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COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

In re Marriage of:

No. 52476-7-II

ADAM J. IMPALA,

Respondent,

and

JULIE R. IMPALA,

Appellant.

BRIEF OF APPELLANT

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In re Marriage of:

No. 52476-7-II

ADAM J. IMPALA,

BRIEF OF APPELLANT

Respondent,

and

JULIE R. IMPALA,

Appellant.

I. INTRODUCTION

The underlying divorce trial occurred on June 21, 25, and 26, 2018, in Pierce County Superior Court. The above-named parties have one child, Cannon Impala (henceforth “Cannon” or “the child”), who as of June 21, 2018, was two years old. The parties tried all issues relative to their divorce. This appeal focuses on the trial court’s rulings regarding the parenting plan. In pertinent part, Appellant Julie Impala (nka Julie Shelton but henceforth referred to as “Ms. Impala” or “mother”) requested a final parenting plan wherein Cannon resided with her the majority of the time.

In his Letter Decision (henceforth “Decision”) dated July 17, 2018—and in

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pertinent part—the Honorable Grant Blinn (henceforth “Judge Blinn,” “the trial court,” or “court”) made the following ruling: The parties will have a “50-50” residential schedule until Cannon begins kindergarten, at which time he will begin residing with Mr. Impala a majority of the time except for summers when the parents would alternate Cannon on a weekly basis.

On August 3, 2018, final divorce orders were entered at presentation among them being the final parenting plan which comports with said ruling. Subsequently, Ms. Impala filed a motion for reconsideration as to—inter alia—said ruling. Judge Blinn considered said motion without oral argument and denied said motion.

Ms. Impala filed this appeal because of her strong conviction that the Court erred by entering a final parenting plan wherein the parties have a 50-50 residential schedule until Cannon begins kindergarten, and then changing that schedule to having Cannon reside with father a majority of the time once Cannon begins kindergarten.

In Ms. Impala’s notice of appeal filed on September 26, 2018, she indicated that she also was seeking review of the trial court’s rulings and final orders as to child support. Ms. Impala hereby waives pursuing review of those issues.

II. ASSIGNMENTS OF ERROR

Assignments of Error

A. The trial court erred in entering the parenting plan of August 3, 2018,

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by designating a 50-50 residential schedule until the child begins kindergarten, and then designating that at that time the child will begin residing with father a majority of the time, and with mother every other weekend, except for summer breaks when the 50-50 schedule would be maintained. (CP 3:15 - 4:4.)

B. The trial court erred by denying Ms. Impala’s motion for reconsideration. (CP 85.)

Issues Pertaining to Assignments of Error

A. Is it in the child’s best interests to reside an equal amount of time with each parent for almost four years, i.e., from age 19 months to (slightly over) age 5.5 years (when the child begins kindergarten), then to be subject to a residential schedule wherein—during the school year—the child will reside with father a majority of the time, with mother every other weekend, and during the summer, will reside an equal amount of time with each parent? (Assignment of Error A.)

B. Did the trial court abuse its discretion when it denied Ms. Impala’s motion for reconsideration? (Assignment of Error B.)

III. STATEMENT OF THE CASE

The parties married in July 2015, separated in December 2016, and after a three-day trial in June 2018, finalized their divorce on August 3, 2018. (CP 28:8,10; CP 32-36; RP 1:18; 152:18; 260:18.) As of the time of trial, Ms. Impala was a

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hairstylist and resided in Eatonville. (RP 262:18-22; 277:10-13.) Mr. Impala worked for Boeing and resided in Lakewood. (RP 114:3-4; 158:5-7.) The parties have one child, Cannon, who was two as of the time of trial. (RP 23:20-22.)

On June 5, 2017, Mr. Impala filed for divorce. (CP 91-94.) On July 6, 2017, and after a contested motion for temporary order, Pierce County Court Commissioner Sabrina Ahrens, inter alia, entered a temporary parenting plan which, in pertinent part, ordered as follows:

1. That for 30 days following entry of said parenting plan, mother’s visits with the child would be supervised;
2. Mother will undergo regular and observed drug testing to confirm that she has not relapsed; and
3. That after 30 days, assuming that mother has remained in compliance with these provisions, the parties would transition to a 50-50 residential schedule, i.e., a “2-2-5-5” schedule.

