

NO. 49439-6-II

WASHINGTON STATE COURT OF APPEALS

DIVISION II

DESIREE PEACOCK,

Appellant

v.

THEODORE PECK

Respondent

RESPONDENT THEODORE PECK'S RESPONSIVE BRIEF

Steven Bobman, WSBA#

Attorney for Respondent

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ASSIGNMENTS OF ERROR

1. Assignments of error.

Appellant Desiree Peacock assigns error to the following findings of fact & conclusions of law from the trial court's August 18, 2016 "Final Order and Findings on Petition to Change a Parenting Plan, Residential Schedule or Custody Order":

- finding of fact no. 4;
- conclusions of law no. 11;

Appellant Desiree Peacock also assigns error to the following findings of fact & conclusions of law from the trial court's August 18, 2016 "Findings of Fact and Conclusions of Law Re: Relocation and Modifications to Parenting Plan":

- findings of fact no. 7, 8, 9, 10, 11, 19, 20, 23;
- conclusions of law (as to relocation) no. 1, 2;
- conclusions of law (as to modification) no. 1, 3, 9.

2. Issues pertaining to assignments of error.

Whether the trial court erred in finding detriment to the children and reversing custody where, after trial, the court initially offered the mother (who had moved to Centralia under a commissioner's order granting temporary relocation) to continue as primary custodian if she moved back to Yelm.

Issues pertaining to the assignments of error

Whether the trial court erred in finding detriment to the children and reversing custody where, after trial, the court initially offered the mother who moved to Centralia under a commissioner's order granting temporary relocation to continue as primary custodian if she moved back to Yelm, Washington?

Statement of the Case

The parties were divorced in 2013. The relevant document is the agreed permanent parenting plan that the party's entered into at that time. Mrs. Peacock thereafter filed a notice of relocation on April 22nd 2016, after the offer on her home was accepted April 20th. Mr. Peck was then served with a notice of intent to relocate by Ms. Peacock, and he also filed a motion to modify custody.

Relocation Hearing

On June 18th, a pro tem commissioner allowed the relocation subject to the trial on the merits of the relocation and pulling in of Mr. Peck's modification, and Mrs. Peacock subsequently filed modification. A guardian ad litem was then appointed for the relocation and a very limited scope on alleged abuse by the father but not for either of the modification actions. The parties in this matter divorced in 2013. Clerk's papers at 181. The Parenting Plan entered October 3, 2013 provided the mother, Desiree Peacock with primary custody of the minor children. In April 2015, Ms. Peacock served Mr. Peacock with Notice of intent to Relocate. Mr. Peacock objected to the relocation and filed a Petition to Modify the Parenting Plan seeking primary custody of the children.

On June 18, 2015, a commissioner granted Ms. Peacock's Motion for Temporary relocation. *Id.* As such Ms. Peacock moved from Yelm to Centralia, Washington with the parties two daughters.

Oral Ruling After Trial

Trial in this matter was conducted from June 14 to June 16, 2016. On June 29, 2016, the Court gave its initial oral ruling. In the oral ruling, the Court denied the relocation, but likewise, declined to rule on Mr. Peck's Petition to Modify and change custody. The court ordered that custody of the minor

child remain with Ms. Peacock if and when she relocated back to the City of Yelm, Washington from Centralia, and the court then set a hearing for July 7, 2016 on the Respondent's Petition for Modification action.

Standard of Review

This Court reviews a trial court's decision to grant a petition for relocation for an abuse of discretion. *In re Marriage of Kim*, 179 Wn. App. 232, 240, 317 P.3d 555 (2014). "The emotional and financial interests affected by [dissolution action] 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." *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). "Abuse of discretion occurs 'when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons.'" *In re The Parenting Plan entered by the Court substantially reflected the Proposed Parenting Plan the mother filed on or about March 6, 2014, with some adjustments* CP 382-93; Exhibit 36. *Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004) (quoting *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)). "Manifestly unreasonable" means that no reasonable judge could have reached the same conclusion. *Kim*, 179 Wn.2d at 240. "A trial court's decision to permit relocation is necessarily subjective" and this Court may not "reweigh the evidence." *Id.* at 244.

