

No. 42698-6- II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Garrett Lail, Respondent,
and
Kimberly Briggs, Appellant.

BRIEF OF APPELLANT

Kimberly Briggs
Pro Se

Kimberly Briggs
3800 14th Avenue SE, D180
Lacey, WA 98503
(360) 500-1795

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I. Introduction

This action arose from my request to relocate to the Olympia area located in Thurston County with our child Mason for education employment and financial reasons and modify the current administrative order of child support to incorporate child care in the transfer payment from Garrett. Garrett objected to the relocation and requested a major modification to the existing parenting plan that designated me as primary custodial parent in order that he may get that designation. The court entered Order on Objection on Relocation restraining relocation on September 15th, 2011 and includes reference to a pending hearing set to modify the parenting plan. I appeal this order.

II. Assignments of Error

a. Assignments of Error

1. The trial court erred in orally denying relocation at the original trial without addressing the 11 statutory factors required for consideration in relocation proceedings

2. The trial court erred in changing primary custody to the non-relocating party
3. The trial court erred in not entering formal written order addressing statutory modification provisions in changing primary residential custody to the non-relocating party
4. The trial court erred in entering order denying relocation on September 15th
5. The trial court erred in entering Finding of Fact 2.3.1
6. The trial court erred in entering Finding of Fact 2.3.2
7. The trial court erred in entering Finding of Fact 2.3.3
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9. The trial court erred in entering Finding of Fact 2.3.6
10. The trial court erred in entering Finding of Fact 2.3.7

11. The trial court erred in entering Finding of Fact

2.3.8

12. The trial court erred in entering Finding of Fact

2.3.9

13. The trial court erred in entering Finding of Fact

2.3.10

b. Issues Pertaining to the Assignments of Error

1. Whether the trial court erred in entering the Order on Objection to Petition for Relocation denying relocation in which the Findings of Fact entered did not reflect the conclusions of the oral opinion from the trial and are not supported by sufficient evidence in the record. In addition, the court considered the best interests of both parties rather than the child and custodial parent only.

2. Whether the trial court erred by ordering an indefinite temporary change in primary residential placement circumventing its obligation to enter an order addressing the factors required for parenting plan modification outlined in RCW 26.09.260. This denied both parties due process; the court further

erred in vacating the all decisions from the original oral ruling, with the exclusion of the relocation decision, which will prevent the moving party from obtaining a fair trial at the modification hearing that is pending the outcome of the appeal decision.

3. The court's words and conduct throughout the proceedings demonstrate an obvious manifestation of bias and/or prejudice in violation of several of the rules under Canon 2 of Judicial Code of Conduct that warrant disqualification of the current judge in this case to ensure a fair trial under Rule 2.11 (A) under that Canon.

III. Statement of the Case

- a. July 2004-Garrett and I broke up and I moved out of our residence with Mason (CP 92).
- b. May 2006- Garrett and I mutually agreed to a permanent parenting plan granting me primary residential custody of Mason after being the defacto primary custodial parent of Mason from the time we broke up (SCP, Parenting Plan, 2006)
- c. July 2006-I moved from Grays Harbor to an apartment in Olympia with Mason to be closer to the Evergreen State College where I

had begun my Bachelor's Degree studies and also where Mason was attending daycare (CP 92).

- d. May 2007- I was approved for my Section 8 Housing Voucher with the Housing Authority of Grays Harbor provides me with financial assistance in paying my rent so I can attend school and not be required to work full time. As a requirement of my assistance, I had to move back to Grays Harbor for at least 1 year before I could use my voucher in another county. I moved to Elma where Mason attended Headstart (RP 92).
- e. May 2009-I filed to relocate to Spokane (CP 5) to take advantage of an employment opportunity available to me in social services which would have allowed me to gain the experience required to get a job as a social worker with WA State DCFS. (CP 5). As a result of losing that relocation case I chose to stay in Grays Harbor so I could retain custody of Mason (RP Testimony 6/22/11, 4).
- f. September of 2009- Due to ending my lease in Elma in anticipation of the Spokane relocation, I had to find a suitable home for Mason and myself. I was able to find a home in Montesano that fit into Section 8 guidelines (RP Testimony 6/22/11, 4). At this same time, I also obtained a full time position at ACS, Inc. located in Lacey (CP 2). I also asked Garrett to start

helping pay for childcare so I could enroll Mason in school in Montesano near our home but he refused without me having to take him to court. Since I was not emotionally or financially prepared to do at that point (RP Testimony 6/22/11, 4), I had to agree to an arrangement that required I allow Mason to attend school in Aberdeen school district near Garrett's residence in order for Garrett to agree to pay \$150 for his neighbor Josie to watch Mason before and after school. (RP Testimony 6/22/11, 4, 31). This arrangement required me to drive Mason 20 miles every weekday morning to Cosmopolis where Garrett resided and drop him off at 7:00 am in addition to the 60 miles the other direction to Lacey and then drive back down to Cosmopolis when I got off work at 5:00 pm and then the 20 miles back to Montesano (RP Testimony 6/22/11, 4).

- g. January 2011-Mason and I moved into my father's residence in Hoquiam which was closer to Garrett's house and Mason's school. This was for the purpose of reducing my commuting costs and allowing me to save money for my anticipated relocation to Olympia at the end of Mason's school year , (RP Testimony 6/22/11, CP 2). At this time, my work schedule changed from having weekends off to having Sundays and Thursdays off. Due to

my new work schedule, Garrett and I both verbally agreed to a residential arrangement allowing Garrett 2 weekday overnight visitations, on Monday and Tuesdays, in exchange for allowing me to have Garrett's Saturday night overnight and Sunday visitation so that I could have Mason on both my days off (RP Testimony 6/22/11, 35, 38).

