Supreme Court No. 95590-5

SUPREME COURT
OF THE STATE OF WASHINGTON
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COA No. 75876-4-I

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In re the Marriage of:

JOHN WILLIAM LAIDLAW,

*Appellant*,

v.

DANAE DIANA NKA ZOELLIN,

*Respondent*.

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AMENDED

# JOHN W. LAIDLAW'S PETITION FOR REVIEW

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## I. INTRODUCTION

Petitioner John W. Laidlaw ("Petitioner" or "Jack"), appellant below, asks this Court to grant review to determine what substantive legal standard applies to a trial court's modification of a parenting plan after granting a petition to relocate. Here the trial court gave no rationale for why it made a material change to the 2013 parenting plan that took away 32 school-year, mid-week overnights from Petitioner and his daughter.

This is an unusual "relocation" case because the "relocating" parent, Respondent Danae Zoellin ("Respondent"), in fact sought to return from Issaquah back to Queen Anne, where she resided when the permanent parenting plan was first entered in 2013. Jack lived in Issaquah in 2013 and continues to live there. Respondent's "relocation petition" thus sought to return the parents to where they resided when the operative parenting plan was first entered in 2013 – everyone "goes back to go." But no findings or rationale supported why the trial court deleted 32 school-year, mid-week overnights when she returned the parents "back to go" to their places of residence when the 2013 plan was entered. Nor are there any findings that this major change to the parenting plan was required to protect their child from physical, mental, or emotional harm. Rather, the trial judge expressly found there were no restrictions on Petitioner as a parent. CP 759-60 ¶4.

Jack petitions because he has still not received any reason why the 2013 plan had to materially change when Respondent returned to where she lived when the plan was crafted in 2013 to foster a "robust" relationship between the child and both parents. Division I has said expressly that the trial court need not give one – the fact of relocation and the findings supporting the relocation are enough to support modification of the parenting plan, even though here there was not a genuine relocation but a "re-relocation." *See generally* Jack's Opening Brief describing the "re-relocation."

Divisions One and Three used different analyses and different standards in recent cases, both of which are now before this Court with petitions. The Court should grant review to establish the definitive standard, one that, unlike Division One's here, gives effect to and harmonizes the underlying principles of the Parenting Act with the policies adopted with the Relocation Statute, as well as all terms of the statute. The standard should require trial courts to articulate with express findings that any changes are necessary to maintain the best interests of the child.

While many relocation cases will have an obvious need to change the residential schedule (*i.e.*, when the parents move to different sides of the state or the country), there are also "near" relocation cases where the distance between the parents' homes is small and little if any change is needed – hence the "if any" language in the last sentence of RCW 26.09.260(6) that Division One ignored

in improperly following the erroneous *dicta* in *In re Marriage of Fahey*, 164 Wn. App. 42, 68, 262 P.3d 128 (2011). *See* App. A at 7 (quoting *Fahey*).[1] Here that language should have been given effect since there was no change of the parents' locations from when the permanent parenting plan was entered in 2013. They "went back to go": Jack continued to live in Issaquah and Respondent returned to Queen Anne.

## II. COURT OF APPEALS DECISION

Division One affirmed the trial court's major modification of the parenting plan and its fee award and other orders in a published decision filed February 5, 2018. *In re Marriage of Laidlaw,* ___ Wn. App. ___, 409 P.3d 1184, 2018 WL 703349 (2018) (App. A hereto "Decision"). The trial court's revised parenting plan eliminated 34 week-day overnights during the school year that Judge O'Donnell included in structuring the parenting plan in 2013 to foster and maintain a "robust" relationship of the young child with both parents. *See* App. B (oral argument chart of school-year weekday overnights by parenting plans); Jack's Reply Br. at 5-8.

The Decision construed RCW 26.09.260(6) to determine that there were no legal requirements that pertained to the modification of a parenting plan following relocation. App. A at 9-11. Instead,

[1] *Fahey's dicta* is shown to be incorrect by the facts of this case. The statute itself refutes it by including "***if any***" in the last sentence of RCW 26.09.260(6) to reinforce that relocation does not always equate with a change to parenting plans, much less a dramatic change.

and contrary to the plain text of subsection 6, the Decision followed *Fahey*'s erroneous *dicta*[2] and held that no findings are needed whether and how the parenting plan is changed, beyond the findings required to support the relocation decision, because "Alterations to the residential schedule are a necessary byproduct of the trial court's order permitting relocation." App. A at 11.[3] This construction and application of the statute was erroneous for at least three reasons and appears to be built on the erroneous *dicta* in *Fahey*, which the Court should correct as part of its review of Jack's case.

***First,*** this construction is contrary to and nullifies text in the last sentence of subsection (6). That sentence states: "Following that [relocation] 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." RCW 26.09.260(6) (emphasis added). The words, "if any," contemplate

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[2] But *Fahey* was affirmed because in that case the trial court did articulate its reasons for modifying the parenting plan, reasons which were grounded in the best interests of the children, as opposed to the convenience of the relocating parent, and therefore were tenable. 164 Wn. App. at 67. Here the trial court gave no reasons for the change to the residential schedule. What brief, inadequate comments were made by the trial court did not focus on or analyze the best interest of the parties' daughter for purposes of modifying the parenting plan. She lost 34 weekday overnights during the school year with her father for no reason.

[3] It appears the Decision accepted the incorrect premise at oral argument that it is a "fact" that "the major change after the relocation decision is that the people won't live where they lived at the time that the initial order was entered." App. C at 4 (oral argument transcript). The facts here refute that premise, as Jack's briefing below pointed out repeatedly that this was a "re-relocation" case. There is no explanation for why the Court of Appeals Decision ignored this fact, which makes the *Fahey dicta* inapplicable.

that in some relocations there will be ***no*** change to the permanent parenting plan. But the Decision reads those words out of the statute, particularly with its incorrect statement that residential schedule alterations are a "necessary byproduct" of a relocation decision. App. A at 11.

***Second,*** this construction ignores the statutory requirements and objectives of permanent parenting plans under RCW 26.09.002 and 26.09.184(1)(g) to place the best interest of the child first and not to make changes except to the extent necessary to serve those best interests. *See, e.g.*, Jack's Reply Br. at 8-13. It also ignores the same requirement stated in RCW 26.09.260(2) that was pointed out by Division Three in *In re Marriage of Monoskie*, 2017 WL 5905764 (Nov. 30, 2017) which was untainted by *Fahey's dicta.*

***Third,*** this construction is contradicted because in this "faux relocation"[4] there was ***no change in parental location from the permanent parenting plan when it was entered.*** When the permanent parenting plan was entered in 2013 by Judge O'Donnell, the Petitioner father lived in Issaquah while the Respondent mother lived in Seattle, on Queen Anne. The so-called relocation petition filed by the Respondent mother in 2016 sought to allow the Respondent mother to relocate from . . . Issaquah ***back*** to Queen Anne, the same locations as when the original parenting plan was

[4] Respondent never formally relocated under the statute from Queen Anne to Issaquah when she moved there in 2014. Nor was that move reflected by a change in the parenting plan.

entered in 2013. Judge O'Donnell expressly stated that the structure of the plan – with its bi-weekly school-year weekday overnights – was necessary for the child to have a "robust" relationship with both parents.