Argument and Authority

The appellant raises the following issues in her appeal:

- (1) Whether the trial court's findings of fact and conclusions of law regarding detriment to the children in Mr. Pack's Modification were supported by the evidence and comply with the law?**

Appellant Desiree Peacock assigns error to the following findings of fact & conclusions of law from the trial court's August 18, 2016 "Final Order and Findings on Petition to Change Parenting

Plan, Residential Schedule or Custody Order":

- finding of fact no. 4;
- conclusions of law no. 11;

The Appellant assigns error to the Finding of Fact no. 4, in which the court found that the guardian ad litem, in her report indicated that the relocation had been completed and that the guardian ad litem considered the crossover factors from the modification when she recommended a change of primary residential care placement to the father.

As to Finding of Fact no. 4, The court in its oral ruling and in its written findings found that, based upon the evidence presented, including testimony of the guardian ad litem and the guardian ad litem's written report, which was admitted into evidence, the guardian ad litem did a thorough, helpful, and complete investigation, including an in-depth analysis of all the crossover factors, and based thereon, the court concluded that there had been a substantial change in circumstances of the children, and that the recommendation of the guardian ad litem; that the minor children be placed with the father was, in fact, in the girls' best interest. VRP p. 8 lines 5-10

The Appellant assigns error to the Finding of fact no. 11, in which the court found that the mother failed to demonstrate flexibility with the existing parenting plan, and that any concessions or changes that had been made were minimal, and that the mother was not flexible or cooperative. VRP p. 17 lines 8-12

As to Finding of Fact no. 11, the court, in its oral ruling and in its written findings indicated that, based upon the evidence presented, the Court found that the mother had not demonstrated any flexibility with the existing parenting plan, and that any concessions or changes that had been made were minimal at best, and that the court was not persuaded that the mother was flexible or cooperative.

The court in its oral rulings and written findings and conclusions indicated clearly indicated that considering a major modification, which is what the father's petition for modification included, R.C.W. 26.09.060 required that the court shall not modify a prior parenting plan unless the Court makes specific findings on factors that have arisen since the permanent parenting plan was entered or that were unknown to the Court at that time, that there had been a substantial change in circumstances of the children, and that, the modification would serve the best interest of the children. The court in its oral rulings and written findings and conclusions indicated clearly indicated that the Father bore the burden on his modification. VRP p. 5 lines 14-25

In its analysis, the Court correctly determined that subsection (2) of 26.09.060 both (a) and (b) did not apply in the instant case, as there was no finding of the existence of an agreement between the parties about what should happen. VRP p. 5 lines 1-5 The Court also clearly indicated that subsection (2)(c) did allow the Court to consider whether the children's present environment is detrimental to the children's physical, mental, or emotional health and whether the harm likely to be caused by a change of environment is outweighed by the advantage of the change for the children. VRP p. 6 lines 6-11

The Court went on to hold that In addition to a major modification, the Court can consider a minor modification but only as to the residential aspects upon a showing of a substantial change in circumstances of either parent or of the children without consideration for the other factors. VRP p. 6 lines 12-17

In both its oral and written rulings the court noted that it really was a combination of two trials; the relocation and the modification. VRP p. 4 lines 9-11

The Court determined that some of the factors of the modification statute encompassed the statutory factors for relocation, and that the guardian ad litem addressed the factors in her report admitted into evidence. VRP p. 4 lines 12-15

The court in its oral ruling and written findings and conclusions clearly indicated that it considered all of the factors for minor adjustments to the existing permanent parenting plan under both of party's modification action. The court also indicated that even in a minor modification filed by the father, or by the mother, the court remains limited and cannot change the residence of the children from the primary residential parent unless the Court makes specific findings, and that the Court may alter the terms of the permanent parenting plan if the number of days affected does not exceed 24 full days. VRP p. 18-25

The Court concluded that it presumed Mr. Peck's modification to be a major modification because he was asking for primary residential placement.

