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No. 45273-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Marriage of:

JESSICA EMILY MATTSON (F/K/A STALKER), Respondent,

vs.

NICHOLAS DAVID STALKER, Appellant

Pierce County Superior Court
Cause Nos. 08-3-00030-2
The Honorable Judge Brian Tollefson

Appellant's Brief

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ASSIGNMENTS OF ERROR

1. Judge Brian Tollefson committed error in finding that the mother's change in work schedule was a substantial change of circumstances for a minor modification of the parenting plan.
2. Judge Brian Tollefson committed error in finding that the mother's remarriage was a substantial change of circumstances for a minor modification of the parenting plan.
3. Judge Brian Tollefson committed error in finding that the mother having a new child was a substantial change of circumstances for a minor modification of the parenting plan.
4. Judge Brian Tollefson committed error in finding that the mother's change in work schedule made the parenting plan impractical to follow.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the custodial parent's work schedule as a school teacher changes from a schedule of .6 (60% of full time) 2.5 days a week to full time 5 days a week and she volunteers to advise a club causing her to lose about 44 minutes a day 2 to 3 time a week with her children during the school year; remarries; and has a new child, does that constitute a substantial change in circumstances for a minor modification of the parenting plan?
2. When the custodial parent's work schedule as a school teacher changes from a schedule of .6 (60% of full time) 2.5 days a week to full time 5 days a week and she volunteers to advise a club causing her to lose about 44 minutes a day 2 to 3 time a week with her children during the school year; does this make a parenting plan, which gives the nonresidential parent three weekends a month and a Tuesday midweek overnight every week, impractical to follow?

STATEMENT OF FACTS

On July 28, 2009, an agreed parenting plan was entered in the dissolution of marriage of Jessica and Nicholas (Nick) Stalker. (CP 1-14) The parenting plan was essentially the proposed plan that the mother, Jessica, had presented when she filed for dissolution of marriage on January 4, 2008. (RP 47-48) This plan gave the father, Nick, Friday at 7:00 p.m. to Sunday 7:00 p.m. on the first, second, and third weekends of the month. This was a provision of the schedule for both under school age children as well as for the school schedule. (CP 2)

The final agreed-upon parenting plan had one major change from the parenting plan proposed by the mother, which was that the father received Tuesday at 4:30 p.m. to Wednesday 9:00 a.m. every week. (CP 2) Prior to the parties having a parenting plan in place, Nick was receiving the children every weekend. (RP 49-50, 54-55, 59) This had been the case since 2007. (RP 48, 59) When the mother filed for temporary orders to get her original parenting plan in place, the Court Commissioner denied Nick's request for the every weekend visitation he had been receiving and granted Jessica's request for him to have three weekends a month, but in the process gave him the midweek overnight. (RP 48-49, 60)

At the time the plan was entered the oldest child, Noah, was 6 years old and in school. The younger child, Riley, was 4 years old and not yet in school. (CP 1) (RP 30)

On August 17, 2012 Jessica filed a petition to modify the parenting plan. (CP 15-20) The substantial change in circumstances was that her work had changed from part-time to full-time. Also, that she had remarried and had another child. (CP 18) Adequate cause was found on September 24, 2012. (CP 32-33)

At trial Jessica testified that when the parenting plan was entered she was employed part time working .6 or 60% of full time, 2.5 days a week as a sign language instructor for the Puyallup School District at Emerald Ridge High School. (RP 29-30) The year prior to her change to full time her schedule had increased to .8 or 80% of full time. (RP 37) She is now working full time 5 days a week. (RP 31) She made no efforts to look into any other employment opportunities that might maintain the part-time schedule she was on. (RP 44-45)

Her current contract hours are 7:10 a.m. to 2:40 p.m. but she typically leaves by 4:00 p.m.. (RP 31-33) Part of the reason for this is because she also volunteers as a club advisor for a sign language club. (RP 31-33) She is also required her to attend some in services over the

summer. (RP 32) The children get out of school at 3:16 p.m. Monday through Friday. (RP 31)

Jessica has remarried and has a new child age 2. (RP 21, 22, 35) Her husband is a branch manager for Chase Bank and he works every day from 8:15 a.m. to 6:15 p.m. and sometimes as late as 7:15 p.m. He also usually works on Saturdays until 1:00 p.m. (RP 35)

