No. 98155-8

SUPREME COURT
OF THE STATE OF WASHINGTON

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In re Parentage of:

Devon Lowe & Jackson Lowe, Children,

ERIK NILSEN,

Respondent,

v.

LEANNE LOWE,

Petitioner.

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# ANSWER TO PETITION FOR REVIEW

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SMITH GOODFRIEND, P.S.

By: Valerie Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

BUCKINGHAM, LAGRANDEUR AND WILLIAMS, INC. P.S.

By: Christy K. LaGrandeur
WSBA No. 27334

321 Burnett Avenue South
Suite 200
Renton, WA 98057
(425) 228-6662

Attorneys for Respondent

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## A. Relief Requested.

Respondent Erik Nilsen asks this Court to deny review of the Court of Appeals' unpublished opinion affirming the trial court's fact-based discretionary decision modifying the parties' parenting plan for their ten-year old twin sons. The Court of Appeals' opinion is wholly consistent with statutory and decisional law and raises no issue of substantial public interest warranting review by this Court.

## B. Restatement of the Case.

### 1. Background.

The following facts are adopted from the Court of Appeals decision, which is Appendix A to the Petition for Review ("Op."):

"Leanne Lowe and Erik Nilsen are the parents of twin boys, J.L. and D.L. The boys were born on March 2, 2010. They have strong and stable relationships with both parents. Nilsen first sought a parenting plan regarding the children in 2011. While the parentage action was pending, Lowe moved with the boys to California without a court order. She rented out her Washington home and entered a one year lease in California. The court ordered Lowe to return the boys to Washington. Lowe then sought a negotiated plan with Nilsen. The parents agreed on a parenting plan on February 8, 2012. Under the plan, D.L. would reside a majority of the time with Nilsen

in Washington while J.L. would reside a majority of the time with Lowe in California. The plan called for the boys to be reunited in Washington by September 2, 2014. One child would remain with each parent in the Puget Sound area. If Lowe didn't return to the Puget Sound area, both children would reside a majority of the time with the Nilsen." (Op. 1-2)

"Lowe returned to Washington in between the summer and fall of 2014. Nilsen then petitioned to modify the parenting plan. Lisa Barton completed a guardian ad litem (GAL) report on behalf of both children on August 12, 2015. Barton recommended that the children have close to equal residential time with each parent. But, she recommended slightly more time with Lowe in order to facilitate going to school with their half-sister, Lowe's daughter. She also recommended that the statutory presumption in favor of relocation under RCW 26.09.520 should not apply in this case. On December 23, 2015, the trial court adopted these recommendations in a new parenting plan. The parties subsequently modified the plan by agreement to correct a minor error. The updated plan was filed on February 8, 2016." (Op. 2)

"About a year later, in early February 2017, Lowe informed Nilsen that she had a potential job offer in Florida. She told Nilsen

that she would take the offer and relocate to Florida unless Nilsen agreed to modify the parenting plan. Lowe told Nilsen that 'as the primary custodial parent, [she] would have a very strong argument in court for relocation.' She said that if Nilsen did not agree to her plan he '[would] be facing BOTH an appeals case and a relocation case.' But, if Nilsen approved her updated parenting plan, she would reject her Florida job offer. However, she refused to rule out further relocation, saying only that the reasons for future location would need to be 'more imperative,' such as her getting remarried to a man in another state. Nilsen agreed to Lowe's demands. Lowe later told the GAL that she 'was willing to agree to not move to Florida' because she wasn't really considering it anyway." (Op. 2-3)

"One month later, in March 2017, Lowe filed a notice of intent to relocate to California. Lowe stated that her employer had mandated this move. She further stated that she needed to move because she was getting married to a man named Robert Burge, who lived in southern California. Lowe also stated that the move was necessary because her daughter had a skin condition that required her to be in a warmer climate. In her declaration in support of her request, she underlined that the law includes a presumption that children be allowed to move pursuant to RCW 26.09.520. She did

not include that her existing parenting plan specifically removed the relocation presumption in this case. Nilsen objected to the relocation. He proposed that if Lowe were to move, the parenting plan should be modified so that the children live with him the majority of the time." (Op. 3)

