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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Parenting and Support of E.B. (DOB: 11/11/2013)

SHELBY BRIGHTHEART-PIXIE,
Appellant

and

DAIN OLSEN,
Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY
THE HONORABLE KEITH C. HARPER

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE CASE

Shelby and Dain met in 2009, RP 24, began a romantic relationship in 2010, RP 27, and moved into a small cabin on Discovery Bay in Jefferson County in 2011. RP 28. In her Opening Brief, Shelby characterizes the home as a "small rural cabin," but the characterization of the cabin as "rural" is not supported by any evidence presented at trial. The cabin is located on State Highway 101 – a major thoroughfare -- in Port Townsend, Washington, across the street from the Gardiner Fire Department, with neighbors only 150 yards away. RP 482.

When they met, Dain was employed on a full-time basis as a home health provider, RP 427, consistent with his education and training in trauma medicine and as an EMT. RP 513. Shelby was essentially unemployed or, at best, marginally employed, and had been for most of her adult life. RP 427. In her Opening Brief, Shelby states that the trial court found that both parties were living what the court deemed "an alternative lifestyle." The court made no such finding. In fact, the court used the term "alternative lifestyle" only twice in its Memorandum Opinion – once when summarizing Dain's testimony regarding Shelby's lifestyle, RP 17, and once in the court's analysis of the statutory factors. RP 293. In both incidences, the

court was not critical of Shelby's lifestyle, nor did the court express any judgment about it.

Shelby and Dain shared, and continue to share, many of the same values. Both have a love of nature, a connectedness to the earth, and a certain level of spiritually. In her Opening Brief, Shelby suggested that she has stayed "true to her values," while Dain has not. Dain disagrees with this suggestion and in fact believes that his "core life values have remained the same and have even been clarified and strengthened throughout the last ten years." CP 420. To the extent Dain participated in activities with Shelby, he did so primarily because he wanted to be supportive of her and her interests, not necessarily because he whole-heartedly shared those interests. RP 530.

A few years after they started living together, Shelby and Dain decided to start a family. RP 428. On November 11, 2013, they gave birth to E.B., who is now six years old. RP 20.

Shelby and Dain separated on April 1, 2015 when E.B. was 17 months old. RP 29, 429. Dain continued to reside at the Discovery Bay cabin and Shelby moved first to Port Townsend and then to a yurt in Irondale.

It is undisputed that E.B. resided with Shelby the majority of the

time after the parties separated. It is also true, however, that E.B. resided with Dain whenever Dain was not working. RP 431, 435. In 2013, Dain started his own company, Great Dain Carpentry. RP 427. He continued to devote his full-time efforts to that venture until he obtained employment at Indian Island (a U.S. Naval installation) in March 2016. RP 431. Dain continues to be employed at Indian Island on a full-time basis to this date. Any suggestion that Dain had an inconsistent work history during or after the parties' relationship is unsupported by the record. RP 193.

By contrast, Shelby's employment was sporadic at best and at most times non-existent. RP 180-88. Both parties agree that she briefly worked on a less than full-time basis for the Food Coop in Port Townsend. RP 429. Both parties also acknowledge that she operated the Wild Rose Forest School which was an 8-hour-a week program which Shelby described as a "nature-based education program." RP 42. Shelby testified that she earned approximately $400 a month from this endeavor. RP 109. At trial, Shelby testified that her work choices were fueled by her devotion to her children and her desire to be "present" for them. RP 42, 188. At the same time, Shelby acknowledged that her choices required her and her children to live in a one-room yurt with no bathroom or shower facilities, RP

77-80, and to rely on food stamps and state medical assistance. RP 192.

After the parties separated in April 2015, Dain provided financial support to Shelby for E.B. despite the absence of a court or administrative order requiring him to do so. RP 489, CP 032. They agreed that $400 a month would be appropriate. Dain testified that he dutifully paid this amount, although Shelby testified that his payments were sporadic and often late. RP 490.

On January 31, 2017, Shelby signed a Petition for a Parenting Plan and Child Support, drafted by a pro bono attorney provided through the Northwest Justice Project. CP 001-006. But, for reasons unknown, Shelby did not immediately file the Petition. Instead, on March 14, 2017, Shelby submitted an Application for Nonassistance Child Support Services to the Division of Child Support. CP 031. On May 18, 2017, while the administrative process was pending, Shelby filed her Petition for a Parenting Plan and Order of Child Support in Jefferson County Superior Court, but, again for reasons unknown, did not serve Dain with the Petition. CP 001. When she filed her Petition, Shelby also filed a motion and declaration for order to proceed *in forma* pauperis which the court granted. CP 364-65. In the motion, Shelby asserted that she had no property or assets.