- h. March 2011- after receiving a letter informing me I did not get accepted into Eastern Washington University MSW Program, I informed Garrett via text message I was planning on relocating to Olympia to be closer to my job and closer to prospective schools offering Masters of Social Work Degree which he was agreeable to until I informed him I would need help with childcare (CP 5, 36).
- i. June 1, 2011-After unsuccessfully trying for two months to work out an agreement with Garrett to prevent the need for going to court (CP 35, 36, 37), I filed pro se, my official Notice of Intended Relocation along with a Petition to Modify Child Support and a Proposed Parenting Plan allowing Garrett more visitation than the original parenting plan on file.
- j. June 9th, 2011- Garrett, through his lawyer, filed an Objection to Relocation (CP 23-29) and a Petition for Modification of Parenting Plan (CP) and a Proposed Parenting Plan (CP 17-22).

- k. June 22, 2011- At the 2 ½ hour evidentiary hearing on relocation, the Honorable Judge Godfrey verbally denied relocation and changed primary residential placement to Garrett temporarily and ordered my child support obligation be set at \$50 in order to allow me to relocate so that I could pursue my Master's Degree and obtain gainful employment. There was also the instruction Garrett and I present the court with an agreed temporary parenting plan by the following Monday allowing me liberal visitation RP (Ruling 6/22/11, 2-7).
- l. June 27, 2011-Due to the inability of Garrett's lawyer and I in reaching an agreement to a parenting plan I felt was liberal, I had to ask the court for a continuance. I also indicated I intended on retaining counsel. The court granted the request but indicated its intent on changing the temporary residential placement to a permanent order if both parties could not reach an agreement. RP 6/27/11, 1-4.
- m. August 1, 2011-With counsel present on my behalf, both lawyers presented the court with separate parenting plans that each party was agreeable to. The court issued another continuance since there was not an agreed plan presented.

- n. August 8th-Both parties presented a separate version of a parenting plan that was agreeable to each party respectively as we were still unable to agree to all provisions. In addition, I presented a declaration in support of my version of the parenting plan to illustrate my genuine effort in supporting the courts stated goals from the June 22nd hearing. CP 77, 78, 79. The court vacated the prior residential and financial rulings from June 22nd and signed the original order denying relocation. The court set a parenting plan modification hearing for September 15th RP 8/8/11, 2-12.
- o. August 26th, 2011- Through my lawyer, I filed a motion for reconsideration of the relocation decision. CP 85-95.
- p. September 15th, 2011-At the hearing scheduled to determine the permanent residential placement of Mason, after opening arguments and a 1 hour recess, the court verbally denied the motion for reconsideration and allowed my counsel to withdraw from the case at the end of the hearing which the court continued to October 3rd for the purpose of verifying my attorney status. The court also entered a second order denying relocation. CP 104.
- q. October 15th, 2011-I filed my Notice of Appeal on the September 15th Order on Objection to Relocation

IV. Argument

A. The trial court erred in entering the Order on Objection to Petition for Relocation denying relocation in which the Findings of Fact entered did not reflect the conclusions of the oral opinion from the trial and are not supported by sufficient evidence in the record. In addition, the court considered the circumstances of both parties rather than the child and custodial parent only.

In the Washington State Supreme Court case decision in Horner vs. Horner, the court stated, “The Child Relocation Act (RCW 26.09.405-.560) creates a rebuttable presumption that relocation will be permitted. To rebut this presumption, an objecting party must demonstrate ‘that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors.’ and list the 11 factors that must be considered. The court goes on to say, “When this court considers whether a trial court abused its discretion in failing to document its consideration of the child relocation factors, we will ask two questions. Did the trial court enter specific findings of fact on each factor? If no, was substantial evidence presented in each factor, and do the trial court’s findings of fact and oral articulations reflect that it that it considered each factor? Only with such written documentation or oral articulation can we be certain that the trial court properly considered the

best interests of the child and the relocation person within the context of the competing interests and circumstances required by the CRA.” *In re marriage of Horner*, 151 Wash.2d 884, 93 P. 3d 124, (2004) In another appellate decision the court states, “Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise.” *In re marriage of Fahey* 164 Wn. App 42, 262 P. 3d 128 (2011) I am asking the court to review this issue under the abuse of discretion standard for lack of substantial evidence meeting the burden required to overcome the presumption in favor of allowing relocation.

The order denying relocation entered on August 8, 2011 (CP 81) deferred it basis for determination to the “reasons stated orally on the record”. When reviewing the Verbatim Report of the court’s ruling, it is evident that all 11 factors were not addressed. The court’s statement, “Am I going to allow you to relocate? No, not with the child. I am taking into account the issue of the child’s school, the move away from his friends and family here, the mother’s need to complete her education for employment purposes, and also the issue of the mother’s acquisition of debt at this point to help raise this child.” loosely addressed statutory factors 1, 6, 7 and 10 with the court’s own statements in that ruling acknowledging my need to relocate for educational and employment

purposes factors weighing in favor of allowing relocation for factors 7 and 10. CP 3, 4. Furthermore, the findings entered in the second Order on Objection to Relocation denying relocation entered at the September 15th, 2011 hearing were not supported by substantial evidence in the record. A court abuses its discretion if its decisions are based on untenable grounds. A court's decision is based on untenable grounds if the factual findings are unsupported by the record. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). Since the court abused its discretion in entering the following Findings of Fact in the September 15th order denying relocation, the order should be reversed allowing relocation.

i. Finding of Fact 2.3.1 (Statutory Factor 1)

Other than the initial comment made by the court denying relocation, there was no further explanation in the oral opinion from June from June 22nd to support the findings under this section. RP (6/22/11 Ruling, 4). Throughout later proceedings however, the court repeatedly asserted these findings in support of its decision to deny relocation although there was no evidence in the record to support these conclusions. RP (6/22/11 Ruling, 4); RP (8/8/11, 8); RP (9/15/11, 9, 10, 11, 12 and 13). In addition to this, the court also completely disregarded evidence that would have supported relocation as Mason and I both have significant social connections in the Olympia area. CP 2; RP (6/22/11 Testimony, 26

and 27). This is due in part to the fact most of my employment and education has been in the Olympia area as well as a large part of Mason's daycare experience was at the on-campus childcare center while I attended Evergreen in addition to the time we both lived in Olympia while I attended school. CP 2 & RP 27, 28. We also both have close friends that have relocated to the Olympia area from Grays Harbor and reside in close proximity to my proposed residence. CP 92.

