

FILED
COURT OF APPEALS
DIVISION II
2012 AUG 14 AM 11:38
STATE OF WASHINGTON
BY 
DEPUTY

No. 42698-6-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

KIMBERLY BRIGGS,
Appellant,

v.

GARRETT LAIL,
Respondent.

BRIEF OF RESPONDENT

Jack B. Micheau
Attorney for Respondent

PO Box 2019
Cosmopolis WA 98537
(360) 532-7473
WSBA No. 13784

TABLE OF CONTENTS

	PAGE
I. STATEMENT OF THE ISSUES	1
1. Did the trial judge abuse judicial discretion by denying the appellant's mother's relocation petition?	
2. Did the trial judge abuse judicial discretion by proceeding on the respondent father's custody modification petition, entering a temporary order which effectively changed only the custodial designation, and ordering a custody modification trial date be set?	
3. Is either party entitled to an award of attorney fees and costs on appeal?	
II. STATEMENT OF THE CASE	2
III. LAW AND ARGUMENT	
1. The denial of the appellant mother's relocation petition followed statutory procedures and considerations, and was within the discretion of the trial judge.	9
2. The entry of a temporary custody order placing the minor child in the care and custody of the respondent father, consistent with the recent practices of the parties but inconsistent with the prior parenting plan, followed statutory procedures and considerations, and was within the discretion of the trial judge.	18
3. Appellant is not entitled to an award of attorney fees on appeal.	25
IV. CONCLUSION	27

TABLE OF AUTHORITIES

<u>STATE CASES</u>	PAGE
<i>Clark v. Gunter</i> , 112 Wn.App. 805 (2002)	23
<i>Marriage of Croley</i> , 91 Wn.2d 288 (1978)	12
<i>Marriage of Faley</i> , 164 Wn.App. 42, 56 (2011)	13, 16
<i>State ex rel. M.M.G. v. Graham</i> , 159 Wn.2d 623, 638 (2007)	26
<i>Marriage of Grigsby</i> , 112 Wn.App. 1, 9 (2002)	13
<i>Marriage of Homer</i> , 151 Wn.2d 884, 894, 895, 896 (2004)	11-12, 13
<i>Marriage of Horner</i> , 151 Wn.2d 884, 893 (2004)	13
<i>Marriage of King</i> , 66 Wn.App. 134, 139 (1992)	25
<i>Marriage of McDole</i> , 122 Wn.2d 604, 610 (1993)	13
<i>Marriage of Possinger</i> , 105 Wn.App. 326 (2001)	20
<i>Marriage of Velickoff</i> , 95 Wn.App. 346, 354 (1998)	24
<i>Parentage of Schroeder</i> , 106 Wn.App. 343, 349 (2001)	24
<i>Marriage of Zigler</i> , 154 Wn.App. 803, 813 (2010)	23
 <u>STATUTES</u>	
RCW 26.09.520	9-11
RCW 26.09.191	10
RCW 26.09.260(1)(2)	14, 17, 20-22
RCW 26.09.270	23

I. Statement of Issues

1. Did the trial judge abuse judicial discretion by denying the appellant mother's relocation petition?
2. Did the trial judge abuse judicial discretion by proceeding on the respondent father's custody modification petition, entering a temporary order which effectively changed only the custodial designation, and ordering a custody modification trial date be set?
3. Is either party entitled to an award of attorney fees and costs on appeal?

II. Statement of the Case

Appellant Kim Briggs (Appellant/Briggs/mother) and Respondent Garrett Lail (Respondent/Lail/father) were never married, but did have a child together—Mason Lail, born February 6, 2004. After the parties separated, a parentage action was filed, resulting in a Final Parenting Plan being entered on May 15, 2006. CP 105-114. Custody initially was with the mother, with the father designated to have alternate weekend visitations from Friday evening to Sunday evening, together with Sunday afternoons on the intervening weeks, and additional holidays. CP107-109. The parties then both resided in the Cosmopolis, Washington area.

