

FILED
Court of Appeals
Division II
State of Washington
11/8/2018 10:35 AM

No. 51956-9-II

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

In re Parentage of C.M.,

Cassandra Weisenberger,

Appellant,

v.

Tyler Mittge,

Respondent.

BRIEF OF APPELLANT

Hannah G. Campbell
Attorney for Appellant

Campbell Law Firm, Inc., P.S.
115 South First Street
Montesano, WA 98563
360-249-8482
hannah@graysharborattorney.com
WSBA #50571

Table of Contents

1. Introduction	1
2. Issues	2
3. Statement of the Case	4
4. Argument	10
4.1. The Trial Court Erred In Modifying the Final Parenting Plan, Specifically Adding New Definitions and Terms, Without Finding a Substantial Change In Circumstances	11
4.1.1. In changing the definition of Pacific County, the trial court expanded the geographical area for visitation, thereby modifying the existing parenting plan	15
4.1.2. The trial court erred in designating a specific “Phase” for the parties to follow, resulting in a modification of the existing parenting plan	16
4.1.3. The trial court modified the transport- ation terms of the existing parenting plan, including adding notice requirements and multiple exchange locations	17
4.2. Ms. Weisenberger Plead a Prima Facie Case for a Substantial Change in Circumstances Pursuant to RCW 26.09.260, and Therefore the Trial Court Should Have Proceeded to a Testimonial Hearing on the Petition	20
5. Fairness Doctrine on Remand	23
6. Request for Attorney Fees Pursuant to RAP 18.1.....	26
7. Conclusion.....	26

Table of Authorities

Cases

<i>Anderson v. Anderson</i> , 14 Wn. App. 366, 541 P.2d 996 (1975)	12
<i>State v. Bilal</i> , 77 Wn. App. 720, 893 P.2d 674 (1995)	23
<i>Bower v. Reich</i> , 89 Wn. App. 9, 964 P.2d 359 (1997)	20, 21
<i>In re Marriage of Christel & Blanchard</i> , 101 Wn. App. 13, 1 P.3d 600 (2000)	12, 13, 14, 16, 17, 20
<i>In re Marriage of Coy</i> , 160 Wn. App. 797, 248 P.3d 1101 (2011)	13
<i>In re Marriage of Flynn</i> , 94 Wn. App. 185, 972 P.2d 500 (1999)	21
<i>In re Marriage of Holmes</i> , 128 Wn. App. 727, 117 P.3d 370 (2005)	12
<i>In re Marriage of Hoseth</i> , 115 Wn. App. 563, 63 P.3d 164 (2003)	13, 21, 22
<i>Kirshenbaum v. Kirshenbaum</i> , 84 Wn. App. 798, 929 P.2d 1204 (1997)	12
<i>In re Marriage of Murray</i> , 28 Wn. App. 187, 622 P.2d 1288 (1981)	13
<i>In re Marriage of Raugust</i> , 29 Wn. App. 53, 627 P.2d 558 (1981)	13
<i>Rivard v. Rivard</i> , 75 Wn. 2d 415, 451 P.2d 677 (1969)	11
<i>Sherman v. State</i> , 128 Wn. 2d 164, 905 P.2d 355 (1995)	24
<i>In re Marriage of Stern</i> , 57 Wn. App. 707, 789 P.2d 807 (1990)	12
<i>See In re Marriage of Tomsovic</i> , 118 Wn. App. 96, 74 P.3d 692, 697 (2003)	21, 22, 23

Statutes

RCW 26.09.260 1, 4, 12, 20, 21
RCW 26.09.270 2, 20, 21
RCW 26.09.140 26

Other Authorities

RAP 18.1..... 26

1. Introduction

Cassandra Weisenberger and Tyler Mittge have a 4-year old son, C.M. Their parentage matter is out of Pacific County Superior Court. The final orders were entered partially by agreement, partially by court order. The terms at issue in the final parenting plan were entered by agreement.

The final parenting plan was fashioned around Mr. Mittge's unusual work schedule, as his employment with his company was expected to continue. However, shortly after the final parenting plan was entered, Mr. Mittge changed employment and subsequently relocated to a neighboring county. As a result, the existing parenting plan was inoperable and did not apply to the parties' new situation.

On January 12, 2018, Ms. Weisenberger petitioned to modify the existing parenting plan due to the change circumstances of Mr. Mittge. The trial court denied Ms. Weisenberger's motion for adequate cause to modify the parenting plan, finding that no substantial change in circumstances existed under RCW 26.09.260.