The Court considered the mother's modification to be a minor modification, even though there was no way to count the number of days on mother's petition or motion.

The Appellant assigns error to the findings of fact & conclusions of law from the trial court's August 18, 2016 "Final Order and Findings on Petition to Change a Parenting Plan, Residential Schedule or Custody Order":

The appellant argues specifically that, the trial court erred in finding detriment to the children and reversing custody where, after trial, the court initially offered the mother, who had moved to Centralia under a commissioner's order granting temporary relocation, to continue as primary custodian if she moved back to Yelm.

On June 18, 2016, a commissioner granted Ms. Peacock's Motion for Temporary relocation. Mr. Peck and Ms. Peacock moved from Yelm to Centralia, Washington with the parties two daughters. However, at the time of trial, the court's found that the decision of the commissioner was not based upon consideration of the relocation factors prior to issuing the temporary Order allowing relocation.

At the July 7, 2016 hearing, Ms. Peacock indicated she intended to comply with the Court's request and would be moving back from Centralia so that the court could take that into consideration

in ruling on the major modification." See July 7, 2016 VRP at 9-10. The Court ordered that the mother be given an opportunity to demonstrate compliance with the Court's order and complete the relocation to Yelm at or by the start of the school year, and if not, the girls would be moved to the father's house. Id. at 12. The Court set the next hearing for August 18, 2016.

As indicated, the Court determined that some of the factors of the modification statute encompassed the statutory factors for relocation, and in its decision making on the issue of Modification the Court clearly looked to the factors for relocation.

At the time of the August 18, 2016 hearing the Court found that evidence presented at trial showed that, the mother had relocated a number of times, and that the mother moved at her peril under a temporary order without the benefit of all of the factors being considered. VRP p. 17 lines 8-12, and that in order to remain involved with the girls, each time the mother had relocated, the father had moved closer to the mother and that the father maintained involvement with the girls on a regular basis. VRP P. 8 lines 25; P. 9 lines 1-31

At the time of the August 18, 2016 hearing the Court found that evidence presented indicated that the "issue of the relocation had not been achieved" by the mother. Id. at 13-14. Based thereon, the court concluded that factors had arisen since the permanent parenting plan was entered or that were unknown to the Court at that time, i.e., that relocation had not been achieved, and that this constituted a substantial change in circumstances of the children, that the children's present environment was detrimental to the children's physical, mental, or emotional health, and that, the harm likely to be caused by a change of environment is outweighed by the advantage of the change of custody to the Father, and that, a change of custody to the Father would serve the best interest of the children.

(2) Whether the trial court's findings of fact and conclusions of law regarding Relocation are supported by the evidence and its findings support its conclusions of law.

Appellant Desiree P.acock assigns error to the following findings of fact & conclusions of

law from the trial court's August 18, 2016 "Findings of Fact and Conclusions of Law Re: Relocation and Modifications to Parenting Plan":

- Findings of fact no. 7, 8, 9, 10, 11, 19, 20, 23;
- Conclusions of law (as to relocation) no. 1, 2;
- Conclusions of law (as to modification) no. 1, 3, 9.

The Appellant argues that the testimony of the guardian ad litem was insufficient to support the Court's findings of fact and conclusions of law regarding relocation.

Post-dissolution relocations involving minor children are governed by the Child Relocation Act, RCW 26.09.405-.560. Under the Act, there is a rebuttable presumption that relocation will be permitted. RCW 26.09.520. In order to rebut this presumption, the party opposing relocation must prove that the detrimental effect of relocation outweighs the benefits to the child and the relocating parent. RCW 26.09.520. This standard "requires proof that the relocation decision of the presumptively fit parent will be so harmful to the child as to outweigh the presumed benefits of the change to the child and the relocating parent." *Momb v. Magone*, 132 Wn. App. 70, 79, 130 P.3d 406 (2006). In determining whether the opposing party has rebutted the presumption, the trial court must consider each of the following factors: VRP p. 7 lines 12-19

(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 and 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. RCW 26.09.520.