In 2009 Briggs gave notice of her intent to relocate, with Mason, to Spokane. Lail objected, a hearing was held, and the requested relocation denied. CP 116-120. Extensive written findings were entered as part of the Order on Objection to Relocation, which included the father's extensive role in the child's life, the disruption to the contact between father and child that would occur if the relocation was allowed, the fact that the mother proposed "to relocate at the far end of the state, to live with a man she had met over the internet just a few weeks ago, to accept employment at a low rate of pay, in a job that should be readily

available to her virtually anywhere in the state”, and “the mother, as a further demonstration of bad faith, immediately violated the restraining order preventing her from removing the minor child from Grays Harbor County.” CP 118. Additional other findings were entered, generally following the statutory framework, including findings that several of the statutory factors did not apply. CP 117-119. Briggs did not appeal, and returned from Spokane to reside in Grays Harbor County within a few weeks after the relocation was denied.

On June 2, 2011, Briggs filed another Notice of Intended Relocation. CP 1-3. This time she stated her intent to move from her father’s residence in Hoquiam, to Lacey, where she was employed. CP 2. Briggs did not mention that her residence was already in a different town, Hoquiam as opposed to Cosmopolis, and she was thus already in a different school district than the original Parenting Plan. Briggs filed her Notice of Intended Relocation on June 2, 2011. CP 1-3. She did not have, or perhaps refused to provide, either a new residential address or a new mailing address in her notice. CP 3.

Briggs alleged financial hardship, and indicated that she had been working in the Lacey area for a year and a half, while

commuting "15+ hours" each week from various locations in Grays Harbor County, "which greatly reduces the amount of quality time I have to spend with Mason". CP 2. Fifteen hours of drive time per work week, divided between five trips from locations in Grays Harbor to Lacey, and five trips back, equals an apparent commute time of approximately one and one half hours each way.

Lail filed his Objection to Relocation, CP 23-30, and a separate Petition for Modification of the Parenting Plan, CP 121-127, on June 10, 2011. His stated bases included: that (a)his actual residential time with Mason had substantially increased since immediately following the 2009 denied relocation request, by agreement of the parties, to the point where he was enjoying actual custody of Mason four days out of every seven; resulting in (b)integration into his home in contravention to the terms of the existing Parenting Plan; (c)the strengthening of bonds between the father and child as de facto primary custodian; and the (d)creation of a safe and secure environment for the child centered around the father's home and custody as compared to the mother's ever-changing circumstances being a detriment to the well-being of the child. Lail also pointed out that Mason would often be tardy or absent at school on Briggs' residential days, and would often not

turn in homework on those days. CP 23-30, CP 121-127. Additional facts regarding the relocation statutory considerations and the modification factors were also summarized in Lail's hearing memorandum filed June 20, 2011. CP 128-135. The existing parenting plan did not include any language giving either parent a preferential right or obligation to care for Mason while the other parent was working or otherwise occupied. CP 105-114.

A temporary, or preliminary, hearing on both the relocation request and the modification petition occurred before Judge Gordon Godfrey on June 22, 2011. Both parties testified. 6/22/2011 RP-Testimony of Kimberly Briggs and Garrett Lail. An oral ruling was made denying the relocation, and denying the modification, but also entering a temporary parenting plan leaving Mason with the father subject to review in one year. 6/22/2011 RP-Court's Ruling, p.3, l.21-p.4, l.10. Judge Godfrey expressly based this decision on "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 mother's acquisition of debt." 6/22/2011 RP-Court's Ruling, p. 4, l. 1-5. Judge Godfrey admittedly did not walk the parties through the numerous statutory relocation

factors, but he did explain the bases for his decision at some length. 6/22/2011 RP-Court's Ruling, p.2-7.