However, in a contradictory approach, the trial court made various changes to the final custody order, changes that

accommodate Mr. Mittge's relocation. The various changes within the *Order Re: Denial of Adequate Cause* serve to demonstrate that a substantial change in circumstances did in fact occur, which was also established through affidavits under RCW 26.09.270.

The various provisions and terms within the *Order Re: Denial of Adequate Cause* were not clarifications, but rather amounted to modifications. Therefore, the trial court's decision was an abuse of discretion, as a final order was modified outside the statutory framework. The trial court abuses its discretion if it permanently alters the parties' rights under the parenting plan without conducting a testimonial hearing. The parties' rights were altered in numerous ways, including changing geographical limits and transportation requirements.

Therefore, this Court should vacate the trial court order entered February 9, 2018, *Order Re: Denial of Adequate Cause*, and remand for further proceedings consistent with this Court's ruling.

2. Assignments of Error and Issues Pertaining

Assignments of Error

1. The trial court erred in modifying a final order without holding a testimonial hearing, including changing the definition of "Pacific

County” to include a larger geographical area than originally designated in the existing parenting plan.

Order Re: Denial of Adequate Cause at ¶2(E): “For the purpose of determining which Phase of contact we are in in the Parenting Plan, the terms ‘home’ and ‘Pacific County’ shall include any residential location within 85 miles of Raymond, WA.” CP 80.

2. The trial court erred in modifying a final order without holding a testimonial hearing, specifically that the parties would currently be following “Phase Three” of the existing parenting plan.

Order Re: Denial of Adequate Cause at ¶2(A): “At the present time we will be following Phase Three as noted in paragraph 9 of the Plan, in spite of father’s present residence in Lewis County.” CP 79-80.

3. The trial court erred in modifying a final order without holding a testimonial hearing, specifically inserting various new transportation provisions including a notice requirement and multiple exchange locations.

Order Re: Denial of Adequate Cause at ¶2(D):
“Transportation shall be as follows:” CP 80. At ¶2(D)(ii):
“Shall occur at a midpoint location between the homes of the parties; presently at the Pe Ell Texaco Station.” CP 80. At ¶2(D)(ii): “Father may utilize any qualified licensed and insured driver to do the exchanges.” CP 80. At ¶2(D)(iii) “If father gives mother at least 24 hours notice, the exchange point may be changed to Galey’s in Raymond.” CP 80.

4. The trial court erred in finding there was not a substantial change in circumstances since entry of the existing parenting plan, as Mr. Mittge had changed employment and relocated shortly thereafter.

Order Re: Denial of Adequate Cause at ¶1: “No adequate cause for a modification of the current Parenting Plan exists.” CP 79.

Issues Pertaining to Assignments of Error

1. Whether the trial court improperly modified a final custody decree by denying Ms. Weisenberger's motion for adequate cause determination, thereby finding no substantial change in circumstances, while simultaneously making various modifications to the existing parenting plan. Issues of modification are reviewed for abuse of discretion. (assignments of error 1, 2, and 3)

2. Whether Ms. Weisenberger plead a prima facie case for modification under RCW 26.09.260, and therefore the trial court should have found adequate cause to proceed to a testimonial hearing. Issues of adequate cause determination are reviewed for abuse of discretion. (assignment of error 4)

3. Statement of the Case

On March 6, 2017, the parties entered the existing final parenting plan. CP 23-33. Ms. Weisenberger is the primary custodial parent and Mr. Mittge has visitation per the residential schedule, Section 8, of the final parenting plan:

When the father is off work, and/or in Pacific County, his visitation with the minor child shall be broken down into three time frames, always commencing with One (below):

1. Phase One: Starting at 8:00 p.m. on the evening he returns to Pacific County (including Friday evening and weekend days this first weekend) and running through 8:00 p.m. the following Friday. The father shall return the child to the mother's care for the weekend commencing on Friday at 8:00 p.m. and running through Sunday night at 8:00 p.m., whereupon the minor child shall return to the father for the next five days during the week and then returned to the mother on the next Friday evening.

2. Phase Two: If the father remains home beyond the first two weeks designated in the preceding paragraph, then the visitation schedule will adjust/alter for the next two weeks. The minor child shall return to the care of the father starting at 8:00 p.m. on Sunday evening at the end of the mother's second weekend contact and shall continue through 8:00 p.m. the following Thursday. The child shall return to the mother's care for the weekend commencing this time on Thursday at 8:00 p.m. and running through Sunday night at 8:00 p.m., whereupon the minor child shall return to the father for the next four days during the week and then returned to the mother on the next Thursday evening.