Neither party sought reconsideration.

## III. ISSUE PRESENTED FOR REVIEW

Division One ruled in this case that trial courts have no legal restrictions or guidance when modifying permanent parenting plans following a decision to allow the primary parent to relocate, and implicitly ruled that the "if any" portion of RCW 26.09.260(6) has no effect because relocations always result in a modification of the parenting plan. It therefore affirmed the trial court's modification of the parenting plan that eliminated 32 mid-week overnights during the school year from the original parenting plan, even though the original plan was specifically designed to maintain a "robust" relationship between the child and both her parents, and even though the "relocation" returned the parents to their locations when the 2013 plan was entered.

Division Three ruled earlier in *Monoskie* , 2017 WL 5905764, that, in fact, legal standards do apply and must be met to modify a parenting plan's residential provisions after a relocation determination, and that RCW 26.09.260(2) requires retaining the residential schedule following relocation absent a showing the changes are necessary to prevent specified harms.

Thus the issues presented are:

1. Where RCW 26.09.002, 26.09.184(1)(g), and 26.09.260(2) all preclude material modifications of parenting plans unless necessary to protect the child from specified physical, mental, or emotional harms, must the Court vacate a material modification of the parenting plan that takes from the child her weekly overnight relationship with her father by removing 34 school-week overnights where there are no restrictions on the father and no findings that such a reduction in overnight time with the parent is needed or in the child's best interest?

2. Must a trial court's major modification of the parenting plan to delete 34 weekday overnights be vacated when the relocation returns the relocating parent to where she resided when the plan was originally put in place, there are no restrictions on the parent with the reduced time, and there are no findings specifying why this modification is needed to protect the child's best interests?

## IV. STATEMENT OF THE CASE

The statement of the case is best set out in Jack's Opening Brief rather than in the Decision, which failed to mention numerous basic facts.

As stated earlier, the Decision erred in ignoring the material fact that the "relocation" simply sought to return the parties to where they were when the parenting plan was entered in 2013. On that basis alone the plan should not have been materially changed, absent findings as to what needs of the child required such changes.

The Decision also mistakenly focused on evidence from before the dissolution trial that the trial judge in the relocation trial

said was not at issue and essentially dismissed by refusing to impose restrictions on Jack.[5]

Thus, two of the most important facts that are relevant to the appeal are that the relocation simply allowed the Respondent to move back to where she lived when the plan to be modified was first put in place and that the relocation judge placed no restrictions on Jack. There are no facts found by the trial court, and none in the record, that justify materially changing the parenting plan established when Respondent lived on Queen Anne by reducing so much of the regular overnight time the child has with her father.

[5] The Decision also incorrectly focused on irrelevant and incorrect points about Jack's alleged domestic violence history, which along with relying on the erroneous *Fahey dicta* may explain why its decision erred in construing and applying the law correctly. It was irrelevant because Judge O'Donnell expressly constructed a parenting plan with overnights for Jack and his daughter **every week** in order to foster a "robust" relationship. *See e.g.*, Opening Br. at 1-4, 9-11; Reply Br. at 13-14. Judge Robinson in 2016 expressly refused to place any parenting restrictions on Jack. CP 759-60 ¶4.

As Jack's Reply Brief points out, Jack was never subject to a domestic violence protection order. Reply Br. at 13-14 n.6. Respondent's attempt to obtain such an order at the outset of the case in 2012 failed when the commissioner denied it as without basis. CP 1436; *see also* Reply Br. at 13-14 n.6, 20-22; CP 1436 (denial order); CP 1474-77 (referenced orders from the hearings in January and February 2012).

## V. REASONS WHY REVIEW SHOULD BE ACCEPTED

### A. Review Should Be Granted Per RAP 13.4(b)(4) Because The Legal Standard For Parenting Plan Modifications In The Context Of Relocations Is A Matter Of Substantial Public Interest. The Supreme Court Should Definitively State What That Standard Is And That It Is Consistent With The Parenting Act's Requirement That Permanent Plans Be Changed Only When The Trial Court Makes Findings That the Change Is Necessary To Protect the Best Interest of the Child.

The Decision construed RCW 26.09.260(6) to require only findings for the relocation itself. App. A at 11. This ignores statutory language and the structure of the Parenting Act. Indeed, if not corrected, it eliminates any genuine analysis of the needs or best interests of the child of a relocating parent and the second part of the analysis. That is error for at least the three reasons noted earlier and additional ones noted here.

RCW 26.09.002 and 26.09.260(6) must be read together per RCW 26.09.184(1)(g), the statute that states the objectives of parenting plans. *In re Marriage of Possinger*, 105 Wn. App. 326, 334-35, 19 P.3d 1109, *rev. denied*, 145 Wn.2d 1008 (2001) ("RCW 26.09.184(1)(g) provides that parenting plans shall be designed '[t]o otherwise protect the best interests of the child consistent with RCW 26.09.002.'").[6]

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[6] RCW 26.09.184(1) provides (emphasis added):

**(1) OBJECTIVES. The objectives of the permanent parenting plan are to**:

(a) Provide for the child's physical care;

(b) Maintain the child's emotional stability;

Review should be granted because the analysis used by the Decision fails to take into account the statutory framework of the Parenting Act, fails to give effect to all parts of the statute by ignoring the "if any" language, and will allow changes to parenting plans that are not needed to protect or further the child's best interests under the guise of a near- or non-relocation as here. The Decision is a "poster child" for how a child's best interests are ignored and undercut by losing the carefully crafted fully "robust" relationship with her father by excising 34 school-year weekday overnights, depriving them both of weekly overnights they had had under the 2013 plan when Jack lived in Issaquah and Respondent lived on Queen Anne. Review should be granted so the Court can clarify that such changes are allowed only when justified under the statutory criteria.