CP 367.

The hearing on Shelby's application for an administrative order of child support was held on August 24, 2017. CP 030. The Administrative Law Judge issued a Final Order on August 28, 2017 which required Dain to pay Shelby $393 per month in child support. CP 030-049. The ALJ gave Dain credit for making a $400 payment before receiving the Notice of Financial Responsibility. CP 035.

Two weeks later, on September 7, 2017, Dain was finally served with Shelby's Petition for a Parenting Plan and Child Support, a proposed Parenting Plan, a Financial Declaration, CP 007-012, and a Child Support Worksheet. CP 368-77. Shelby's parenting plan proposed that E.B. reside primarily with her but that E.B. reside with Dain on all of his days off. Specifically, the parenting plan proposed by Shelby provided for residential time with Dain the 1st and 3rd week of every month from Wednesday at 3:00 p.m. until Friday at 7:00 p.m. (two overnights) and on the 2nd and 4th weekends of the month from Thursday at 4:00 p.m. until Sunday at 2:00 p.m. (three overnights). These dates and times coincided with Dain's scheduled time off from work at that time. In effect, Shelby's proposed parenting plan had E.B. residing with Dain whenever Dain was not working. Dain filed his response to Shelby's Petition on October 2, 2017. CP 013-017.

On November 22, 2017, Dain filed a motion for entry of a temporary parenting plan. CP 027. In her response to Dain's motion, Shelby re-filed the same parenting plan she had submitted with her Petition. CP 050. The motion was heard on December 7, 2017 and the court entered the parenting plan proposed by Shelby providing that E.B. would reside primarily with her but reside with Dain whenever he was not working. CP 050-065. The court reminded the parties that this was only a temporary parenting plan.

In March 2018, Dain was promoted to a position with the Department of Defense and his work days changed slightly. Instead of being off work on Wednesdays and Thursdays every other week and on Fridays, Saturdays and Sundays in alternating weeks, Dain was off on Saturdays and Sundays every other week and on Fridays, Saturdays and Sunday in alternating weeks. Because of Dain's changed work schedule, the parties adjusted Dain's residential time with E.B. to coincide with Dain's new days off. RP 435. The change did not result in any reduction of E.B.'s time with Dain, only the days on which he resided with Dain.

Several months after the parties separated in April 2015, Shelby began a relationship with Benjamin Pixie who she had met some years earlier at an event called the Fairy and Human Relations

Congress held annually at the Skalitude Retreat in the Methow Valley. RP 123. She acknowledged that her relationship with Pixie was not exclusive. RP 124. In the summer of 2016, another individual, Rick Rawls, proposed marriage to Shelby which she accepted. RP 290-91. Shelby testified that she accepted Rawls' proposal of marriage because she believed marrying him would provide stability for her family. RP 125-26. The engagement was not long-lived. RP 124-25. After several months, Shelby ended the engagement and resumed her relationship with Pixie sometime thereafter. RP 127, 291. Shelby testified that she and Pixie were later ceremonially married sometime in June 2017 in the woods at the Skalitude Retreat. RP 292. Shelby acknowledged that the ceremony did not create a marital community in a legal sense, but from that moment on she considered Pixie and his children her family. RP 292.

Since the parties separated, Dain has had a single short-term relationship with a woman primarily because she needed a place to live. RP 518. She and her two children lived with Dain for about three months until they could find housing. RP 519. The relationship ended at that point. Dain has spent every day he has not been working exclusively with E.B. and he has not introduced new

members into their family unit. Instead, he has focused his time and attention solely to the care and well-being of E.B. RP 435.

On May 7, 2018, Shelby's attorney requested that the matter be set for trial for entry of a final Parenting Plan. The trial was scheduled for November 26, 2018, with a Mandatory Settlement Conference on October 31, 2018. In the meantime, the parties continued to adhere to the temporary parenting plan as adjusted by agreement in March. RP 435.