The testimony in regards to family consisted of a brief comment that simply verified the presence of family in Grays Harbor RP(6/22/11 Testimony, 29) and another verifying my father as a support system for me RP (6/22/11 Testimony, 6). There was no specific testimony regarding any family Mason has in Grays Harbor through Garrett.

The testimony of the availability of friends Mason has in Grays Harbor through Garrett mainly focused on the children Mason knew primarily as a result of Mason being cared for by Garrett's neighbor Josie RP (6/22/11 Testimony, 45) . During testimony, I made the court aware that I had some concerns in regards to the care Mason was receiving while at Josie's that I previously expressed to Garrett with no resolution RP (6/22/11, Testimony, 17, 30 and 31) and already had plans on choosing a different childcare provider if the relocation was denied RP (6/22/11 Testimony, 30, 31). This naturally would have resulted in a significant

change in the amount of time Mason would be around these children regardless of the outcome of the relocation decision. Other than these children, there was no other indication that Garrett had facilitated any other significant friendships for Mason with other children from his school as he stated he didn't "know certain parents"(RP). He further stated, "and-you know, like Kim knows this one", which was the mother of a child who had invited Mason to his birthday the weekend before. RP (6/22/11 Testimony, 46). Furthermore, there wasn't any evidence present in the record showing a detrimental effect on the relationships that were present had the relocation been granted. The relocation to Olympia, a distance of approximately 55 miles, is not such an insurmountable distance to travel that it would have prevented Mason and I from maintaining regular contact with our friends and family in Grays Harbor. In addition, had the relocation been granted, the proposed parenting plan I submitted with my petition for relocation modified Garrett's residential time to include overnight visitations every weekend (CP 9, 10), instead of every other weekend which the original parenting plan allowed for. This would enable Mason to maintain regular contact with Garrett and the other social connections he had through Garrett.

There was evidence of a significant amount of friendships Mason has through my social ties in Grays Harbor. However, the court's action of

changing primary residential placement to Garrett has significantly reduced Mason's access to these well-established connections.

ii. Finding of Fact 2.3.2 (Statutory Factor 3)

Although, Garrett exercised residential time that deviated from the original parenting plan, the facts in the record do not support a conclusion of designating him as defacto primary residential parent.

In a decision affirming a trial court's decision to permit relocation, Division II Court of Appeals upheld the decision of the lower court in retaining the designation of the mother as the primary residential parent despite the argument of the father that he was the defacto parent despite evidence substantiating the children spent over 50% of their nights and total time with him due to the mother's work schedule. *In re marriage of Fahey*, 164 Wn. App 42, 262 P. 3d 128.

In the current case, unlike the Fahey case, the evidence in the record that indicates I did have Mason more than 50% of the nights during the week RP (Testimony June 22, 2011 at 18, 24, 40 and 41). However, the calculations repeatedly asserted by Garrett's lawyer showed Garrett having Mason more than 50% of the time (CP 28). These calculations included the half hour Garrett had Mason on the days I commuted to and from work and the respective day after and before that Mason was at school or in childcare. The court in Fahey found that "just because Lisa

was unavailable to personally care for the children on each and every day of her scheduled residential time when she worked did not extinguish her primary residential parenting status under the parenting plan.” This would negate the repeated assertions these time periods counted against me in the determination of which parent is entitled to primary residential status and, in effect, should have been counted towards my time in the calculations. *In re marriage of Fahey*, 164 Wn. App 42, 262 P. 3d 128.

The appellate court in *Fahey* also held that “contrary to Lawrence’s position, the parenting plan in place at the time of a proposed relocation is used to determine primary residential parenting status” and that the court does “not consider arguments rooted in contrary interpretations of residential parenting status under the original parenting plan”. After a thorough review of the record, both courts in *Fahey* came to the same conclusion of allowing the relocation despite the father’s assertions he should be considered the primary residential parent for purposes of deciding this matter. *In re marriage of Fahey*, 164 Wn. App 42, 262 P. 3d 128.

The decision in the *Fahey* case further clarified the previous decisions in the 2004 Division II Court of Appeals RFR case. The court in RFR found sufficient evidence to support the designation of primary residential custodian to the mother although the child spent time with both

parents. Furthermore, the mother's designation as primary custodial parent in the parenting plan at the time of relocation entitled her to the designation of primary residential custodian for the purposes of the relocation proceeding. *In re Parentage of RFR* 122 Wn.App 324, 93 P.3d 951 (2004).

In another case that clarifies the Legislature's intent on how residential time is to be calculated, the Appellate court concluded, "The term 'full day' is not defined in the statute." and "We do not believe, however, that the Legislature intended parents to transfer children, particularly young children, at midnight. It does not appear the Legislature intended changes of less than a full day to go uncounted." and "The only reasonable construction of 'full day' would seem to be changes in the residential schedule totaling 24 hours." *In re Marriage of Hansen* 81 Wn.App. 494, 914 P.2d 799 (1996). Although this determination was made in the context of a modification proceeding and the case at issue is technically a relocation proceeding, it has essentially turned into a modification proceeding as a result of the conclusions from the relocation decision and would be appropriate to apply here. In addition, there appears to be an absence of specific methodology in calculating actual residential time for the purposes of determining primary residential parenting status in a relocation proceeding.

In applying the methods for determining primary residential status from these previous cases, it is evident the trial courts conclusion designating Garrett as the “defacto primary custodian” is erroneous.

iii. Finding of Fact 2.3.3 (Statutory Factor 3)

Despite the court’s one brief comment in support of the findings under this section, RP (9/15/11, 10), there is absolutely no evidence in the record that supports the conclusion that disrupting contact between Mason and I would be any less detrimental to Mason than disrupting contact with Garrett. Although Garrett has maintained regular contact with Mason by exercising his regular visitation in addition to the extra time in accommodation of my work schedule, aside from Garrett’s testimony stating he talked to Mason’s teacher a couple of times, there was no other evidence in the record that indicated he was actively involved with Mason.

