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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY

  
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No. 465981-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DARCIA DAVIS,

*Appellant,*

v.

GEORGE PATECEK,

*Respondent.*

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE CASE**

RAP 10.3(a)(4) states that a brief should contain “a fair statement of the facts and procedure relevant to the issues presented for review, without argument.” Respondent objects to all portions of the Statement of the Case that are contained in Brief of Appellant wherein the citations are made to Clerk’s Papers as either not being supported by the citation to the Clerk’s Papers to which the statement is attributed, or as argument which should not be included in the Statement of the Case. Appellant’s citations to Clerk’s Papers are completely irrelevant throughout the Statement of the Case as well as the body of the brief and Respondent moves to strike those portions of the Statement of the Case not supported by appropriate citation to the record.

Respondent further objects to the following portions of the Statement of the Case contained in Brief of Appellant as either not being supported by the citation to the Clerk’s Papers to which the statement is attributed, or as argument which should not be included in the Statement of the Case.

1. *Objection, Brief of Appellant, Page 9.*

On page 9 of the Brief of Appellant, the following statement is made:

“This matter proceeded to trial on Mr. Patecek’s petition to modify the parenting plan on July 25, 2013.”

This statement should state the matter proceeded to trial on both a petition to modify the parenting plan as well as a petition to modify the order of child support. Trial dates occurred on July 25, 2013; July 26, 2013; April 18, 2014, October 17, 2014; July 14, 2014 and final orders were entered nearly one year later on July 21, 2014. Many Appellant citations to the report of proceedings from July 25-26, 2013 are contradicted by evidence produced at trial dates after Ms. Davis filed a Petition to Relocate approximately one week after the first two days of trial. The original Petitions resulted in entry of final orders on July 21, 2014. The relevance of how the child was doing in Westport, Washington would be relevant to this court’s review only if the relocation had been denied and became irrelevant as it relates to Ms. Davis’s move to Bellingham. In this case the court granted the relocation requested by Ms. Davis. See CP 181-183. Respondent asks the Court to disregard the sections of the Brief of Appellant, pursuant to RAP 10.7, which appear to

be misidentified by the Appellant and unsupported by appropriate citation to the record.

*2. Objection, Brief of Appellant, Page 12.*

On page 12 of the Brief of Appellant, the following statement is made:

“The Guardian ad Litem requested that the parties submit to psychological evaluations.”

The parties had a trial date scheduled for December 13, 2013 and an order stating that said trial date shall not be continued. The parties entered an agreed order striking the trial date for the sole purpose of obtaining psychological evaluation for each of the parents. See CP 146.

Respondent Patecek provides the following counterstatement of the case:

On or about August 31, 2012, George Patecek filed a Petition to Modify the April 6, 2010 Parenting Plan and a separate Petition to Modify the April 6, 2010 Order of Child Support. CP 58-63 and CP 64-66. On September 24, 2012 default orders were entered against Ms. Davis and she then filed responses to both Petitions pro se. CP 67-72 and CP 181, Lines 15-16. The default orders were vacated by entry of an agreed order and

Attorney Hillary Beardon represented Ms. Davis for several months. (See footer on CP 73-75 and CP 76.) Trial was scheduled to begin on June 21, 2013, however Ms. Davis had not filed a pretrial statement of the issues or the statutorily mandated proposed parenting plan and the trial date was stricken, a guardian ad litem appointed and the trial was reset to begin July 25, 2013. RP, July 25, 2013, Pgs. 5 -7. The first two days of trial occurred on July 25 and 26, 2013. See Transcript of Proceedings Dates. The guardian ad litem reported orally when the trial began in July 2013 based upon his summary investigation. The trial was scheduled to continue at a later date. RP July 26, 2013 Page 157, Lns. 1-7.