On July 29, 2018, Shelby sent Dain an email informing him that she and Pixie were in the process of purchasing the Skalitude Retreat in the Methow Valley, the venue of the Fairy and Human Relations Congress which Dain had attended with Shelby in the past. Dain immediately communicated his objection to Shelby relocating with E.B. to Skalitude. Shelby acknowledged that she was aware that there was a legal process associated with the relocation. Despite that awareness, Shelby did not immediately file a Notice of Intent to Move with Child. Instead, on August 20, 2018, Shelby filed a motion to amend the temporary parenting plan, explaining to the court that she had "an opportunity to establish an educational retreat in the Methow Valley of Okanagon County." CP 066-068. The amended parenting plan proposed by Shelby would have reduced

the amount of time E.B. resided with Dain by more than half and would have imposed significant travel requirements for both parties and E.B. RP 080-096.

The hearing was originally set to be heard on August 31st. What is clear from the pleadings accompanying her motion, however, is that Shelby had actual knowledge of her plan to relocate long before she notified Dain on July 29th and long before she filed her motion. On July 5th, she inexplicably filed three declarations from individuals attesting to her qualities as a parent. CP 395, 397, 399. All three declarations had been drafted and signed in June. When Shelby filed her motion on August 2nd, she included a declaration from Lindsay Swope, the owner of Skalitude, which included a letter dated July 9th indicating that Shelby had signed a real estate contract to purchase Skalitude and that the sale was scheduled to close on September 12th. CP 072-074. Two other declarations filed with the motion were drafted and signed long before Shelby notified Dain on July 29th. CP 075-079. The parenting plan proposed by Shelby was signed on July 9, 2018. CP 417. Shelby also filed her own declaration which was signed on July 9th. CP 069.

Prior to Shelby's motion to amend the temporary parenting plan, Dain had not been represented by counsel. Upon receipt of the

motion, Dain immediately retained counsel who requested that the hearing be continued to accommodate a long-planned vacation. On August 31st, the parties entered an agreed order continuing the matter until September 14, 2018.

On September 4, 2018 Shelby finally filed her Notice of Intent to Move with Children (Relocation). CP 097-101. Shelby stated that she wanted to move ASAP and that she already had school lined up for E.B. and for Helios, her ten-year-old son from a prior relationship. She further stated that "it would be best for my children to begin school at the beginning of the school year." CP 098. In support of her request to relocate with E.B., Shelby filed a declaration dated August 30th in which she alleged – for the first time during these proceedings -- that she had experienced "years of being harassed and verbally abused by Dain" and that she left Dain because "[h]e was entrenched in alcoholism and had been verbally, emotionally and psychologically abusive towards my son, Helios, then 7 ½ and me." CP 102-108. Shelby also stated: "For myself, living father away from my son's father and getting some space from our contentious relationship and hostile interactions will reduce my stress and benefit my health, wellbeing and sense of safety." CP 071.

During the course of this litigation, Shelby has filed six proposed parenting plans, none of which had identified these limiting factors under RCW 26.09.191. Shelby also signed a second declaration definitely stating that her son, Helios, was enrolled in Methow Valley Elementary School and would begin school on September 4th. CP 109-111. She also informed the court that Pixie – the individual she had "married" in June 2017 – had already begun moving into the house at Skalitude with his two children. CP 111.

Shelby's statements about her having enrolled Helios and E.B. in school and about Pixie and his children moving to Skalitude, led Dain to reasonably believe that it was more likely than not Shelby had in fact already relocated to Skalitude. Based on that belief, Dain filed not only his Objection about Moving with Children, CP 112, but also a Motion for a Temporary Order Preventing Move with Children. CP 150. Dain also requested that the court enter a temporary parenting plan memorializing the agreement the parties had reached in March 2018 when Dain's work schedule changed. RP 424.

Counsel for the parties agreed that it made sense to hear both motions together and a hearing was scheduled for October 5, 2018. At that hearing, Shelby argued that there was no need to enter an order temporarily restraining the move because she was still living in

Jefferson County and had no intention of moving until the court specifically authorized her to do so. CP 238. She insisted that she was merely "commuting" to Skalitude a couple of days a week to perform her duties as Skalitude's caretaker and manager. CP 239. Although the court took Shelby at her word, the court expressed skepticism about her representations, given that her older son was attending school full-time in the Methow Valley and E.B. was attending pre-school there. CP 240-41.

The court did, however, enter an amended temporary parenting plan as requested by Dain and ordered that the transportation arrangements previously in place would remain unchanged, i.e., the child would be exchanged in Jefferson County. CP 186. The parties also agreed that both matters – entry of a final parenting and the determination of whether Shelby should be allowed to relocate with E.B. – should be heard on the date already set for trial. CP 220.