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(c) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;

(d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;

(e) Minimize the child's exposure to harmful parental conflict;

(f) Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and

**(g) To otherwise protect the best interests of the child consistent with RCW 26.09.002**

## B. Review Is Particularly Appropriate Per RAP 13.4(b)(4) Since There Are Different Court Of Appeals Decisions.

Jack submitted an unpublished decision from Division Three as supplemental authority. *Monoskie*, 2017 WL 5905764, at *2 (Nov. 30, 2017). The point he made was legal standards apply and must be met to modify a parenting plan's residential provisions after a relocation determination and that the decision showed that RCW 26.09.260(2) requires retaining the residential schedule absent a showing of specified harms. A significant point was that, while the relocation statute eliminated the adequate-cause requirement for considering a modification in conjunction with a relocation, it did not remove the standards for examining changes to a parenting plan. Division Three held:

> While the relocation context streamlines a decision on the merits by avoiding the threshold requirement of adequate cause, a party seeking modification must still demonstrate that a change to the residential schedule is in the best interests of the child. This is no easy burden. 'Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification.' *McDole*, 122 Wn.2d at 610. The presumption of residential continuity is set forth at RCW 26.09.260(2). Pertinent to this case, this provision requires a court to retain the parties' current residential schedule 'unless . . . [t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.' RCW 26.09.260(2)(c).

*Monoskie*, 2017 WL 5905764, at *2.

The petition for review in *Monoskie, 2017 WL 5905764,* was filed February 23, 2018.

Divisions One and Three thus have come to different conclusions about what legal requirements, if any, guide trial courts when considering whether to modify a permanent parenting plan under RCW 26.09.260(6), once the decision is made to allow one parent to relocate. These two cases illustrate the problem: each case would have been decided differently had they been heard in the other appellate jurisdiction. Per GR 14.1, even though the Division Three decision is unpublished, it still may be cited as persuasive authority. This creates ambiguity in the law, if not a technical conflict between the two decisions.

Disputes over relocations and associated parenting plan modifications that go to court because the parties cannot agree tend to be high-conflict cases. Certainty about the legal standard is therefore particularly important to end disputes. The parties and the lower courts will benefit from a definitive ruling from this Court on this important legal standard that affects parents and their children throughout the state regularly.

### C. Review Should Be Granted So This Court Can Articulate The Modification Requirements Under The Full Context Of The Parenting Act.

Review should be granted so that the Court can clarify the legal requirement for modification of parenting plans following a

relocation decision involving a near- or non-relocation, which standards presumably would be met by a more far-flung relocation across the state or country. Jack suggests the Court specify that relocation decisions do not give a blank check for modifying parenting plans, but that any such modifications are subject to the same basic statutory requirements as other modifications, the criteria of RCW 26.09.002 as referenced in RCW 26.09.184(1)(g) and RCW 26.09.260(2): "the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent . . . required to protect child from physical, mental, or emotional harm." Further, this is implicitly recognized by the last sentence of RCW 26.09.260(6) – which need only be given proper effect: "Following that [relocation] determination, the court shall determine what modification pursuant to relocation should be made, ***if any***, to the parenting plan . . . ." RCW 26.09.260(6) (emphasis added).

## VI. CONCLUSION

Petitioner Jack Laidlaw asks this Court to grant review and schedule the case for argument as quickly as possible.

Respectfully submitted: March 7, 2018.

**CARNEY BADLEY SPELLMAN, P.S.**

By _____
Gregory M. Miller, WSBA No. 14459
*Counsel for John William Laidlaw*

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document, the amended petition for review, on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 21st day of March, 2018.

Elizabeth C. Fuhrmann, PLS,
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# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| In the Matter of the Marriage of:<br><br>JOHN WILLIAM LAIDLAW,<br><br>Appellant,<br><br>and<br><br>DANAE DIANA LAIDLAW, now known as DANAE DIANA ZOELLIN,<br><br>Respondent. | DIVISION ONE<br><br>No. 75876-4-I<br><br>PUBLISHED OPINION<br><br>FILED: February 5, 2018 |

DWYER, J. — In this domestic relations relocation action, John Laidlaw appeals from the trial court's orders entering a parenting plan and ordering Laidlaw to pay some of Danae Zoellin's attorney fees and costs. On appeal, Laidlaw contends that the trial court erred by reducing his residential time with his daughter. Laidlaw also contends that the trial court erred by ordering him to pay some of Danae Zoellin's attorney fees and costs and by ordering wage garnishment in the event that he defaulted on that obligation. Finding no error in the issues warranting review, we affirm.

I

John Laidlaw and Danae Zoellin were married on January 3, 2009. Together the parties have one child—T.L. Following a trial, Laidlaw and Zoellin were divorced on August 2, 2013. Judge Sean O'Donnell entered an order concluding that Laidlaw had engaged in a series of acts that constituted domestic violence and had engaged in abusive use of conflict. Judge O'Donnell also entered a parenting plan pursuant to the marital dissolution. The parenting plan incorporated the findings and conclusions concerning domestic violence as a basis for certain restrictions imposed against Laidlaw.[1] Judge O'Donnell also ordered Laidlaw to pay $30,000 of Zoellin's attorney fees.[2]

Laidlaw and Zoellin lived in Issaquah when T.L. was born. Prior to the dissolution of their marriage, Zoellin entered an address confidentiality program, moving multiple times out of fear for her safety. At the time the final dissolution order was entered, Zoellin lived in Issaquah. In October 2014, Zoellin began a new job in Seattle. Zoellin commuted from Issaquah to Seattle for one and a half years before giving notice of her intent to relocate with the child in Seattle.

Laidlaw opposed the relocation. In March 2016, Laidlaw filed a motion objecting to the relocation and seeking to modify the 2013 parenting plan. Laidlaw's proposed parenting plan removed the restrictions contained in the 2013 parenting plan and made him the primary residential parent. In April 2016, the

[1] The 2013 parenting plan required Laidlaw to complete certain counseling and treatment requirements prior to having unsupervised visitation with T.L. The 2013 parenting plan also designated Zoellin as the sole decision-maker.

[2] These fees were never paid. The fee obligation was discharged in Laidlaw's subsequent bankruptcy.

trial court entered an order permitting Zoellin to temporarily relocate with the child to Seattle pending trial. Zoellin moved to Seattle in July 2016.

Following trial, the trial court entered an order permitting Zoellin to relocate with T.L.[3] The trial court found that (1) there were no agreements between the parents concerning moving with the child, (2) relocation would not affect the relationship between the child and either parent, (3) the history of domestic violence continued to affect the parents' relationship, and (4) permitting relocation would not impact the child's future, quality of life, resources or opportunities as a result of the move. The trial court also found that Laidlaw had failed to rebut the presumption that the benefit of the change to the child and the relocating parent outweighed the detrimental effect of the relocation. Finally, the trial court found that, in light of the relocation, there were valid reasons to alter the parenting plan and that such changes were in the best interest of the child.

After considering the financial affidavits and declarations submitted by both parties, the trial court found that Zoellin needed financial assistance to pay her attorney fees and costs and that Laidlaw had the ability to pay those fees and costs. The trial court ordered Laidlaw to pay $15,360[4] of Zoellin's attorney fees and costs after finding that such an amount was reasonable. The trial court also ordered the Washington State Division of Child Support to collect $1,000 each month via immediate wage garnishment should Laidlaw fail to satisfy the judgment within 90 days.