Approximately one week later Ms. Davis filed a Notice of Intent to Relocate. CP 96-99. Mr. Patecek objected to the relocation. CP 100-106. Mr. Patecek filed a Proposed Parenting Plan with the Objection to Relocation. CP 107-115. Ms. Davis filed an Amended Proposed Parenting Plan and Amended Notice of Intention to Relocate and hired a new attorney Mr. William Stewart. CP 116-130. Ms. Davis moved the court for a temporary Order Permitting Relocation. CP 131-132. The court allowed Ms. Davis to relocate to Bellingham and entered orders regarding transportation requirements and restated the oral ruling on visitation from trial on July 26, 2013. The third day of trial was scheduled for December 13, 2013 and was stricken by agreed order for the purpose

of allowing each of the parties to obtain psychological evaluations. CP 146. In April 2014 the guardian ad litem filed a Declaration/Report after investigation of the home Mr. Patecek's is purchasing in Seiku as well as the rental home of Ms. Davis in Bellingham. The report differed greatly from the reports from the Guardian ad Litem in July 2013. CP 144-151. The court made an oral ruling for the child to spend equal amounts of time in each parent's household changing the child's primary residence each school year and Ms. Davis hired her third attorney, Scott Campbell; to prepare and file a Motion to Reconsider and her supporting Declaration. CP 152-156. Nearly one year after the first day of trial the court entered a Final Parenting Plan; Final Order of Child Support and Findings of Fact and Conclusions of Law and Order re Modification of Parenting Plan. CP 158-183.

The Appellant's Statement of the Case should be rejected in its entirety as not being supported by appropriate citations to the record.

## **II. QUESTIONS PRESENTED**

1. Whether the trial court erred in failing to enter separate Findings of Fact and Conclusions of Law regarding the relocation when all of the statutory relocation factors were considered over many days in

- trial and testimonial hearings and were additionally set forth in the Findings of Fact and Conclusion of Law regarding the original Modification petitions? (Davis's Assignment of Error No. 1)
2. Whether the trial court refused Ms. Davis's relocation to Bellingham and if so, erred in doing so, when Ms. Davis actually relocated with the child and failed to provide a timely Notice of Intent to Relocate. (Davis's Assignment of Error Nos. 1, 2, and 3.)
  3. Whether the trial court abused its discretion by entering findings regarding the original petition for modification as well as considering the relocation factors, where notice of relocation was not timely provided and the petition for modification of the parenting plan was already properly before the court? (Davis's Assignment of Error Nos. 1-3, inclusive.)
  4. Whether Mr. Patecek on appeal is entitled to attorney fees and costs?

### **III. STANDARD OF REVIEW**

This court reviews a trial court's decision to modify a parenting plan for abuse of discretion. *In re Marriage of Hansen*, 81 Wash.App. 494, 498, 914 P.2d 799 (1996). The appellate court shall not reverse the decision unless the court's reasons are untenable. *In re Marriage of McDole*, 122 Wash.2d 604, 610, 859 P.2d 1239 (1993).

A trial 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; [and] it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. In the case at hand Mr. Patecek filed a Petition for Modification and two days of trial had already occurred before Ms. Davis provided a Notice of Intent to Relocate and Mr. Patecek timely objected to the relocation. The parties agreed there was adequate cause for modification of the parenting plan at the time the default orders against Ms. Davis were vacated. Ms. Davis failed to provide timely notice of her intentions to relocate. CP 182, Paragraph 2.7. *In re Marriage of Fiorito*, 112 Wash.App. 657, 664, 50 P.3d 298 (2002).

#### IV. ARGUMENT

1. Where the trial Court entered specific findings in the Order re Modification of a Parenting Plan the trial court is not required to enter redundant or duplicative orders when an objection to relocation is considered a petition for modification of the underlying parenting plan, specifically where relocation is granted and the original petitions were litigated to conclusion. (Re Davis's Assignment of Error No. 1.)

Davis alleges the trial court abused its discretion in not granting a relocation to Bellingham, when in fact, the court allowed the relocation to occur. Appellant Brief, Issues Re Assignment of Error No. 1. The court granted the relocation to Bellingham and entered a final parenting plan supported by Findings of Fact and Conclusions of Law. See CP 142-143 and CP160-166. The Order re Modification of the Parenting Plan specifically found the best interests of the child was based upon the relocation statutes as well as modification statutory factors during the multiple day trial. CP 181 Lines, 9-12. The Appellant cites as authority *In re Marriage of Kim*, 179 Wash.App.232 (2104) and numerous others to suggest that the trial court failed to consider the appropriate factors for relocation, however the trial court specifically set forth consideration of the statutory factors for relocation as well as the modification factors over the many days of testimonial hearings and trial in this case. These findings among others are set forth in writing at CP 181.