I have been the primary custodial parent of Mason having him a majority of the time for the 7 years previous to the trial. CP 77. I had been very actively involved in Mason’s life up to that point as I had worked at Mason’s daycare when I attended Evergreen and I have stayed actively involved in Mason’s schooling as I have volunteered at Mason’s school on a regular basis since then. CP 78.

The evidence on record is also contrary to the conclusion that Garrett “would only have occasional contact as visitation would

necessarily be greatly restricted if the move is allowed.” The proposed parenting plan I submitted to the court with my petition for relocation allows Garrett 2 overnight visitations every other weekend and one overnight visitation on the other weekends. CP 9. This actually allows Garrett more visitation than the current parenting plan on file. SCP, Parenting Plan 2006. The proposed parenting plan submitted by Garrett with his Petition for Modification allowed me two overnight visitations every other weekend (CP 18). It was a well-known fact throughout the proceedings that I work every Saturday until 5 pm so my actual residential time available to spend with Mason would be greatly restricted. RP (6/22/11 Testimony, 18, 24) & RP (6/27/11, 2). This also would have resulted in long periods between overnight visitations that Mason was not accustomed to. I also informed the court in my motion for reconsideration, due to the change in primary residential placement, my overnight visitations would be further impacted. (CP 92). When I started the UW MSW Program, I would be unable to exercise my overnight visitations on weekends I had class and, since the court did not feel midweek overnight visitations at my home in Olympia were appropriate, I would be unable to exercise overnight visitations with Mason.

iv. Finding of Fact 2.3.5 (Statutory Factor 5)

The conclusion of the court that Garrett had legitimate reason to oppose the relocation is erroneous as the other reasons “stated herein” in the Order on Objection to Relocation are not supported by facts present in the record. I also feel the court completely ignored facts present in the record that would have shown Garrett’s true motivations for opposing relocation were in bad faith.

From the beginning of this relocation case, I informed the court about testimony from the previous relocation case that was denied in 2009 which Garrett had testified he would not fight relocation if it was within Western Washington. CP 5 and RP (6/22/11 Testimony at 9). In response to clarify untrue statements in an affidavit Garrett’s submitted with his petition for modification (SCP, Motion and Affidavit), I submitted a copy of text messages sent between Garrett and I. In one of the conversations via text, Garrett stated he would not fight the relocation (CP 36) until I had mentioned I would need him to agree to help pay his portion of childcare based on the child support worksheet. CP 36, 37. I also testified about this particular conversation with Garrett during the trial. RP (6/22/11 Testimony, 8).

In my motion for reconsideration, I also informed the court about a voicemail I had discovered sometime after trial when I was cleaning out my voicemail archives that I was completely unaware that I had that

would have proven Garrett's true motivations for opposing the relocation (CP 83). The court denied my motion for reconsideration and so I was unable to admit this voicemail into evidence but the contents of that voicemail are included in my motion for reconsideration and were available to the court at the time this finding was entered. CP 83.

v. Factor 2.3.6 (Statutory Factor 6)

In addition to the social considerations already addressed in the argument for Factor 2.3.1, this factor includes a provision for the impact of relocation on Mason's education.

Other than the initial comment by the court, this topic was not further expounded upon in the oral ruling from June 22nd (CP 3, 4). There were only a couple statements in the testimony in regards to Mason's schooling and none supported a finding that a change of his school would be of any specific detriment to Mason. In fact, the testimony reflects that Mason has been the victim of bullying at Stevens where he attended which caused him to get into a fight with another student (RP 25, 46). There was testimony that Mason has some issues adjusting at the beginning of the school year but that once he adjusts to the new routine and structure, he does fine (CP 24, 25, 44, 45). The testimony also indicated that Mason's behavior issues at the beginning of the year weren't any different the first year he started at Stevens than they were his second year. There was also

no indication present in the record that continued attendance at this particular school would improve this behavior. CP 44,45. The record also reflected my plan to familiarize Mason with his new school and allow him to establish new friendships by enrolling him at the summer Y care program that was being housed at the school Mason would have attended. Aside from that, the only other testimony was my comment that Mason does well academically. CP 24.

vi. Factor 2.3.7(Statutory Factor 7)

The court's finding that this factor does not apply is completely erroneous as this was the sole basis for filing my motion to relocate (CP 2) and therefore would have to be addressed in the written findings. Entry of this finding is also contrary to the oral opinion of the trial court from the June 22nd hearing where the court acknowledged the quality of life, resources and opportunities that would be available to me if I moved to Olympia would be of benefit for both Mason and myself. RP (6/22/11 Ruling, 4, 6). All three provisions in Factor 7 greatly apply to my motivations for filing my motion to relocate which I will address individually.

1. Quality of Life

Facts present in the record support a finding that our quality of life would have significantly improved as both Mason and I have an

established social support network in Olympia. This is due in part to the relationships we have with close friends that have moved here, friends Mason and I both have from when I attended Evergreen and worked at the on-campus daycare Mason went to while I was in school and close friends I have due to my current job (CP 2, 92 & RP Testimony 6/22/11 26, 27, 28). Although we resided in Grays Harbor for the last few years, most of our life since starting my education at Evergreen, has been primarily centered around the connections we have in the Olympia area (CP 92). Instead of having to drive up to Olympia on my days off to visit with our friends, they would be readily available if we had been allowed to relocate.

The reduction in commuting for work and recreational purposes would also significantly impact our quality of life as there would be drastic reduction in my expenses leaving more expendable income for Mason and myself (CP 2). In addition, we both would have experienced a positive impact to our quality of life due to the reduction in commuting as Mason and I would have more time to spend with each other (CP 2). Furthermore, Mason would also experience an overall positive impact in the amount of quality time he could spend with both parents due to my changed work schedule (CP 88) had the relocation been granted. He would have been able to spend 2 full days during the week with me and 2 full

days on the weekend with Garrett and only 3 days in childcare. Changing custody to Garrett and allowing me weekend visitations would require Mason to be in childcare all 5 days during the week (CP 51, 52) and one day on the weekend when he was with me. RP (6/27/11, 2).