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[3] Laidlaw does not appeal this order.

[4] The trial court ordered Laidlaw to pay $360 of Zoellin's costs in the judgment summary. Elsewhere in the judgment, in paragraph 11, the court listed $350 as the amount of costs to be paid. Neither party has assigned error to the discrepancy.

The parenting plan entered by the trial court incorporated the findings of domestic violence and abusive use of conflict outlined in the dissolution and 2013 parenting plan.[5] As with the 2013 parenting plan, the 2016 parenting plan contained detailed residential provisions concerning the residential time schedule. In light of the relocation, the total residential time allocated to Laidlaw in the 2016 parenting plan is less than the total time allocated in the 2013 parenting plan.[6] Laidlaw appeals from the entry of the 2016 parenting plan and related orders.

II

Laidlaw first contends that the trial court erred by entering the 2016 parenting plan. This is so, he asserts, because the trial court failed to make any findings to support its decision to alter the residential schedule. We disagree.

A

We review a trial court's decision concerning the welfare of children for an abuse of discretion. In re Marriage of Horner, 151 Wn.2d 884, 893, 93 P.3d 124 (2004). A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). "A court's decision is

[5] Because Laidlaw had completed treatment by this time, the 2016 parenting plan contained no restrictions on Laidlaw's visitation.

[6] For example, the 2013 parenting plan originally granted Laidlaw residential care during the school year every other weekend and, on opposite weeks, after school Wednesday through after school Friday. Conversely, the 2016 parenting plan eliminated the mid-week overnights and provided Laidlaw with a few hours on alternating Wednesdays and overnight care every other weekend. However, the 2016 parenting plan *increased* the residential time granted to Laidlaw during the summers—allowing him to care for T.L. every other week rather than every other weekend and alternating Wednesdays through Fridays. Nevertheless, the practical effect of the alterations resulted in a reduction of the total amount of residential time allocated to Laidlaw.

manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Unchallenged findings of fact are verities on appeal and unchallenged conclusions of law become the law of the case. Rush v. Blackburn, 190 Wn. App. 945, 956, 361 P.3d 217 (2015).

The child relocation act (CRA), RCW 26.09.405-.560, provides certain notice requirements and standards for changing the primary residence of a child who is the subject of a court order regarding residential time. "If a person entitled to residential time or visitation objects to a child's relocation, the person seeking to move the child may not relocate the child without court approval." In re Marriage of McNaught, 189 Wn. App. 545, 553, 359 P.3d 811 (2015). The CRA imposes a rebuttable presumption that relocation will be permitted and requires trial courts to consider 11 factors when determining whether the detrimental effects of relocation outweigh the benefits to both the child and the parent seeking to relocate. RCW 26.09.520. These considerations include any prior agreements between the parents, the effect of the relocation on the child's physical, educational, and emotional development, the quality of life and opportunities available to the child before and after relocation, and any alternatives to relocation. RCW 26.09.520(2), (3), (6), (7), (9).

A court order permitting or restraining the relocation of a child may necessitate modification of an existing parenting plan. A trial court's ability to modify a parenting plan is controlled by statute. McDevitt v. Davis, 181 Wn. App. 765, 769, 326 P.3d 865 (2014).

RCW 26.09.260 sets forth the predicates for modification of a parenting plan. Pursuant to that statute, modification is generally prohibited absent a finding that "a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1). In addition, modification of a parenting plan generally requires one of the following: (a) the assent of both parents, (b) the integration of the child into the family of the petitioner with the consent of the other parent, (c) a finding that the child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child, or (d) parental noncompliance with the residential time provisions in the parenting plan that has resulted in the nonmoving parent being held in contempt of court at least twice within three years. RCW 26.09.260(2).

But an exception to the statutory predicates set forth in RCW 26.09.260(1) and (2) exists when modification is based on a court's order permitting relocation. Modification of a parenting plan based on relocation is governed by RCW 26.09.260(6). That statute provides:

> 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.*

RCW 26.09.260(6) (emphasis added).

"[T]he relocation petition itself is a basis for modifying a parenting plan." Davis, 181 Wn. App. at 771. Indeed, "[r]elocations 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." In re Marriage of Fahey, 164 Wn. App. 42, 68, 262 P.3d 128 (2011). "[A] trial court need not support each term of a parenting plan with specific factual findings. Rather, a trial court has broad discretion to structure a parenting plan, guided by the provisions of the applicable statutes." McNaught, 189 Wn. App. at 563.

B

The trial court entered numerous factual findings supporting its order permitting relocation, including that relocation was in the best interest of the child. The trial court also found that, in light of the relocation, there were valid reasons to modify the 2013 parenting plan. The trial court noted that the modified

parenting plan did not change the parent with whom T.L. resided the majority of the time. The trial court found that Laidlaw had not rebutted the presumption that the benefits of relocation outweighed its detrimental effects.

Laidlaw does not assign error to the trial court's order permitting relocation. Neither does Laidlaw assign error to any factual findings or conclusions in that order. Rather, Laidlaw assigns error to the reduction in residential time provided to him during the school year in the modified parenting plan, asserting that the trial court failed to support that change with factual findings.

Laidlaw first characterizes the reduction in residential time as a "restriction" in the residential schedule and asserts that the trial court failed to find that the restriction was necessary or required to protect the child from harm. Laidlaw's assertion is puzzling. The modified parenting plan explicitly contains "no restrictions." Rather, the trial court's finding of domestic violence—which Laidlaw does not challenge on appeal—simply precludes him from making major decisions concerning T.L.'s school, health care, and child care. The change to the residential schedule in the modified parenting plan is not a restriction.

Laidlaw next contends that the trial court should have made findings concerning whether the proposed changes to the residential schedule were necessary consequences of the relocation, whether the changes were in the best interest of the child, and whether the changes were necessary to protect the child from physical, mental, or emotional harm. In support of these contentions, Laidlaw relies on the general predicates for modification of a permanent

parenting plan, RCW 26.09.260(2), as well as the general policy considerations behind dissolution proceedings, RCW 26.09.002.[7]

As a preliminary matter, none of the findings sought by Laidlaw are required by the plain language of the statute. Rather, all of the necessary findings pertaining to the impact of relocation on the child were appropriately made in the trial court's unchallenged order permitting relocation. See McNaught, 189 Wn. App. at 553 (discussing findings required by the CRA). Once the trial court entered its order permitting relocation, it was then required to "determine what modification pursuant to relocation should be made, if any, to the parenting plan." RCW 26.09.260(6). It is the decision to authorize the relocation that provides the basis for modification. Davis, 181 Wn. App. at 771. It does not follow that, after making the necessary findings and entering an order permitting relocation, the trial court could be left without the authority to modify the residential schedule absent an additional finding that the present residential schedule is harmful to the child.[8]

Moreover, Laidlaw's assertion—that the modification statute places additional burdens on parents seeking to relocate with a child—ignores the straightforward and comprehensive process set forth by the CRA and RCW 26.09.260(6). Prior to the enactment of the CRA, a parent's ability to unilaterally

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[7] RCW 26.09.002 provides, in pertinent part, that the best interests of the child are "ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm."