Jessica's primary complaint with the parenting plan was that since 2009 (not since her job change) she has not had quality time with the children. (RP 25-26) She testified that the plan was not working very well because:

The amount of time that we had together was always having to be shared with other responsibilities such as homework and those things. There was no extended period of time or even a short period of time where we could really do any family activity or spend time together. (RP 25-26)

She further complained that due to holidays that would end at the end of the month and because the children's birthdays were at the end of the month, she would sometimes not get the fourth weekend of the month and have to go seven weeks before getting a weekend. (RP 27)

When asked about the impact that this had on the children, Jessica stated that they were not always able to get their homework done and they lacked structure after they came home. (RP 28) They also did not have

much time for family activities like going to the zoo or visiting grandparents. (RP 29)

Jessica said that the children's routine on Monday, Wednesday, and Thursday (the weekdays that the children are with her) was that she would pick them up from their nanny and they would go home and do their homework. She would prepare dinner; they would clean up; take showers; "do their reading and go to bed". (RP 34)

Nick testified that when Jessica got the job with the Puyallup School District that this was part time work as a foot in the door to full-time employment. (RP 62) He did not recall a specific conversation regarding this, but it was always his understanding and assumption that the part-time employment was a means to full-time employment. (RP 62) Jessica testified that she only wanted part-time employment because she had small children at home. (RP 44)

Nick testified that when the children are with him on the weekends he picks them up at 7:00 p.m. on Friday. (RP 69) They will generally get to bed about 8:30 p.m. (RP 69) They are all generally up in the morning around 8:00 a.m. (RP 69) The visitation ends at 7:00 p.m. on Sunday. (CP 2)

The court found that there were three unanticipated changes that had occurred since the parenting plan was entered. (RP 96) First was the

change from part-time to full-time work. The court felt that regardless of whether or not there were any discussions between the parties, the fact that there was no mention of a schedule change in the parenting plan when the mother went from part-time to full-time work meant that this was an unanticipated change. (RP 96-97)

Next was the fact that the mother had remarried. (RP 97) The court noted that there were two cases out of Division III which decided both ways on the issue of whether or not remarriage was a substantial change, but the court felt that in this case it was. (RP 97)

Finally the court decided that the new child was a substantial change. (RP 97) The court commented that there was no case law citing this as a substantial change of circumstances but the court noted that “common sense also dictates that mother must now attend to the needs of a two-year-old and this diminishes the quality time that she has with her older children from her first marriage.” (RP 98)

The court then found that the change in work schedule was involuntary because Jessica testified that even though she could have asked for a transfer to another school to maintain her part-time position, the chances of her obtaining other part-time employment in the district were “zilch”. (RP 98)

The court then addressed the question of impracticality stating the following:

So you still have to find that this involuntary change in circumstances impractical that you're seeking to make an adjustment under RCW 26.09.260 (5) (b). Do I think it is impractical? Yes, for the reasons stated above; namely, new sibling, remarriage, and now that she has a full-time schedule, all of those things make it impractical for her to have any quality time with these kids during the week, so that standard has been met under RCW 26.09.260 (5) (b). (RP 98-99)

In the court's findings the court found that there was a substantial change in circumstances based upon the mother's move "from part-time to full-time employment"; "the mother has remarried"; and "the mother has another child/sibling of the children." (CP 38-39) The court also found that the change was less than 24 full days in a calendar year and based upon "an involuntary change in work schedule by a party which makes the residential schedule and the custody decree/parenting plan/residential schedule impractical to follow." (CP 38) The result of this was that the parenting plan was changed and Nick lost one weekend a month and in its place was given a Thursday overnight every other week. (CP 42)¹

¹ While preparing this brief counsel became aware of a scrivener's error in the final parenting plan. Rather than stating in paragraph 3.2 that visitation would be "From Thursday 7:00 p.m. to Sunday 7:00 p.m. every other week" as it stated in the proposed parenting plan (CP 22) it stated "Friday 7:00 p.m. to Sunday 7:00 p.m. every other week." (CP 42) I have left a message for counsel and this scrivener's error will be corrected.