Thereafter, Shelby's pro bono attorney withdrew and a privately-retained lawyer, Mark Nelson, filed his Notice of Appearance on October 29, 2018. This matter proceeded to trial on December 31, 2018. The trial was conducted over a three-day period.

In her Trial Memorandum, Shelby argued that the resolution of the case was controlled by the Child Relocation Act, RCW

28.09.405-560 and that there is a rebuttable presumption that her relocation with E.B. should be permitted. CP 200. Shelby further argued that Dain had the burden of persuasion and the burden of production to demonstrate that "the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person." CP 200.

In his Trial Memorandum, Dain argued that Shelby's failure to adhere to the notice requirements of the Child Relocation Act should preclude her from, in effect, benefitting from the Act's presumption. CP 480. Alternatively, Dain argued that even if the court applied the factors set forth in RCW 26.09.520, the evidence presented at trial would demonstrate by a preponderance of the evidence that the detrimental effect of E.B.'s relocation outweighed the benefit of the change to E.B. and to Shelby. CP 480.

In his opening statement, Shelby's counsel reiterated her position that the matter was governed by the Child Relocation Act, stating that "[a]lthough this is an action to establish a final parenting plan, a petition of relocation has been filed; therefore, under 26.09.520, the statutory factors for relocation do apply and take precedence over any factors the Court particularly would consider under 26.09.187." RP 11.

In her opening statement, Dain's counsel argued that this matter was a parentage action which should be determined using a "best interest of the child" standard. She further argued that "if every litigant can simply transform a parentage action into a relocation action by simply in the midst of, and after setting a trial date, announce they're going to move, and thereby switch the burden of proof and switch the considerations, everybody would do that." RP 15.

The trial concluded after three days of extensive testimony from the parties and other witnesses. In her Closing Argument, Shelby continued to argue that the court should apply the rebuttable presumption set forth in the Child Relocation Act and that the best interests of the child as set forth in RCW 26.09.187 were not applicable or relevant. RP 580. Not surprisingly, in his Closing Argument, Dain continued to argue that this matter was, first and foremost, a parentage action governed by RCW 26.09.187 and that Shelby should not be able to shift the burden of proof and benefit from the rebuttable presumption of the Child Relocation Act, particularly in light of her blatant disregard of the CRA's notice requirements. RP 599-602.

At the conclusion of the three-day trial, the trial court took the

matter under advisement. On January 25, 2019, before the court issued its Memorandum Opinion, Shelby's counsel sent the court a letter arguing, once again, that the Child Relocation Act should govern the court's decision. CP 214.

On March 25, 2019, the court issued its Memorandum Opinion. CP 277-97. The court began its Opinion by meticulously, methodically, and accurately recounting the testimony of the witnesses. CP 277-89. The court then addressed the issue of whether it should apply the criteria set forth in RCW 26.09.187 or whether it should apply the criteria set forth in the Child Relocation Act, 26.09.520. CP 289. The court concluded that because the CRA applies even to temporary orders, the CRA criteria should apply. CP 289. While finding that Shelby did fail to comply with the CRA notice requirements, CP 289, the court nevertheless rejected Dain's argument that Shelby should be precluded from benefitting from the CRA's rebuttable presumption because of that failure.

Based on the evidence presented at trial, the court made detailed findings of fact and applied those facts to the eleven criteria set forth in RCW 26.09.520. The court then concluded that Dain had rebutted the presumption that the relocation should be permitted by demonstrating that the detrimental effect of the relocation

outweighed the benefit of the change to E.B. and to Shelby.

On April 11, 2019, the parties and their counsel appeared in court to enter final orders. At that hearing, Shelby's attorney suddenly announced that Shelby had decided to "abandon any plans related to this new business venture, her marriage in central Washington, and remain in Jefferson County as the primary custodian of her child, [E.B.]." RP 636. By this time, Shelby and Pixie were already legally married and the purchase of Skalitude was no longer a "plan." Instead, it was a done deal. Shelby requested that the court adopt the alternative plan proposed by Dain earlier in the litigation which would have E.B. residing with Shelby the majority of the time but spending every weekend, holidays and the entire summer with Dain. RP 636.