3. Phase Three: If the father still remains home beyond the fourth week, then the parties share time equally with the minor child. The time shall be on an alternating, rolling schedule of four days and three days that will follow the schedule as follows (starting with Sunday night): Four days with the father; four days with the mother; three days with the father; three days with the mother, and then following this pattern *until the father returns to work.*

CP 25-26 (emphases added). Section 8 of the final parenting plan was an agreement of the parties, specifically drafted to accommodate Mr. Mittge's out-of-state employment. CP 83.

Mr. Mittge was employed with Global Tower Service, Inc. for several years at the time of entry of the existing final parenting plan. CP 83. Mr. Mittge would be out-of-state for months at a time, but then return to Pacific County for a number of weeks with time off from work. CP 83; RP 6. The visitation schedule is broken down

into three phases, depending on how much time Mr. Mittge has off from work. CP 25.

In May of 2017, Mr. Mittge left his job with Global Tower Service, Inc. CP 39-40. At his new place of employment, Mr. Mittge works Monday through Friday, although his exact work schedule is unknown. CP 62. His new place of employment is also outside of Pacific County. CP 61; RP 23-24; 39-40.

Shortly after leaving Global Tower Service, Inc., Mr. Mittge also relocated to Chehalis, Lewis County, Washington. CP 62; 39-40. Since entry of the existing parenting plan, the parties by agreement enrolled the minor child in head start pre-school in Raymond, Washington for the 2017-2018 school year. CP 84.

After Mr. Mittge's change in employment and subsequent relocation, the parties developed a visitation schedule over the next nine months, adapting to the changed circumstances without court order. CP 39-40. Ms. Weisenberger continued to be the primary custodial parent and Mr. Mittge had visitation every other weekend in Chehalis or C.M. would have visitation with the paternal grandparents in Raymond. CP 39-40.

On January 10, 2018, Ms. Weisenberger petitioned to modify the final parenting plan. CP 138–141. Ms. Weisenberger's petition

referenced the changed circumstances, including Mr. Mittge's change in employment schedule and relocation. CP 139. The plan was inoperable because Mr. Mittge was both working and outside of Pacific County. Technically, none of the visitation terms applied under Section 8 of the existing parenting plan. CP 25-26.

Although the parties developed a visitation schedule over the previous nine months to reflect the changed circumstances, Ms. Weisenberger ultimately petitioned the court because of difficulties in amicably co-parenting without an operable parenting plan, including hostile contact from Mr. Mittge:

He disrespects me, calls me foul names, and brings up disagreements in front of our three year old son instead of discussing the issues in private. I am seeking a modification so there is more certainty in the schedule and Mr. Mittge can consult the parenting plan rather than berate me if I do not do exactly as he wants.

CP 41. This same declaration details verbal abuse by Mr. Mittge resulting from disagreements related to C.M. CP 41. Coupled with the changed circumstances and difficulties in co-parenting without an operable plan, Ms. Weisenberger sought relief from the court.

Ms. Weisenberger's motion for adequate cause was brought before the Honorable Judge Goelz, Pacific County Superior Court, on February 9, 2018. RP 1; RP 37. CP 59-60. The trial court

denied Ms. Weisenberger's motion and entered the *Order Re: Denial of Adequate Cause*. CP 79–81.

The *Order Re: Denial of Adequate Cause* not only denied Ms. Weisenberger's motion for adequate cause, but also added new terms and definitions to the existing parenting plan. CP 79-80. This order requires the parties to continue under the existing parenting plan, but "with the following provisions and understandings: A.) At the present time we will be following Phase Three as noted in paragraph 8 of the Plan, in spite of father's present residence in Lewis County" and "E.) For the purpose of determining which Phase of contact we are in, in the Parenting Plan the terms "home" or "Pacific County" shall include any residence location within 85 miles of Raymond, WA." CP 79–80.

Ms. Weisenberger filed a Motion for Reconsideration and accompanying declaration. CP 83-85. She explains why she agreed to the phased visitation schedule, as it accommodated Mr. Mittge's unique work schedule and ensured both parents had visitation with C.M. CP 83-85.

Ms. Weisenberger briefed the issue for the trial court in support of her Motion for Reconsideration, detailing that the changed or new terms included in the *Order re: Denial of Adequate*

Cause went beyond clarifications but were instead modifications of the final parenting plan. CP 88-89.

