

Parties and practitioners alike would benefit from a definitive statement from this Court condemning this

pernicious practice. The ongoing trend of using exaggerated or unfounded claims of abuse to gain a tactical advantage in family court is a matter of substantial public interest. This Court should accept review.

5.2 Contrary to the Court of Appeals decision, the trial court's errors were not harmless because they allowed Amanda to benefit from her unfounded allegations.

The Court of Appeals failed to discourage this troubling trend when it held that the trial court's errors were harmless. The court failed to account for the full impact of the allegations on the relocation decision. The trial court's errors were not harmless because they allowed Amanda to gain advantages in the relocation analysis from her false allegations.

The Court of Appeals correctly held that the trial court erred in considering the DVPO as res judicata and in excluding Joshua's evidence that would have challenged the DVPO's central finding. It correctly held

that the DVPO could not be the basis for applying the presumption favoring relocation.

But, contrary to the Court of Appeals decision, the trial court did, in fact, consider the spanking and the DVPO in its analysis of the relocation factors. The trial court's consideration was not limited to the short comments at 4 RP 939. The totality of the trial court's factor four analysis included its comments on the spanking allegation and the §191 findings and restrictions that it intended to impose. 4 RP 923-32, 946-50, 966.

Taken as a whole, the trial court's reasoning was as Joshua explained at oral argument[3]: Under factor four, Joshua was subject to §191 findings that the trial court would enter based on the DVPO and abusive use

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[3] The Court of Appeals incorrectly stated that Joshua conceded at oral argument that the trial court did not base its relocation decision on the spanking. App. 22. Joshua made no such concession, as he explained on reconsideration. App. 31-33.

of conflict. But because of the limitations that the trial court planned to impose, assuming they were followed, the trial court expected the §191 findings to have little impact, and therefore factor four only slightly favored Amanda. Thus, the trial court *did* consider the spanking as part of its factor four analysis.

Considering the appellate court's reversal of the trial court's §191 limitations, the trial court's reliance on those limitations as part of its factor four analysis is entirely undermined. It is difficult to understand how an error can be harmless when it so substantially influenced the trial court's analysis. Reversal of the §191 findings requires a new factor analysis, which, because of the excluded evidence, requires a new trial.

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." ***Budd v. Kaiser Gypsum Co., Inc.***, 21 Wn. App. 2d 56, 79, 505

P.3d 120 (2022). The test is "whether there is any reasonable probability that the outcome of the trial would have been materially affected had the error not occurred." ***Williams v. Dep't of Social and Health Servs.***, 24 Wn. App. 2d 683, 696 n.6, 524 P.3d 658 (2022). Here, there is a reasonable probability that admission of Joshua's evidence would have materially affected the outcome of the relocation decision.

The trial court erroneously excluded Dr. Wigren's evidence that called into question whether the spanking happened at all, see 2 CP 317-55, and Dr. Hedrick's evidence that the forensic interviews of the children were flawed and their testimony influenced by Amanda, see 2 CP 475, 596; 2 RP 59. Had this evidence been admitted, there is a reasonable probability that the trial court would have found that the spanking had never occurred and that it had been fabricated by Amanda to gain an advantage in the litigation.

This would have completely changed the relocation factor analysis. There would have been no spanking to consider, no finding of assault, and no need for any limitations to mitigate it. There would have still been abusive use of conflict to consider, but now Amanda would also have been a target for such a finding, because of her strategic abuse of the DVPO process. *See **Burrill***, 113 Wn. App. at 868-71 (a party's support and encouragement of unsubstantiated allegations supported a finding of abusive use of conflict). There is a reasonable probability that factor four, instead of favoring Amanda, would be neutral or even favor Joshua.

Joshua's evidence would likely have changed the trial court's view of Amanda's good faith, under factor five. At the initial hearing, the trial court seriously questioned her good faith, believing she might have been manipulating the process to achieve a better result. RP (7/15/21) 19. Joshua's evidence would have

demonstrated that the trial court's initial impressions were correct—that Amanda was manipulating the process and therefore was not acting in good faith. Factor five would have more strongly favored Joshua.

There is a reasonable probability that Joshua's evidence would have changed the trial court's view of Amanda's credibility. This could have had a significant impact on all of the other factors, and even on the presumption favoring relocation. The trial court's analysis of the parties' agreement for 50/50 residential time was driven primarily by credibility of the parties. 4 RP 937-38. At the initial hearing, when the trial court had a poorer view of Amanda's credibility, it had concluded that the presumption favoring relocation would not apply. RP (7/15/22) 18. There is a reasonable probability that the trial court would have taken the same view at trial if it had heard Joshua's evidence.

There is also a reasonable probability that the trial court would not have given Amanda the benefit of

her unauthorized move to Union, under factor seven. Amanda cited the DVPO as justification for the move, and leveraged the DVPO to convince the trial court that the move could not be undone. RP (7/15/21) 15, 17. If Joshua's evidence proved that the spanking allegations were false, the trial court would likely have taken a dimmer view of the unauthorized move, seeing it as another example of manipulating the process. *See* RP (7/15/21) 18-19. It is likely that the trial court would have reasonably based factor seven on Amanda's original residence in King County, so as not to allow her to benefit from the unfounded DVPO.

With no presumption, and factors analyzed differently after considering the erroneously excluded evidence, the outcome of the relocation trial might very well have been different. The trial court's errors were not harmless. Rather, they allowed Amanda to improperly benefit from her unfounded allegations of abuse. This Court should accept review, hold that the

errors were not harmless, and remand for a new relocation trial.

5.3 The trial court erred in its analysis of relocation factors four and seven.

Joshua argued that the statutory language of factor four, "Whether either parent … is subject to limitations…," RCW 26.09.520(4), can only apply to §191 findings and limitations in the existing parenting plan. The statutory language cannot authorize a trial court to consider new §191 findings and limitations. It cannot authorize a trial court to consider §191-type evidence. It may be possible that evidence of excessive spanking could be relevant to other factors, such as the strength, quality, and stability of the child's relationship with a parent (factor one) or the balance of disrupting contact with either parent (factor three). But the statutory language of factor four does not permit consideration of limitations that do not yet exist.

Joshua argued that it was an abuse of discretion for the trial court to use Union, Washington, as the "current location" for purposes of factor seven. By using Union, the trial court allowed Amanda to take advantage of her unauthorized move to create a more favorable comparison. This Court should interpret "current ... geographic location," RCW 26.09.520(7) to mean the children's permanent address at the time of the notice of relocation. Just as a temporary order cannot be allowed to prejudice the outcome at trial, ***Watson***, 132 Wn. App. at 234, even so a temporary move should not be allowed to change the relocation analysis—especially when the temporary move was done in violation of the law. It is a bedrock principle of equity that a party should not be permitted to benefit from their own bad acts. *E.g.*, ***Montgomery v. Engelhard***, 188 Wn. App. 66, 94, 352 P.3d 218 (2015).

The trial court's errors in factors four and seven allowed Amanda to use the unfounded DVPO to her

advantage in the relocation proceeding. This Court should accept review and correct these errors.

6. Conclusion

This case involves a matter of substantial public interest that should be addressed by this Court: the ongoing abuse of the DVPO process to obtain unfair advantages in family court. The Court of Appeals decision fell short when it failed to account for the full impacts on the relocation trial of Amanda's unfounded allegations. This Court should accept review, reverse the trial court's relocation decision, and remand for a new trial.

I certify that this document contains 4,940 words.

Submitted this 26th day of October, 2023.

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AMANDA R. COWAN,

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v.

JOSHUA T. COWAN,

Appellant.