In addition, independent adequate cause exists for modification of the parenting plan based upon Mr. Patecek's original Petition for Modification. If the moving party establishes adequate cause and the court holds a full hearing, the court may then modify the existing parenting plan if it finds that (1) a substantial change occurred in circumstances as they were previously known to the court, (2) the present arrangement is

detrimental to the child's health, (3) modification is in the child's best interest, and (4) the change will be more helpful than harmful to the child. RCW 26.09.260(1), (2)(c). The record supports the findings set forth in this case.

2. The trial court may modify the parenting plan under any Petition for Modification, whether it considers the original Petition or the Objection to Relocation so long as Appropriate Orders are made and Findings and Conclusions are Supported by the record. (Re Davis's Assignment of Error No. 2.)

The Appellant suggest Ms. Davis was not allowed to relocate to Bellingham, which is untrue. Ms. Davis was allowed, and in fact did relocate to Bellingham with the child, where the child attended school. After the relocation was granted the court entered a modified final parenting plan on Mr. Patecek's original petition for modification, which was properly before the court. A court abuses its discretion only where the court applies an incorrect standard, the record does not support the court's findings, or the facts do not meet the requirements of the correct standard. Ms. Davis should not be allowed to change the standard by filing a relocation action in the middle of trial proceedings on a modification proceeding and the court appropriately brought the original petitions to conclusion with entry of final orders. Trial court decisions

will be affirmed unless no reasonable judge would have reached the same conclusion. *In re Marriage of Landry*, 103 Wash.2d 807, 809–10, 699 P.2d 214 (1985). “The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.” *Id.* at 809, 699 P.2d 214. Ms. Davis agreed there was adequate cause for modification of the parenting plan and the court considered many days of trial and testimonial hearings before entering final orders on the petition for modification. Ms. Davis has not met the heavy burden of showing a manifest abuse of discretion by the trial court. RCW 26.09.260 sets forth the procedures and criteria to modify a parenting plan, which were all followed in the case at hand.

The trial court could also make a major residential change based solely upon Mr. Patecek’s objection to relocation, in part since the court found Ms. Davis failed to provide timely notice in violation of the Relocation Act. RCW 26.09.260(6), an exception to the requirements of RCW 26.09.260(1), allows a trial court to make a “major” modification to a parenting plan, including an adjustment to the residential schedule “pursuant to a proceeding to permit or restrain a relocation of the child”:

The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to

modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. RCW 26.09.260(6).

Therefore, in a relocation case, it is not necessary for the court to consider whether there is a substantial change in circumstances other than the relocation itself, or to consider the factors contained in RCW 26.09.260(2). *In re Marriage of Grigsby*, 112 Wash.App. 1, 15, 57 P.3d 1166 (2002). Here, Davis never abandoned her relocation and did, in fact, relocate in violation of the parenting plan and the notice requirements of the Relocation Act. Therefore, RCW 26.09.260(6) applies, and the trial court was not required to find some other substantial change in circumstances or consider the factors of RCW 26.09.260(2). The trial court did not abuse its discretion in modifying the residential schedule under these circumstances, in particular where the trial court made the findings which would have been necessary and brought the original petitions to complete resolution by entry of final orders. *In re Marriage of Raskob*, 183 Wash.App. 503, 334 P.3d 30 (2014). The trial court's modification of the parenting plan was not a manifest abuse of discretion and should not be disturbed on appeal.

3. The trial court gave credit for all evidence of daycare expenses actually incurred by Ms. Davis and even eliminated the interest on the judgment entered against her. Ms. Davis has the burden, however offered no evidence she incurred additional day care expenses and was given credit for those day care payments she substantiated in court. (Re Davis's Assignment of Error No. 3.)

Ms. Davis presented an accounting for all day care expenses paid after the Order of Child Support was entered on April 7, 2010 until just prior to the first part of trial in July 2013. Ms. Davis failed to supplement these daycare expenses with anything other than her own testimony after she filed a response to interrogatories and requests for production of documents. The court agreed this calculation was appropriate. RP July 20, 2014, Page 182, Ln. 2. The trial court considered Ms. Davis's testimony about incurring additional daycare expenses and considered Ms. Davis's credibility after allowing her additional time to submit evidence. The trial court's findings regarding credibility of witnesses or the weight given to testimony will not be disturbed on appeal. *In re Marriage of Fiorito*, 112 Wash. App. 657, 667, 50 P.3d 298 (2002); *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

RCW 26.19.080(3) provides, in applicable part:

“If an obligor pays court or administratively ordered day care or special child rearing expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses ... Any ordered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor. If the obligor does not have child support arrearages, the reimbursement may be in the form of a direct reimbursement by the obligee or a credit against the obligor's future support payments. If the reimbursement is in the form of a credit against the obligor's future child support payments, the credit shall be spread equally over a twelve-month period.”