No single factor is dispositive. *Id.*; *Kim*, 179 Wn. App. at 241. Further, the trial court must make specific findings, on the record, as to each factor. *Kim*, 179 Wn. App. at 240.

Here, from its oral ruling and its written findings and conclusions, it is clear that the trial court entered findings of fact on all ten of the above identified factors.

The Appellant contends that, the findings and conclusions of the court were not supported by substantial evidence, and that the trial court therefore, abused its discretion.

"Substantial evidence" exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). For the reasons that follow, all of the trial court's findings are supported by substantial evidence and its judgment should be affirmed by this Court.

In addressing the relocation factors, the court determined that even though the modification factor also encompassed the relocation. The overlapping piece of relocation and modification is whether or not the relocation of the children is more detrimental or less detrimental than changing primary residential placement.

The court clearly identified the standard and burden of proof, concluding specifically that, it is a rebuttable presumption that relocation is preferred when proper notice is given, that the father had the burden to demonstrate the detrimental effect of the relocation, that, detrimental effect of the relocation outweighs the benefit of the change to the children and the relocating mother, and that, the court was required to consider all of the statutory factors in making its decision on whether or not the move should be permitted even though the mother has already moved. VRP p. 7 lines 12-19

The Court also clearly noted in its oral ruling and in its written findings that, no factor was to be given greater weight than the other, and that, there was no magic number that must be satisfied to grant or deny a relocation. VRP p. 7 lines 20-22

In its oral rulings and in its written findings, the court also indicated clearly and correctly that, the decision of the pro tem commissioner that allowed the relocation was not binding on the court and carried no precedent in restricting or broadening the court's decision. VRP p. 7 lines 20-21; p.8 lines 1 In its oral rulings and in its written findings, the court also indicated clearly and correctly that the Court must determine whether or not the father satisfied his burden to rebut Mother's the presumption that allowed her to relocate. VRP P. 8 lines 1-4

The Respondent, by and through counsel undersigned that, the record in this case does contain sufficient evidence to persuade a fair-minded, rational person of the truth of the declared premise, i.e., that the detrimental effect of the relocation outweighs the benefit of the change to the children and the relocating mother, and that the record in this case does contain sufficient evidence to persuade a fair-minded, rational person that he satisfied his burden to rebut Mother's the presumption that allowed her to relocate.

The evidence in this case was undisputed and clearly indicated that, while both parents had a strong, loving, caring relationship with these girls since the parties separated in 2009, and that the girls

had a strong relationship with the parents' new spouses, their stepsister in the father's home and with the mother's extended family, testimony showed that the mother had relocated a number of times, that the mother's relocation had drastically altered the father's participation in the girls' after-school activities and nearly unilaterally eliminated the mid-week. Evidence also showed that, in order to remain involved with the girls, each time the mother had relocated, the father moved closer to the mother, and that the father maintained involvement with the girls on a regular basis. VRP P. 8 lines 25; P. 9 lines 1-3t

The guardian ad litem reported that the girls had a close relationship with each of the parents VRP P. 9 lines 3-8, but the guardian ad litem also reported that the girls were reluctant to express the depth of their feelings, love and close relationship with the father if the mother was near or within hearing.

The second factor is the prior agreement of the parties. Here, there was no evidence of an agreement on the relocation or that either of the party's modifications. The only agreement found to have been reached was in 2001 and finalized in 2013 with the agreed permanent parenting plan. VRP P. 9 lines 9-13

Evidence does indicate that Factor three was really a major focus of the guardian ad litem's report and a considerable amount of testimony at trial focused on, and that was whether or not disrupting the contact between the children and the mother would be more detrimental to the children than disrupting the contact between the children and the father. VRP P. 9 lines 14-19