The court rejected Shelby's request and made several interesting statements in doing so. First, the court reflected on the hearing on Dain's motion to restrain the relocation and noted that the court had specifically asked Shelby whether she had already relocated and that she had said no. RP 650. The court stated that, based on her representation that she was still residing in Jefferson County, the court felt it could not dictate where she spent her recreational and personal time. RP 650. The court then went further, stating "[i]n

retrospect, as I read this through and wrote this opinion, I kicked myself for what I did in September maybe a little bit because to me it became clear that her moving was a foregone conclusion. She essentially had done it and made those choices." RP 650-51. Finally, the court explicitly stated: "But at this point, given everything I've heard and so forth in connection with this trial, I have absolutely no reason to believe that [Shelby] is making a sincere, genuine return to Jefferson County." RP 652. Final orders were entered at the conclusion of that hearing.

Ten days later, Shelby filed a Motion for Reconsideration in which she presented the same facts she presented at the April 11th hearing. CP 266. In response to Shelby's motion, Dain argued that Shelby had not asserted or met any of the criteria of Civil Rule 59 and that he should be awarded his attorney's fees on that basis alone. CP 270.

On May 22, 2019, the court entered its Order Denying the Motion for Reconsideration. CP 273. The court found that Shelby had not articulated any of the grounds for reconsideration set forth in Civil Rule 59. Most notably, the court stated: "In addition, based on the evidence at the hearing and this Courts memorandum opinion, the Court believes that the parenting plan that has been entered is the

plan ***which is in the best interests of the child."*** (emphasis added). CP 273.

II. ARGUMENT

A. The Standard of Review

Trial courts are afforded broad discretion in matters involving the welfare of children. *In re Marriage of Cabalquinto,* 100 Wash.2d 325, 327-28, 669 P.2d 886 (1983); *In re Marriage of McDole,* 122 Wash.2d 604, 610, 859 P.2d 1239 (1993).

In cases involving an initial determination of custody, as well as in cases involving subsequent relocation of a child, a trial court's decision will not be reversed on appeal unless the court manifestly abuses its discretion. *In re Marriage of Kovacs,* 121 Wash.2d 795, 801, 854 P.2d 62 (1993); *In re Marriage of Katare,* 175 Wash.2d 23, 35, 283 P.3d 546 (2012) ("A trial court wields broad discretion when fashioning a permanent parenting plan.").

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Kovacs,* 121 Wash.2d at 801. "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the

record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield,* 133 Wash.2d 39, 47, 940 P.2d 1362 (1997).

The trial court's findings of fact will be accepted by the reviewing court so long as they are supported by substantial evidence. *In re Marriage of Katare,* 175 Wash.2d 23, 35, 283 P.3d 546 (2012). Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted. *Id.*

A trial court's findings of fact are treated as verities on appeal if they are supported by substantial evidence. *In re Marriage of Black,* 188 Wash.2d 114, 127, 392 P.3d 1041 (2017). The party challenging a court's findings of fact bears the burden of demonstrating that substantial evidence does not exist to support those factual findings. *In re Marriage of Grisby,* 112 Wash.App. 1, 9, 57 P.3d 1166 (2002).

In an Appendix to her Opening Brief, Shelby assigns error to virtually all the court's findings of fact and conclusions of law. She does not, however, offer any argument on these assignments of error. This Court "will not review assignments of error not supported

by legal argument." *In re Marriage of Kim,* 179 Wash.App. 232, 245, 317 P.3d 555 (2014) (citing *Herring v. Dep't of Soc. & Health Servs.,* 81 Wash.App. 1, 13, 914 P.2d 67 (1996). Consequently, this Court should decline to review any assignments of error not supported by legal argument.

An appellate court does not review the trial court's determinations with respect to the credibility of the witnesses, nor does it weigh conflicting evidence. *In re Marriage of Black,* 188 Wash.2d 114, 127, 392 P.3d 1041 (2017). Similarly, appellate courts are "reluctant to disturb a child custody disposition because of the trial court's unique opportunity to personally observe the parties." *Murray v. Murray,* 28 Wash.App. 187, 189, 622 P.2d 1288 (1981). In short, trial court decisions in custody matters should be affirmed "unless no reasonable judge would have reached the same decision." *In re Marriage of Kim,* 179 Wash.App. 232, 317 P.3d 555 (2014).

With respect to relocation cases specifically:

> A trial court abuses its discretion in making a relocation decision only if it fails to consider and balance each of the 11 relocation factors. The decision about whether the detrimental effects of relocation outweigh the benefits to the child and the relocating parent is inherently subjective. An appellate court may not substitute its findings for those of the trial court where there is sufficient evidence in the record to

support the trial court's determination.