No. 83082-1-I
(Consolidated with
No. 83860-1-I and
No. 84148-3-I)

DIVISION ONE

PUBLISHED OPINION

COBURN, J. — A mother obtained a one-year Domestic Violence Protection Order (DVPO) against the father following a spanking incident of one of their children. Neither parent petitioned to modify their then-existing parenting plan. At a later relocation trial, the court granted the mother's requests to preclude the father from introducing any evidence challenging the spanking incident while also imposing mandatory conditions against the father that mirrored those from the DVPO. The court granted the relocation and considered the father's abusive use of conflict but not the spanking incident in its consideration of relocation factors. The father appeals both the trial court's order on relocation and modification of the parenting plan.

We hold that a DVPO is not the type of "court order" contemplated by RCW

26.09.525(2) to determine whether the presumption in favor of relocation applies. The trial court also abused its discretion in precluding the father, under res judicata, collateral estoppel, and law of the case from introducing evidence challenging the spanking incident in the relocation trial. Because the errors were harmless as to the relocation order, we affirm the trial court granting the mother's request to relocate the children. However, because the court modified the parenting plan beyond what is permitted pursuant to a relocation, we reverse that order. The current residential schedule will remain until the trial court can enter a parenting plan consistent with this opinion on remand.

FACTS and PROCEDURAL HISTORY

In 2019, Joshua and Amanda Cowan separated after being married for 10 years. A court entered an agreed permanent parenting plan in 2020 ordering equally sharing residential time with their three children.[1] The order provided,

> Both parents will have equal 50/50 share custody of the children. While the parenting time calendar is not an equal time share schedule, both parents have agreed that this is what makes the most sense for the children for the foreseeable future so one parent can work full time while the other parent is the primary caregiver. If either parent decides that they would like to petition the court to change the schedule, they should be granted up to 50% of the children's time per this agreement. At all times, the parent that has the children will be the primary caregiver. Outside of vacations, neither parent will have a significant other taking care of the children except with one-off, extenuating circumstances that do not extend overnight.

The agreed parenting time calendar provided that the children were with Amanda[2] 16 out of 28 nights, or approximately 57 percent of the residential time.

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[1] Joshua asserts the parenting plan was entered at the same time as the agreed dissolution of the marriage. The order of dissolution is not in the record.

[2] Because the parties share the same last name, we refer to them by their first name for clarity.

In April 2021, under a separate cause number, Amanda filed for a domestic violence protection order (DVPO) against Joshua based on a March 15 event. She recalled that the children came home from a weekend with Joshua. When she was giving her 2-year-old daughter, E.C., a bath, she noticed severe bruising on her hip and thigh. Amanda called Joshua and he explained he had to "spank her" repeatedly because she was not obeying him and kept getting out of bed. Amanda sent a picture of the bruising to her pediatrician, who contacted Child Protective Services (CPS). CPS then contacted the police. The court entered a temporary DVPO, prohibiting contact between Joshua and the children.

In May, Amanda filed a notice of intent to move the children to St. George, Utah. She provided the reasons for the move: (1) to provide a better environment for her children; (2) she could no longer afford to live in the greater Seattle area; (3) she had a job offer in St. George; and (4) she could afford a new townhome in St. George. In the attached proposed parenting plan, Amanda requested the court prohibit Joshua from having any contact with the children pending the outcome of the CPS and police investigation from the spanking incident. Amanda also requested Joshua be evaluated for substance abuse and anger management and/or domestic violence, that he start and comply with treatment as recommended by the evaluation, that he provide a copy of the evaluation and compliance reports, and that his residential time be suspended for noncompliance.

Amanda planned to move in August. She indicated that she planned to reside with her parents in Union, Washington, in between selling her home in King County and moving to Utah.

Joshua filed a motion for a temporary order preventing the move with the children. The court heard his motion on July 15. At the hearing, the court learned that Amanda had already moved with the children out of King County to Union. Amanda conceded that she "jumped the gun" and moved without permission of the court, but explained that the children were not in school and Joshua could not have contact with the children because of the temporary DVPO. Joshua asked the court to order the children to be brought back to King County and that Amanda reside there until the relocation issue was resolved. The court explained that it had no authority to order Amanda to live in King County, and though it could order the children be returned to King County, they would not be able to reside with Joshua because of the temporary DVPO. The court explained that the only reasonable temporary order that the court could impose given the unusual circumstance was to order Amanda not to leave the state of Washington with the children on a permanent basis. The parties agreed.[3] At this hearing Amanda declined to have the DVPO matter and the relocation matter consolidated.

At the July 21 hearing on the DVPO, a trial court commissioner found that Joshua's excessive corporal punishment of E.C. constituted domestic violence. The commissioner explained that although corporal punishment is legal in Washington, excessive corporal punishment is not. The court issued a DVPO that expired July 21, 2022. The commissioner limited Joshua's contact with his children by prohibiting any overnight visits, but otherwise allowed contact as permitted by the then-existing parenting plan schedule. The commissioner also ordered Joshua either participate in a

[3] Joshua does not appeal the court's ruling from the July 15 hearing.

domestic violence perpetrator treatment program or obtain a domestic violence assessment and comply with its recommendation. The same day, Joshua filed a motion for revision of the DVPO, and the court denied it. Joshua filed a notice of appeal of that decision (the first of three consolidated appeals).

In August, Amanda filed an amended notice of intent to move the children to Utah with an attached proposed parenting plan. She revised her reasons for moving to be: (1) providing a better environment for the children; (2) moving to Mapleton, Utah to marry her new fiancé; and (3) moving will allow her to cease working outside the home and be available for the children. In her attached proposed parenting plan, she requested that all residential time with Joshua be professionally supervised at his expense. She maintained her previous evaluation and treatment requests. Joshua filed an amended objection to Amanda's request to relocate. Neither she nor Joshua filed a petition to modify the parenting plan.

Joshua moved to vacate the DVPO under CR 60(b). The court denied the motion in March 2022. Joshua filed a notice to appeal that decision (the second of his three consolidated appeals).

In April, the court held a five-day trial regarding the mother's request to relocate the children to Utah. Amanda attached the DVPO to her trial brief and requested the court place RCW 26.09.191 findings and limitations on Joshua and order the same conditions required by the DVPO.[4] Joshua asserted in his trial brief that he intended to contest any allegation of child abuse and that he intended to introduce evidence to

[4] Amanda also requested RCW 26.09.191 limitations imposed on Joshua for alleged acts of domestic violence and sexual abuse against Amanda. However, the trial court found that Amanda failed to prove by a preponderance of the evidence that there was a history of acts of domestic violence against her. Amanda did not appeal this ruling.

dispute that claim. Specifically, Joshua offered that Dr. Carl Wigren, a forensic pathologist, would testify regarding the lack of evidence of physical abuse and the deficient criminal and CPS investigation. Joshua would also be calling Dr. Marsha Hedrick to testify regarding Amanda's influence on the children's forensic interviews and their lack of credibility.

Amanda moved in limine for the court to preclude Joshua from introducing any evidence related to the excessive spanking incident. Amanda argued under res judicata that Joshua should not be able to relitigate this issue. Amanda asserted that the DVPO should stand on its own and that she should be able to rely on it at trial. The court granted the motion, ruling that it would accept the DVPO finding under res judicata (claim preclusion), collateral estoppel (issue preclusion), and "the law of the case." The court excluded Wigren's testimony explaining that it was not going to allow Joshua to "relitigate" the DVPO, and that it accepted the previous DVPO finding that an assault had occurred because it had "already been proven as the law of the case." The court allowed Hedrick to testify about how the relocation might affect the children, but prohibited any testimony "about whether the assault happened, how the assault might effect [sic] the children." The court clarified, however, that while it accepted the fact that Joshua excessively spanked E.C., how that fact would weigh into the court's consideration of RCW 26.09.191 limitations was a matter of the court's broad discretion.