In considering this factor, the Court looked at conduct of each party and the relationships that they had with each other, even though they were divorced, and how that relationship affected the children, specifically whether or not the relationships that the party's had with the children were healthy, and whether there's an abusive use of conflict. The Court looked at the number of moves that the mother had made and the impact on the girls with each of those moves. VRP P. 10 lines 1-6

The Court also noted that the guardian ad litem reported a lack of encouragement by the mother for the girls to have a positive and loving relationship with their father. On more than one occasion the guardian ad litem pointed out and commented that the children were afraid to express their feelings and their love or concern for their father if the mother was able to overhear or consider how they might truly feel about their father. VRP P. 10 lines 7-14

Based thereon, the Court found that both parents knew that children were not good reporters, that both parents knew that children would say what the parent who is listening needs to hear, and that both parents knew that the children wanted to please each of the parents so that the parents will continue to love them regardless of how they felt about the other parent; and that each of the parents were judging the girls based upon their relationship individually with them. VRP P. 10 lines 15-22

Factor four is whether or not there are any Section 191 limitations by either parent. While this Court found that there were no 191 limitations, based upon evidence presented in the report of the guardian ad litem, the mother's conduct rose to Section 191 limitations. The guardian ad litem reported that she was concerned about the mother tape recording the girls as she interviewed them after residential time with their father; the professed delay in reporting to CPS; and the abundant excuses for not completing the concerning issues addressed to the mother by the guardian ad litem. VRP P. 11 lines 1-7

The fifth factor is the good-faith reasons given for the relocation and the good-faith reasons for opposing the relocation.

In this case, the mother put forward five reasons to relocate: To stabilize her rental versus purchase living arrangements; to move to a larger home with more land or property suitable and fitting to the Peacock's lifestyle; that there was more personal space for the two children to pursue outdoor activities such as gardening, the horse riding and caring, and basketball. And finally, there was put forth

in the notice for relocation a more reasonably located residence for Mrs. Peacock's current husband.

VRP P. 11 lines 8-18

At trial the mother added that the neighborhood where she had been residing, in her opinion, had become rundown and there was current drug activity. Mother testified that the location chosen was affordable and more convenient for Mr. Peacock over the next five years, even though his driving distance was increased and the driving distance for the natural father was substantially increased. VRP P. 11 lines 19-25 Although scant, testimony in the matter indicated that the mother gave little if any consideration to the impact her relocation would have on the relationship of the father and the girls. While the testimony does support that the mother did give notice to the father she intended to relocate, she never indicated she was looking at homes outside of the Yelm or Roy area where everyone had been living. The court in its oral ruling determined that it was disingenuous to suggest that it was the father's burden to inquire if she was intending to relocate. VRP P. 12 lines 3-9

The next factor is the age, developmental state, and needs of the children, and the likely impact the relocation or its prevention will have on the children's physical, emotional, and educational development taking into consideration any special needs of the children. Evidence in this case showed that each of the girls had separate needs. There was no dispute that Alyssa is outgoing, happy and active, although overweight. The guardian ad litem observed a perceived lisp and had some medical issues that she thought needed to be addressed for Vanessa. With regard to the weight issue, the guardian ad litem indicated that both girls had shortness of breath, they fail to enjoy exercise, they had a poor self-image and have never really properly addressed the overeating issues. The guardian ad litem's recommendations were not completed as to the neuro-educational evaluation, the speech pathology evaluation, and the medical diagnosis for whether or not there is an issue with Vanessa's hip that needed to be addressed beyond the chiropractor's evaluation.

The next factor is the quality of life, resources, and opportunities available to the children and to the mom, the relocating parent, in the current and proposed geographic location. Evidence in this case showed there to be really no dispute that the quality of life and the resources available in Yelm or Centralia were any different. There's the same land opportunity. There's basketball both in Yelm and perhaps in Rochester, although Alyssa's not currently involved. There was a horse on the property in Yelm. There's a horse on the property in Centralia, albeit there's more land in Centralia. The gardening and basketball practice suggested in the notice for relocation were certainly available in the Yelm property and were occurring at the Yelm property and are only made more difficult by the move to Centralia for the Hoop Star basketball.