"Barton was again appointed as the GAL for the children to address issues related to relocation and development of a parenting plan. She issued her report on June 29, 2017. Barton reported that Lowe's marriage to Burge 'does appear to be an afterthought in an effort to gain traction for the relocation action.' Burge reported to Barton that that their relationship had 'changed' in early March, when Lowe gave her the notice to relocate. Barton also noted that it was 'interesting' that Lowe did not mention marrying until Nilsen raised the issue when the parties were discussing relocation. And, Barton learned from Lowe's employer that they considered her move to California to be for 'personal reasons' rather than a job requirement as Lowe had claimed. She said that Lowe had provided no evidence regarding her daughter's medical condition requiring her to move to California. Barton reported that Lowe told her that she had discussed the potential move with the children." (Op. 3-4)

"Barton recommended that the relocation be denied. She also recommended that the children should reside primarily with Nilsen. On August 1, 2017, about a month after Barton issued her report, Lowe withdrew her request to relocate and moved to dismiss Nilsen's modification action. Nilsen objected and asked the court to allow his modification action to proceed. The trial court found that Lowe had acted in bad faith throughout the relocation action. It also found that her withdrawal of the relocation notice was disingenuous and submitted in bad faith. The court ordered Lowe to pay $9,811.88 in attorney fees to Nilsen. It also denied her motion to dismiss Nilsen's modification action, but instructed Nilsen to file a separate motion for adequate cause to modify the plan." (Op. 4)

"On October 12, 2017, Nilsen filed a petition to modify the parenting plan. He proposed that the boys reside with him 15 out of 28 days, and with Lowe 13 out of 28 days. The court found adequate cause for a hearing to modify the plan based on Lowe's constant threats of relocation creating a detriment to the children." After a trial, the court approved Nilsen's proposed changes to the parenting plan, after making nearly fifty findings of fact in support of its decision. (Op. 4-5)

### 2. Court of Appeals decision.

Division One affirmed the trial court's decision in an unpublished opinion. The Court of Appeals rejected Lowe's argument, reasserted in this Court, that the trial court's decision to modify the parenting plan was based solely on a "fear of future relocations" and was inconsistent with *Marriage of Grigsby,* 112 Wn. App. 1, 57 P.3d 1166 (2002), which reversed a trial court's decision modifying a parenting plan after the mother, who unsuccessfully sought to relocate the children, withdrew her request to relocate. The Court of Appeals correctly distinguished *Grisby* from this case on both the facts and the law.

First, unlike here, the trial court in *Grigsby* did not find that the mother withdrew her relocation in bad faith. (Op. 7) The Court of Appeals noted that this case raised a question that the *Grigsby* Court specifically declined to reach – "whether a trial court would have authority to modify the parenting plan" if, as here, the trial court found that both the request to relocate, and the withdrawal of that request, was made in bad faith. (Op. 7)

Second, unlike in *Grigsby,* Nilsen in this case showed adequate cause for his petition to modify the parenting plan after the petition for relocation had been withdrawn. (Op. 7) Accordingly, the

Court of Appeals held that the trial court did not rely solely on the relocation request as a basis for modifying the parenting plan, and properly allowed Nilsen to pursue modification upon the necessary threshold showing. (Op. 7)

In affirming the trial court's decision, the Court of Appeals relied on the unique facts of this case, and the trial court's nearly fifty findings on those facts, which the Court concluded was supported by substantial evidence. (Op. 10) Specifically, the Court concluded that substantial evidence supported the trial court's determination that "a change was necessary because Lowe's repeated attempts to relocate, and repeated involvement of the children in parental conflicts, were adverse to the best interests of the children." (Op. 10) The Court concluded "the trial court had sufficient evidence of the mother's continued threats of relocation and involving the boys in parental conflict occurring after the prior order to conclude that a substantial change of circumstances in the lives of the children had occurred. The court had additional reasons to believe this behavior would continue under the current residential schedule. Its reasons for exercising its discretion to modify the parenting plan are not manifestly unreasonable." (Op. 12)

The Court of Appeals held substantial evidence supported the trial court's finding that Lowe "does not recognize the detriment of telling the children they will be moving and involving them in the parental conflict. The mother has continued in these pursuits . . . The need to have repeated court actions that result in the mother withdrawing her requests or reaching agreement demonstrates that the mother's conduct in threatening to move is adverse to the best interests of the children." (Addendum Findings of Fact ("AFF") 45, CP 1249; Op. 10) Since the last parenting plan was entered, Lowe had twice threatened to relocate the sons: "first, to Florida and then, a month later, to California. She used her first request to relocate, a move she later stated she 'was not considering' anyway, to get more residential time from Nilsen. She was forced to withdraw her second request after the GAL uncovered inconsistencies in her proffered reasons for the move. That request came only one month after exacting concessions in exchange for dropping her previous request to move to Florida." (Op. 10)