During the court's ruling, it stated it needed to first decide if there were going to be RCW 26.09.191 limitations in a new parenting plan before considering the 11 relocation factors under RCW 26.09.520. The court explained that RCW 26.09.191(n) provides that the weight to be given to a DVPO is within the court's discretion. The

court denied RCW 26.09.191 limitations based on Amanda's allegations that Joshua was domestically violent with her. The court acknowledged that the over-spanking of E.C. occurred but used its discretion to not limit residential time under RCW 26.09.191(2)(n). The court, however, found that Amanda proved that Joshua abusively used conflict because Joshua indicated he wanted to exchange the children at 4 a.m. for retaliatory reasons.

The court then considered whether the rebuttable presumption permitting relocation under RCW 26.09.520 applied in analyzing the required 11 factors. Because the presumption did not apply if 45 percent or more of the child's residential time is spent with each parent, the court considered, among other factors, the "determination on the amount of time designated in *the court order*" as required under RCW 26.09.525(2) (emphasis added). The parties disputed at trial whether the court should consider the designated time in the parenting plan or how the schedule changed under the DVPO.

The court explained what it viewed as three options. The court stated it could consider the residential schedule designated under the DVPO. It could also consider the parenting plan residential schedule and find that it had not been significantly modified, or it could consider the parenting plan as having been modified by the DVPO. Under any of the scenarios, the court concluded a presumption supporting relocation applied because the children spent more than 45 percent of their time with their mother. The court determined that the DVPO was the controlling court order under RCW 26.09.525. The court reasoned that the DVPO order fell within the definition of "court order" under RCW 26.09.410, and the DVPO contained a schedule that was the "most

recent order." Under the restrictions of the DVPO, the children spent more than 55 percent of their time with their mother.

The court then analyzed the 11 relocation factors under RCW 26.09.520.[5] It found that factor 1, the nature of the children's relationship, significantly favored relocation because Amanda was more involved with the children, was more nurturing, and had a stronger relationship with them that is of higher quality. It found that factor 2, prior agreements, was a neutral factor because the court rejected Joshua's argument that the parties had moved to a 50/50 parenting schedule. It found that factor 3, disrupting contact between the children with either parent, heavily favored relocation for the same reasoning as in factor 1. The court then considered factor 4:

> I next must consider whether either parent is subject to limitations under [RCW] 26.09.191. And here if I allow relocation, there will be a finding of

[5] The 11 factors under RCW 26.09.520 are the following:
(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 seeking relocation 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.

> abusive use of conflict against the father, and I am considering that. But frankly, I don't find that that is a determinative factor.

The court found that the RCW 26.09.191 limitation was largely remedied by the conditions the court placed on the father. The court found that this factor slightly favored Amanda's position.

The court then analyzed factor 5, reasons for proposing or opposing relocation. It found that this factor slightly favored Joshua's opposition because both parents were acting in good faith, and the move would negatively impact Joshua's relationship with the children. It noted that in the first notice of relocation, Amanda moved the children in violation of the law by moving the children to a different school district. It found that factor 6, the effect of the relocation on the children, slightly disfavored relocation because the move would disrupt the relationship with Joshua and their grandparents on both sides of the family. It found that factor 7, quality of life available to the children and Amanda, significantly favored relocation because the move would improve Amanda's quality of life romantically, personally, and interpersonally. It found that factor 8, the availability of alternative arrangements, favored Joshua despite the availability of travel, video calling, and extended summer visits. It found that factor 9, whether the objecting person can also move, slightly disfavored relocation because it was not feasible for Joshua to relocate. It found that factor 10, financial impacts of the relocation, was neutral because there were no financial impacts either way. It found that factor 11, regarding the amount of time before trial, was not applicable because the parties had already been through trial.

The court granted Amanda's request to relocate with the children. The court explained the outcome would have been the same if it considered the residential time

designated in the parenting plan rather than the DVPO. The court also explained that the factors would still have supported relocation even if Amanda was not afforded the presumption to relocate.

The court also entered a modified parenting plan. In it, the court noted there were two reasons supporting limitations on Joshua under RCW 26.09.191:

> a. Abandonment, neglect, child abuse, domestic violence, assault, or sex offense.
>
> A parent has one or more of these problems as follows:
>
> > Child Abuse - Joshua Cowan (or someone living in that parent's home) abused or threatened to abuse a child. The abuse was: physical.
>
> b. Other problems that may harm the children's best interests:
>
> A parent has one or more of these problems as follows:
>
> > Abusive use of conflict - Joshua Cowan uses conflict in a way that may cause serious damage to the psychological development of a child. . . .

However, consistent with its oral ruling, the court added that it was not imposing RCW 26.09.191(2)(a) residential time limitations by exercising its discretion under RCW 26.09.191(2)(n):

> Under RCW 26.09.191(2)(n), the Court expressly finds that based on significant evidence presented at trial that continued contact between the father and the children will not cause physical harm to the children and that the probability that the father's harmful or abusive conduct to the children will recur in the future is so remote that it is not in the interests of the children to apply the limitations in RCW 26.09.191(2)(a).

Nevertheless, the court ordered compliance with the DVPO that was set to expire on July 21, 2022, as well as adopted conditions that were first imposed under the DVPO: completing a domestic violence assessment and complying with all recommendations,

completing "DV Dads," not using corporal punishment on his children, and using Talking Parents[6] to communicate with Amanda. The court also ordered Joshua not to drink alcohol during his residential time or within 12 hours of seeing the children. The court provided that if Joshua did not follow the treatment requirements or if he violated the conditions upon him, then his residential time would be suspended.

Joshua appeals the final orders entered in his child relocation case. A commissioner of this court granted Joshua's motion to consolidate all three of his appeals. In total, Joshua appeals the July 21, 2021 DVPO, the denial of his motion for revision of that order, the denial of his motion to vacate that order, and the 2022 relocation order and modified parenting plan entered after trial.[7]

DISCUSSION

Parenting Plan Modification

Joshua first contends that the trial court abused its discretion by excluding, based on res judicata or collateral estoppel, Joshua's expert testimony evidence rebutting the DVPO finding that he excessively spanked the child. We agree.

We review evidentiary rulings for abuse of discretion. Hollins v. Zbaraschuk, 200 Wn. App. 578, 580, 402 P.3d 907 (2017). A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775

[6] Talking Parents is an application that will create a record of all communication between parents.

[7] Though Joshua assigns error to the entry of the DVPO, order denying his motion for revision, and order denying his motion to vacate, he does not provide substantive argument as to why these orders were improper. Thus, we do not address these claims. RAP 10.3(a)(6) (requiring an appellant's brief to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record"); see also Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838, 845, 347 P.3d 487 (2015).

(1971). However, whether the court used the correct legal standard is a question of law reviewed de novo. Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833-34, 161 P.3d 1016 (2007).

The court excluded evidence of the excessive spanking incident on collateral estoppel, res judicata, and law of the case doctrine.[8] The court explained,

> The DVPO is on appeal. And here the mother alleges that the issue of that assault and what happened, that is alleged in the DVPO having been found, is collateral estoppel or res judicata.
>
> The laws of the State [of] Washington are quite clear that just because that issue is on appeal, the DVPO, does not affect its finality in terms of this hearing. What the court of appeals and the supreme court have said over and over is it is something that is subject to the collateral estoppel analysis.
>
> . . .
>
> In the DVPO you had the same parties, the same standard of proof, and there was a finding of fact that we're not going to relitigate the DVPO. That is the fact that the Court just accepts that there was a finding of an assault.