The next factor is the availability of alternative arrangements to foster and continue the child's relationship with an access to the non-moving parent.

The court determined that there were only a number of alternatives available to this Court to address this factor. One is to change custody to the father and give Mother the reverse residential time that the father has had; two, have the mother relocate back to the Yelm area; or three, deny everyone's petition.

The next factor is the alternatives to relocation and whether it is feasible and desirable for the moving party. In this case the Court concluded that in considering both alternatives for Father to move to Centralia or Mother to move back to Yelm, both were really not feasible or desirable.

The next factor is also tied to the alternatives to relocation, and it's the financial impact and the logistics of the relocation or its prevention. The court found these two factors troubling and really not very helpful in the Court's analysis of all of the other factors that the Court needed to look at.

After considering all of the factors and exhibits and witness testimony that had been presented, the Court made reference to a couple of troubling things about this case: The first, that the party's couldn't resolve this by agreement, that the party's continue to war between themselves seven years after separation, constant inappropriate, demeaning, rude texts to each other, the party's failure to appreciate the impact that their personal and constant warring was having on the children, that the party's had not really demonstrated an ability to put the girls' needs first and foremost over their own needs, but more importantly, over their own battles with each other, and that the attitude of the party's in coming to trial appeared to be that someone was going to win this case.

Based upon the evidence presented, the court found that, the mother's relocation had drastically altered the father's participation in the girls' after-school activities and nearly unilaterally eliminated the mid-week time, especially when this is coupled with the mother's refusal to drive the girls home after the Wednesday basketball practice in Yelm. The Court agreed with the father that his attendance at basketball practice was not residential time, even though he got to spend time with the girls.

Based upon the evidence presented, the Court found that the mother had not demonstrated any flexibility with the existing parenting plan. Based upon the evidence presented, the Court found that any concessions or changes that had been made were minimal at best and did not persuade the Court that the mother was flexible or cooperative. Based upon the evidence presented at trial, and after a complete analysis of the statutory factors, the court concluded that, the mother moved at her peril under a temporary order without the benefit of all of the factors having been considered.

Again, the Appellant argues that the testimony of the guardian ad litem was insufficient to support the courts findings of fact and conclusions of law regarding relocation.

Here, the testimony of the guardian ad litem was not the only evidence relied upon by the court. The guardian ad litem's written report was admitted into evidence and considered and relied upon by the court at the time of hearing. The Court, in its oral ruling and in its written findings, noted that while the guardian ad litem's report appeared to suggest that the guardian ad litem considered the relocation a fait de complete; the Court in its analysis of the guardian ad litem's investigation found that the guardian ad litem did a thorough, helpful, and complete investigation, including an in-depth analysis of all the relocation factors, and even though she considered and concluded the relocation to be resolved, the guardian ad litem recommended that the relocation by the mother was more detrimental to the girls than a change of primary residential placement to the father. After and based upon the evidence presented at the time of hearing and after complete consideration and application of the relocation factors, the court also found that the mother had moved at her peril under a temporary order without the benefit of all of the factors being considered by the trial court, VRP p. 17 lines 13-17, that the father had met his burden of overcoming the presumption in favor of relocation, VRP P. 17 lines 13-17 that the relocation by the mother was more detrimental to the girls than a change of primary residential placement to the father, and based thereon, the court denied the mothers request for relocation. VRP P. 17 lines 13.

CONCLUSION

The trial court's Findings of Fact and Conclusions of Law regarding detriment to the children in Mr. Peck's Modification are supported by the evidence and do comply with the law. Additionally, the trial court's Findings of Fact and Conclusions of law regarding Relocation are supported by the evidence and its findings do support its conclusions of law.

RELIEF REQUESTED

As such, the Respondent, Theodore Peck, by and through counsel undersigned, respectfully requests that this Court affirm the judgment of the trial court.

DATED THIS 18th day of May 2017

Respectfully Submitted,



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STEVEN M. BOBMAN

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Transmittal Information

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