Due to several delays requested or caused by Briggs, no written order derived from the June 22 oral decision was entered until August 8, 2011. CP 81-82. Temporary custody of Mason was reaffirmed to remain with Garrett on that date, pending trial on the modification petition, which was allowed to proceed. CP 81. Once again, Judge Godfrey offered extensive oral colloquy amounting to findings of fact, and explaining his decision, but not directly addressing the statutory relocation factors. 8/8/2011 RP, p.7-12.

While the case was waiting for a September 15, 2011 date to enter additional formal written orders, Briggs filed for reconsideration of the June and August decisions. RP 83-84. Briggs' declaration in support of her motion improperly raised several factual allegations known to her at the time of June 22, 2011 trial, but not previously presented. RP 85-95. Briggs' appeal brief inappropriately made several references to these untimely presented 'facts' as reasons the trial court decision should be reversed.

Two written orders were entered on September 15, 2011. A hand-written order was entered reflecting oral rulings of the court of

that same date, finding adequate cause for the father's modification petition to proceed, requiring a trial date thereon be set, and setting forth temporary parenting plan/visitation terms. RP 98-99. A formal, mandatory form Order on Objection to Relocation was also entered. RP 100-103. The first ten statutory relocation factors were all listed, and some specific findings made, in that order. CP 101-102. The term 'does not apply' was perhaps inartfully used with respect to findings on some of the statutory relocation factors, where perhaps an equal balance, or no finding at all, should have been designated. Once again, Judge Godfrey discussed his findings and rationale at length on the record, but admittedly did not walk the parties through the statutory relocation factors. 9/15/2011 RP p.7-14, p.15-17, p.17-19. The clerk's minutes of the proceedings of September 15, 2011 has been provided. CP 104. The written findings did in some way address each of the first ten statutory relocation factors.

The trial on the modification petition was set for December 16, 2011, with notice of that date filed and sent to the parties on October 13, 2011. Briggs filed her Notice of Appeal, dated October 12, 2011, on that same date. The December modification trial date was later struck due to the pending appeal.

The Notice of Appeal indicated only that the September 15, 2011 Order on Objection to Relocation was being appealed. Briggs' appellate brief nevertheless seemingly also challenges the minimal actions taken on the modification petition.

III. Law and Argument

1. The denial of the appellant mother's relocation petition followed statutory procedures and considerations, and was within the discretion of the trial judge.

The primary issue raised on appeal is whether the trial judge properly and permissibly denied the mother's relocation request. The short notice and sketchy information provided by the mother in her notice of intended relocation is not at issue, only the basis for the judge's determination after hearing. Appellant Briggs literally argues that the trial court committed reversible error with respect to each and every listed statutory factor.

It is significant to point out that the appellant mother repeatedly attempts to bolster her appellate arguments by referring to alleged 'facts' never presented at the relocation hearing, but only presented for the first time many weeks later, in her own, self-serving declaration in support of a motion for reconsideration. CP 85-95. Any 'facts' from that post-hearing declaration should not be properly considered on appeal.

RCW 26.09.520 sets forth the statutory bases for a relocation petition determination. That statute provides, in its entirety, as follows:

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

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

(2) Prior agreements of the parties;

(3) Whether disrupting the contact between the child the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;

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

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

(6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical,

educational, and emotional development, taking into consideration any special needs of the child;

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

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

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

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

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

The State Supreme court has provided guidance on application of the statutory factors. In Marriage of Horner, 151 Wn.2d 884 (2004), a case where the trial judge was found to have abused its discretion when it denied a relocation request without considering and balancing all eleven statutory factors on the record, the Court **reasoned**:

In reviewing whether the trial court abused its discretion, we first consider whether trial courts must consider all of the child relocation factors. We hold that they must. The factors are conjunctive because "and" separates factors 10 and 11. The factors are

equally important because they are neither weighted nor listed in any particular order. ... Finally, consideration of all the factors is logical because they serve as a balancing test between many important and competing interests and circumstances involved in relocation matters.