ARGUMENT

1. **WHEN THE CUSTODIAL PARENT'S WORK SCHEDULE AS A SCHOOL TEACHER CHANGES FROM A SCHEDULE OF .6 (60% OF FULL TIME) 2.5 DAYS A WEEK TO FULL TIME 5 DAYS A WEEK AND SHE VOLUNTEERS TO ADVISE A CLUB CAUSING HER TO LOSE ABOUT 44 MINUTES A DAY 2 TO 3 TIMES A WEEK WITH HER CHILDREN DURING THE SCHOOL YEAR; REMARRIES; AND HAS A NEW CHILD, THAT DOES NOT CONSTITUTE A SUBSTANTIAL CHANGE IN CIRCUMSTANCES FOR A MINOR MODIFICATION OF THE PARENTING PLAN**

The standard for review of a minor modification of a parenting plan is abuse of discretion. The case of *In re Marriage of Hoseth*, 115 Wash. App. 563, 63 P.3d 164 (2003) presented the standard as follows:

We review a superior court's rulings with respect to a parenting plan for abuse of discretion. *In re Marriage of Littlefield*, 133 Wash.2d 39, 46, 940 P.2d 1362 (1997). An abuse of discretion occurs when the superior court's ruling is manifestly unreasonable or its ruling is based on untenable grounds or untenable reasons. *Id.* at 46-47, 940 P.2d 1362. With respect to modification of parenting plans, the procedures and criteria set forth in RCW 26.09.260 limit the superior court's range of discretion. *In re Marriage of Shryock*, 76 Wash.App. 848, 852, 888 P.2d 750 (1995). **Accordingly, a superior court will abuse its discretion if it fails to base its modification ruling on the statutory criteria.** (at 569 emphasis added)

In the case of *In re Marriage of Littlefield*, 133 Wash. 2d 39, 47, 940 P.2d 1362, 1366 (1997) the court elaborated on what constituted an abuse of discretion by stating:

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the

applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995) (citing Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993)), review denied, 129 Wash.2d 1003, 914 P.2d 66 (1996). (at 47)

In this case, there has been an abuse of discretion. The court's decision was based on untenable grounds because its factual findings were unsupported by the record. The trial court's decision was based upon untenable reasons because it failed to base its ruling on the statutory criteria of RCW 26.09.260 (5).

RCW 26.09.260 (5) reads as follows:

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

(a) Does not exceed twenty-four full days in a calendar year; or

(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or

(c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

This statute was summarized by *In re Marriage of Hoseth*, 115

Wash. App. 563, 63 P.3d 164 (2003) as follows:

Under the plain wording of RCW 26.09.260(5), the superior court may order an adjustment to the parenting plan if the petitioning parent shows (1) a substantial change in circumstances, and (2) the proposed adjustment meets at least one of the three criteria set forth in subsections (a) (24 full days), (b) (change of residence or work schedule resulting in impracticality), or (c) (90 overnights, lack of reasonable time, and best interests of child).(at 570)

Therefore, a minor modification of a parenting plan requires the court to first find there has been a substantial change in circumstances and then the court is to consider whether or not one of the remaining 3 criteria have been established in order to grant a minor modification in a parenting plan.

If the court does not find that there is a substantial change in circumstances or the court does not find that one of the express 3 items

listed apply, then the court has no authority or discretion to grant a minor modification of the parenting plan. The court does not have discretion to substitute its own judgment or modify a parenting plan based upon its own view of what would be best for the children or either party. That would be an abuse of discretion.

In the case of *In re Marriage of Shryock*, 76 Wash. App. 848, 888 P.2d 750 (1995) cited by Hoseth the court was very specific in regards to the mandatory nature of following the statute. That court stated:

Procedures relating to the modification of a prior custody decree or parenting plan are statutorily prescribed and compliance with the criteria set forth in RCW 26.09.260 **is mandatory**. *In re Marriage of Stern*, 57 Wash.App. 707, 711, 789 P.2d 807, review denied, 115 Wash.2d 1013, 797 P.2d 513 (1990). Failure by the trial court to make findings that reflect the application of each relevant factor is error. *Stern*. (at 852 emphasis added)

The statutory basis for modification of the parenting plan is mandatory and the court has no discretion to do anything beyond following the express criteria of the statute.