Allowing relocation would also have a further impact on Mason as he would have been able to begin the Y care program I enrolled him in (CP 5). This childcare program would have given Mason the structured environment he needed to help him transition back into school at the end of summer RP (6/22/11 Testimony, 17, 31). The Y care program would have been a more high quality childcare option than the unlicensed and untrained provider Garrett was paying for (CP 94).

2. Resources

After the hearing, I was informed of a 50% tuition award I was given by the Thurston County YMCA to help with Mason's daycare expenses. This would have allowed me to have access to the high quality structured daycare I felt was important for Mason (RP Testimony, 31) at a more affordable rate for both Garrett and I. This information was disclosed to the court before the entry of this finding (CP 88).

3. Opportunities

The court verbally recognized the educational and employment opportunities available in the Olympia area in its June 22nd oral ruling RP (6/22/11 Ruling, 4), yet still found that this Finding of Fact does not apply.

vii. Factor 2.3.8

The court concluded, “Does not apply.” The court did not address this particular finding in the oral opinion but it does apply as the proposed parenting plan I submitted with my motion for relocation did allow for the fostering and continuation of the child’s relationship with Garrett as I provided for overnight visitations every weekend (CP 9) instead of every other weekend as the existing parenting plan on file called for (Supp CP). In addition, based on the provisions of RCW 26.09.260 (5) allowing the non-custodial parent to request a minor modification, Garrett could have proposed a parenting plan that would allow him to have visitation every weekend on both days. The court would have been well within its bounds to grant this modification as the amount of additional residential time would have fell within the limits of subsections (a) and (c).

viii. Factor 2.3.10

The court concluded this factor does apply as follows: “The relocation would necessitate more daycare and travel expenses.” The court did make several comments in support of this conclusion with no evidence

in the record to substantiate this conclusion and evidence present to the contrary.

I testified at trial that I had Thursdays and Sundays off from work. Before entry of this order, I had informed the court my job was able to modify my work schedule by allowing me to have Wednesdays off as well without reducing my hours in order to allow me more days off to spend with Mason (CP 88). This would have resulted in Mason only needing to be in daycare 3 days per week had relocation been granted. In addition to only having to pay for 3 days of care, I also informed the court there would be a further reduction in the cost of child care due to the YMCA of Thurston County awarding me a 50% tuition discount (CP 88). However, due to the court's decision to deny relocation and subsequently award custody to Garrett, Garrett's work schedule of 8 until 5 Monday through Friday would have required Mason to be in daycare 5 days per week with no known tuition discount (CP 51, 52).

In addition to the added expense of paying my portion of the full time, full rate childcare to Garrett due to the custody modification, I would have had to pay the full childcare cost out of pocket while I worked on Saturdays (RP 6/27/11, 2) so that I could exercise overnight visitation on both nights on the weekend. Denying relocation and the subsequent

change in primary residential custody to Garrett would have actually been more expensive for me.

The conclusions to court came to in regards to additional transportation costs are erroneous as well. I now have to take two trips to Aberdeen to maintain contact with Mason for approximately 1 ½ days per week (one overnight) and Garrett has to make one to Olympia due to the court's decision to deny relocation and change primary residential custody to Garrett (CP 100). Had the court allowed relocation and awarded Garrett a minor modification of the parenting plan to include both days on the weekend in his residential time, this would have resulted in only one trip for both Garrett and I for him to exercise 2 full days (2 overnights) visitation.

Although this written finding does not accurately reflect the original financial concerns addressed by the court during the June 22nd oral ruling, it is necessary to address the courts conclusions from that opinion as they were repeatedly used to justify the courts decisions throughout the proceedings leading up to the entry of this order. One of the primary concerns of the court in regards to my financial situation was the credit card debt I disclosed in my financial declaration (RP Ruling 6/22/11, 5) that accompanied my child support worksheets. Although I do have credit card debt, denying relocation on this basis by making

assumptions that it has had or will have any detrimental effect on Mason or myself without any evidence in the record to support this conclusion is erroneous per the requirements of RCW 26.09.520. Further error is evident when considering my primary reason for requesting relocation was to reduce the commuting I had to do for my employment which would have significantly improved my financial situation (CP 2, RP Testimony 6/22/11, 6, 7).

The court also went so far as to acknowledge the benefit for Mason and I in allowing me to relocate to pursue employment and educational opportunities that would ultimately improve our financial situation (RP Ruling 6/22/11, 4). Yet, instead of granting the relocation, the court changed primary residential custody of Mason to Garrett as it concluded it was a necessity I go to school and get my Master's Degree so that I can "obtain employment, commensurate with raising this child." (VRP, 8/8/11, 8) and "become fully employed gainfully". Although it is obvious earning my Master's degree would have allowed me to earn more money, I had maintained a suitable lifestyle for both Mason and myself up to that point despite the excessive commuting costs on the income I was receiving at my current full time job (CP 92).

ix. The court erred in considering the circumstances of both parties in denying the relocation and the subsequent

change in primary residential custody to Garrett that resulted due to the denial of the relocation.

In the Supreme Court opinion of Horner, the court states in regards to the consideration of all statutory factors listed in RCW 26.09.520, “[C]onsideration of these factors is logical because they serve as a balancing test between many important and competing interests and circumstances involved in relocation matters. *Particularly important in this regard are the interests and circumstances of the relocating person.* Contrary to the trial court’s repeated references to the best interests of the child, *the standard for relocation decision is not only the best interests of the child.*” They go on to quote a statement from Division one of the Court of appeals that states, “Rather than contravene the traditional presumption that a fit parent will act in the best interest of the child,...the relocation statute establishes a rebuttable presumption that the relocation of the child will be allowed. Thus, the act both incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interest of her child. The burden of overcoming that presumption is on the objecting party, who can prevail only by demonstrating that the detrimental effect of the relocation upon the child outweighs the benefit of the change to *the child and the relocating person*” The Supreme Court, in giving its conclusion, states, “We adopt this reasoning and hold that trial

courts must determine whether the ‘detrimental effect of the relocation outweighs the benefit of the change to the child *and* the relocating person’ “ with no mention of the consideration of the benefits and/or detriments to the non-relocating party *In re marriage of Horner*, 151 Wash.2d 884, 93 P. 3d 124, (2004).