151 Wn.2d at 894.

The Supreme Court, in its reasoning, went on to discuss the rebuttable presumption in favor of relocation, before **holding** “that the trial courts must determine whether the “detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person.” ... We further require that the trial courts must consider each of the child relocation factors.” 151 Wn.2d at 895.

The Supreme Court went on to consider the manner in which trial courts must document their consideration of the statutory factors. It expressly stated: “**Ideally**, trial courts will enter findings of fact on each factor.” 151 Wn.2d at 895 (emphasis added). The court went on to recognize long-standing case law that it is not necessarily reversible error to fail to enter specific findings of fact on each factor. 151 Wn.2d at 896, citing *Marriage of Croley*, 91 Wn.2d 288 (1978).

The Court in *Horner* set forth a two-pronged test: “when this court considers whether a trial court abused its discretion in failing to document its considerations of the child relocation factors, we will ask two questions. Did the trial court enter specific findings of fact on each factor? If not, was substantial evidence presented on each factor, and do the trial court’s findings of fact **and oral articulations** reflect that it considered each factor?” 151 Wn.2d at 896 (emphasis added).

An appellate court shall defer to the trial court’s decision on a relocation request or objection, unless that decision is manifestly unreasonable or is based on untenable grounds or untenable reasons under the abuse of discretion standard. *Marriage of Fahey*, 164 Wn.App. 42, 56 (2011); *Marriage of Horner*, 151 Wn.2d 884, 893 (2004). Findings of facts are to be upheld by a reviewing court if they are supported by substantial evidence in the record. *Marriage of Grigsby*, 112 Wn.App. 1, 9 (2002); *Marriage of McDole*, 122 Wn.2d 604 610 (1993). The party challenging the findings of fact bears the burden of demonstrating that substantial evidence does not exist. *Grigsby*, 112 Wn.App. at 9.

In the case at hand, it is conceded that the trial judge did not, at any of several hearings, walk through a point by point discussion of the eleven statutory relocation factors. It is not conceded, however, that the record is so deficient as to justify either a finding of abuse of judicial discretion, or to otherwise call for reversal of the trial court decision. Again, in analyzing the record on appeal, it is also important to disregard many allegations of 'fact' that appellant Briggs failed to offer at the actual hearing.

In the case at hand, respondent father Lail did file a written objection to the requested relocation which did include reference and discussion to each of the statutory factors. CP 23-30. Lail also filed a hearing memorandum which discussed each of the statutory factors. CP 128-135. The September 15, 2011 mandatory form Order on Objection to Relocation also contained express reference to the first ten of the eleven statutory factors. Factor eleven was not reference in the Order because it was not a temporary relocation order, but was a temporary order on the custody modification petition. CP 100-103. The mother had, in fact, already relocated, without the child, according to the statement of her own attorney as of the August 8, 2011 hearing. 8/8/2011 RP p.3,l.8.

Aside from these references to facts pertaining to the statutory factors in the actual pleadings, the testimonial hearing included several statements applicable to several of the factors. The appellant even cites several aspects of such testimony in her brief, although, naturally, she construes the interpretation of the evidence in her favor.

More importantly, due to delay in entering actual orders after the June 22, 2011 hearing, the trial judge was afforded multiple opportunities to orally articulate his reasoning, findings, and decision. Judge Godfrey took full advantage of those opportunities on three separate dates—at the conclusion of testimony on June 22, on August 8, 2011, and on September 15, 2011.

On June 22, 2011, Judge Godfrey stated he was “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...” 6/22/2011 RP p.4, l.1-5. The mother’s debt situation, while perhaps an unusual consideration, was, in fact, a primary justification presented by the mother in support of her relocation request. CP 2.