In re Marriage of Pennamen, 135 Wash.App. 790, 802, 146 P.3d 466 (2006). *See also In re Marriage of Grisby,* 112 Wash.App. 1, 14, 57 P.3d 1166 (2003) ("The decision of whether the proposed relocation would be detrimental to the children is inherently a subjective one, given the statutory scheme."); *In re Marriage of Horner,* 151 Wash.2d 884, 897, 93 P.3d 124 (2004) (court abuses its discretion if it fails to document its consideration of the child relocation factors); *In re Marriage of Fahey,* 164 Wash.App. 42, 56, 262 P.3d 128 (2011) ("We defer to the trial court's ultimate relocation decision unless it is manifestly unreasonable or based on untenable grounds or untenable reasons under the abuse of discretion standard.").

> We do not review credibility determinations or reweigh the evidence to determine whether we would reach a different conclusion, as Byron's argument implies. We review instead for abuse of discretion.

In re Marriage of McNaught, 189 Wash.App. 545, 561, 359 P.3d 811 (2015).

B. Shelby's reliance on the concept of "custodial continuity" and her previous role as the child's primary caretaker are misplaced.

Throughout her Opening Brief, Shelby repeatedly cites the concept of custodial continuity in support of her position that the court

erred in denying her request to relocate with the child and entering a final parenting plan which has E.B. residing with Dain the majority of the time. Shelby's reliance on this concept is misplaced. The term "custodial continuity" arises almost exclusively in the context of modifications of permanent parenting plans. *In re Marriage of McDole,* 122 Wash.2d 604, 610, 859 P.2d 1239 (1993) ("Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification."); *In re Marriage of Stern,* 57 Wash.App. 707, 712, 789 P.2d 807 (1990). The concept of custodial continuity recognizes that custodial changes are highly disruptive to children and permanent parenting plans should not be modified unless a substantial change has occurred in the circumstances of the child or nonmoving party. RCW 26.09.260(1).

This case does not, however, involve modification of a permanent parenting plan. This case was commenced as an action to establish a permanent parenting plan. The relocation issue was raised by Shelby prior to entry of a permanent parenting plan while the parties were still adhering to the temporary parenting plan entered a year earlier. No final parenting plan had been entered. At trial, the court was therefore tasked with deciding both whether

Shelby's relocation should be approved as well as entry of a final parenting plan. Shelby nevertheless seems to be arguing that "modifying" the temporary parenting plan violated the concept of custodial continuity. The Parenting Act makes clear that, however, that "[i]n entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan." RCW 26.09.191(4).

In her Opening Brief, Shelby also repeatedly references her historical role as E.B.'s primary caretaker and suggests that this fact should have weighed heavily in the court's decision about the final parenting plan. This argument fails. In *In re the Marriage of Kovacs,* 121 Wash.2d 795, 854 P.2d 629 (1993), the Washington State Supreme Court stated as follows:

> It is clear to us from the Legislative history [of the Parenting Act] that the Legislature not only did not intend to create presumption in favor of the primary caretaker but, to the contrary, intended to reject any such presumption.

In re Marriage of Kovacs, 121 Wash.2d. at 809. Shelby's role as E.B.'s primary caretaker was and should have been irrelevant to the court's decision to award primary residential placement with Dain.

C. The trial court properly analyzed, weighed and balanced the factors set forth in RCW 26.09.520 in reaching its decision denying relocation and entering a final parenting plan.

"A preponderance of the evidence standard is applied to rebut the presumption favoring a primary residential parent's relocation decision." *In re the Marriage of Wehr,* 165 Wash.App. 610, 267 P.3d 1045 (2011). In determining whether the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, the court must consider all eleven factors set forth in RCW 26.09.520. *In re Marriage of Horner,* 151 Wash.2d 884, 895, 93 P.3d 124 (2004). The trial court did just that. In a lengthy and detailed Memorandum Opinion, the court evaluated and considered each of the eleven factors, weighed the evidence presented at trial, and evaluated the credibility of the witnesses. After having conducted an exhaustive analysis, the trial court concluded "that the detrimental effects of the relocation outweigh the benefit of the change to the child in particular and to the Petitioner." CP 296. Furthermore, all of the trial court's findings of fact were supported by substantial evidence, as detailed in the court's exceedingly accurate recitation of the testimony and evidence presented at trial. Shelby has offered no evidence or argument suggesting that the trial court's findings were not supported by substantial evidence. Shelby's contentions that the trial court "misapplied" the factors, failed to

properly weigh the evidence, or that the court's analysis of a factor is "riddled with error" are unsupported by legal argument and fail to recognize that decisions with respect to relocation are inherently subjective.