Contrary to statutory and recently established case law, the trial court in its decision to deny relocation repeatedly emphasized the circumstances and needs of both parties rather than only that of Mason and myself. RP (6/22/11, 6), RP (8/8/11, 8, 9, 10), RP (9/15/11, 8.9.10, 11, 12)

The court also incorrectly emphasized Garrett’s financial situation in support of the parenting plan modification (RP 6/22/11 Ruling, 6) that was subsequent to the denial of the relocation. In the oral opinion, the court acknowledged the lack of financial information in the file in regards to Garrett’s income (RP Ruling 6/22/11, 5). Even if there had been evidence in the record to support Garrett’s claims of being “financially set”, the court can only consider the circumstances of the child or custodial parent per RCW 26.09.260 (1) as it states, “[T]he court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of fact that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the *child and the nonmoving party*”

Also, In determining whether substantial change in circumstances has occurred to justify custody modification, trial court must look only at circumstances of child or custodial parent and not those of noncustodial parent. *George v. Helliard* 62 Wn.App. 378, 814 P.2d 238 (1991). Case law dictates the “Fact that divorced husband's financial standing had improved greatly after award of custody of children to mother afforded no ground for award of their permanent custody to father, but merely required him to increase payments of support money to mother.” *Schorno v. Schorno* 26 Wash.2d 11, 172 P.2d 474 (1946) and “Under provisions of this section, which restricts the power of a court to modify a prior custody decree, changes in the circumstances of a noncustodial parent do not warrant a modification.” *Schuster v. Schuster* 90 Wash.2d 626, 585 P.2d 130 (1978).

B. The trial court erred by ordering an indefinite temporary change in primary residential placement circumventing its obligation to enter an order addressing the factors required for parenting plan modification outlined in RCW 26.09.260. This denied both parties due process; the court further erred in vacating the all decisions from the original oral ruling, with the exclusion of the relocation decision, which will prevent the moving party from obtaining a fair trial at the modification hearing that is pending the outcome of the appeal decision.

The most relevant case that addresses the question of whether or not courts can impose a temporary parenting plan in lieu of a permanent plan and reserve final disposition of parenting issues for a specified period of time pending significant changes that are expected to occur in the lives of the parents is the Division One Court Possinger case where they concluded, “the trial court is not precluded by the Parenting Act from exercising its traditional equitable power derived from common law to defer permanent decisionmaking with respect to parenting issues for a specified period of time following entry of the decree of dissolution of marriage.” *In re Marriage of Possinger*, 105 Wn. App. 326, 337, 19 P.3d 1109 (2001). The court affirmed the lower courts imposition of a temporary parenting plan in this case. However, I was unable to find any cases outside of dissolution proceedings that addressed whether or not courts can sua sponte order temporary parenting plans when there is no pending court action. Furthermore, case law mandates after a trial court enters a final parenting plan, and neither party appeals it, the plan can be modified only under RCW 26 .09.260. *In re Parentage of Schroeder*, 106 Wn.App. 343, 350, 22 P.3d 1280 (2001)

- i. The court’s decision to order an indefinite change in primary residential custody without addressing the petition for modification resulted in an

impermissible modification to the existing parenting plan.

The cases that most closely address this issue are the Washington State Division Two Halls case and the Christel case. In the Halls case, the appellate court agreed that “that entry of the 10-year Temporary Order changing primary residential placement from the mother to the father was actually an impermissible, permanent parenting plan modification” because it had a permanent effect on the existing parenting plan without regard for the consideration of factors set forth in RCW 26.09.260. *In re Custody of Halls* 109 P.3d 15 (2005). In the Christel case, the appellate court also found there to be a permanent effect on the parenting plan based on the language used by the trial court to restrict the mother’s right to move and to award temporary custody to the father while they participate in dispute resolution if the mother changed residence *In re Marriage of Christel* 101 Wash. App. 13, 1 P.3d 600 (2000). The appellate court in both these cases vacated the trial court’s decision stating they were an impermissible modification of the parenting plan because there was no motion made in either case to modify the parenting plan. In the Christel case, the court defined that a modification “occurs when a party’s rights are either extended beyond or reduced from those originally intended in the decree” and stated “The order on its face imposes new limits on the

rights of the parents”. They also stated, “In addition, the language is clearly intended to apply into the future. It has all of the characteristics of a permanent change rather than a temporary order. The language used by the court amounts to a modification of the parenting plan.” and that, “The language of the court is prospective and permanent.” *In re Marriage of Christel* 101 Wash. App. 13, 1 P.3d 600 (2000). Furthermore in RCW 26.09.197, in setting forth criteria for the courts issuance of a temporary parenting plan, there is language that indicates a temporary parenting plan is to be issued only while an action is pending.

Unlike the previous appellate cases, there was a parenting plan submitted in this current case but the court rendered it null by not using it as a basis for the custody modification. Instead, the court decided on imposing a “temporary” parenting plan changing primary placement of Mason to Garrett (CP 3, 4) to allow me to relocate to Olympia and obtain my Master’s Degree in Social Work and obtain a job in my field of study (CP 4). The court reserved the right to review the decision every year and arbitrarily alter the plan if deemed “appropriate at that time” taking into account Mason’s performance in school and “[my] situation” and seriously consider moving Mason with me where I wished to relocate “a year or two after [I] complete this program” (CP 5). In addition to the “one or two years” after the completion of my program, I had indicated it may

take 2-3 times of applying before I would even get accepted (RP Testimony 6/22/11, 13) in which would mean it may be potentially 4 years before I started the program. All of this would be in addition to the time it would take to complete the actual 3-year part-time program (CP 91). This would have meant that I may not have been eligible to have this decision reviewed for 9 years. At that point, Mason would be very well established in the Aberdeen School District as well as in his father's household which ultimately would result in the valid conclusion of the court that a change in residence for Mason would not be appropriate at that time nor in Mason's best interest. The court, in a later opinion further clarified its ulterior motive of putting me and Garrett on "equal footing" in order to determine if integration to a different atmosphere would be appropriate (RP 8/22/11, 8). At that point, Garrett and I would not have been on "equal footing" as he would have been the custodial parent for a larger portion of Mason's life and would also be the parent who had current custody of Mason. This would have not have allowed me to have a fair chance at getting custody of my son back.