[8] Laidlaw directs our attention to a recent unpublished decision from a different division of this court that supports his contrary position. That opinion cites no authority for its application of RCW 26.09.260(2) to modifications entered pursuant to relocation. We do not find that opinion persuasive.

relocate with a child was heavily litigated and fraught with uncertainty. See 2000 FINAL LEGISLATIVE REPORT, 56th Wash. Leg., at 78 ("Washington's laws do not explicitly address when a parent may or may not relocate a child and whether the parent must notify the other parent before relocation occurs."). In 1997, our Supreme Court held that trial courts lacked the authority to restrict a parent from unilaterally relocating with a child absent a limiting factor that warranted a restriction in the residential schedule. Littlefield, 133 Wn.2d at 56-57. In 1999, our Supreme Court held that a parent could seek a "minor" modification to the residential schedule, pursuant to RCW 26.09.260(5), after demonstrating a bona fide reason for the relocation. In re Marriage of Pape, 139 Wn.2d 694, 696, 989 P.2d 1120 (1999). As a corollary, a parent could object to a proposed relocation by showing that (1) no bona fide reason existed for the move, or (2) the move would be "detrimental to the child and the harm suffered will be beyond the normal distress a child suffers due to travel, infrequent contact with a parent, or other hardships which predictably result from a move following dissolution." Pape, 139 Wn.2d at 696.

By enacting the CRA, our legislature sought to supersede both Littlefield and Pape and provide trial courts with clear authority to permit or restrain the relocation of a child. It did so by establishing the statutory presumption that relocation would be permitted and by creating the 11 factors for trial courts to weigh when considering a parent's objection to relocation. See 2000 FINAL LEGISLATIVE REPORT, 56th Wash. Leg., at 78. Many of the considerations weighed by trial courts during relocation proceedings are duplicative of the

general predicates to modification of a parenting plan. Accordingly, parental plan modifications made pursuant to relocation are exempted from those general predicates. RCW 26.09.260(1), (6).

Finally, Laidlaw complains that the trial court failed to support its alterations to the residential schedule with findings establishing that each change was necessary. But, again, there is no such requirement. Alterations to the residential schedule are a necessary byproduct of the trial court's order permitting relocation. Such changes are expressly authorized by statute. RCW 26.09.260(6). There is no requirement for trial courts to make individual factual findings justifying each change made to a residential schedule in light of a relocation order.

There was no error.

III

A

Laidlaw next contends that the trial court erred by ordering him to pay some of Zoellin's attorney fees and costs. This is so, he asserts, because the trial court failed to make any findings to support such an award.

We review an award of attorney fees and costs for an abuse of discretion. Tribble v. Allstate Prop. & Cas. Ins. Co., 134 Wn. App. 163, 170, 139 P.3d 373 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Littlefield, 133 Wn.2d at 46-47. "To withstand appeal, a fee award must be accompanied by findings of fact and conclusions of law to establish a record

adequate for review." Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 715, 9 P.3d 898 (2000). Pursuant to RCW 26.09.140, a trial court may award attorney fees after consideration of the financial resources of each party.

Here, the trial court entered findings and conclusions regarding attorney fees and costs in its order permitting relocation. The trial court found that "Danae Zoellin incurred fees and costs, and needs help to pay those fees and costs. John Laidlaw has the ability to help pay fees and costs and should be ordered to pay the amount as listed in the Money Judgment in section 12 below. The court finds that the amount ordered is reasonable." The trial court awarded Zoellin $15,000 in fees and $360 in costs.

Laidlaw does not assign error to the trial court's order permitting relocation. Neither does Laidlaw assign error to the factual findings in that order. Rather, Laidlaw attempts to characterize the trial court's findings as legal conclusions that lack factual support. His attempt fails.

The trial court's decision concerning attorney fees and costs was made after considering the financial affidavits and declarations submitted by both parties. The trial court also considered the testimony of the parties during trial—testimony that directly addressed financial need and ability to pay. The trial court then made factual findings that are supported by the record. Consideration of the financial need and ability to pay of the parties in light of the financial affidavits, declarations, and trial testimony is sufficient to support an award of attorney fees. McNaught, 189 Wn. App. at 568-69.

There was no abuse of discretion.

B

Laidlaw also contends that the trial court erred by ordering the Division of Child Support to collect $1,000 per month from Laidlaw as a support obligation in the event that he failed to pay the judgment against him within 90 days. The parties agree that Laidlaw has paid the principal balance of the judgment entered against him and that, as a result, his wages will not be garnished.

"A case is moot if a court can no longer provide effective relief." State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). Appellate courts avoid considering moot issues in order "to avoid the danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of a case, to zealously advocate their position." Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

Here, there is no effective relief that we could provide concerning this issue. Laidlaw has paid the principal balance due to Zoellin and concedes that his wages will not be garnished as a result. Moreover, the record reveals that the Division of Child Support refused to garnish Laidlaw's wages as a support obligation.

The issue is moot and need not be further addressed.

C

Finally, Zoellin seeks an award of appellate fees pursuant to RCW 26.09.140[9] and also on the basis of Laidlaw's asserted intransigence.

[9] That statute provides, "[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs." RCW 26.09.140.

Having considered the arguments set forth by both parties and the record before us, we exercise our discretion and decline to award appellate fees to either party.

Affirmed.

We concur:

# APPENDIX B

No. 75876-4-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

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In re:

JOHN WILLIAM LAIDLAW,

*Appellant,*

v.