Temporary Parenting Plan, 3:20 - 4:2; 8:7-18.¹

At trial, both parties confirmed that they had followed this schedule for the “past 48 weeks.” (RP 172:7-13; 271:9-14.)

At trial, Ms. Impala requested a final parenting plan wherein Cannon

¹ Ms. Impala did not designate said temporary parenting plan as Clerk’s Papers until January 29, 2019, when she filed a Second Amendment to Designation of Clerk’s Papers. As of the time that this Appellant’s Brief is filed, Ms. Impala has not yet received Clerk’s Papers Prepared relative to her Second Amendment.

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resided with her the majority of the time. (RP 149:407.) Mr. Impala wanted Cannon to reside with him a majority of the time (RP 144:18-21) but was not opposed to a final parenting plan which maintained the 50-50 residential schedule (RP 146:13-15).²

On July 17, 2018, Judge Blinn issued his Decision in which he made rulings regarding the issues that the parties tried. In pertinent part, the trial court made the following rulings in connection with the residential schedule of the parenting plan:

The residential schedule shall continue on the '2 2 5 5' schedule until Cannon begins school. When this occurs, Cannon will spend every other weekend with his mother and may spend one evening per week with his mother, for no more than 4 hours per evening. [CP 107, 8th paragraph.]

...

Once Cannon starts school, either full time or part time, he will spend time with his mother and father in alternating 7 day increments. "Summer" will be determined by the school calendar. [CP 107, last paragraph.]

It is noted that the final parenting plan incorporates this Decision by reference (CP 2:1-3, 24)—as do the final divorce order (CP 35:20) and the findings/conclusions (CP 31:7).

On August 3, 2018, the trial court conducted a hearing on the presentation

² It is noted that on direct examination by Mr. Impala's attorney—Joe Loran—Mr. Loran refers to this as a "2-2-2-5" schedule. (RP 146:13-14.)

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of final orders. A day prior thereto, Ms. Impala filed a declaration in which she made numerous requests relative to the final orders.³ Most of these were minor and/or made to clear up any ambiguity in the Decision. At presentation, and inter alia relative to the final parenting plan, she requested that the trial court reconsider its ruling relating to the change in the school schedule once Cannon began kindergarten, i.e., her time with Cannon going from every other week to every other weekend, and also requested that as long as she moved from Eatonville to Lakewood by that time, that the “2-2-5-5” residential schedule remain in effect. (CP 72:7-12.)

At presentation Judge Blinn entered the final divorce documents. Relative to the parenting plan, he denied Ms. Impala’s request that the 50-50 residential schedule continue in effect once Cannon begins kindergarten. (Presentation Verbatim Report of Proceedings, 11:7-13.) Judge Blinn’s ruling as stated in the last paragraph on page 5 of his Decision is slightly ambiguous. (CP 107, last paragraph.) The parties agreed that he most likely meant that they would exchange Cannon every other week during the summer break. At presentation, Judge Blinn concurred with that interpretation, and language relating thereto is stated in the final parenting plan at Section 9, Summer Schedule (CP 4:5-11.)).

³ Ms. Impala has not designated said declaration as Clerk’s Papers per se but notes that it is included as Exhibit C to the motion for reconsideration of final parenting plan that she filed on August 13, 2018 (discussed below)--said declaration being CP 69-75.

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On August 13, 2018, Ms. Impala filed a motion for reconsideration of—inter alia—Section 8.b. of the final parenting plan, i.e., the school schedule once Cannon begins kindergarten. (CP 37-84.) Judge Blinn denied said motion without oral argument and filed said denial on September 7, 2018. (CP 85.) Ms. Impala filed her notice of appeal on September 26th. (CP 109-148.)