The first thing we must therefore consider is whether or not there has been a substantial change in circumstances in this case. A substantial change in circumstances is necessary for both a major and a minor modification of the parenting plan and this standard is identical for both. (See *In re Marriage of Tomsovic*, 118 Wash. App. 96, 105-106, 74 P.3d

692 (2003)) There is no definition in the legislation for what constitutes a substantial change of circumstances. When there is no definition in a statute and there appears to be no ambiguity as to the meaning of the words, the plain meaning rule applies. *State v. Ervin*, 169 Wash. 2d 815, 239 P.3d 354, 356 (2010) stated the following in regard to this:

When interpreting a statute, “the court's objective is to determine the legislature's intent.” *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, we “ ‘give effect to that plain meaning.’ ” *Id.* (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002)). In determining the plain meaning of a provision, we look to the text of the statutory provision in question, as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Id.* An undefined term is “given its plain and ordinary meaning unless a contrary legislative intent is indicated.” *Ravenscroft v. Wash. Water Power Co.*, 136 Wash.2d 911, 920–21, 969 P.2d 75 (1998). If, after this inquiry, the statute is susceptible to more than one reasonable interpretation, it is ambiguous and we “may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wash.2d 365, 373, 173 P.3d 228 (2007) (at 820)

In this case the phrase “substantial change in circumstances” should be given its plain meaning. A substantial change in circumstances has been explained in the case law as being a change that was unknown to the court or unanticipated at the time of the entry of the parenting plan.

This was reiterated in *In re Marriage of Tomsovic*, 118 Wash. App. 96, 74

P.3d 692 (2003) as follows:

In *In re Marriage of Hoseth*, 115 Wash.App. 563, 569–70, 63 P.3d 164 (2003), petition for review filed No. 73779–7 (Wash. Mar. 28, 2003), this court interpreted for the first time the Legislature's intent in enacting the provisions for a minor modification under RCW 26.09.260(5). Citing RCW 26.09.260(1), a major modification subsection, we held that the trial court must base its determination of a substantial change in circumstances on facts unknown to the court at the time of the prior decree or plan or arising since entry of the decree or plan. We also held that unknown facts include those facts that were not anticipated by the court at the time of the prior decree or plan. *Hoseth*, 115 Wash.App. at 571, 63 P.3d 164.

This makes it clear that a substantial change in circumstances must be a genuine change in the circumstances of the parties. The court in *In re Marriage of Hansen*, 81 Wash. App. 494, 499-500 914 P.2d 799 (1996) determined that a child beginning school was not an unanticipated change in circumstances because it was provided for in the parenting plan. If something is listed in the parenting plan, clearly it was known to the court at the time of the entry of the parenting plan. However, the case law has not stated that unless something is listed in the parenting plan that it was not something that was unknown or unanticipated. The trial court in this case seemed to confuse that standard and assumed that if the parenting plan did not state what would happen if the mother began working full time, that it was therefore unanticipated.

The term that has never received any judicial interpretation or elaboration is the term “substantial”. RCW 26.09.260 (5) does not state that for a modification of a parenting plan there can be “any change of circumstances”, but there must be a “substantial change of circumstances”. Therefore just because something may have been unanticipated or unknown at the time of the entry of the parenting plan that does not mean that it is sufficient to justify a major or minor modification of a parenting plan. It must be a change that is substantial.

Merriam-Webster’s dictionary online defines the term “substantial” as follows:

sub·stan·tial

adjective \səb-'stan(t)-shəl
: large in amount, size, or number
: strongly made
of food : enough to satisfy hunger

Full Definition of SUBSTANTIAL

- 1 *a* : consisting of or relating to substance
b : not imaginary or illusory : REAL, TRUE
c : IMPORTANT, ESSENTIAL
- 2: ample to satisfy and nourish : FULL <a *substantial* meal>
- 3 *a* : possessed of means : WELL-TO-DO
b : considerable in quantity : significantly great <earned a *substantial* wage>
- 4: firmly constructed : STURDY <a *substantial* house>
- 5: being largely but not wholly that which is specified <a *substantial* lie>

Therefore in order for a change of circumstances to be substantial, it would have to be a change in circumstances that is something large,

something of some genuine substance or not imaginary or illusory. It must be something on some real importance something of quantity.