On August 8, 2011, Judge Godfrey articulated in greater detail about each of those same considerations, 8/8/2011 RP p.7, l.24-p.8, l.9. He added: "This child had very significant connections with the father who has done what he's supposed to do as the father in this situation. He wanted the child maintained in the community with the same school, peers, family connections, et cetera. It only made rational common sense to encourage the young woman to get her education, to get her finances straight now, to maintain her relationship with this child and come back in a year when she has these matters straightened out... ." 8/8/2011 RP p.8, l.14-21. "You do what's in the best interest of the child. And the best interest of this child is that the mother become better educated and make more money to be able to provide a better atmosphere and better home for the child... ." 8/8/2011 RP p.9, l.14-17. It should be noted, that unlike the facts in Fahey, the existing Parenting Plan in this case **did not** contain any sort of language either obligating or permitting the non-custodial parent to provide child care outside of stated visitation hours. CP 105-114.

On September 15, 2011, Judge Godfrey further articulated his reasoning, findings, and decision. He noted that the matter came to court on short notice, "after the mother, in effect, had

already relocated.” 9/15/2011 RP p.8, l.6-7. He referenced the mother’s prior relocation request, “in essence, almost abandoning this child.” 9/15/2011 RP p.8, l.17-20. He noted “Both of these parents, it appears, have been very good parents for this child.” 9/15/2011 RP p.9, l.5-7. He noted the mother’s job involved varying work hours, not on a Monday through Friday 9 AM to 5 PM schedule, 9/15/2011 RP p.9, l.10-12, which would cause problems with school, and cause “substantial involvement with daycare”. 9/15/2011 RP p.9,l.12-15. He noted this would constitute a substantial change, to the detriment of the child, which “the evidence also established that this child has basically been raised in this community since birth, has had connections with the father’s family, there have been issues regarding the family participating in daycare for this child, you’ve had the child in the same school with his peers and all the rest of it.” 9/15/2011 RP p.9,l.15-21. He further noted it is a major change “when you’re going to move the child away from their peers that they have gone to school with, away from daycare and family connections that they have been with, interfere with the parental contact with the father, place the child in a transitory situation in order that the mother may better herself, whose got employment that varies hours that interfere and is going

to incur substantial daycare costs... I would say someone has to be deaf, dumb and blind to believe that that is not major interference..." 9/15/2011 RP p.10,l.20-p.11,l.5.

Clearly, Judge Godfrey was conducting a balancing test based on the statutory relocation factors. Clearly, Judge Godfrey was considering not only the best interests of the child, but also the best interests of the mother—even though she does not yet realize it, and even the best interests of the father. It is unfortunate that Judge Godfrey did not specifically orally articulate a finding, or lack of relevance, as to each of the eleven statutory factors, but given the available record, that was not a fatal error or abuse of discretion. The final written order, together with the transcripts of three different hearings, more than adequately addresses the applicability of the statutory factors to the situation at hand, and the required balancing of those factors, and the best interests of all concerned parties.

2. The entry of a temporary custody order placing the minor child in the care and custody of the respondent father, consistent with the recent practices of the parties but inconsistent with the prior parenting plan, followed statutory procedures and considerations, and was within the discretion of the trial judge.

The second major issue raised on appeal seemingly challenges the appropriateness of any action being taken on the respondent father's petition to modify custody.

Respondent Lail filed a Petition for Modification of Custody on June 10, 2011. CP 121-127. The stated bases for his request included that the child had already been integrated into his home in substantial deviation from the prior Parenting Plan, and that the child's environment should he continue to reside with the mother would be more detrimental than if there were an official change of custody. CP 123. At the June 22, 2011 hearing, the father offered a calendar documenting the time the child had been residing with the father during 2011. This exhibit was admitted. CP—Exhibits. The prior Parenting Plan did not contain any language either obligating or offering the opportunity for the father to spend extra time with the child when the mother was working or otherwise unavailable. CP 105-114. The father has never withdrawn his petition for modification of custody, and it has not arguably become moot as the mother has never withdrawn her request to relocate, and she has, in fact, relocated.