IV. ARGUMENT

Standards of Review

It is well established law that the trial court has broad discretion when determining a permanent parenting plan.⁴ In re Marriage of Possinger, 105 Wn. App. 326, 335, 19 P.3d 1109 (2001) review denied, 145 Wn.2d 1008, 37 P.3d 290 (2001). Appellate courts use a manifest abuse of discretion standard to review a parenting plan and do not reweigh the trial court's credibility determinations or weigh conflicting evidence. In re Marriage of Black, 188 Wn.2d 114, 127, 392 P.3d 1041 (2017). A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or reasons. In re Marriage of Fiorito, 112 Wn. App. 657, 663–64, 50 P.3d 298 (2002). Nor do appellate courts review the trial court's determinations as to the persuasiveness of the evidence. In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). Because of the trial court's unique opportunity to observe the parties, the appellate court should

⁴ Case law uses the phrase “final parenting plan” and “permanent parenting plan” interchangeably. No difference nor distinction is given these phrases as they are used herein. They are meant to be given the same meaning.

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be “extremely reluctant to disturb child placement dispositions.” In re Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (quoting In re Marriage of Schneider, 82 Wn. App. 471, 476, 918 P.2d 543 (1996)).

Appellate courts use an abuse of discretion standard to review the denial of a motion for reconsideration. Kohfeld v. United Pac. Ins. Co., 85 Wn. App. 34, 40, 931 P.2d. 911 (1997).

The Law

A. The Law in General as to Permanent Parenting Plans and Best Interests of the Child

RCW 26.09.184 (Permanent parenting plan) and RCW 26.09.187 (Criteria for establishing permanent parenting plan) describe the objectives and define the criteria for a permanent parenting plan. These statutes, RCW 26.09.002 (Policy) , and family law in general require that courts use the best interest of the child as the standard for determining and allocating parental responsibilities. In fact, the best interest of the child standard is the paramount policy underlying the Parenting Act and RCW 26.09 et seq. Possinger, 105 Wn. App. at 336. What is in the best interest of a child is a factual decision supported by the trial court’s findings on the underlying factual issues, including what will best maintain “a child’s emotional growth, health and stability, and physical care.” RCW 26.09.002. The statutory policy behind the court’s governance of parenting is set forth in RCW 26.09.002 as follows:

Parents have the responsibility to make decisions and

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perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm. [Emphasis added.]

RCW 26.09.184 states in pertinent part as follows:

- (1) OBJECTIVES. The objectives of the permanent parenting plan are to:
 - (a) Provide for the child's physical care;
 - (b) Maintain the child's emotional stability;
 - (c) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;
 - (d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;
 - (e) Minimize the child's exposure to harmful parental conflict;
 - (f) Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and
 - (g) To otherwise protect the best interests of the child consistent with RCW 26.09.002.

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The entry of a parenting plan is governed by RCW 26.09.187 which states the following as to the residential provisions therein:

(3) RESIDENTIAL PROVISIONS.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

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Factor (i) shall be given the greatest weight.

(b) Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

(c) For any child, residential provisions may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of residential time by a parent, including but not limited to requirements of reasonable notice when residential time will not occur.

Washington courts repeatedly have held that changes in residences are highly disruptive to children. Schroeder, 106 Wn. App. at 343 (citing In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993)). Changes should occur only if “necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.” Schroeder, 106 Wn. App. at 349. Stability of the child’s environment is crucial. In re Marriage of Wicklund, 84 Wn. App. 763, 932 P.2d 652 (1996). These policies are embodied in RCW 26.09.260 (Modification of parenting plan or custody decree) requiring a substantial showing on the part of the moving party to modify a residential schedule.

B. The Law as to Reserving Determination of Residential Schedule

A child has a weighty interest in finality, particularly where a child's

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living arrangements are at stake. In re Parentage of Jannot, 149 Wn.2d 123, 128, 65 P.3d 664 (2003). Thus, “in the ordinary case, the sooner that a decree ensuring finality of the parenting plan and residential continuity can be entered, the better it is likely to be for the children.” Possinger, 105 Wn. App. at 336-37. In Possinger, the trial court reserved decision on the child's final residential schedule for one year, during which time the parents' schedules were likely to change. Possinger, 105 Wn. App. at 329. Still, appellate courts have recognized that a trial court has equitable power to defer a permanent decision on a parenting plan for a limited period of time after entry of the decree. McDole, 122 Wn.2d at 610; Possinger, 105 Wn. App. at 336-37.