The provisions of RCW 26.19.080(3) are mandatory. *In re Marriage of Barber*, 106 Wn.App. 390, 23 P.3d 1106 (2001). The trial court entered findings that Mr. Patecek actually made overpayments. While the amount of overpayment was contested at trial, resolving this dispute is within the province of the trial court, which had the opportunity to observe the demeanor of Mr. Patecek and Ms. Davis while testifying and to consider the other evidence offered by the parties. Counsel for Mr. Patecek summarized his calculations based upon the evidence at trial and presented an additional oral summary at the time of entry of orders. The trial court found Mr. Patecek had properly calculated the amount of overpayment based upon the evidence at trial and Mr. Patecek is therefore entitled to reimbursement in accordance with RCW 26.19.080. The court then entered an appropriate judgment against Ms. Davis. (See RP July 21, 2014 Page 180, Line 11 through Page 182, Line 3.) On page three of the

Findings of Fact and Conclusions of Law re Petition for Modification of Child Support Section 2.8 Other; the trial court found “Between March 2010 and the last date of trial Mother produced evidence of a sum amount of \$6,219.36 in day care expenses actually incurred.” See CP 179. The court entered the judgment against Ms. Davis for overpayment for daycare expenses not actually incurred under Paragraph 3.22 of the July 21, 2014 Order of Child Support. See CP 175.

The legislature has adopted a special statute for the benefit of obligors who have paid court ordered or administratively ordered day care or special child rearing expenses that were not actually incurred. RCW 26.19.080. The obligor obtains this reimbursement by instituting a proceeding in the court if the obligation is court ordered. An offset under this statute may also be made as a defense in an enforcement action. When actual payment of day care and special child rearing expenses is challenged, the burden of proof is on the party seeking enforcement who must provide adequate proof that the expenses were incurred. In *Fairchild v. Davis*, 148 Wn.App. 828, 201 P.3d 1053 (Div. 3 2009), withdrawn from bound volume and republished at, 148 Wn.App. 828, 207 P.3d 449 (Div. 3 2009), as amended, (Apr. 28, 2009), the court required the parent seeking to collect arrearages under a child support order to provide proof of actual payment of such expenses in the form of canceled checks, tax returns,

declarations from service providers, or similar evidence, holding that a declaration under oath by the parent seeking to enforce the order was inadequate as evidence. Ms. Davis offered nothing other than her testimony at hearings as evidence she had incurred any daycare expenses not set forth in the trial exhibits from July 25-26, 2013 and she was given full credit for the expenses she produced receipts or declarations from service providers as set forth in the Findings of Fact and Conclusions of Law re the Modification of Child Support. (CP 179, Para. 2.8) Ms. Davis otherwise failed to meet her burden of proof to show any additional daycare expenses were actually incurred.

If relief is granted, the overpayment is applied in the following order: (1) as an offset to any child support arrearage of the obligor; and (2) either by direct repayment or credit against future support payments.

It is Ms. Davis's burden to show daycare expenses were actually incurred. Ms. Davis also alleges there were some child support arrearages owed by Mr. Patecek, however failed to offer any evidence whatsoever that any specific amount was owed. The only evidence of any arrearages is Mr. Patecek referring to a statement which ended in June 2013. This statement was followed by Mr. Patecek's understanding his pay was being garnished in addition to his current support obligations. Ms. Davis offered no testimony and ignores any garnishment collections which were

raised by Mr. Patacek during the July 2013 trial dates. Ms. Davis failed to meet her burden to show there should be offset for child support arrearages, if any. The court found that after a year of garnishments in addition to current support obligations that there was no longer any arrearage when the order of child support was entered a year later in July 2014. (CP 174, Ln 22) The trial court “in equity” (See RP July 21, 2014 Pg. 182, Lns. 1-3) eliminated the interest due and owing on the overpayments resulting from the daycare expenses not actually incurred, though Mr. Patecek was entitled to receive the interest by statute.

4. Mr. Patecek was entitled to attorney’s fees related to the establishment of a judgment for overpayment of child support due to day care expenses not actually incurred and should be awarded attorney’s fees on appeal as well.