How this has been applied by the courts can be seen in the distinction between the case of *In re Marriage of Hoseth*, 115 Wash. App. 563, 63 P.3d 164 (2003) and *In re Marriage of Tomsovic*, 118 Wash. App. 96, 74 P.3d 692 (2003) both from Division III. In these cases Division III of the Court of Appeals dealt with changes in residences as well as new domestic partners and reached seemingly opposite positions. Indeed, the trial court expressed it as follows in the context of new domestic partners:

Remarriage. Now, some cases say that this is not a substantial change; other cases say it is a substantial change. The Hoseth case, for example, says a new domestic partner can be a substantial change and explains why this is a substantial change. In the Tomsovic case, which is from the same division three, different -- two of the three judges are different. The only commonality between Tomsovic, which is 118 Wn. App 96, the only commonality is Judge Kurtz. He was in both panels. But other than that, different judges decided those two cases. Interesting. But, in that case, it said, no, remarriage is not a substantial change in circumstances. (RP 97)

In the *Hoseth* case the Father brought a petition to modify the parenting plan based upon his relocation from Idaho to Washington where the child lived and he also had a new domestic partner. The court found that the move from Idaho to Washington was not anticipated in the parenting plan and made it more practical for increased visitation to take

place. It was therefore determined to be a substantial change in circumstances. Also, the court found that the father's new domestic partner was a substantial change of circumstances. In that case the father testified that the new relationship provided a more inviting environment for Cody when he spent time with his father.

In the *Tomsovic* case the father brought a petition to modify the parenting plan based in part on the mother's remarriage and her relocation from one part of King County to another and his relocation from Pullman, Washington to Moscow, Idaho. First the court found that the father had failed to show that the distance change between Pullman, Washington and Moscow, Idaho made the parenting plan impractical to follow. The court also found that the mother's change of residence in King County and the father's move to Moscow, Idaho were fairly insignificant.

In regard to the mother's remarriage the court stated the following:

The trial court additionally found that Ms. Tervonen's remarriage did not constitute a substantial change in circumstances. Although it recognized that in *Selivanoff v. Selivanoff*, 12 Wash.App. 263, 529 P.2d 486 (1974) the mother's remarriage was found to be a material change in circumstances, the trial court also noted that the remarriage in *Selivanoff* adversely affected the children. The *Selivanoff* court found that the provision of a "second father figure" could detrimentally affect the status of the biological father. *Id.* at 265, 529 P.2d 486. No argument was made here that Ms. Tervonen's remarriage had any effect on the children or on the residential schedule beyond causing her to relocate. (at107)

The difference between the two cases is that in the *Hoseth* case the father there are provided evidence as to the significance or substance of the change in circumstances between his domestic situation prior to his obtaining a new domestic partner and the situation afterwards. With his new domestic partner made his residence residence more inviting than it was previously. In the *Tomsovic* case there was no evidence as to what impact the change had on the children, only evidence that a change had occurred.

The same situation existed with the relocation of the parties, in the *Hoseth* case there was testimony that the move made it more practical for the father to have increased time with his son because he now lived closer to him. In the *Tomsovic* case there was testimony that both parties had relocated, but there was no evidence presented to show that it made the current plan impractical to follow.

In short, these two cases illustrate clearly the fact that in order for there to be a substantial change in circumstances there must be testimony that the change in circumstances is substantial. Simply stating changed circumstances is insufficient. The court is not entitled to speculate or guess as to what evidence may be. The court has to make its determination based upon facts presented. If the moving party only presents evidence that a

change in circumstances has occurred, whether or not that change was anticipated or unanticipated, that is insufficient. In order to show that a change of circumstances is substantial there must be evidence to show how the change of circumstances is substantial. There must be evidence to show what impact that change of circumstances has on the parenting plan.

In the case of Mr. Stalker that was not done. The only testimony provided by the mother as to the impact or harm of the parenting plan dealt with the parenting plan as it was put in place in 2009. All of her complaints were problems that existed from the time of the entry of the parenting plan. Those issues could not be considered unanticipated or unknown to the parties because they had followed the same plan for over a year prior to the entry of the 2009 parenting plan. Therefore this was not a change in circumstances, much less a substantial change. There was no additional testimony presented regarding what, if any, impact the mother's new work schedule had on the parenting plan. The only testimony presented was that her work schedule had changed. The impact of that change or its effect on the children, was not presented.

Additionally, there was no testimony from which the court could determine the substantial nature of any change of circumstances due to the mother's remarriage. There was no testimony regarding any relationship between the mother's new husband and the children. The testimony

presented was that he worked at Chase Bank until 6:15 p.m. to 7:15 p.m. every night and until 1:00 p.m. most Saturdays. That is the extent of the testimony regarding the husband and there was nothing to show what if any relationship he had with the children and how that impacted them one way or the other.