Based on the Christel rationale, the action of the court in awarding temporary custody to Garrett qualifies as a modification as my custodial parental rights were severely impacted by the change in custody. Furthermore, the court's decision essentially had a permanent effect on the

parenting plan because there was no defined time period it was to be in effect and the conditions of its duration were based on arbitrary provisions and it was not based on any pending court action as the relocation had been denied at that point (RP Ruling 6/22/11, 3). Therefore, the court's decision to temporarily change primary residential custody to Garrett in order to allow me to obtain my Master's Degree was an impermissible parenting plan modification.

- ii. By labeling the parenting plan modification "temporary" the court circumvented its obligation to enter a formal order specifically addressing the factors outlined in RCW 26.09.260 in changing primary residential custody which are required to ensure due process in a modification proceeding.

Normally, there must be an adequate cause hearing to justify a hearing on modification per RCW 26.09.270. A showing of adequate cause requires more than prima facie allegations, *In re Custody of B.J.B.*, 146 Wn.App. 1, 189 P.3d 800 (2008), review denied, 165 Wn.2d 1037, 205 P.3d 131 (2009). RCW 26.09.260(6) allows provisions for the non-moving party in a relocation proceeding to file for a parenting plan modification without an adequate cause hearing *so long as the relocation is being pursued*. However, the petition to relocate is not to be used as the sole

basis for changing custody. The trial court is to first make a decision on the relocation and then only after denying the relocation can it enter a decision on the petition for modification. If the relocation is not being pursued at that point, 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). *In re Marriage of Grigsby* 112 Wash.App. 1, 57 P.3d 1166 (2002). This established process mandated by statute did not occur in my case preventing due process.

During the trial in the present case, I indicated several times I would not relocate if the relocation was denied (RP Testimony 6/22/11, 26, 27, 30, 31). Instead of following the process outlined in RCW 26.09.260(2) and requiring Garrett to show adequate cause to justify modification, the court verbally ordered a temporary change of primary residential placement of Mason to Garrett (RP Ruling 6/22/11, 3, 4). Although the court vaguely addressed factor (C) of this statute in its oral opinion, the evidence in the record does not show a significant change in circumstances required to modify the parenting plan.

From the oral ruling, it appears the court emphasized my acquisition of credit card debt (RP Ruling 6/22/11, 4) as part of its basis for changing primary residential placement. Aside from the courts examination of me at

trial, there was no evidence presented regarding this debt or any allegations made by the other party that its presence was negatively impacting my ability to provide for Mason. The court apparently ascertained information in regards to my debt from the financial sheets I was required to submit with my petition to modify child support (RP Ruling 6/22/11, 5). During the courts examination however, I testified to having fluctuating credit card debt as far back as when I was attending Grays Harbor College (RP Testimony 6/22/11, 36). This testimony does not support a conclusion that a significant change of circumstances had occurred. Furthermore, since there was no evidence presented that this debt was negatively impacting Mason's well-being, the best interest standard for modification had not been met.

Another reason the court cited for modifying the parenting plan was the need for me to complete my education to allow me to become gainfully employed (RP Ruling 6/22/11, 4). Although earning my Master's degree would allow me to obtain a higher paying job which would result in a higher standard of living for Mason and I, there was testimony in the record stating my current employment situation was full time and I was making between \$10 and \$13 per hour and was able to work overtime if needed (RP Testimony 6/22/11, 32). The court also concluded the amount of time involved in me going to school and working

would have put a strain on both Mason and I (RP 8/8/11, 8). Due to the fact I was a full time student earning my Bachelor's degree and working at the time the original parenting plan was entered in 2006 and the MSW program I am trying to get in to is only part-time and on weekends, there is no basis to support a finding that my participation in my education and employment is a significant change in circumstance detrimental to Mason to warrant a change in primary residential placement.

Another issue that arises from the court's failure to enter a written order addressing the custody modification, which prevents due process, is that both parties as well as the court would have no remedy for seeking amendment or reversal of the court's decision because amending or reversing of an oral ruling which has not been reduced to writing is outside scope of CR 52 and CR 59. *Hubbard v. Scroggin* 68 Wash.App. 883, 846 P.2d 580 (1993), reconsideration denied, review denied 122 Wash.2d 1004, 859 P.2d 602.

Further error becomes evident when the court, on its own initiative, vacated the residential and financial rulings in the oral opinion from June 22nd without written entry of an order of those rulings. CR 59 (d) states, "Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a

party.” There was no entry of a written order at that point to trigger the 10 day time limit to effectively conclude the courts August 8th motion to vacate its previous rulings was timely.

- iii. The court abused its discretion in vacating the residential and financial provisions and scheduling a modification hearing without vacating the relocation decision after it was aware I had relocated which will prejudicially affect the outcome of that hearing.

CR 59(d) states, “Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party.” and CR 59 (a) furthermore states, “On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, *or on some of the issues when such issues are clearly and fairly separable and distinct*, or any other decision or order may be vacated and reconsideration granted.”