1. The court properly applied the first relocation factor – 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. RCW 26.09.520(1).

Based on the evidence presented at trial, the court found that both parents had high quality, strong and stable relationships with the child. CP 291. While E.B. had resided with Shelby the majority of the time since the parties separated in April 2015, E.B. had resided with Dain whenever Dain was not working. Although Shelby disputed this fact at trial, the parenting plan she proposed as early as January 2017 would have had E.B. residing with Dain whenever Dain was not working. Shelby's proposed parenting plan strongly supports the proposition that E.B. had in fact been residing with Dain on all of his days off.

Shelby ridicules the court's assessment that Dain "has had the child more than the typical amount of time," stating that there was no evidence in the record about what a typical amount of time might be." Opening Brief, page 24, footnote 7. But surely a Superior Court

Judge in a one-judge county, who presides over 100% of the family law cases, is in a position to evaluate what is typical in terms of a noncustodial parent's residential time. The fact that Dain essentially devoted all of his non-working time to E.B. was appropriately significant to the court.

Shelby argues that the court "misapplied" the first relocation factor. She argues that the court cannot examine Shelby's job or relationship history. She argues that the court cannot consider its finding, based on the evidence presented at trial, that Shelby had essentially relocated to Skalitude prior to the trial. She argues that the court's finding was not based on substantial evidence even though the evidence showed that both of Shelby's children were enrolled in school in the Methow Valley and that Pixie, to whom Shelby considered herself married, had already relocated with his children to Skalitude. Shelby further argues that her decision to maintain a "sustenance lifestyle" should have had no bearing on the court's decision and was irrelevant. None of these arguments are based on any legal authority.

Shelby also makes factual assertions unsupported by the record. She states that both she and Dain "had an unsuccessful relationship post separation." Opening Brief, page 25. That

assertion is at best misleading and at worst outright false. The evidence at trial clearly establishes that Shelby was dating Pixie and others in the months following her separation from Dain, accepted a proposal of marriage from Rawls in the summer of 2016, broke off the engagement with Rawls a few months later, resumed her relationship with Pixie, subsequently became engaged and "married" Pixie in an unofficial ceremony at Skalitude in June 2017, but decided to delay their "official" marriage until three years later in 2020.

Dain, by contrast, had a single relationship that lasted for three months, was based primarily on the woman's need for housing for herself and her two children, and did not involve engagement or marriage. RP 518-19.

Finally, Shelby accused the court of minimizing the importance of E.B.'s relationship with his half-brother, Helios, by the court's finding that the relationship between E.B. and Helios would "remain close" regardless of whether E.B. lives primarily at Skalitude. She states in her Opening Brief that "[t]he court cannot have it both ways," equating E.B.'s relationship with his father with that of his half-brother.

As a practical matter, the final parenting plan entered by the court provides for substantial time together for the half-brothers.

They will spend every other weekend together during the school year, half of the Winter Break, Spring Break and all of the summer. The only time they will not be together is during the school year when both of them will spend five days a week in school. The court's conclusion that they would remain close is supported by substantial evidence.

2. The court did not abuse its discretion in finding that disrupting contact between E.B. and Shelby would be less detrimental than disrupting contact between E.B. and Dain.

Shelby's argument that the court erred in finding that disrupting contact between E.B. and Shelby would be less detrimental than disrupting contact between E.B. and Dain relies heavily on Shelby's historical role as E.B.'s primary caretaker and the concept of custodial continuity, both of which have no relevance to the court's decision with respect to a final parenting plan. Shelby's statement that "Washington policy concerns itself with preserving the continuity of the primary residential caregiver" is just plain wrong, at least in this context. The Parenting Act specifically rejects the presumption that residential placement should be with the parent who has been the primary residential caregiver when entering a final parenting plan. Accordingly, the trial court would have erred had it given undue weight to Shelby's role as primary caretaker or if it had

given any weight to the fact that the temporary parenting plan had Shelby as the parent with whom E.B. resided the majority of the time.

The court properly considered how detrimental it would be to E.B. to disrupt his contact with Dain, given that Dain had spent every non-working moment with E.B. since the parties separated, had a stable living situation, had secure employment, had never gone so much as a week without spending substantial, quality time with E.B., and evinced an understanding that his role as a parent meant not merely "being present" for the child, but also providing some measure of financial security, structural stability, and opportunity.