In responding to the Motion for Reconsideration, Mr. Mittge did not address the analysis of clarification v. modification. CP 103-105. Ultimately, the trial court denied Ms. Weisenberger's Motion for Reconsideration. The trial court's written decision was silent on the issue of clarification v. modification as well. CP 120-121. The trial court did not justify changing terms or adding definitions. CP 120-121.

Instead, the trial court focused on how Ms. Weisenberger plead for a minor modification of the existing parenting plan. CP 120. The existing parenting plan, Section 8, does not designate a specific number of overnights to Mr. Mittge but rather includes three phases. CP 25-26. The phases are distinguished by how much time Mr. Mittge has off from work. CP 25-26. Therefore, it's unclear whether the appropriate requested change in the petition was a major or minor modification because of the phased visitation schedule. CP 25-26.

Ms. Weisenberger filed a declaration, in support of her petition to modify, detailing how many overnights Mr. Mittge had requested since his change in employment and relocation, with

attachments. CP 73; 39-50. Based on that schedule, Ms. Weisenberger calculated the requested change to be a minor modification for purposes of petitioning the court.

The trial court's modification to the existing plan caused a major change to C.M.'s routine, stability and development. CP 124-126. Since entry of this order, the parties have been rotating visitation on a 4-4-3-3, per Phase Three. CP 79-80. This is drastically different than the schedule the parties had done by agreement for nine months prior. CP 39-40; 70-73.

During Mr. Mittge's time, C.M. has spent the majority of time with the paternal grandparents, not Mr. Mittge. CP 125. C.M. no longer attended school on weekdays when he is with the paternal grandparents. CP 84. Ms. Weisenberger also detailed the lack of continuity in medical care between her care and the paternal grandparents. CP 125. This was a difficult transition for C.M., as it was an abrupt change to significantly reduce C.M.'s time with Ms. Weisenberger. CP 125.

4. Argument

The trial court abused its discretion in two distinct ways: First, it modified the final parenting plan while simultaneously

finding there was not a substantial change in circumstances.

Second, it was error to find that Ms. Weisenberger had not established a substantial change in circumstances, as Mr. Mittge had relocated more than 85 miles from the area and changed employment. The change in employment is significant, as the existing parenting plan was fashioned around Mr. Mittge's previous employment.

4.1. The Trial Court Erred In Modifying the Final Parenting Plan, Specifically Adding New Definitions and Terms, Without Finding a Substantial Change In Circumstances

The trial court states that it had authority to "clarify" the parenting plan. RP 40. However, the trial court did not merely clarify the plan but instead modified various terms of the existing parenting plan. RP 79-81.

A court clarifies a parenting plan when it merely defines the rights and obligations that the trial court already gave to the parties in the original parenting plan. *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969). A court may clarify a decree by defining the parties' respective rights and obligations, if the parties cannot agree on the meaning of a particular provision. *E.g.*, *Rivard*, 75 Wn.2d at 419, 451 P.2d 677 (upholding court's clarification that father could have children on alternate weekends and one evening per week,

when parties could not agree on meaning of divorce decree's phrase "reasonable visitation rights"). In contrast, a modification extends or reduces the rights provided in the original plan. *In re Marriage of Christel & Blanchard*, 101 Wn. App. 13, 22, 1 P.3d 600, 606 (2000).

The trial court may change a permanent parenting plan in three ways: "by agreement, by petition to modify, and by temporary order." *Christel*, 101 Wn. App. at 22, 1 P.3d 600. To modify a parenting plan, the court must find that there has been a "substantial change in circumstances", even if the modification is minor. *In re Marriage of Holmes*, 128 Wn. App. 727, 734, 117 P.3d 370 (2005) (citing *Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 807, 929 P.2d 1204 (1997); RCW 26.09.260(1), (4)). The court must also find that modification is in the child's best interest and that modification is "necessary to serve" the child's best interest. RCW 26.09.260(1).

"Compliance with these criteria is mandatory." *In re Marriage of Stern*, 57 Wn. App. 707, 711, 789 P.2d 807 (1990). The trial court's failure to make findings reflecting its application of each relevant factor is error. *Stern*, 57 Wn. App. at 711 (citing *Anderson v. Anderson*, 14 Wn. App. 366, 368, 541 P.2d 996 (1975), *In re*

Marriage of Murray, 28 Wn. App. 187, 622 P.2d 1288 (1981); *In re Marriage of Raugust*, 29 Wn. App. 53, 627 P.2d 558 (1981)).