Finally, the court acknowledged that there was no case law substantiating a new sibling as a change of circumstances (RP 97) There was no testimony from which the court could find a substantial change of circumstances due to the mother having a new child. There was no testimony regarding the impact of the new two-year-old half sibling on the parenting plan, only testimony that the child existed. Without this testimony it was not possible for the trial court to make a finding that there had been a substantial change in circumstances.

The above makes it clear that the decision of the trial court was an abuse of discretion. First of all, it was based upon untenable grounds because there were no facts in evidence from which the court could find that a substantial change of circumstances had occurred. Secondly, it is based upon untenable reasons because it was based upon an incorrect standard and the facts did not meet the requirements of the correct standard. The trial court found a substantial change of circumstances

without there being any evidence presented for anything other than a change of circumstances.

Accordingly, the trial court abused its discretion as it failed to base its modification ruling on the statutory criteria. RCW 26.09.260 (5) makes it clear that the court must first find a substantial change of circumstances before it can proceed to make either a major or a minor modification of a parenting plan. Due to the lack of evidence provided in court, the trial court was not in a position to make this finding and the failure to do so rendered its decision contrary to the statute. For these reasons, the decision of the trial court must be reversed.

2. **WHEN THE CUSTODIAL PARENT'S WORK SCHEDULE AS A SCHOOL TEACHER CHANGES FROM A SCHEDULE OF .6 (60% OF FULL TIME) 2.5 DAYS A WEEK TO FULL TIME 5 DAYS A WEEK AND SHE VOLUNTEERS TO ADVISE A CLUB CAUSING HER TO LOSE ABOUT 44 MINUTES A DAY 2 TO 3 TIMES A WEEK WITH HER CHILDREN DURING THE SCHOOL YEAR; THAT DOES NOT MAKE A PARENTING PLAN, WHICH GIVES THE NONRESIDENTIAL PARENT THREE WEEKENDS A MONTH AND A TUESDAY MIDWEEK OVERNIGHT EVERY WEEK, IMPRACTICAL TO FOLLOW**

As noted above, if there is no substantial change in circumstances that would normally end the analysis, however, in the event that the court were to determine that the facts listed in the preceding section were sufficient for a substantial change in circumstances, there must still be

evidence sufficient to demonstrate that the change in work schedule makes the parenting plan impractical to follow. RCW 26.09.260 (5) (b) states:

(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow.

In the context of a work schedule alone, this is an issue of first impression. In *In re Marriage of Pape*, 139 Wash. 2d 694, 716, 989 P.2d 1120, 1132 (1999) the State Supreme Court dealt with a case in which there was a change in employment that caused the mother to relocate, but that case rested upon the fact that the parent in question needed to relocate due to her employment. The issue of a change in work schedule which makes a parenting plan impractical to follow is an issue of first impression. There are no cases dealing with this issue.

However, the cases dealing with a change of residence are instructive to some degree as to the analysis. In the *Hoseth* and *Tomsovic* cases, as noted above, the court did require that there be some evidence showing whether or not the change of residence made the parenting plan impractical to follow. In the *Hoseth* case the fact that the father moved from Idaho to the same city, Spokane, where the child lived was deemed evidence sufficient to show the parenting plan was impractical to follow

because the father was now in a position where he could see the child and the child could see him more often due to his close proximity.

The *Tomsovic* case is perhaps more on point because it deals with a scenario that actually took time away from the petitioning parent. The father had moved from Pullman, Washington to Moscow, Idaho. This is a difference of about 9 miles and according to MapQuest is an average drive of 14 minutes. This would have meant that on a round-trip drive the father would have been losing approximately a half hour of time with his child. Also it should be noted that the exact location and distance of the move of the mother in King County may also have impacted this, however, those facts were not listed in the opinion. Nevertheless, the court did not believe that this on its own made the parenting plan impractical to follow. The court rejected the mere presentation of facts without any application to show how it made the parenting plan impractical to follow. In short, the failure to make any showing that the change made the parenting plan impractical to follow was therefore insufficient for the moving party to meet their burden of proof.

In like manner here there was no showing that the change in the mother's work schedule made the parenting plan impractical to follow. The mother outlined her schedule and the routine of her and the children and her husband. She did not state how her schedule was different, if at

all, with the loss of 44 minutes a day 2 to 3 times a week. Her complaint was that the parenting plan from the beginning never allowed her quality time with the children. There was nothing said of how this change in work schedule made any difference to that whatsoever.