States a recent case, case law recognizes that “delaying finality may be a tenable exercise of discretion, so long as the delay is not indefinite, and the best interests of the child are served by waiting to see if a particular residential schedule works out as anticipated before making it final. Matter of Marriage of Rounds, 4 Wn. App. 2d 801, 423 P.3d 895, 899 (2018). The exercise of such discretion should be used sparingly because of the strong presumption favoring the finality of parenting plans. Possinger, 105 Wn. App. at 337.

Analysis

- A. It is not in Cannon’s best interests to reside an equal amount of time with each parent for almost four years then to be subject to a residential schedule wherein—during the school year—he will reside with father a majority of the time, with mother every other weekend, and an equal amount of time with each parent during the summer.

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Given Cannon’s age, it would be anticipated that he will begin kindergarten in September 2021, i.e., he was born in January 2016, will turn five in January 2021, and thus will begin kindergarten in September 2021. At that time, the final parenting plan in Impala provides for a self-executing, significant, and substantial change in the residential schedule. That change will be reducing Cannon’s residential time with his mother during the school year from every other week to alternating weekends and a weekly mid-week after school visit of four hours.

By the time he begins kindergarten, Cannon will have continuously resided with mother 50 percent of the time for almost four years, i.e., approximately late July 2017 through August 2021. The parenting plan decreases the amount of time that she is to care for him from 50 to 14.3 percent once he begins kindergarten. (Every other week equates to two overnights every 14 days which equates to 14.3 percent.) Her overnights with him will reduce from seven to two every 14 days.

Ms. Impala recognizes that she is not losing time with Cannon that will not be hers in the first place. For example—and hypothetically speaking—if prior to kindergarten she cares for Cannon at home Monday through Friday in the late morning, she will not be losing that time per se given that arguably he will be in kindergarten at least during the late morning, every day Monday through Friday. Still, the trial court did not make any finding that reducing the time that Cannon is

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to reside with his mother during the school year from 50 to 14.3 percent is in Cannon's best interests.

In fact, this reduction could put Cannon's well-being at significant risk for the following reasons. First and foremost, it will disrupt the stability of the 50-50 arrangement that will have been in place for almost four years and no doubt to which Cannon will be accustomed. (Wicklund, Schroeder.) Second, owing to the reduced time of being with his mother, Cannon could develop significant problems after the schedule change goes into effect. It is common for children to develop issues of any sort when a substantial scheduling change is implemented.

Granted, testimony was not provided at trial pertaining to issues that Cannon may or may not develop. He might weather this change without any issue whatsoever. He also may need to be treated by one or more health care professional dependent on the condition(s) that he might develop as a result of the schedule change.

The question is, why "roll the dice" and put Cannon at risk of developing problems when he begins kindergarten? Why put this child's well-being at risk? This type of schedule change is the type that can be "highly disruptive" to a child. Schroeder, 106 Wn. App. at 349. This type of change should be condoned only if "necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." Id. And in Impala, nothing in the record condones this schedule change for several reasons. First, nothing in

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the parents' relationship necessitates this schedule change. Granted, their relationship changed over time, i.e., they went from being married to separating to being divorced. But the record is lacking as to any significant change in their relationship from when they commenced the "50-50" residential schedule in late July 2017 through trial.

Second, if the trial court ordered this change in order to protect Cannon from physical, mental, or emotional harm, then the court would have made one or more findings regarding the same (which the court did not do).

In fact, the trial court found the following (all references are within the Decision):

1. That "Cannon enjoys a strong, stable and health relationship with both of his parents" (CP 106, under caption beginning "**The relative strength**"); and
2. That "[S]o long as Mrs. Impala maintains sobriety, she appears to be an excellent parent" (CP 106, under caption beginning, "**Each's parent's past**").

To the extent to which the trial court was concerned about Ms. Impala's past issues with substance abuse and addiction, the court addressed those issues by imposing ongoing testing for substance abuse.

The Court made absolutely no finding that a substantial reduction in Cannon's time with mother once he begins kindergarten would in any way be in

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his best interests.