Accordingly, a trial court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria. *In re Marriage of Hoseth*, 115 Wn. App. 563, 569, 63 P.3d 164 (2003).

The trial court abuses its discretion if it permanently alters the parties' rights under the parenting plan when there is no showing that there has been a substantial change in circumstances. *Christel*, 101 Wn. App. at 23-24, 1 P.3d 600; see also *In re Custody of Halls*, 126 Wn. App. 599, 606-07, 109 P.3d 15 (2005). Any modification, no matter how slight, requires an independent inquiry by the trial court. *In re Marriage of Coy*, 160 Wn. App. 797, 804, 248 P.3d 1101, 1105 (2011).

When language goes beyond explaining the provisions of the existing parenting plan or filling in procedural details, the language used by the court amounts to a modification. *Christel*, 101 Wn. App. at 23–24, 1 P.3d 600.

In *Christel*, the trial court altered language related to dispute resolution in the final custody decree and this was found to be a modification, not clarification. *Christel*, 101 Wn. App. at 23, 1 P.3d

600. The language used by the trial court in the order on appeal speaks to the future (“Failure of a parent to meet either a deadline for written notice to the other parent or the deadline for noting a motion following mediation shall be deemed a waiver of a parent's right to seek a change in school enrollment for the following academic year”). *Id.*

In reasoning why such language was a modification, the *Christel* court stated:

This language goes beyond explaining the provisions of the existing parenting plan. The language goes beyond filling in procedural details. The order on its face imposes new limits on the rights of the parents. It is not a clarification of the existing parenting plan. In addition, the language is clearly intended to apply into the future. It has all of the characteristics of a permanent change rather than a temporary order.

Christel, 101 Wn. App. at 23, 1 P.3d 600.

Here, the Pacific County trial court did not apply the mandatory statutory framework for modifications. There was no agreement between the parties. The trial court did not issue a temporary order, but instead a final order. CP 79-81. And last, there was a petition to modify pending, but the court denied that petition by not finding adequate cause to proceed to a testimonial hearing. Therefore, the changes detailed in the *Order Re: Denial of*

Adequate Cause; CP 79-81; must be clarifications, not modifications, in order to be upheld on appeal.

4.1.1. In changing the definition of Pacific County, the trial court expanded the geographical area for visitation, thereby modifying the existing parenting plan.

As reflected in the *Order Re: Denial of Adequate Cause*, the trial court changed the term “Pacific County” to mean “any residential location within 85 miles of Raymond.” CP 80. The term “Pacific County” is clearly defined and does not require clarification.

Therefore, by ordering the new meaning of Pacific County is anything within 85 miles of Raymond, this expanded Mr. Mittge’s rights under the existing parenting plan. Mr. Mittge can exercise the same visitation schedule while living within a much larger geographical area than designated under the existing parenting plan. This is a clear expansion of rights, not a clarification of rights already set forth. The trial court stated:

Why don't we say - why don't we say that the term Pacific County includes no distance greater than...75 miles. It's a clarification to mean that - I do not want your client to decide if Pacific County means Pacific County.

RP 39-40. The trial court intentionally altered the definition of Pacific County so as to accommodate Mr. Mittge’s new residence in Lewis County.

Similarly to *Christel*, the change as to the definition of Pacific County is clearly intended to apply into the future and has “all of the characteristics of a permanent change rather than a temporary order”. *Christel*, 101 Wn. App. at 23, 1 P.3d 600. The *Order Re: Denial of Adequate Cause*, similarly to *Christel*, goes far beyond filling in procedural details but makes a permanent change to the final order. *Id.*

To change the term “Pacific County” to “any residential location within 85 miles of Raymond”, the trial court needed to first find adequate cause and conduct a testimonial hearing. Without a finding of adequate cause, changing Pacific County to mean anything within 85 miles of Raymond cannot be a mere clarification. Such a modification is an abuse of discretion by the trial court and warrants vacating the order entered February 9, 2018.

4.1.2. The trial court erred in designating a specific “Phase” for the parties to follow, resulting in a modification of the existing parenting plan

Under the existing parenting plan, Mr. Mittge’s visitation with the minor child is detailed in three phases. CP 25-26. His visitation is conditioned on how long he is physically in Pacific County. The phases were meant to account for Mr. Mittge’s job and the unique schedule that came with that employment. CP 25.