The ruling to change primary residential custody to Garrett was intertwined in the decision to deny the relocation of Mason so that I could accomplish the courts stated goals of allowing me to relocate in order to improve my financial situation to eventually regain custody of Mason and

therefore were not “clearly and fairly separable and distinct”. A limitation of issues on retrial should only be imposed where the issue to be retried is so distinct and separable from the other issues that a trial of that issue alone can take place without injustice or complication. *Cramer v. Bock*, 21 Wn.2d 13, 149 P.2d 525 (1944). As a result of the June 22nd ruling, I relocated in compliance with the court verbalized expectations that I do so (CP 86, RP 8/8/11, 3) and the court was well informed of this fact at the time it vacated the other rulings. In order to have a fair chance at retaining custody of Mason at the pending modification hearing, I would have had to break my lease and move back to Grays Harbor. In doing so, I would have had to forfeit my housing assistance and I would then have bad rental history. This would make it harder for me to secure adequate housing for Mason and I which would make it even harder for me to regain custody of Mason.

C. The court’s words and conduct throughout the proceedings demonstrate an obvious manifestation of bias and/or prejudice in violation of several of the rules under Canon 2 of the Code of judicial Conduct that warrant disqualification of the current judge in this case to ensure a fair trial under Rule 2.11 (A) under that Canon.

Rule 2.2 of the Washington State Code of Judicial Conduct states, “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” and comment [1] under this rule further states, “To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.” Rule 2.3 (b) “ A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.” Comment [1] under this rule states, “A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.” Comment [2] under that rule further states, “Examples of manifestations of bias or prejudice include but are not limited to...threatening, intimidating, or hostile acts;” Furthermore, Rule 2.6 (A) states, “A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.” and (B) states, “Consistent with controlling court rules, a judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces any party into settlement.” with comment [1] under this rule stating, “The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures

protecting the right to be heard are observed.” Rule 2.11 (A) states, “A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:” and it goes on to list specific conditions requiring disqualification. None of the specific qualifications apply to my current case but Comment [1] under this section further states, “[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply.”

Throughout the proceedings, the court made comments indicating the decision to deny relocation would not be changed (RP 6/27/11, 3) even though it made very clear, after the original hearing on June 22nd, the decision on custody modification could and would be changed from the temporary order to a permanent order if I did not agree to a parenting plan (RP 6/27/11, 3). As a result of the court's decision to deny relocation and change primary residential placement of Mason to Garrett at the June 22nd hearing, the court gave instruction that Garrett and I come to an agreed parenting plan by Monday June 27th (RP Ruling 6/22/11, 7) After only having two business days to accomplish this, I had to inform the court we were unable to agree to a parenting plan as I did not feel the parenting plan Garrett was agreeable to would serve Mason's best

interest. I also informed the court at this time I would like time to retain a lawyer. In response to this, the court addressed me specifically in stating, “I am not changing my mind.” and “If I am forced into a position, I can assure you that I am going to be required to enter a permanent order” and “So you need to discuss that with your lawyer. Because if forced to write and eliminate the word temporary, I will.” and, “I am either going to sign an order that says temporary or I am going to sign an order that says permanent...I am not changing my mind.” and further stated, “There is an old statement, be careful what you ask for.” (RP 6/27/11, 3). The court made this same statement direct at me at the September 15th hearing (RP 9/15/11, 13) At the hearing on August 8th, the court made good on these threats (RP 8/8/11, 11) despite my genuine efforts to negotiate a parenting plan Garrett would agree to that would accomplish the court’s stated goal of allowing my liberal visitation (RP 8/8/11, 11, CP 77-79).

By repeated threats of the court in regards to eliminating the temporary provisions of its original ruling and the eventual vacating of that ruling, the court, in both word and conduct manifested bias in violation of Rule 2.3 (B) and, in violation of Rule 2.6 (B), acted in a manner that influenced me to submit a parenting plan that I did not feel was in Mason’s best interest in order for me to retain the chance to potentially regain custody of Mason at some point in the future. In addition, these comments of the

court reflect and attitude that is contrary to that of an objective and open-minded judge that is required by Rule 2.2 to ensure impartiality and fairness for all parties.

The court also did not uphold its requirement of according me the right to be heard under Rule 2.6 [A]. At several points during the hearings that followed the original trial, I attempted to object to statements made by the court to no avail. One of the hearings I was pro se and the court refused to let me speak after acknowledging my attempt to do so by raising my hand (RP 6/27/11, 3). The next incident was at the August 8th hearing when the court addressed my physical manifestation of shaking my head in objection to incorrect statements made by the court (RP 8/8/11, 8) and later during that proceeding where I actually spoke up (RP 8/8/11, 10). At the final hearing on September 15th, the court also refused to allow me to speak despite my efforts (RP 9/15/11, 17).

The obvious lack of adherence to the rules set forth in Canon 2 of the Judicial Code of Conduct, especially that of Rule 2.3, require the current judge to be disqualified from presiding over further matters in this case to ensure a fair trial.

D. Award of Attorney Fees and Expenses

If this court finds merit in the issue I have brought on appeal, I am requesting my expenses for preparing and filing this appeal be awarded

per RAP rule 18.1. Garrett's testimony indicates he feels he is financially set RP. (6/22/11 Testimony, 42, 53). The record also indicates my current less-than-ideal debt situation the court used as a basis to deny my relocation and change primary residential status to Garrett is due in part to having to pay lawyer fees from a previous case regarding relocation that Garrett objected to. RP (6/22/11 Testimony, 35, 36). In determining attorney fees on appeal, the court must consider the merit of the issue and the financial resources of both parties. *In re King*, 66 Wash. App. 134, 139,831 P.2d 1094 (1992).

V. Conclusion

Throughout the proceedings, the court clearly abused its discretion by disregarding statutorily established procedures and not basing its decisions on the evidence in the record which prevented me from having a fair trial. The court's disregard for many of the rules in Canon 2 of the Code of Judicial Conduct has caused me to question the judge's impartiality and I strongly feel this has and will prevent me from receiving a fair trial. I am asking that the decision to deny relocation be reversed and remanded to trial court to a different judge to enter an order allowing the relocation of Mason. I would also like a hearing to address minor modification of the current parenting plan to allow Garrett more time with Mason on the weekends than is currently allowed in the

parenting plan and for the entry of a modified child support order to include childcare.

July 5, 2012.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Kim Briggs", written over a horizontal line.

Kimberly Briggs, Pro Se
3800 14th Avenue SE, D180
Lacey, WA 98503