The court further explained that what it chose to do with the assault finding was up to its discretion. Joshua contends that although the trial court and parties used the term res judicata, the issue is more correctly analyzed under the doctrine of collateral estoppel. We agree.

The doctrine of res judicata, or claim preclusion, ensures that "every party should be afforded one, but not more than one, fair adjudication of his or her claim" by

[8] The parties spend little effort addressing whether "law of the case" was a proper basis to preclude Joshua's evidence. As this court has explained, "'The term 'law of the case' means different things in different circumstances. First, it refers to the effect of jury instructions in a trial. Second, it refers to the binding effect of appellate determinations on remand. Third, it refers to the principle that an appellate court will generally not reconsider the rules of law it announced in a prior determination of the same case." Bergerson v. Zurbano, 6 Wn. App. 2d 912, 925, 432 P.3d 850 (2018) (citations omitted). The trial court erred in suggesting the law of the case doctrine supported the court's ruling.

prohibiting the re-litigation of claims that were litigated or could have been litigated in a prior action. Reeves v. Mason County, 22 Wn. App. 2d 99, 115, 509 P.3d 859 (2022). Here, Amanda filed the motion to relocate, not Joshua. It was Amanda who requested RCW 26.09.191 limitations and modification of the parenting plan as part of the relocation trial. Joshua simply objected to Amanda's requests.

Collateral estoppel, or issue preclusion, bars re-litigation of the same issue in a later proceeding after an earlier opportunity to fully and fairly litigate the issue results in a final decision on the merits. Marriage of Pennamen, 135 Wn. App. 790, 805, 146 P.3d 466 (2006). The party asserting collateral estoppel must prove four elements: (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. Id. "Collateral estoppel does not apply when a substantial difference in applicable legal standards differentiates otherwise identical issues even though the factual setting of both suits is the same." Reeves, 22 Wn. App. 2d at 112 (citing Cloud v. Summers, 98 Wn. App. 724, 730, 991 P.2d 1169 (1999)).

Joshua challenges the court's ruling based on the first factor, arguing the issue decided in the DVPO was not identical to the issue presented in relocation proceeding because the procedures and purposes of the proceedings were significantly different. We agree. For support, Joshua cites to Regan v. McLachlan, 163 Wn. App. 171, 181, 257 P.3d 1122 (2011) (holding that the issue in a prior criminal proceeding, whether the trial court had jurisdiction, was not identical to the issue in the present civil proceeding,

whether the defendant was negligent and breached its fiduciary duty), and Standlee v. Smith, 83 Wn.2d 405, 518 P.2d 721 (1974) (holding that a parolee's acquittal on criminal charges did not, on the basis of collateral estoppel, preclude parole revocation based on the same charges).

Also informative is Pennamen. There, the parties' marriage was formally dissolved in 1999 and the court entered a parenting plan at the time of dissolution. 135 Wn. App. at 795. In 2005, the mother requested to relocate the children. The father separately filed a petition for modification of the parenting plan alleging that the mother and her fiancé were methamphetamine users, and that the fiancé had a history of domestic violence and may have abused her and the children. Id. at 796. In response, the mother got a urinalysis (UA) drug test, tested negative for all substances, and filed the results of the UA with her reply to the father's motions. Id. A commissioner denied the father's petition for modification of the parenting plan, ruling that there was "no nexus" between the mother's prior drug use and the statutory requirements for modification under RCW 26.09.260. Id. The trial court dismissed the father's motion for revision of the commissioner's decision. Id.

Later at the relocation trial, the mother contended collateral estoppel precluded the court from considering her past drug use. She argued that because that issue had already been decided in her favor when the trial court refused to revise the commissioner's finding, there was no nexus between her drug use and the statutory requirements for modifying the parenting plan. Id. at 805. This court held that it was not improper for the trial court to consider the mother's past drug use during the relocation hearing as it must have done under RCW 26.09.520(4), which requires the court to

consider whether any RCW 26.09.191 limitations apply. Id. at 806. We explained that the mother's collateral estoppel argument failed because the issues were not identical. Id. We noted that RCW 26.09.260 limits the circumstances in which a court may modify a parenting plan and that "the key issue for the commissioner was whether the children's present environment was so detrimental to their well-being that the benefit of a change in the parenting plan would outweigh the harm from moving the children out of the mother's home." Id. Further, we explained, "This is different from a relocation proceeding, where the key issue is whether the future detrimental effects of allowing relocation outweigh the benefits of the move." Id.

Pennamen is similar to the instant case in that the issues presented in the two different hearings are not the same issue. A DVPO proceeding is different from a relocation proceeding substantively and procedurally.

The purpose of chapter 26.50 RCW, Domestic Violence Prevention Act, is to provide a process by which victims of domestic violence may obtain orders of protection more efficiently and easily than court orders are generally obtained. Smith v. Smith, 1 Wn. App. 2d 122, 135, 404 P.3d 101 (2017); Marriage of Barone, 100 Wn. App. 241, 247, 996 P.2d 654 (2000). "Conversely, it is relatively difficult to obtain orders that modify final parenting plans and child support decrees." Id. "Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification." Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993).

DVPO proceedings allow courts to consider hearsay in a chapter 26.50 RCW protection order proceeding. Gourley v. Gourley, 158 Wn.2d 460, 464, 145 P.3d 1185

(2006); ER 1101(c)(4). Whereas, hearsay is not admissible, absent an exception, in a trial modifying a parenting plan. DeVogel v. Padilla, 22 Wn. App. 2d 39, 59, 509 P.3d 832 (2022). When modifying a parenting plan, The Parenting Act anticipates that the court will craft a child's permanent residential schedule based on the best interests of the child, as they can be determined at the time of trial. Marriage of Abbess, 23 Wn. App. 2d 479, 485, 516 P.3d 443 (2022) (citation omitted). To impose new RCW 26.09.191 limitations in a parenting plan, the court is required to apply the "civil rules of evidence, proof, and procedure." RCW 26.09.191.

A permanent parenting plan may be changed by an agreement, by petition to modify, and by temporary order. Marriage of Watson, 132 Wn. App. 222, 235, 130 P.3d 915 (2006). A trial court may not modify a parenting plan unless it finds, upon the basis of facts that have arisen since the prior parenting plan or that were unknown to the trial court at the time of the parenting plan, that a "substantial change in circumstances" has occurred. RCW 26.09.260(1). Additionally, under RCW 26.09.260(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.

A court may not allow a DVPO to serve as a de facto modification of a parenting plan. Watson, 132 Wn. App. at 234 (citing Barone, 100 Wn. App. at 247).

Thus, parties may petition to modify a parenting plan when there has been a substantial change in circumstances or 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. Even when neither party petitions to modify the parenting plan, a "court order permitting or restraining the relocation of a child may necessitate modification of an existing parenting plan." Marriage of Laidlaw, 2 Wn. App. 2d 381, 387, 409 P.3d 1184 (2018). However, the modification must be "pursuant to relocation." "Relocations involve new time and distance factors that will inevitably require dramatic changes to a parenting plan . . . . A trial court decision is not based on untenable grounds simply because it favors one parent against another." Marriage of Fahey, 164 Wn. App. 42, 68, 262 P.3d 128 (2011).

Neither party petitioned to modify the parenting plan. The only issue at trial, as articulated in Pennamen, was "whether the future detrimental effects of allowing relocation outweigh the benefits of the move." This is not the same issue as whether a court should enter a temporary protection order. Certainly, as we observed in Pennamen, the court could have considered the spanking incident as part of its consideration of the required factors under RCW 26.09.520(4) as to the issue of relocation, which means Joshua had the right to contest the issue. The trial court abused its discretion in its misapplication of res judicata, collateral estoppel, and law of the case to bar Joshua's evidence related to the spanking incident.