The trial court permanently altered the parties' rights by ordering, "At the present time, we will be following Phase Three as noted in paragraph 8 of the Plan, in spite of father's present residence in Lewis County." CP 79-80. Again, similarly to *Christel*, this change by the trial court is clearly intended to apply into the future and is a permanent change. *Christel*, 101 Wn. App. at 23, 1 P.3d 600.

Phase Three was modified such that it provides for the current situation indefinitely. Therefore, this modification *de facto* eliminates the phases under Section 8 of the existing parenting plan. CP 79-80. While Phase One and Phase Two remain in place, it is unlikely those phases will be triggered. And without finding a substantial change in circumstances and holding an evidentiary hearing, such a change was a permanent alteration of the parties' rights and an abuse of discretion by the trial court.

4.1.3. The trial court modified the transportation terms of the existing parenting plan, including adding notice requirements and multiple exchange locations.

While simultaneously finding there had not been a substantial change in circumstances, the trial court made various changes to the transportation arrangements within the existing parenting plan. CP 80. These changes cannot be classified as

clarifications because entirely new terms were added and other terms removed.

First, the location for exchanging C.M. was modified. The existing parenting plan requires the parties to exchange at the “Raymond Police Station or another agreed upon location”. CP 29. Per the *Order Re: Denial of Adequate Cause*, the parties now exchange at the “Pe Ell Texaco Station” or “[i]f the father gives mother at least 24 hours’ notice, the exchange point may be changed to Galey’s in Raymond”. CP 80.

By changing the exchange location to Pe Ell, the trial court permanently altered the rights of the parties as to transportation. Exchanging C.M. in Pe Ell requires increased driving by Ms. Weisenberger, who works a significant distance from Pe Ell. RP 32. Mr. Mittge’s new situation has been accommodated, expanding his rights, and Ms. Weisenberger has the burden of driving much further to exchange C.M.

And although Mr. Mittge relocated to Chehalis, Lewis County, the trial court ordered a second exchange location in Raymond, Pacific County at “Galey’s”. RP 30. This was done to accommodate the paternal grandparents, as explicitly stated by Mr.

Mittge's counsel. RP 30. The trial court accommodated this request as well. RP 30.

Second, the trial court also added a notice requirement. CP 80. This notice requirement is entirely new and cannot be considered a mere clarification of rights already given. Mr. Mittge benefits from this notice requirement – he can now choose to have C.M. in the care of the paternal grandparents in Raymond, Pacific County or in his care in Chehalis, and then notify Ms. Weisenberger 24 hours ahead where she must exchange. This type of modification is only within the court's discretion if a testimonial hearing is held because it is such a major deviation from the terms of the existing plan.

Third, anyone can transport the child under the new order. CP 80. Under the existing parenting plan, there were agreed restrictions as to who could transport C.M. "Lorie Mittge shall not transport the child". CP 32; 125-26. This term was an agreement of the parties. However, the trial court unilaterally eliminated this provision, reasoning:

And – and I will also say that the father is not so irresponsible that he can't figure out who's a good person to pick his kid up. Anybody he sends, unless it's a sex offender or a four-year-old, is fine.

RP 30. Removing an agreed term, without holding a testimonial hearing, is another major deviation from the existing parenting plan and amounts to a modification of the final order.

Clearly, the new or modified transportation terms are intended to apply to the future as ongoing, permanent changes. The new transportation terms go far beyond filling in procedural details of the existing parenting plan. And on its face, the terms impose new limits on the rights of the parties. This was done not through a temporary order, but as a permanent and final change. See *Christel*, 101 Wn. App. at 23, 1 P.3d 600.

These modifications were an abuse of discretion by the trial court, and as such the *Order Re: Denial of Adequate Cause* should be vacated.

4.2. Ms. Weisenberger Plead a Prima Facie Case for a Substantial Change in Circumstances Pursuant to RCW 26.09.260, and Therefore the Trial Court Should Have Proceeded to a Testimonial Hearing on the Petition

For a party to establish they are entitled to a full hearing on a petition to modify a parenting plan, the petitioner must first demonstrate that adequate cause exists. RCW 26.09.270; *Bower v. Reich*, 89 Wn. App. 9, 14, 964 P.2d 359 (1997). Along with a motion for adequate cause to proceed, the petitioner must submit

affidavits with specific relevant factual allegations demonstrating a substantial change in circumstances that if proved, would permit a court to modify the parenting plan under RCW 26.09.260. RCW 26.09.270; *In re Marriage of Flynn*, 94 Wn. App. 185, 191, 972 P.2d 500 (1999); *Bower*, 89 Wn. App. at 14, 964 P.2d at 362.