On June 22, 2011, after hearing the testimony of both parties on the relocation request, Judge Godfrey stated "Normally in a situation like this I would probably go with a modification, but I am not going to. I'm going to impose a temporary parenting plan... ." 6/22/2011 Court's Ruling RP p.4, l.7-10. He went on to outline factors that would be considered on review a year later, consistent with the sort of temporary parenting plan outlined as permissible in Marriage of Possinger, 105 Wn.App.326 (2001). On August 8, 2011, the oral orders of June 22, other than the denial of the relocation request, were all vacated and the modification petition set for trial, initially set for September 15. CP 93. When appellant's motion for reconsideration and other issues, including withdrawal of appellant's counsel due to conflict with client, consumed the proceedings of September 15, the custody modification trial was ordered to be reset. CP 98-99. Lest there be any doubt, a written finding of adequate cause to proceed was set forth in that same written order. CP 98-99.

RCW 26.09.260 sets forth the standards and trigger events for a modification of a custody order. The beginning of that statute reads as follows:

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

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

(a) The parents agree to the modification;

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

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

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of

custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

RCW 26.09.260 (1) and (2).

Much of the court's colloquy on the several hearing dates herein, as previously referenced, actually spoke very clearly to the statutory modification factors. There were substantial changes afoot in the mother's life, as evidenced by her own relocation request. The admitted evidence at the testimonial hearing clearly demonstrated that the child had, for some time, been spending the majority of available residential time with the father, and was integrated in the father's home, in contravention to the terms of the prior parenting plan. Many aspects of the mother's requested relocation would be detrimental to the child, and were therefore not in the child's best interests. As the trial judge observed at the first hearing, under these circumstances, ordinarily he would just go with a modification of custody. Without much question, except in the eyes of the mother, there was adequate cause to move ahead with the modification of custody.

Written temporary orders placing primary custody of the child with the father were entered on August 8, 2011, CP 81-82, and September 15, 2011. CP 98-99. The September 15 order expressly

premised the change of the custodial designation "... on the mother having already relocated, and the relocation of the child having been denied, and school having started... ." CP 98. The trial on the modification has not yet occurred because the mother filed this appeal before the scheduled trial date, staying all proceedings at the trial court level.

Temporary orders in conjunction with modification of custody petitions are clearly contemplated and permissible, as a statutory process requiring affidavits (evidence) and a finding of adequate cause is set forth. RCW 26.09.270.

As to the statutory bases factors raised by the respondent father, integration with consent is, by itself, a substantial change of circumstances, and the court then proceeds to a 'best interests of the child' analysis, including a comparison of the two living environments. Clark v. Gunter, 112 Wn.App. 805 (2002). A living environment can be considered to be detrimental to the well-being of the child without proof that damage or impairment caused by that environment exists. An environment may be detrimental even though its deleterious effects have not yet appeared. Marriage of Zigler, 154 Wn.App. 803, 813 (2010). A finding of detrimental effect

does not require a finding of parental unfitness. Marriage of Velickoff, 95 Wn.App. 346, 354 (1998).

Appellant Briggs alleges Judge Godfrey abused his discretion in entering the temporary orders changing the custodial designation. This court should not lose sight of the fact that only temporary orders are at issue, as the final modification trial never occurred due to Briggs filing her appeal on the relocation decision.

“The appellate court reviews the trial court’s rulings on residential provisions in a parenting plan for an abuse of discretion. ... A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. ... A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is **outside the range of acceptable choices**. ... A decision is based on untenable grounds if the findings are not supported by the record. ... Finally, a decision is based on untenable reasons if the court applies the wrong legal standard or the facts do not establish the legal requirements of the correct standard. ... Because of the trial court’s unique opportunity to observe the parties, the appellate court should be “extremely reluctant to disturb child placement dispositions.”

Parentage of Schroeder, 106 Wn.App. 343, 349 (2001).