As this court recognized in Laidlaw, a relocation order necessitates some modification of a parenting plan because relocations involve new time and distance factors that will inevitably require dramatic changes to that plan. Laidlaw, 2 Wn. App. 2d at 387. However, those changes must be "pursuant to relocation." RCW 26.09.260(6). A trial court abuses its discretion when it orders restrictions under RCW 26.09.191 based on the adverse effects of its own temporary orders. Watson, 132 Wn. App. at 235.

In her response brief, Amanda maintained that the final parenting plan entered after the order to relocate does not include RCW 26.09.191 limitations based on domestic violence. At oral argument, she argued that a relocation is adequate cause to modify a parenting plan citing Laidlaw, Marriage of Raskob, 183 Wn. App. 503, 334 P.3d 30 (2014), and Marriage of McDevitt, 181 Wn. App. 765, 326 P.3d 865 (2014). Wash. Court of Appeals oral argument, Marriage of Cowan, No. 83082-1-I (June 6, 2023), at 12 min., 20 sec., *video recording by* TVW, Washington State's Public Affairs network, https://www.tvw.org/watch/?clientID=9375922947&eventID=2023061164. However, in these cases, the court only altered residential aspects related to the relocation order. In Laidlaw, the court modified the parenting plan pursuant to the relocation action by reducing the father's residential time during the school year based on a DVPO. 2 Wn. App. at 389. In McDevitt, the court entered a modified parenting plan pursuant to relocation resulting in more equal visitation and sharing of parental responsibility. 181 Wn. App. at 773. In Raskob, the court entered a modified parenting plan entering a provision requiring the mother to provide the father with notice if she

decided to relocate outside of the child's school boundaries—which constitutes as a residential aspect. 183 Wn. App. at 516. These cases are inapposite.

Here, the trial court announced that it was exercising its discretion under RCW 26.09.191(2)(n) to not limit residential time under RCW 26.09.191(2)(a) because of physical abuse of a child. The court explained,

> I find that the – there has been evidence presented, significant evidence that continued contact between the father and the children will not cause physical harm to the children, and that the probability of the parent's harmful or abusive conduct will recur is so remote that it would not be in the children's best interests to apply the limitations of subsection [RCW 26.09.191](a). So while I do find that that happened, and that there was an assault, I find that there are no limitations that are necessary, other than those that I'm going to put in this order . . . .

The court then proceeded to impose the following conditions:

- The father must comply with all terms of the DVPO.
- The father shall complete domestic violence assessment at a state certified agency within 30 days of today's date, unless such an assessment was previously completed for the DVPO, and also timely follow all recommendations of the assessor.
- The father shall complete DV Dads and commence DV Dads within 30 days after completing the recommendations of the assessor, or sooner if his DV batterer's counselor indicates he can start DV Dads earlier.
- The father shall not use corporal punishment on his children at any time.
- The father shall not drink alcohol or use any mind-altering substances within 12 hours of any of his residential time and shall not drink any alcohol or use any mind-altering substances during his residential time.
- The father must abide by the restrictions on communications with the mother in Section 14 of this Parenting Plan (Talking Parents, appropriate child focused communication, etc.)

> If the father does not follow the treatment requirements above or violates any of the conditions imposed on him within this Order, then the father's residential time with his children is suspended pending further order of the court.

The court did not merely modify "residential aspects" as contemplated by RCW 26.09.260(6). Instead, the court imposed limitations on Joshua's residential time that

was tied to completion of conditions imposed based on the existence of a DVPO that Joshua could not contest at trial. A court abuses its discretion when it does not follow the statutory procedures or a modified parenting plan for reasons other than the statutory criteria. Watson, 132 Wn. App. at 230.

In light of the above, we reverse the parenting plan order entered following trial. However, because we affirm the relocation order as discussed below, the residential schedule shall remain until the trial court can enter a parenting plan consistent with this opinion on remand.

Order Granting Relocation

Joshua contends that the trial court improperly analyzed two of the relocation factors. We disagree.

The RCW 26.09.520 factors to be considered in determining whether the harm of a proposed relocation outweighs its benefits are not weighted or listed in any particular order. Abbess, 23 Wn. App. 2d at 486. Joshua only challenges the court's analyses of factors 4 and 7.

Under factor 4, Joshua contends that the trial court lacked statutory authority to contemplate new RCW 26.09.191 restrictions during its analysis of whether to allow the relocation of a child.

We will only reverse a trial court's order permitting relocation of children upon a finding of manifest abuse of discretion. Marriage of Horner, 151 Wn.2d 884, 893, 93 P.3d 124 (2004). A trial court abuses its discretion if its decision is based on untenable grounds or reasons. Id. (citing State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)).

RCW 26.09.191 restrictions limit a parent's residential time with a child, including physical abuse of the child and abuse of conflict that psychologically harms the child. RCW 26.09.191(2)(a), (3)(e).

The fourth relocation factor provides that the court must consider "[w]hether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191." RCW 26.09.520(4). Joshua argues that "is subject to" means that the court must consider only RCW 26.09.191 limitations currently in place per the existing parenting plan, not future RCW 26.09.191 restrictions in a modified parenting plan. We disagree.

As previously discussed, this court in Pennamen, held that where "RCW 26.09.520(4) requires the court to consider whether either parent is subject to RCW 26.09.191 limitations, which include a long-term impairment resulting from drug abuse that interferes with the performance of parenting functions," the trial court "properly viewed the mother's history of methamphetamine use as relevant to the question whether the detrimental effects of the relocation outweighed the benefits" when considering factor 4. 135 Wn. App. at 804. Nothing in that case suggested that a court had previously imposed RCW 26.09.191 limitations against the mother. This court rejected the mother's argument that the mere consideration of the existence of RCW 26.09.191 limitations under RCW 26.09.520(4) equated to a modification of the parenting plan. Id. at 807.

While it was not improper for the trial court to consider the spanking incident, as discussed above, it was improper for the trial court to bar Joshua from admitting

evidence as to that issue. However, as Joshua conceded during oral argument,[9] the trial court did not base its relocation decision on the spanking incident. The court explained that "there has been evidence presented, significant evidence that continued contact between the father and the children will not cause physical harm to the children, and that the probability of the parent's harmful or abusive conduct will recur is so remote that it would not be in the children's best interests to apply the limitations of subsection [RCW 26.09.191](a)." When the trial court considered factor 4, it explained:

> I next must consider whether either parent is subject to limitations under [RCW] 26.09.191. And here if I allow relocation, there will be a finding of abusive use of conflict against the father, and I am considering that. But frankly, I don't find that that is a determinative factor.

Under Pennamen, the trial court was able to consider the abusive use of conflict limitation when considering factor 4 of the relocation factors. Notably, Joshua does not challenge insufficient evidence supported the court's determination of the abusive use of conflict. The court did not abuse its discretion by considering the RCW 26.09.191 limitation in its analysis while making its relocation determination.

Joshua also contends that the trial court incorrectly analyzed factor 7, comparing the current and proposed geographic locations. The court analyzed the differences between the intended residence in Mapleton, Utah, and the children's then-current temporary residence in Amanda's parents' home in Union, Washington. Amanda had sold her previous home in Maple Valley and did not live there at the time of trial. Joshua argues, without any supporting authority, that because Amanda moved the children to Union without authority of the court, the court should have compared the

[9] Wash. Court of Appeals oral argument, Marriage of Cowan, No. 83082-1-I (June 6, 2023), at 4 min., 23 sec., *video recording by* TVW, Washington State's Public Affairs network, https://tvw.org/video/division-1-court-of-appeals-2023061164.

children's prior residence in King County instead of Union. Factor 7 expressly requires the court to consider the *"current* and proposed geographic locations." RCW 26.09.520(7) (emphasis added). The court did not abuse its discretion in analyzing factor 7.