If the trial court finds that the affidavits establish a prima facie case, it sets a hearing date to show cause why the requested modification should not be granted. RCW 26.09.270; *Flynn*, 94 Wn. App. at 189–90, 972 P.2d 500.

Relocation of either parent is a changed circumstance that may justify a minor modification, but only if the original parenting plan did not anticipate relocation. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 106–07, 74 P.3d 692, 697 (2003); *see also Hoseth*, 115 Wn. App. at 572-73, 63 P.3d 164.

In *Tomsovic*, the parenting plan explicitly put forth three residential schedules based on the proximity of the parents. *Tomsovic*, 118 Wn. App. at 106–07, 74 P.3d 692. Relocation was not only anticipated, but planned for. *Id.* The court also noted that the moving party made no showing that the change of residence made the residential plan impractical to follow. *Id.* Relocation of either parent is a changed circumstance that may justify a minor

modification, but only if the original parenting plan did not anticipate relocation. *Hoseth*, 115 Wn. App. at 572–73, 63 P.3d 164.

Unlike the parenting plan in *Tomsovic*, the existing parenting plan in this matter did not anticipate Mr. Mittge’s relocation, nor did the parenting plan anticipate a change in Mr. Mittge’s work schedule. And further unlike *Tomsovic*, the existing parenting plan in this matter is impractical to follow, if not completely inoperable.

The existence of a substantial change in circumstances is best demonstrated by the *Order Re: Denial of Adequate Cause* itself. CP 79-81. The changes the trial court ordered, such as altering the definition of Pacific County and adding various new transportation terms, only demonstrates that there had been a substantial change in circumstances in this matter. CP 79-80. If there had not been a substantial change in circumstances, the various modifications within the *Order Re: Denial of Adequate Cause* would not have been necessary to make the existing parenting plan operable.

Last, the adequate cause determination has the same legal standard whether petitioning for a major or minor modification. See *Tomsovic*, 118 Wn. App. at 96 ([T]hreshold finding of a substantial change in circumstances is the same for either a major or a minor

modification of a residential schedule established in a parenting plan). The trial court took issue with Ms. Weisenberger petitioning for a minor modification, but this is problematic in two ways. CP 120. First, the standard is the same for establishing adequate cause. *See Tomsovic*, 118 Wn. App. at 96. Second, the existing parenting plan does not designate a specific number of overnights for Mr. Mittge, so Ms. Weisenberger petitioned for modification consistent with how many overnights Mr. Mittge had actually had with the child since entry of the existing parenting plan. CP 124. Regardless, the trial court failed to apply the correct threshold for a substantial change in circumstances.

Ms. Weisenberger, through affidavit, established a prima facie case for adequate cause to proceed to a testimonial hearing for modification of the existing parenting plan. This Court should remand accordingly.

5. Fairness Doctrine on Remand

A judicial proceeding satisfies the appearance of the fairness doctrine if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). The court analyzes whether a judge's impartiality might reasonably

be questioned under an objective test that assumes a reasonable person to know and understand all relevant facts. *Sherman v. State*, 128 Wn.2d 164, 205–06, 905 P.2d 355 (1995).

This judge did not preside over any hearings in this matter prior to Ms. Weisenberger’s motion for adequate cause, so this was his first time presiding over the matter. Because it was a motion hearing, the court only reviewed accompanying affidavits. Based on the limited record, the trial judge concluded:

People are playing with fire here, so. . . And it's only - I don't know you, either of you, but - and so I get to see you through your attorneys in a courtroom. And I - and I don't really know you very well, but I'm getting a bad impression... **You were definitely giving me the idea that you're trying to alienate this child from this father...** No ifs, ands, or buts about that.

RP 44-45 (emphasis added).

To conclude that a parent is alienating a child from the other parent is a serious conclusion. Without taking testimony to assess credibility, it is troubling that the judge made such a harsh assessment. The judge stated, “No ifs, ands or buts about that”, so his opinion as to Ms. Weisenberger was solidified based on affidavits alone, not the weighing of credibility and other evidence that occurs at a testimonial hearing. RP 45.

Further, the judge's position is unsupported by the affidavits filed both in support and opposition to the motion for adequate cause. Ms. Weisenberger detailed the efforts she took to work with Mr. Mittge and accommodate his visitation requests upon his relocation:

Whenever Mr. Mittge texts or calls me requesting visitation with [C.M.] (even if it's only a few hours prior), I have been accommodating and make arrangements to exchange at his request... In the past eight months there has only been a few times that I was unable to accommodate him.