DANAE DIANA NKA ZOELLIN,

*Respondent*

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT

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# APPELLANT'S ORAL ARGUMENT EXHIBIT

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Gregory M. Miller, WSBA No. 14459

**CARNEY BADLEY SPELLMAN, P.S.**
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Facsimile: (206) 467-8215

*Attorneys for John William Laidlaw*

## Table of School-Year Weekday Overnights By Parenting Plan

Adapted from page 7 of Appellant's Reply Brief

| Month | # weeks w/ mid-week overnights @ 1/2 school weeks) – JJ O'Donnell & Amini | # weekday overnights @ 2/week – **J. O'Donnell** | # weekday overnights @ 3/week – **J. Amini** | # weekday overnights - @ 1/ "non-school day **J. Robinson** |
|---|---|---|---|---|
| Sept. | 2 | 4 | 6 | Zero |
| Oct. | 2 | 4 | 6 | 1 |
| Nov. | 2 | 4 | 6 | 2 |
| Dec. | 1.5 | 3 | 4.5 | Zero |
| Jan. | 2 | 4 | 6 | 1 |
| Feb. | 1.5 | 3 | 4.5 | Zero |
| March | 2 | 4 | 6 | Zero |
| April | 1.5 | 3 | 4.5 | Zero |
| May | 2 | 4 | 6 | Zero |
| June | 1.5 | 3 | 4.5 | Zero |
| **TOTAL:** | **18** | **36** | **54** | **4** |

Changes made by Judge Robinson's Parenting Plan:

- 17 weeks of mid-week, two or more overnights eliminated
- 32 mid-week overnights eliminated

Appendix B-2

## CARNEY BADLEY SPELLMAN

## January 11, 2018 - 2:54 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 75876-4 |
| **Appellate Court Case Title:** | John William Laidlaw, Appellant v. Danae Diana Laidlaw, Respondent |
| **Superior Court Case Number:** | 11-3-07851-9 |

**The following documents have been uploaded:**

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Sender Name: Elizabeth Fuhrmann - Email: fuhrmann@carneylaw.com
**Filing on Behalf of:** Gregory Mann Miller - Email: miller@carneylaw.com (Alternate Email: )

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# APPENDIX C

# Oral Argument Transcript
# WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

*In re Marriage of Laidlaw*, No. 75876-4-I
Oral Argument, 1/11/18

| Judicial Panel: | Attorneys: | |
|---|---|---|
| Hon. Stephen Dwyer | For Appellants: | Gregory M. Miller |
| Hon. David Mann (Presiding) | For Respondents: | Nancy Zaragoza |
| Hon. Michael Spearman | | |

JUDGE MANN Next case this morning is the *Laidlaw* matter.

J. DWYER Well, we know both of you.

G. MILLER It's old home week, isn't it? Good morning. May it please the Court. For the record, my name is Greg Miller. I represent the appellant Jack Laidlaw in this matter. I'd like to reserve 10 minutes for rebuttal.

We're going to focus on the parenting plan and we hope to keep it to that. Father appeals here because he was denied his day in court on the one issue he devoted his life to for the three years before the trial: his relationship with his daughter. Father is not contesting the decision on relocation. Father is contesting the decision changing the school year visitation schedule taking away 32 weekday overnights during the school year.

No reason was given by the judge for the change. There is nothing in the record that points to a justification for that change. What is so incorrect is that the decision ignored the child's best interest. By failing to give a reason for this material change, the trial court made its decision unreviewable and abused its discretion. By failing to address the child's best interest and make finding showing the change was required to protect the child from physical, mental or emotional harm, the decision violated RCW 26.09.002.

The parenting plan provisions must be vacated and the matter remanded to the trial court.

This case illustrates the rule, why we have the rule that courts must give reasons for what they decide, particularly in family law cases where you have residential time between parents and children at issue. Residential time is the most important right a parent has to build a robust relationship with his child.

And if you turn to the exhibits which have been handed out, you'll see that that's familiar from p. 7 of the Reply Brief. Eliminating 17 weeks of midweek overnights during the school year, 32 total midweek overnights, denied father the chance to be the best father he can be. It makes a material difference. Having

overnights with your child every week is very different from just being an every other weekend dad. That's what the fight is about. This is a material change to the parenting plan. No reasons were given by the trial court.

There is no analysis anywhere about the child's best interest. The child is lost in this. It's one of those sad cases where the parents are fighting and the child gets lost in the shuffle. It's the child's time with father as well as father's time with the child. Both of those are gone. And here father was not really given any reason for this decision which was the most important part of the case for him. There's no analysis about the changed time was necessary to protect any interest of the child.

We've cited a lot of the cases about abuse of discretion. The failure to give reasons is an abuse of discretion. We've talked about the fact that the *Chandola* case says that your discretion in family law cases is "cabined," was the term that Justice Gordon McCloud used, is "cabined" by the facts and by the law and the statutes. You don't have a free rein. And if you have to make changes when you're making a change in a parenting plan, they have to be specific to prevent a particular harm. In that case it was a restriction under 191.3(g). Here, we're talking about change to the parenting plan.

J. DWYER You cite to us as persuasive authority a Div. III case that contains language that's favorable to your position, but doesn't seem to explain how it got there, what the process was. That may explain why they decided not to publish it. I don't know.

G. MILLER It's on reconsideration, Your Honor.

J. DWYER But, what do we make of that? What do we do with that? We're in this new world now where people are favoring us with the musings of other courts.

G. MILLER [Laughter] Yes, we are. And my thought on that was as stated in the supplemental authority which is, here's an example of [a court] saying that you need, that the statute is in play. And that you have to apply the statutes and the requirements for making a modification of a parenting plan in the relocation setting. So at that gross level, that big level, that's what it pertains to. You can also look at the analysis, and they do use that subsection (2) of .260 and say that that requires the result.

My analysis that we put forward in the briefs, and particularly in the Reply Brief, if you look at 26.09.002, 26.09.184(1)(g), permanent parenting plans are required to respect the principles in .002. And .002 says, we want continuity for the child and you only change that to the extent <u>required</u>--that's in the statute—<u>required</u> to protect the child from physical, mental or emotional harm. That means you need findings to be able to review a change as severe as this. That is the essence of the case.

The only other brief point I want to make is that we hope that whatever the decision is will address the enforcement provision by the Division of Child Support, just so that that gets cleaned up. Thank you, Your Honor.

N. ZARAGOZA Good morning. May it please the Court. Nancy Zaragoza on behalf of the respondent, Danae Zoellin, in this matter.

We ask that the Court affirm the parenting plan and the award of attorney's fees both of which are well within the discretion of the trial court and supported by the record. And we ask that this Court award her fees on appeal.

The size of this Court's correspondence file alone might suggest that there is a lot more to this case then there really is, as Mr. Laidlaw would like you to believe.

J. DWYER Let me ask you the same question I asked Mr. Miller. What do we make of the unpublished Division III case? What do we do with it, if anything?

N. ZARAGOZA Well, I think the statute that applies here is .260(6) which specifically addresses changes to a parenting plan after a relocation. And I think that that's all the Court is required to do at that point. Once the relocation is granted, which it's not challenged on appeal, the Court has discretion to make adjustments that are appropriate. And here, the adjustments were made based on the commute which was an undisputed fact of this relocation.