Presumption

Lastly, Joshua contends that the trial court erred in its application of the presumption in favor of relocation because the DVPO residential schedule should not have been considered as it is not an "order" contemplated by RCW 26.09.410(1). We agree.

The Child Relocation Act (CRA) "governs the process for relocating the primary residence of a child who is the subject of a court order for residential time." Abbess, 23 Wn. App. 2d at 485-86 (citing Marriage of McNaught, 189 Wn. App. 545, 553, 359 P.3d 811 (2015)). The CRA creates a rebuttable presumption that the intended relocation for the child will be permitted when the relocating parent enjoys the majority of the children's time. Id. at 487 (citing RCW 26.09.520; McNaught, 189 Wn. App. at 553). The challenging parent, here Joshua, may rebut the presumption by demonstrating by a preponderance of the evidence that the detrimental effect of the relocation outweighs the benefit of the child and the relocating person. Id. (citing RCW 26.09.520; McNaught, 189 Wn. App. at 553-54). If both parents have "substantially equal residential time," the presumption favoring relocation does not apply. Abbess, 23 Wn. App. 2d at 487. "Substantially equal residential time" includes any arrangement in which the child spends 45 percent or more of the time with each parent. Id. (citing RCW 26.09.525(2)). Generally, the court determines whether the parties have substantially

equal residential time based on "the amount of time designated in the court order." Id. (citing RCW 26.09.525(2)(b)).

The trial court considered the DVPO as the determinative "court order" that governed the children's residential time and supported the application of the rebuttable presumption in favor of relocation. However, as observed by the trial court, even if the parenting plan was the proper "court order," the rebuttable presumption would still favor relocation because Amanda had custody of the children 57 percent of the time, and thus Joshua only had 43 percent custody—lower than the 45 percent threshold. We nevertheless take this opportunity to hold that the "order" as contemplated in RCW 26.09.525(2)(b) cannot be an order that is not otherwise defined in RCW 26.09.410(1).

When interpreting a statute, we first look to its plain language. HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citing State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). "'Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.'" Id. (quoting Human Rights Comm'n v. Cheney Sch. Dist. No. 30, 97 Wn.2d 118, 121, 641 P.2d 163 (1982)).

A "'Court order' means a temporary or permanent parenting plan, custody order, visitation order, or other *order governing* the residence of a child under this title." RCW 26.09.410(1) (emphasis added). A DVPO restricts a person's ability to have contact with someone else. And while a court may take into consideration the existence of a parenting plan in how the court chooses to restrict parents' ability to contact their children, that does not turn a DVPO into a court order that *governs the residence* of a child. This holding does not prohibit any party from properly petitioning to modify a

parenting plan based on the same underlying facts that support a DVPO. Nor does this holding prevent a trial court from considering RCW 26.09.191 limitations under its factor 4 analysis under RCW 26.09.520 in a relocation trial.

Though the trial court erred in determining applicability of the rebuttable presumption in favor of relocation based on the DVPO, the error was harmless because the rebuttable presumption would still have applied based on the permanent parenting plan where the children spent about 57 percent of the residential time with Amanda.

CONCLUSION

Although the trial court abused its discretion in precluding Joshua from introducing evidence challenging the spanking incident, the error was harmless as to the decision to grant Amanda's request to relocate the children because the spanking incident did not play a factor in that decision. Thus, we affirm the relocation order, but where neither party petitioned to modify the parenting plan, we reverse the parenting plan because the trial court abused its discretion in modifying the parenting plan beyond the limited modification allowed for pursuant to a relocation. Because we affirm the relocation, the residential schedule will remain until the trial court on remand can consider and enter a new parenting plan consistent with this opinion.

Colum, J.

WE CONCUR:

Birk, J.

Smith, C.J.

Court of Appeals, Div. I, of the State of Washington

Amanda Cowan, Respondent, v. Joshua Cowan, Appellant.	No. 83082-1-I **Motion for Reconsideration**

1. Identity of Moving Party

Joshua Cowan, Appellant, asks for the relief designated in Part 2.

2. Statement of Relief Sought

Reconsider the Opinion filed August 28, 2023. Hold that the trial court's error in excluding evidence was not harmless, reverse the relocation order, and remand for a new trial. Hold that the trial court erred

in its analysis of the relocation factors. Correct or clarify other portions of the Opinion.

3. Facts Relevant to Motion

The facts of the case are set forth in the briefs of the parties and in the Opinion of the court. The following are facts that the Court appears to have overlooked or misunderstood in its Opinion or that are otherwise relevant to the issues in this motion.

At an early hearing to restrain Amanda from moving, the trial court found that Amanda had relocated to Union in violation of the law. RP (7/15/21) 17; 1 CP 117. At this hearing, the trial court found that Amanda's abuse allegations were "suspect." RP (7/15/21) 21. The trial court was suspicious that Amanda was "trying to manipulate the process in order to get a desired result." RP (7/15/21) 19.

With this view of Amanda's credibility, the trial court found that the parties had deviated from the

parenting schedule in their written parenting plan, and the presumption favoring relocation did not apply. RP (7/15/21) 18. The trial court analyzed the statutory factors and found that the circumstances did not justify allowing the move before trial and that the relocation was unlikely to be approved at trial because it did not appear to be in the children's best interests. RP (7/15/21) 19-22; 1 CP 117. In particular, because of the suspect allegations and the unauthorized move to Union, the trial court found that Amanda had unclean hands and was not acting in good faith. RP (7/15/21) 21. This Court's ●pinion at page 4 overlooks these facts.

Believing it was without power to undo Amanda's unauthorized move to Union, and unable to order the children be returned to Joshua because of the DVP●, the trial court ordered Amanda not to move the children from Washington pending trial. 1 CP 119. Contrary to this Court's statement at page 4 of the

Opinion, the parties did not agree that this was the only viable option. Joshua argued that the trial court could order Amanda to return to King County or order the children to reside with Joshua's parents. RP (7/15/21) 10-11, 16. The only thing the parties did agree to—and only after the trial court had already made its ruling—was that temporary travel of no more than two weeks at a time would be a reasonable exception to the prohibition against taking the children out of state. RP (7/15/21) 23.

The trial court's basis for finding abusive use of conflict by Joshua was much more than what is stated in this Court's Opinion at page 7. The trial court considered evidence "that the father has indicated he wanted the children to be exchanged at 4:00 a.m. for basically a retaliatory reason; that he either would tell the children or threaten to tell the children negative things about the mother because of some of her relationship choices; that he would allow some

deviations to the parenting schedule relying on the DVPO, but not others when it was not in his interests, even though it was in the children's best interests or the mother's best interest; that he threatened court action based on an obvious misinterpretation of the parenting plan and the DVPO. … These things all taken together convinced me that the mother has proven that the father has abusively used conflict." 4 RP 931.

This Court's Opinion at page 7 misinterprets the three options the trial court considered at trial for determining whether the presumption favoring relocation would apply. The first option was that the DVPO was the applicable "court order." 4 RP 932-33. The second option was that the parenting plan, unaltered by the parties' conduct, was the "court order." 4 RP 933. The third option was that the parties *did* alter the schedule in the parenting plan, and that altered schedule would apply, per RCW 26.09.525(2)(b).