Further, the Court of Appeals noted that "Lowe admitted to discussing the potential move to California with the children, in violation of a prohibition in the parenting plan. She moved to California with her daughter, but without her sons, while a decision

from the trial court was pending, making the boys all the more aware of the potential separation from their father." (Op. 10-11) "Lowe also involved the children in her attempts to interfere with Nilsen's residential time. She did this by enrolling the children in a Taekwondo class that met on Tuesdays and Thursdays, even though Tuesday was Nilsen's only residential weekday with the boys." (Op. 11) The sons were aware that these classes overlapped with their residential time with Nilsen. Lowe "framed Nilsen's choice by saying 'if he chose to support their goal, then that was up to him.'" (Op. 11) The Court therefore agreed with the trial court's conclusion "that this placed Nilsen in a situation to either disappoint the boys or lose his only weekday time with them. The facts support a conclusion of abusive use of conflict by Lowe and of involving the children in the conflict." (Op. 11)

Finally, the Court of Appeals acknowledged that to the extent the trial court had a "fear of future relocations" by Lowe, substantial evidence supported that fear. The Court noted that "just 17 days prior to trial, Lowe e-mailed her daughter's father, indicating that all his visits with their daughter after September 1, 2018 would take place 'at [her] residence in Costa Mesa, California.' The trial court thus found her trial testimony that she didn't have a residence in

Costa Mesa not credible . . . The court also found this exchange indicated either that the mother would deliberately schedule her daughter's residential time with her father in Costa Mesa without the boys, that she would take the boys with her to Costa Mesa, or that she would be residing in Costa Mesa." (Op. 12)

## C. Grounds for Denying Review.

This Court should deny review of Division One's unpublished opinion affirming the trial court's fact-based discretionary decision modifying the parties' parenting plan, as it does not raise an issue of "substantial public interest" warranting review by this Court under RAP 13.4(b)(4). There is no need for this Court to accept review of this unpublished opinion to "provide lower courts with the correct interpretation of RCW 26.09.260(6)." (Pet. 7) This provision of RCW 26.09.260 is unambiguous and there is already a published Court of Appeals' opinion addressing this provision, with which Division One's unpublished opinion is wholly consistent.

RCW 26.09.260(6) provides that a person objecting to the other parent's request to relocate the children "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." The statute is plain – an objecting parent need not show adequate cause for their petition for modification so long as "the request for relocation is being pursued."

Consistent with its plain language, the Court of Appeals in *Marriage of Grigsby*, 112 Wn. App. 1, 57 P.3d 1166 (2002) held that RCW 26.09.260(6) provided that "the normal requirement of a showing of adequate cause is excused only so long as relocation is being *pursued.* Where, as here, the parent is no longer pursuing relocation, the parent proposing modification of the parenting plan must show a substantial change in circumstances, considering the factors set forth in RCW 26.09.260(2)." 112 Wn. App. at 16 (emphasis in original).

Review of Division One's unpublished opinion is not necessary "to provide lower courts with the correct interpretation of RCW 26.09.260(6)" because there is no confusion, as evidenced by the trial court's decision here. Division One's opinion is wholly consistent with the plain language of RCW 26.09.260(6) and *Grigsby's* interpretation of this provision. The trial court here "required Nilsen to show adequate cause on his own modification

petition after the petition for relocation had been withdrawn." (Op. 7) Lowe does not contend that the trial court wrongly interpreted RCW 26.09.260(6); she only claims that the trial court wrongly found adequate cause existed. That is a discretionary, fact-based decision that raises no issue warranting review by this Court.

Division One properly affirmed the trial court's decision modifying the parenting plan when the trial court found a substantial change in circumstances had occurred since the prior plan was entered that was "adverse to the best interests of the children" because "the behavior of Lowe posed a risk of harm to the children and was not in their best interest," thus a "change was necessary." (Op. 9-10, 13) The trial court's decision is consistent with RCW 26.09.260(1) and (2), which limit a court's authority to modify a parenting plan unless it finds "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," because "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."

This Court should decline Lowe's invitation to review Division One's unpublished opinion "to determine whether fear of future relocations constitutes adequate cause for modification if there has been a bad faith withdrawal of a relocation request" (Pet. 8) because whether certain facts establish adequate cause is better left to the trial court. The impact one parent's repeated attempts to relocate the children has on a family depends on the family and the facts.