I'd like to point out that Mr. Miller's argument—

J. DWYER Is there any insight as to why Division III arrived at the different conclusion?

N. ZARAGOZA Well, I think these relocation cases are hard, you know, because a lot of times you don't have the--, you have the primary parent presumption. A lot of parenting plans aren't 50/50 and it's, I think courts are grappling with this new reality that these relocation cases that there's a 50/50 parenting plan, but one party gets hurt. I mean, relocations are just--, they're hard.

J. DWYER They're terrible for judges. Usually in family law, if something's changing, it's because somebody's done something wrong.

N. ZARAGOZA Yes.

J. DWYER And relocations--

N. ZARAGOZA Relocations—

J. DWYER --changes can be brought about with everybody having behaved perfectly.

N. ZARAGOZA In fact, there was a case we just had in a relocation where the trial court just, in her findings, just described it as hideous. She hates these cases. They're hard because you have two fit parents, so—

J. DWYER So, over in, the panel in Division III, is it your position that they just missed the boat? They just missed that day in school. It's covered by .260(6), and that's really the end of it?

N. ZARAGOZA That would be our position on that. I know Mr. Miller makes that argument that .002 should come into play here, which is the general policy statute, although we do have a specific statute addressing this situation so that is what should control. And I also point out that this argument was raised for the first time in the reply and shouldn't be considered and we'd ask that it be stricken as we noted in our motion to strike which, I think, is also before this panel.

He managed to slip a citation to that statute in his corrected brief that was filed a month after he filed his opening brief and claimed in opposition to our motion to strike that he was only correcting typos or adding record citations, but actually he was raising a substantive legal argument which this Court doesn't typically consider in a reply and we have not had a chance to brief that issue.

As to—

J. DWYER What about the argument I heard at opening here primarily was, without some findings of fact, how are we left to judge even in abuse of discretion standing, without knowing why the trial court did what it did?

N. ZARAGOZA Well, I don't think we can say we don't know why the trial court did what it did. In fact, trial counsel even said on the record, so this is because of the commute, which the trial court said yes.

J. DWYER So we have to assume that's what the trial court—

N. ZARAGOZA Yes, I mean, that was the whole trial. You're right. The findings weren't super specific, but I don't think that's what this statute requires. The statute just requires that the court make an adjustment that flows from the relocation which is what happened here. I don't think that, I just don't think there's any mystery why the court, it was an adjustment to the schedule because of the commute. And I don't think anybody can dispute that.

J. DWYER Well, the major change after the relocation decision is that people won't live where they lived at the time that the initial order was entered.

N. ZARAGOZA Yes. That's just a fact.

J. DWYER That's just a fact.

N. ZARAGOZA Yes.

J. DWYER Oh.

N. ZARAGOZA Yes, and, you know, typically, people's residential schedules are completely thrown out the window. I mean, if you live such a certain distance, maybe you only see your child in the summertime. That's just the sad fact of these relocations.

I don't have much to add on the attorney fee award other than to say I notice that the argument was substantially gutted from the position he took in the motion to stay that there was absolutely no evidentiary basis for the award. I think the court can see in the record there was sufficient evidence of the party's financial circumstances.

And on the enforcement issue, the DCS enforcement issue which was certainly an extraordinary measure that Judge Robinson took, it's moot at this point. It was moot as soon as he posted the bond for the stay, which took forever, but it was moot, so that is not even an issue here.

Which takes us to our request for fees on appeal which really is the only substantive issue here. I think when you get past all the smoke and mirrors and the distortion of the record, shifting arguments, there really isn't much to this appeal. But, there is sufficient evidence of intransigence to justify a fee award.

I'm not going to belabor the tortured history because you have that correspondence file you can go through. But, I would like to focus on that motion to stay which I think was probably the most egregious example of intransigence.

Mr. Laidlaw repeatedly criticizes Ms. Zoellin as fighting tooth and nail the motion to stay. And this is a motion, of course, that was denied and for the reasons we opposed the stay. If he would have just posted bond in the first place as required by the rules in the amount, there would have no reason to oppose the stay. But instead, six months later, tons of litigations, fees going up, this is type of conduct that demonstrates precisely the type of intransigence that warrants a fee award.

By pursuing this baseless motion and the ensuing litigation, he drove up the fees and required Ms. Zoellin to call him out on his failure to comply with the court rules and court orders and we had to seek rulings from this court that, yes, he has to comply with the rule to post bond for the stay of a money judgment and, yes, he has to post the amount required by the rules. This emergency motion was filed in November 2016 just as the 90-day period for him to pay the judgment was about to be up. He didn't pay it until he found enough money to retain appellate counsel, perfect a record of about 2,000 pages of clerk's papers, five days of trial. And during this six months, Ms. Zoellin was required not only to respond to the motion to stay, but to seek an order from the trial court requiring to comply the RAP rule when he refused to post the full amount and then come back to this court to seek clarification from the Commissioner even though the rules give the trial court that authority.

And then even after the Commissioner agreed with us that he was required to post the full amount and order that he post within 14 days, instead he filed a motion to clarify on that 14th day, pointing out that the Commissioner mistakenly referred to this appeal as a dissolution rather than a relocation and then asking the court to accept additional evidence of the parties' current financial circumstances which was not even before the trial court.

And again, Ms. Zoellin was required to call him out and file a response. And then after the Commissioner denied that motion finally putting an end to the stay issue, he continue to drag things on, ignoring nearly a month of repeated inquiries from our office as to whether he was going to post the full amount and continue the stay. So it wasn't until after two months after that date that he was ordered to post the full amount that he finally responded that he was going to drop the stay and agree to release the funds to Ms. Zoellin rendering the enforcement provision.

I think it goes without saying that Ms. Zoellin has incurred substantial fees and costs in resisting this protracted stay motion in addition to all the other things and that stay motion actually only revealed the lack of merit to his appeal. His appeal has cost easily two or three times what a typical appeal should have cost and surely he spent more than the $15,000 attorney fee award that he was so desperate to avoid paying. And so, why pursue this litigation? Why pursue this strategy which was also extremely costly to him, and I think the sad reason is, is that he was out to hurt Ms. Zoellin. He was out to exact revenge and by doing so he necessarily hurts the child who is affected by this. You know, you're depleting funds that should go to the child support and instead wasting them on all this litigation.

So, we ask the court to award Ms. Zoellin her reasonable attorney's fees and we ask the court to affirm the parenting plan and the attorney's fees award. Thank you.

J. DWYER With regard to anything that was put in a reply brief that you didn't have an opportunity to—

N. ZARAGOZA Excuse me, I'm sorry.

J. DWYER With regard to anything that was put in a reply brief that you did not have an opportunity to respond to, we've got four minutes and 20 seconds of extra time now if there's anything you want to say in response to anything, if you feel cut off—

N. ZARAGOZA Okay. I would, I think I've made the point about relying on .002 as a basis for making more specific findings about the change in the parenting plan following a relocation. I don't think that statute changes the specific statute .260(6). But, I think our arguments are pretty well laid out in the briefing. I don't want to repeat them here. I don't want to waste any more of the court's time on this case. So if the court doesn't have any other questions, we'd ask that you affirm.