4 RP 933. The trial court observed that under this third option, no presumption would apply. 4 RP 933.

This Court's Opinion at page 22 misunderstands a statement made by Joshua's counsel at oral argument. Joshua did not concede that "the trial court did not base its relocation decision on the spanking incident." Rather, Joshua asserted the opposite—that the trial court did use the spanking incident in its consideration of the relocation factors. From 3:38 to 4:30, Joshua answered a hypothetical question:

> **Judge Birk**: If the evidence that was excluded on preclusion principles is not relevant to the relocation factors, then it would not provide any basis to revisit the trial court's relocation conclusions, fair?
>
> **Counsel**: Well, the trial court *did* use the spanking incident, the 191 factors, in considering factor number four of the relocation factors.
>
> **Judge Birk**: But what I'm asking is does any of the evidence that you say was wrongly excluded bear on any of that? If it doesn't…

> **Counsel:** If the spanking incident is not relevant to any of those factors, then you are correct, [at 4:23:] we wouldn't need this additional evidence that we wanted in, because we wouldn't even be talking about the spanking incident.

When the Court asked directly whether the trial court did not consider the spanking incident as part of the relocation factor analysis, Joshua answered twice in the negative, from 7:15 to 9:08:

> **Judge Coburn:** Didn't the court explicitly say that they did not consider the spanking incident as far as the factor analysis towards relocation?
>
> **Counsel:** I don't think so. I think the court very specifically under factor four was saying we have … we're gonna have these 191 findings and we're gonna impose these restrictions and as long as these restrictions are followed, then we're … it's not going to have an impact, but…
>
> **Judge Coburn:** But wasn't that related to the modification of the parenting plan, which clearly that was included, but didn't the court say they were focusing on the abusive use of conflict and not the spanking?

> **Counsel:** I don't think so. In the court's oral ruling, it very specifically was talking about, in the factor four analysis, we're gonna impose these findings and restrictions, and only because of the restrictions, this won't have that much of an effect, and it's for that reason that the factor only slightly favored Ms. Cowan. But without that, it changes, and maybe it's neutral, maybe it favors Mr. Cowan. And so, you know, all these things are intertwined, and if there's the possibility that we're going to be talking about these things under other factors, as Judge Smith pointed out, then we need to address the evidentiary question, because we need to know what evidence can we put on … if the spanking incident is relevant to any of the factors, Joshua Cowan needs the opportunity to present his evidence.

This Court's Opinion holds that the spanking incident *is relevant* to the relocation factors, and factor four in particular. Thus, Joshua's position, as stated at oral argument, is that the trial court did consider the spanking incident in its relocation factor analysis and that exclusion of his evidence prejudicially affected that analysis.

4. Grounds for Relief

Joshua respectfully submits that this Court may have overlooked or misapprehended key points of law or fact. Primarily, Joshua believes the Court overlooked some of the impacts of the exclusion of his evidence, which could have resulted in a different outcome of the relocation trial. Joshua also asks the Court to correct or clarify portions of the Opinion that may be unclear or in error. Joshua requests the Court reconsider its opinion in light of the clarification provided in this motion.

4.1 The exclusion of Joshua's evidence was not harmless as to the order authorizing relocation.

In holding that the exclusion of Joshua's evidence was harmless as to the relocation order, the Court appears to have misunderstood the trial court's analysis of the relocation factors and to have overlooked some of the prejudicial impacts of the exclusion of the evidence.

4.1.1 The trial court did consider the spanking incident as part of its analysis of the relocation factors.

The trial court's oral ruling demonstrates that it did, in fact, consider the spanking incident as part of its analysis of the relocation factors. The trial court's relocation analysis begins at 4 RP 923: "[RCW] 26.09.520 are the 11 factors that the Court must consider in deciding whether to allow a parent to relocate with the children. Factor 4 states that one of the factors is whether there are 191 restrictions. And so I need to decide if there are going to be 191 restrictions in a new parenting plan…"

The trial court then considered the admitted evidence and announced the findings and restrictions it intended to include in a modified parenting plan. 4 RP 924-32. Based on its erroneous conclusion that the DVPO was res judicata, the trial court announced that it would make a 191 finding of assault of a child. 4 RP 929. The trial court would also find that it would not be

necessary to limit Joshua's residential time because it would be imposing other limitations on his conduct:

> I find that ... continued contact between the father and the children will not cause physical harm to the children, and that the probability of the parent's harmful or abusive conduct will recur is so remote that it would not be in the children's best interests to apply the limitations of subsection (a). So while I do find that ... there was an assault, I find that there are no limitations that are necessary, other than those that I'm going to put in this order, which I'll get to in a minute.

4 RP 930. The trial court announced that it would also make a 191 finding of abusive use of conflict. 4 RP 931. This was all within the trial court's initial consideration of relocation factor four, before addressing any actual modification of the parenting plan.

After this tangential discussion of the 191 findings that would inform the trial court's analysis of factor four, the trial court returned to its consideration

of the relocation factors, in order. 4 RP 934-46. When it reached factor four, the trial court stated,

> I next must consider whether either parent is subject to limitations under 26.09.191. And here if I allow relocation, there will be a finding of abusive use of conflict against the father, and I am considering that. But frankly, I don't find that that is a determinative factor. It certainly favors the mother's position, but the things that are necessary to remedy that abusive use of conflict are largely things that are not going to be related to residential time or the relocation if it's allowed.

4 RP 939. The trial court announced that it would allow the relocation. 4 RP 946-48.

The trial court then addressed modification of the parenting plan, starting by explaining in detail the 191 restrictions that it had alluded to earlier, for inclusion in a modified parenting plan. 4 RP 948-50. The trial court stated, "I find that those factors are enough to end the need for any other restrictions based on ... the assault on the child." 4 RP 949. The trial court later re-

iterated, "it's my strong belief that the orders that I've made will be followed, and that they're enough to make sure that there are no more problems." 4 RP 966.

Taken as a whole, the trial court's reasoning was as Joshua explained at oral argument: Based on the DVPO, the trial court excluded Joshua's evidence and entered a 191 finding of assault of a child. The trial court then reasoned that, under factor four, the assault finding would have no impact *because of the limitations that the trial court planned to impose*. The trial court found the same with regard to abusive use of conflict. Because the trial court *did* consider the spanking incident as part of its factor four analysis, the trial court's errors are not automatically harmless as to the relocation decision. This Court should reconsider its harmless error analysis.

4.1.2 There is a reasonable probability that Joshua's evidence would have materially affected the outcome of the relocation decision.

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." ***Budd v. Kaiser Gypsum Co., Inc.***, 21 Wn. App. 2d 56, 79, 505 P.3d 120 (2022). "We review non-constitutional errors for whether there is any reasonable probability that the outcome of the trial would have been materially affected had the error not occurred." ***Williams v. Dep't of Social and Health Servs.***, 24 Wn. App. 2d 683, 696 n.6, 524 P.3d 658 (2022). Here, there is a reasonable probability that admission of Joshua's evidence regarding the spanking incident would have materially affected the outcome of the relocation decision.

The trial court erroneously excluded Dr. Wigren's evidence that called into question whether the

spanking happened at all, *see* 2 CP 317-55, and Dr. Hedrick's evidence that the forensic interviews of the children were flawed and their testimony the result of coaching by Amanda, *see* 2 CP 475, 596; 2 RP 59. Had this evidence been admitted, there is a reasonable probability that the trial court would have found that the spanking incident had never occurred and that it had been fabricated by Amanda to gain an advantage in the litigation.