However the court in its ruling in regard to the impracticality did not focus on whether or not the change in work schedule made the parenting plan impractical to follow. Instead the court made the following analysis:

Do I think it is impractical? Yes, for the reasons stated above; namely, new sibling, remarriage, and now that she has a full-time schedule, all of those things make it **impractical for her to have any quality time** with these kids during the week, so that standard has been met under RCW 26.09.260 (5) (b). (RP 98-99 emphasis added)

The court determined that it was impractical for her to have any quality time, but the question of impracticality deals with whether or not it makes the parenting plan impractical to follow. It does not consider whether or not the parenting plan gives her ‘quality time’. Subsection (c) allows for modification if the noncustodial parent is not receiving “reasonable” time, but there is nothing dealing with “quality time”.

The issue of impracticality focuses on whether or not the parenting plan can still be followed. If a parent has the children on the weekend and his work schedule changes so that he works every weekend and his days

off are during the week, that would clearly make the parenting plan impractical to follow. If a parent had midweek visitation and his work schedule changed to swing shift so that midweek visitation after school could not happen, that potentially would make the parenting plan impractical to follow. However, if a parent had every other weekend visitation and his or her employer required them to work a half a day on Saturday, but they still have Friday night, Saturday afternoon and evening, and Sunday, does this make the parenting plan impractical to follow? That may depend upon the facts of the case. Do the children routinely sleep in until noon on Saturday? There would have to be evidence or testimony regarding how the change of work schedule makes the parenting plan impractical to follow.

The problem in this case is that there was absolutely no evidence as to what, if any, impact at all this had on the practicality of following the parenting plan. Just like in the *Tomsovic* case where the change in residence caused him to spend more time traveling and may have caused him to lose time with the child, the fact that there was no testimony regarding how that made the parenting plan impractical to follow resulted in the court being unable to find that the change of residence made the parenting plan impractical to follow.

The same applies to the mother here, the change in her work schedule may have caused her to lose a few minutes with the children, but how did that make the parenting plan impractical to follow? She provided no testimony in that regard only that she had never had quality time under the current parenting plan and still did not. If the parenting plan did not give her quality time before because all she had was the afterschool time, how has this changed? There was no testimony that previously that 44 minutes was spent doing some fun thing at the house and qualified as quality time that she was now lacking. Her testimony was that this had always been a problem. This is not sufficient to show that the parenting plan is impractical to follow because if the mother's testimony is correct, this impracticality existed prior to the change in her work schedule. If that is the case the change in her work schedule did not change anything. If the change in the work schedule did not change anything, then the change in her work schedule did not make the parenting plan impractical to follow. Therefore, the change is irrelevant and does not make the parenting plan impractical to follow.

In regard to the question of whether or not the change in work schedule made the parenting plan impractical to follow, the court once again committed an abuse of discretion in determining that this was the case. First of all, the decision was based upon untenable grounds because

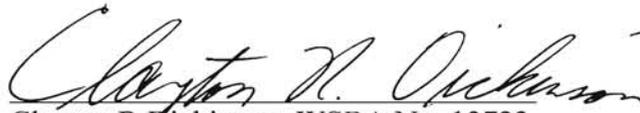
there was no factual findings or basis in the record to support that the change in work schedule made the parenting plan impractical to follow. The court's determination was based upon untenable reasons because it incorrectly applied the legal standard. The court determined that the mother's work schedule made it impractical for her to have "quality time" with her children. However, this is not the legal standard and as noted above, was not a circumstance created by the change in work schedule. For all these reasons, the trial court must be reversed.

CONCLUSION

In this case it is clear that the court committed an abuse of discretion in finding that there was a substantial change in circumstances and that the mother's work schedule change made the parenting plan impractical to follow. The decision was based upon untenable grounds because there was no evidence provided of any change in circumstances based upon the mother's change in work schedule, remarriage, or new child. The parenting plan, according to the testimony of the mother, always denied her quality time with the children. The changes that she specify did not create the problem. Equally, there was no evidence or testimony presented from which the court could determine that the change in work schedule made the parenting plan impractical to follow. As a result, the court's decision was based upon untenable reasons because he

did not follow the statutory standards for determining that there was a substantial change in circumstances and that the change in work schedule made the parenting plan impractical to follow. For all these reasons the trial court must be reversed.

Respectfully submitted on January 21, 2014.


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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Brief Review to:

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All postage prepaid, on January 21, 2014.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Fircrest, Washington on January 21, 2014.


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