CP 40. Ms. Weisenberger attached text messages with Mr. Mittge in support of her declaration, showing the parents coordinating visitation every other Friday. CP 44-45. Ms. Weisenberger also detailed efforts to partake in holidays together for C.M.'s sake. CP 41.

In his response, Mr. Mittge alleges that Ms. Weisenberger was "blocking and interfering" with his visitation, but did not provide *any* examples. CP 61. Ms. Weisenberger responded, stating that Mr. Mittge had only requested C.M. every other weekend, for which she complied. CP 70-71.

The affidavits filed by the parties clearly provide contradictory accounts. However, this judge came to the conclusion

that Ms. Weisenberger was alienating C.M. from his father merely because she was seeking a modified parenting plan, reflecting the status quo, after a substantial change in circumstances.

As such, a reasonably prudent and disinterested person would not conclude that Ms. Weisenberger obtained a fair, impartial, and neutral motion hearing. A reasonable person, knowing and understanding all the relevant facts, would not conclude that Ms. Weisenberger had alienated C.M. from Mr. Mittge. This is a hasty conclusion when Ms. Weisenberger was merely seeking a parenting plan that would formalize the status quo after the change circumstances. As such, this matter should be remanded for further proceedings before a different judge.

6. Request for Attorney Fees Pursuant to RAP 18.1

This section of Ms. Weisenberger's opening brief requests attorney fees pursuant to RAP 18.1(b). RCW 26.09.140 grants Ms. Weisenberger the right to recover reasonable attorney fees or expenses on review.

7. Conclusion

The trial court's order was an abuse of discretion. For the reasons set forth above, Ms. Weisenberger respectfully requests

that this Court vacate the Order of the trial court and remand for further proceedings consistent with this Court's ruling.

DATED this 2nd day of November, 2018.

/s/ Hannah Campbell

Hannah Campbell, WSBA #50571
Attorney for Appellant
hannah@graysharborattorney.com
Campbell Law Firm, Inc., P.S.
115 South First St.
Montesano, WA 98502
360-701-6632

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on November 2, 2018, I caused the foregoing document to be filed with the Court and served on Respondent listed below by way of the Washington State Appellate Courts' Portal.

Tyler Mittge
2221 SW Salsbury Avenue
Chehalis, WA 98532
tylermittge53@gmail.com

DATED this 2nd day of November, 2018.

/s/ Hannah Campbell
Hannah Campbell, WSBA #50571
Attorney for Appellant
hannah@graysharborattorney.com
Campbell Law Firm, Inc., P.S.
115 South First St.
Montesano, WA 98502
360-701-6632

FILED
Court of Appeals
Division II
State of Washington
11/9/2018 3:40 PM

COURT OF APPEALS, DIVISION II,
STATE OF WASHINGTON

In re:

Cassandra Weisenberger,

Appellant,

v.

Tyler Mittge,

Respondent.

COA No. 51956-9-II

**CERTIFICATE OF
SERVICE**

I, Hannah G. Campbell, attorney for Appellant, certify under penalty of perjury under the laws of the State of Washington that on November 9, 2018, I caused the Brief of Appellant to be served on Respondent, Tyler Mittge, listed below by way of U.S. Mail:

Tyler Mittge
2221 SW Salsbury Avenue
Chehalis, WA 98532

DATED this 9th day of November 2018.

/s/ Hannah Campbell
Hannah Campbell, WSBA #50571
Attorney for Appellant
hannah@graysharborattorney.com
Campbell Law Firm, Inc., P.S.
115 South First St.
Montesano, WA 98502
360-701-6632

CAMPBELL LAW FIRM, INC., P.S.

November 09, 2018 - 3:40 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51956-9
Appellate Court Case Title: Cassandra Weisenberger, Appellant v. Tyler Mittge, Respondent
Superior Court Case Number: 15-3-00088-3

The following documents have been uploaded:

- 519569_Affidavit_Declaration_20181109153850D2058207_7691.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Certificate of Service mailed.pdf

A copy of the uploaded files will be sent to:

- tylermittge53@gmail.com

Comments:

Sender Name: Hannah Campbell - Email: hannah@graysharborattorney.com
Address:
115 S 1ST ST
MONTESANO, WA, 98563-3601
Phone: 360-249-8482

Note: The Filing Id is 20181109153850D2058207