As this Court has held, "parenting plans are individualized decisions that depend upon a wide variety of factors, including 'culture, family history, the emotional stability of the parents and children, finances, and any of the other factors that could bear upon the best interests of the children.' The combination of relevant factors and their comparative weight are certain to be different in every case, and no rule of general applicability could be effectively constructed." *Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003). "The very nature of a trial court makes it better suited than an appellate court to weigh these varied factors on a case-by-case basis." *Jannot*, 149 Wn.2d at 127.

Here, after weighing the evidence presented at trial trial, the trial court found that Lowe's repeated attempts to relocate the children was detrimental to the children. (AFF 19, 22, 26, 29, 33, 36,

44, 45, 47, CP 1245, 1246, 1247, 1248, 1249; RP 18) In affirming the trial court's decision, Division One concluded that there was substantial evidence to support the trial court's finding that Lowe's constant efforts to minimize Nilsen's relationship with the children created an environment that was detrimental and necessitating a change that neutralized the "sword" – Lowe's designation as the primary residential parent – that she persistently wielded to create conflict, to the children's detriment. (*See* AFF 33, 26, CP 1247; RP 18)

For instance, Lowe violated the parenting plan in ways that "necessarily interfered with [Nilsen]'s residential time," involved the children in parental conflict, and used threats to relocate to minimize Nilsen's role in the children's lives. (AFF 19, 22, 29, 33, 36, 44, 45, CP 1245, 1246, 1247, 1248, 1249; *see also* AFF 47, CP 1249) Lowe's actions cause the sons "to question whether or not they will have a relationship with the other most important person in their lives. Every time they're being told 'You're going to move, sister in California already,' it destabilizes them." (RP 308) Lowe's refusal to correct her behavior created conflict, which the trial court found "a detriment to the children, as they continue to live in the conflict and chaos that the mother has generated." (AFF 36, CP 1247)

By affirming the trial court's decision, Division One did exactly what this Court has directed appellate courts to do – not "substitute[ ] its judgment for that of the trial court" in reviewing a trial court's discretionary decision modifying a parenting plan. *Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). Accepting review in this Court to determine whether a "fear of future relocations constitutes adequate cause for modification if there has been a bad faith withdrawal of a relocation request" would place it in a position that it has repeatedly refused to be placed – as arbiter over discretionary parenting decisions. Review by this Court would require it to construct a "rule of general applicability" as to what weight a trial court should place on one parent's repeated attempts to relocate and their bad faith in pursuing and withdrawing those efforts in deciding whether to modify a parenting plan to protect the children's best interests. But as this Court has held, "a trial judge is in the best position to assign the *proper weight* to each of the varied factors raised by the submitted affidavits in a particular case," not this Court. *Jannot,* 149 Wn.2d at 128 (emphasis in original).

This Court should deny review of Division One's unpublished opinion, as it raises no issues of substantial public interest warranting review. Division One's decision is wholly consistent with

statutory and decisional law under RCW 26.09.260(6), and the principles governing review of a trial court's fact-based and discretionary decision to modify the parenting plan.

## D. Conclusion.

This Court should deny review.

Dated this 20th day of March, 2020

SMITH GOODFRIEND, P.S.

By: _____
Valerie Villacin
WSBA No. 34515

Attorneys for Respondent

## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 20, 2020, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

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| Christy K. LaGrandeur<br>Buckingham, LaGrandeur & Williams, Inc. P.S.<br>321 Burnett Ave. South, Suite 200<br>Renton, WA 98057<br>christy@blwattorneys.com | ___ Facsimile<br>___ Messenger<br>___ U.S. Mail<br>_√_ E-Mail |
| Sharon J. Blackford<br>Sharon Blackford PLLC<br>600 Stewart St Ste 400<br>Seattle, WA 98101-1217<br>sharon@washingtonappellatelaw.com | ___ Facsimile<br>___ Messenger<br>___ U.S. Mail<br>_√_ E-Mail |

**DATED** at Seattle, Washington this 20th day of March, 2020.

SNE

Sarah N. Eaton

## SMITH GOODFRIEND, PS

## March 20, 2020 - 9:45 AM

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| **Appellate Court Case Title:** | In the Matter of the Parentage of D.L. and J.L. Erik Nilsen v. Leanne Lowe |

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