This would have completely changed the relocation factor analysis. There would have been no spanking incident to consider, no finding of assault, and no need for any limitations to mitigate it. There would have still been abusive use of conflict to consider, but now Amanda would also have been a target for such a finding, because of her strategic abuse of the DVPO process. Instead of slightly favoring Amanda, there is a reasonable probability that factor four would have been neutral or even favored Joshua.

And the impact does not stop with factor four. Joshua's excluded evidence would likely have changed the trial court's view of Amanda's good faith, under factor five. At the initial hearing, the trial court seriously questioned her good faith, believing she might have been manipulating the process to achieve a better result. Joshua's excluded evidence would have demonstrated that the trial court's initial impressions were correct—that Amanda was manipulating the process and therefore was not acting in good faith. Factor five would have more strongly favored Joshua.

There is a reasonable probability that Joshua's evidence would have changed the trial court's view of Amanda's credibility. This could have had a significant impact on all of the other factors, and even on the presumption favoring relocation. The trial court's analysis of the parties' agreement for 50/50 residential time was driven primarily by credibility of the parties. 4 RP 937-38. When the trial court had a poorer view of

Amanda's credibility at the initial hearing, it had concluded that the presumption favoring relocation would not apply. There is a reasonable probability that the trial court would have taken the same view at trial if it had heard Joshua's evidence.

There is also a reasonable probability that the trial court would not have given Amanda the benefit of her unauthorized move to Union. If Joshua's evidence showed that Amanda was manipulating the DVPO process, the trial court might also have taken a dimmer view of the unauthorized move, seeing it as another example of manipulating the process.

With no presumption, and factors analyzed differently after considering the erroneously excluded evidence, the outcome of the relocation trial might very well have been different. This Court should reconsider its harmless error analysis, hold that the exclusion of Joshua's evidence was prejudicial, and remand for a new relocation trial.

4.2 The trial court erred in its analysis of the relocation factors.

Joshua argued that the statutory language of factor four—"Whether either parent … is subject to limitations…"—can only apply to pre-existing §191 findings and limitations to which the parent is currently subject at the time of trial. This statutory language cannot authorize a trial court to consider new §191 findings and limitations. It cannot authorize a trial court to consider §191-type evidence. Joshua contends that the *Pennamen* court was wrong when it indicated otherwise. It may be possible that evidence of the spanking incident could be relevant to *other* factors, such as the strength, quality, and stability of the child's relationship with a parent (factor one) or the balance of disrupting contact with either parent (factor three). But the statutory language of factor four does not permit consideration of limitations that do not yet exist. This Court should reconsider its opinion.

Regarding factor seven, Joshua argued that it was an abuse of discretion for the trial court to use Amanda's unauthorized move to Union as the "current location" for purposes of factor seven. By using Union as the basis for the analysis, the trial court allowed Amanda to take advantage of her unauthorized move to create a more favorable comparison. This sort of manipulation of the process should not be rewarded. This Court should interpret "current … geographic location" to mean the children's most recent authorized location at the time of the notice of relocation. Just as a temporary order cannot be allowed to prejudice the outcome at trial, ***Marriage of Watson***, 132 Wn. App. 222, 234, 130 P.3d 915 (2006), even so a temporary move should not be allowed to change the relocation analysis from what it would have been without the temporary move. This is even more so when the temporary move was done in violation of the law. It is a bedrock principle of equity that a party should not be

permitted to benefit from their own bad acts. *E.g.,* ***Montgomery v. Engelhard***, 188 Wn. App. 66, 94, 352 P.3d 218 (2015).

Contrary to these basic principles, this Court's Published Opinion creates a precedent for future parties to manipulate the process by making a temporary move before the real move, in order to create a more favorable comparison in factor seven. This should not be permitted. This Court should reconsider and hold that "current location" in factor seven means the children's most recent authorized location at the time of the notice of relocation, before any temporary orders.

4.3 The Court should correct or clarify portions of the Opinion.

Even if the Court does not change the substance of any of its holdings, the Court should correct or clarify other portions of the Opinion.

4.3.1 The Court should clarify that § 191 findings, restrictions, and conditions are "nonresidential aspects" of a parenting plan and cannot be modified without a petition and adequate cause.

On pages 17-20 of the Opinion, this Court holds that the trial court erred in modifying the parenting plan beyond what is allowed "pursuant to relocation" without a separate petition to modify. The Court implies that modifications pursuant to relocation should be related to the "new time and distance factors" that result from the move. The Court holds that the trial court erred in entering 191 findings and limitations. But the Court does not draw a clear line between what types of modifications are allowed pursuant to relocation and what types are not.

Modification of "residential aspects" of a parenting plan are permitted pursuant to relocation without a petition or adequate cause hearing under RCW 26.09.260(6). "Nonresidential aspects," on the other hand, may only be modified upon a showing of a

substantial change in circumstances and that the change is in the best interests of the child, with a petition and a finding of adequate cause. RCW 26.09.260(10). There are few cases that discuss the distinction between "residential aspects" and "nonresidential aspects" of a parenting plan, and none that specifically state that §191 findings and limitations are "nonresidential aspects." *See* ***In re Marriage of Raskob***, 183 Wn. App. 503, 334 P.3d 30 (2014).

This Court should take the opportunity in its Published Opinion to state unequivocally that §191 findings, restrictions, and conditions are "nonresidential aspects" and cannot be modified without a petition and adequate cause.

4.3.2 The Court should clarify that Joshua did not concede that "the trial court did not base its relocation decision on the spanking incident."

Even if the Court maintains its holding that the trial court did not base its relocation decision on the spanking incident, the Court should still clarify that Joshua did not concede this point at oral argument. As set forth above at pages 6-8, Joshua expressly rejected this idea multiple times at oral argument. At the very least, this Court should delete the phrase, "as Joshua conceded during oral argument," and the associated footnote 9 from page 22 of the Opinion.

4.3.3 The Court should clarify that the trial court, not the parties, determined that the only reasonable resolution of Amanda's unauthorized move was to let it stand with an order not to move out of state.

The Court should delete the sentence, "The parties agreed," and the associated footnote, from page 4 of the Opinion. As set forth above at pages 3-4, the parties did not agree that "the only reasonable

temporary order … was to order Amanda not to leave the state of Washington with the children on a permanent basis." The only thing the parties agreed on was that, given the trial court's ruling, it would be reasonable to allow temporary travel out of state of up to two weeks.

4.3.4 The Court should correct the error on page seven regarding the three options considered by the trial court in determining whether the presumption would apply.

Finally, the Court should correct the error on page seven of the Opinion regarding the three options considered by the trial court in determining whether the presumption favoring relocation should apply. The Opinion states that the third option was that the parenting plan had been modified by the DVPO. This is incorrect. The third option was that the parties had agreed to deviate from the parenting plan—prior to the DVPO—such that the actual residential schedule was

close enough to 50/50 that the presumption would not apply. 4 RP 933.

5. Conclusion

Joshua respectfully submits that the Court has overlooked key points of fact and law. The trial court's errors were not harmless as to the relocation order. The trial court's analysis of relocation factors 4 and 7 was improper and an abuse of discretion. There are other errors, omissions, or unclear statements in the Opinion. This Court should reconsider its Opinion and remand for a new trial on relocation. At the very least, the Court should correct or clarify the other issues identified in this motion.

I certify that this document contains 3,839 words.

Submitted this 18th day of September, 2023.

/s/ Kevin Hochhalter

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on September 18, 2023 I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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FILED
9/26/2023
Court of Appeals
Division I
State of Washington

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

AMANDA R. COWAN, Respondent, v. JOSHUA T. COWAN, Appellant.	No. 83082-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Joshua Cowan, having filed a motion for reconsideration herein, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Coburn, J.

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on October 26, 2023 I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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