The prevailing party in an appeal of a child support enforcement action is entitled to an award of reasonable attorney fees under RAP 18.1 and RCW 26.18.160. *In re Marriage of Briscoe*, 82 Wn.App. 529, 538, 919 P.2d 84, 88 (1996). The trial court awarded attorney’s fees in the sum amount of \$2,000.00 to Mr. Patecek related to the overpayment of child support due to day care expenses not actually incurred (CP 175, Paragraph 3.23)

5. Should Ms. Davis be barred from raising issues to the appellate court having not brought the issues at the time of trial?

Only certain errors may be raised for the first time on appeal. RAP 2.5(a). Ms. Davis is asking the Court of Appeals to vacate the final orders of child support and parenting plan and yet she provides no citation to the court rules or other legal authority to vacate these orders. Ms. Davis did not ask that the original Petitions for modification be dismissed after she filed a Notice of intention to Relocate, in fact quite the opposite occurred and the original petitions were litigated to the entry of final orders on each. Ms. Davis attempts to argue there should be a certain amount of offset for child support arrearages she alleges were owed by Mr. Patecek when the orders were entered, however there was no relevant evidence offered at the time of trial and the issues was not specifically plead and do not fall under any of those errors set forth in RAP 2.5 which may be raised for the first time on appeal.

## **V. CONCLUSION**

This case was initiated by Mr. Patecek's filing of a Petition for Modification of the Parenting Plan and a Petition for the Modification of the Order of Child Support. After the trial was substantially complete Ms. Davis provided an untimely Notice of Intention to Relocate and without providing adequate authority seeks to have the trial court orders vacated.

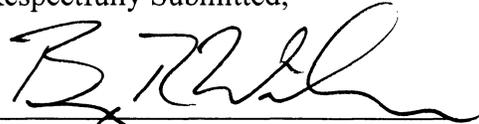
Ms. Davis seeks to dismiss both of Mr. Patecek's Petitions for Modification. Even in the event there had not been independent pending modification proceedings at the time Ms. Davis sought to relocate; the consideration of statutory relocation factors are not necessary due to Ms. Davis's failure to comply with the notice requirements of the Relocation Act. In any event, Mr. Patecek's Petitions for Modification were never dismissed and the orders on modification are appropriate and fully supported by the findings of fact, conclusions of law and trial court record. The court allowed the relocation to occur and ultimately entered a modified final Order of Child Support and a Final Parenting Plan based upon Mr. Patecek's original petitions for modification. Ms. Davis provides no legal authority to vacate orders, require separate findings when Mr. Patecek objected to relocation in the form of a petition for modification and she provides no authority or argument that the original petitions for modification should be dismissed.

Ms. Davis has a burden to show the court manifestly abused its discretion and fails to come close to meeting her burden. Even on the issue of the order of child support Ms. Davis has the burden to show she actually incurred daycare expenses and she failed to provide anything other than her testimony that would suggest she incurred any daycare expenses which she wasn't given credit for.

The court awarded Mr. Patecek attorney's fees at the trial court level. Mr. Patecek is entitled to attorney's fees on appeal. The trial court did not abuse its discretion and its orders should be affirmed and Mr. Patecek should be awarded attorney's fees and costs on appeal.

Dated: March 31, 2015.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "B. Winkelman", with a long horizontal flourish extending to the right.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

DARCIA DAVIS,

**Appellant,**

and

GEORGE PATECEK,

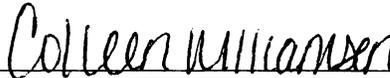
**Respondent.**

**TRIAL COURT NO. 10-3-00013-5  
COA NO. 465981-I-II**

**PROOF OF SERVICE  
[RAP 10.2(h)]**

COLLEEN WILLIAMSEN, under penalty of perjury under the laws of the State of Washington, declares: I am regularly employed by the law firm of Parker, Winkelman & Parker, P.S. On March 31, 2015, I duly served Stephen L. Olson, attorney for the Appellant, by mailing a true and correct copy of Brief of Respondent, via regular U.S. Postal Service, proper postage affixed thereto on March 31, 2015 to Stephen L. Olson, Olson & Zabriskie, Inc., 104 W. Marcy Avenue, Montesano, WA 98563.

DATED: March 31, 2015.

  
\_\_\_\_\_  
Colleen Williamsen

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