Here, the trial court temporary orders pertaining to change of custody are unquestionably in compliance with the available

evidence and the statutory considerations. There was no arguable abuse of discretion. Even if the relocation decision might be remanded for further findings or other reasons, the temporary custody order should stand pending the final custody modification hearing.

3. *Appellant is not entitled to an award of attorney fees on appeal.*

Appellant Briggs includes in her brief a request for an award of attorney fees and costs on appeal. Briggs cites no authority for her request other than RAP 18.1, and a single family law case which she cites for reasons other than establishing a basis to award fees. In that case, the court did mention the possibility of an award of fees based on RCW 26.09.140, after the examination of both the arguable merits of the issues raised on appeal, and the financial resources of both parties. *Marriage of King*, 66 Wn.App.134, 139 (1992).

Briggs' brief seems to base her request entirely on her alleged or assumed need, and not at all on the merits of the issues she raised on appeal. It is important to note that the court in *King* clearly indicated an award of attorney fees is discretionary, and did not

award attorney fees or costs to either party, even though that appellant did establish a financial need. *Ibid.*

A party seeking an award of attorney fees on appeal must cite a specific legal basis for the request in their appellate brief. *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 638 (2007). Briggs did not comply with this requirement. The party seeking an award of attorney fees must also substantially prevail on the appeal, and show financial need. *Ibid.* Each of these elements await later determination as to success on appeal, or compliance with applicable rules.

Perhaps most significantly, however, actual incurrence of attorney fees is implicit in the rule. Otherwise there would be no need for an affidavit of fees and expenses. RAP 18.1(d). Briggs is pro se in her appeal, and thus has incurred no potentially reimbursable attorney fees on appeal. Her request should be summarily denied, even if she somehow prevails on the merits of the issues.

IV. CONCLUSION

While the trial court judge did not follow ideal practice of walking the parties through each of the eleven statutory factors required in reaching a relocation request decision, there is ample evidence in the record, both in the form of repeated oral explanations by the trial judge of his considerations, and in the written orders to support the decision. Given the facts of this case, and the unusual reasons offered by the mother in support of her request, the trial court did not abuse his discretion in ruling against the requested relocation.

The court properly and permissibly entered a temporary order modifying custody in favor of the father, which order recognized that the child had been integrated into the father's home in substantial deviation from the prior parenting plan, and the potential detriment to the child of the mother's circumstances as compared to the father's living environment. Adequate cause was properly found and the matter properly set for a final modification trial, which was delayed only due to the mother's filing of this appeal.

Appellant's request for attorney fees is inappropriate. She has not followed required procedure to date, and, more importantly, has

not incurred apparent fees on appeal as she has been acting pro se throughout out.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Micheau', written over a horizontal line.

JACK B. MICHEAU, WSBA #13784

FILED
COURT OF APPEALS
DIVISION II

2012 AUG 14 AM 11:38

STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KIMBERLY BRIGGS,

Appellate

NO. 42698-6-II

vs.

CERTIFICATE OF MAILING

GARRETT LAIL,

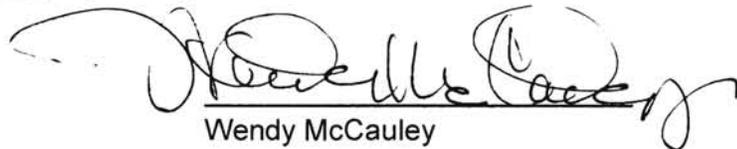
Respondent.

THE UNDERSIGNED, pursuant to CR 5(b), affirms that on the 13th day of August, 2012, she deposited in the mail at the United States Post Office, Cosmopolis, Washington, a copy of the Brief of Respondent to the following at their respective addresses set forth below:

Kimberly Briggs
3800 14th Ave. SE, #D180
Lacey, WA 98503

David Ponzoha
Clerk of the Court
Court of Appeals, Div II
950 Market Street, Ste 350
Tacoma WA 98402

DATED this 13th day of August, 2012.



Wendy McCauley
Paralegal