J. DWYER Thank you.

N. ZARAGOZA Thank you.

G. MILLER On the last point, Judge Dwyer, in terms of matters in the reply brief, I think if you look at the opening brief, you'll see that our primary focus was on the fact that there were no findings and conclusions that was the abuse of discretion. Part

of what the reply brief did was give more of a legal structure so that this court hopefully can provide some instruction to the lower courts. When I've talked with a number of trial attorneys, they talk about the lack of guidance in this area, which is maybe one reason why Division III has a slightly different take on it.

J. DWYER We've got two things put at issue with regard to the attorney fee request, in my mind, two things. One would be the fact of appellate relief being sought and the second would be the manner in which the appellate relief was sought. I would have difficulty ever finding fault with someone for seeking appellate relief when there is a case even if that case is unpublished from a Division of this court giving authority that supports their position. But with regard to the contentions of the manner in which this appeal proceeded, it would do you well to use at least some of your time here to respond to that.

G. MILLER I will, Your Honor. If you are going to look at that, then look carefully at all of the pleadings because, first, you have an illegal provision for the Division of Child Support for enforcement. The initial thought was that would be readily granted stay and that would be done and over with. That was not an intent to have it become an event unto itself. Mr. Laidlaw has always contended, and you will see in the declarations that have been filed, that he did not have the money and could not borrow the money to put in the attorney's fees. So when Commissioner Kanizawa granted the initial stay, she limited it to just the judgment amount and did not put in interest or attorney's fees. She said, you put in the judgment amount and that will suffice.

Counsel then went to trial court and asked for relief to get the amount bumped. We responded and said, well, this is an appellate order. Trial court doesn't really have authority to change an appellate ruling. It went to Judge Rietchell. It went to Judge Williams. They both said, we agree. Denied. At that point, there was no longer time to file a motion to modify. So, Ms. Zoellin files a motion to clarify. She complains about our motion to clarify. Their motion to clarify went to Commissioner Kanizawa. She ruled on it. And then she says, oh, okay, you have to pay an extra $28,500 if you want your stay. So then we were faced with a choice of do you file a motion to modify on that and go that route or file your own motion to clarify and try and straighten things out because then you have the question about what is going to be the likelihood under the RAP 8.1 of an award of fees on appeal.

We tried a motion to clarify. She denied it. We then stopped. We did not try and litigate. We didn't try and recall the money back from the superior court. But he said at every stage, including on the motion to clarify, that he could not afford to put in the $28,000 in attorney's fees. So that's why that was done. And that's why it was then turned over, the judgment amount was turned over. Rather than have additional litigation. That is in the file if you want to go through that much detail.

As an aside, there were a number of other matters that any of us lawyers have which interfered with some of the timing from my perspective and should not be put as a blame on the client. So to the extent that you look at that, you can look at those extension requests. There were different times for illness and other such. Those were part of it.

But there was no intent—I would not bring a case and I would not pursue a case if it were intended to try and inflict pain on the other side or on the child. That is not how I litigate. This took off on a life of its own. You will note in the reply brief that Ms. Zoellin's counsel admitted in the motion practice, and we appended it to the reply brief, that the Division of Child Support had no authority to collect and that that could be easily found out. That should have been found out by them before they started resisting. They didn't. We were stuck with an order that could get enforced.

S. DWYER We understand that and I think that we're cognizant of, well, again, the distinctions I made between the fact of seeking appellate relief or not. I mentioned only the Division III unpublished case. But an unusual enforcement mechanism also, I think, would fall in with regard to the fact of seeking relief. Someone having a conversation with their client, a question asked, is there some case that says that this is right. The answer would be no, then why don't we pursue—I mean, I can—we're not—we are sent bills up here and hope that people would pay them. We get that aspect of things.

We're just trying to, without having this turn into a mud wrestling match, just trying to get a feel for the things that happened early that, and we have been granted the benefit of all of the work done by both sides. We know that. And there are young people whose misfortune it is to become expert in the contents of all of that and then assist us, so. But I just wanted you to take some time since time was there and you had time. Now you're down to 3½ minutes. I don't want to deprive you of your merits argument just by focusing on fees.

G. MILLER Well, I think the exhibit we passed out, that's what this is about. And that's what my instructions have been on trying to pursue this case. Let's get the time back, because one of the things, you may have noted that Judge Robinson said, well, maybe he can move over and be closer. Well, the problem with this parenting plan is, let's assume that father moves to Magnolia or Queen Anne so he's nearby. Now he has to modify this permanent parenting plan to try and get that time back. In other words, those 17 weeks and 32 nights don't automatically come back if he moves next door or if he moves around the block or if he moves three neighborhoods away.

That's part of the vice of this. And that's part of why we think that when you look at the statutory structure, you do have to do some analysis. RCW 26.09.260(6) is not a complete free ticket for a judge to do whatever they feel is appropriate. "Appropriate" is not the legal test. Remember, the last sentence of that statute says, We make changes in the parenting plan, "<u>if any</u>." So, it contemplates, unlike

some of the dicta in the *Fahey* case, it contemplates that there are going to be relocation cases where there is no change made to the permanent parenting plan for whatever reason. You have a relocation, it may not be that far away. But there may be no change to the parenting plan.

We think that consistent with the *Chandola* case under .191, a parenting plan change under the relocation statute has to have meaningful standards. That's what we tried to give you in the reply brief. I remember being here on a case and Judge Leach said, "What's the rule you want adopted, counsel? What's the rule?"

Well, that's the rule we would like adopted is that you have to comply with .002. That's the fundamental requirement of the Parenting Act.

It says, continuity is what it's about. And you do not make changes in the parenting plan except to the extent required to protect the child from physical, mental or emotional harm. And, again, I've spoken with a number of trial lawyers on this. They want some guidance from the appellate courts.

And I think the other part I thought about when I mentioned the Division III case, if you look at RCW 26.09.260, the relocation statute, you have subsection (1) which says except as provided in these later sections. All that's doing is removing adequate cause. It's not giving a complete free ride to a change in the parenting plan under subsection (6). That is the misanalysis that is being proposed by Ms. Zoellin.

So what you need to do is look and see what does that statute as a whole do. How does it interrelate to the other statutes? It needs to have some substance to it. And in many cases, both the bench and counsel are correct. It's obvious. You're going across state. You're going across country. My *Katare* case, across country. Major change.

We ask that you reverse and remand and award fees to the father. Thank you very much.

J. DWYER Thank you, counsel.

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## CARNEY BADLEY SPELLMAN

## March 21, 2018 - 8:54 AM

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