B. In the alternative, the trial court erred by not reserving final determination of the residential schedule once Cannon begins kindergarten.

The trial court’s ruling regarding the change in the residential schedule when Cannon begins kindergarten is not in his best interests. In the alternative, the court erred by not reserving final determination of the residential schedule until Cannon was much closer to beginning kindergarten.

Judge Blinn’s Decision clearly reflects that he was concerned about Ms. Impala relative to the following:

1. Her history of substance abuse and addictions;
2. Her ongoing sobriety and ability to remain clean and sober, and by extension, her ability to perform parenting functions;
3. Her potential lack of a structure to support her in maintaining sobriety and avoiding another relapse, and to support her in promptly seeking treatment in the event of another relapse; and
4. His belief that she has not yet fully confronted the nature and extent of her addictions and may not yet have the tools to maintain ongoing sobriety.

CP 105, first paragraph underneath caption entitled “RCW 26.09.191 LIMITING FACTOR), through CP 106, end of first paragraph.

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In fact, the trial court found that RCW 26.09.191(3)(c) (Restrictions in temporary or permanent parenting plans) applied to mother. (CP 105, first sentence under caption referenced in above citation.) Yet, despite these concerns and this finding, the court not only entered a final parenting plan which maintains—through August 2021—the 50-50 residential schedule which began in late July 2017—but the court also maintains that schedule for summer breaks once Cannon begins kindergarten.

If the court was not going to maintain the 50-50 schedule during the school year, then it should have reserved determination of that schedule until Cannon was much closer to beginning kindergarten—per McDole, Rounds, and Possinger. In fact, reserving said determination removes any uncertainties that the court may perceive might arise three years hence relative to the mother’s sobriety.

C. The trial court erred by denying Ms. Impala’s motion for reconsideration.

The trial court erred by denying Ms. Impala’s motion for reconsideration for the reasons stated supra.

V. CONCLUSION

Based upon the authorities cited and arguments made, it is respectfully submitted that the Appellate Court should grant Ms. Impala’s appeal and grant her the following relief:

A. Find that the trial court erred in entering the final parenting plan of

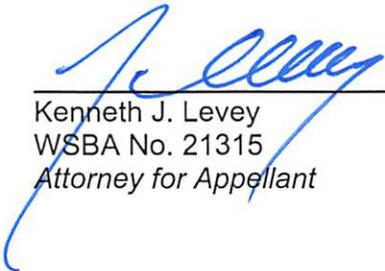
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August 3, 2018, by designating a 50-50 residential schedule until Cannon begins kindergarten, and then designating that at that time he will begin residing with father a majority of the time, and with mother every other weekend, except for summer breaks when the 50-50 schedule will be maintained;

- B. Find that the trial court erred by denying Ms. Impala's motion for reconsideration as to the relief requested in "A" above; and
- C. Find that Cannon's best interests will be served by maintaining the 50-50 schedule during the school year once he begins kindergarten— providing that Ms. Impala meet certain conditions and remand this matter back to the trial court with directions for that court to determine those conditions.

DATED this 31st day of January, 2019.

Respectfully Submitted,
The Levey Law Group, P.S.



Kenneth J. Levey
WSBA No. 21315
Attorney for Appellant

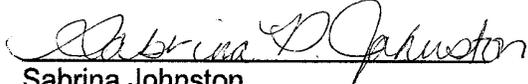
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the law of the State of Washington that on the below day, the document to which this Certificate is affixed was file in the Court of Appeals, and a true copy was sent to the following attorney of record through the Court of Appeals' portal, and via a direct email from me:

Joseph Loran, Esq.
Loran & Ritchie
615 Commerce St., Ste. 103
Tacoma, WA 98402
(253) 383-7123
joe@loranritchie.com

SIGNED at Tomball, Texas, this 31st day of January, 2019.


Sabrina Johnston
Paralegal to Kenneth J. Levey

THE LEVEY LAW GROUP, P.S.

January 31, 2019 - 12:57 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52476-7
Appellate Court Case Title: Adam J. Impala, Respondent v. Julie R. Impala, Appellant
Superior Court Case Number: 17-3-02092-2

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