In any case, Shelby is essentially requesting that the appellate court re-weigh the evidence and substitute its judgment for that of the trial court.

> RCW 26.09.520(3) requires the court to make a judgment call as to separation from which parent would cause the most disruption. The court was within its discretion in finding that the boys would be more disrupted by separation from their father.

In re Marriage of Grisby, 112 Wash.App. 1, 11, 57 P.3d 1166 (2002). In this case, the court did what it was supposed to do – exercise its judgment about separation from which parent would cause the most disruption. The trial court exercised its judgment and concluded that disrupting E.B.'s relationship with Dain would be more detrimental

than disrupting E.B.'s relationship with Shelby.

3. The court did not err in considering Shelby's unfounded accusations of alcoholism and mental and emotional abuse in evaluating whether Shelby had acted in good faith in seeking and in justifying her reasons for the relocation.

A parent's unfounded allegations regarding potentially limiting conduct on the part of the other parent are viewed unfavorably by the courts. *Burrill v. Burrill,* 113 Wash.App. 863, 56 P.3d 993 (2002). In this case, Shelby lodged significant accusations against Dain. She alleged that he was "entrenched in alcoholism" when they separated and that Dain had been "verbally, emotionally and psychologically abusive towards my son, Helios, then 7 ½ and me." She also gave as at least one justification for her proposed move to Skalitude the following: "For myself, living farther away from my son's father and getting some space from our contentious relationship and hostile interactions will reduce my stress and benefit my health, well-being and sense of safety."

After hearing both Shelby's testimony and Dain's testimony on these issues, the court specifically found "none of this to be credible." The court noted in support of its finding that, prior to seeking approval from the court to relocate, Shelby had never identified any RCW 26.090.191 limitations in any of the many

parenting plans she had proposed during the course of these proceedings. The court reasonably concluded that Shelby was making these unfounded allegations "to strengthen her justification for relocating and to put [Dain] in a bad light." CP 293. Based on that conclusion, the court understandably questioned Shelby's good faith in seeking the relocation which is one of the factors the court must address.

4. The court's analysis of the fifth relocation factor is not "riddled with error." Instead, the court properly considered the viability and long-term stability of Shelby's move to Skalitude and was not required to simply accept her representations that the purchase of Skalitude represented an excellent opportunity for her and for E.B.

The fifth relocation factor requires the court to examine the "reasons of each person for seeking or opposing the relocation and the good faith of each person in requesting or opposing the relocation." RCW 26.09.520(5). Shelby stated that the purchase of Skalitude was an excellent business opportunity; that she would be living rent-free in a home more desirable than her one-room yurt in Irondale; that she would be earning more income than she had previously; that she would be earning equity in the property; that she would be living "true to her values; and that pursuing this opportunity would provide her and her children with long-term stability. The court

had the right and duty to examine whether Shelby's assertions with respect to Skalitude were based in fact. Shelby essentially argues that it was error for the court to have done so and was required to simply accept her representations without question at face value.

Substantial evidence presented at trial demonstrated the following facts:

- Although Shelby was named as a member of Brightheart Pixie LLC, she did not and could not have made any financial contribution to this enterprise; instead, her "partner," Pixie contributed $200,000, half of which was a gift from his mother and step-father; RP 137-38.
- Shelby's home at Skalitude is anything but "free." The purchase was financed by a loan from the seller which requires monthly payments of $2,684, RP 145, and a balloon payment in ten years of $405,000. RP 147. Folks who own their homes but are obligated to make monthly mortgage payments do not consider themselves to have "free housing."
- The gross income historically generated by Skalitude is insufficient to make the monthly loan payments, the normal expenses related to the property (e.g., property taxes, insurance, routine maintenance), and pay Shelby and Pixie

monthly salaries of $750 each. RP 238.

- In evaluating whether to purchase the property, Shelby did not request or examine any financial records other than a few rough spreadsheets prepared by the seller purporting to show income and expenses over the past two years, Exhibits 203-206; she did not request or examine the seller's tax returns, any Washington State Department of Revenue statements, any bank statements, or any profit or loss statements, RP 152; she had not prepared a budget or developed a business plan, RP 155; there was no "feasibility study with promising results" as alleged by Shelby in her Opening Brief. RP 252.
- Although Shelby testified that she would earn $1,000 from Pixie Honey Company, the evidence presented at trial clearly demonstrated that Pixie Honey Company had earned only $13,482 in the preceding year, RP 134, and consequently had no ability to pay Shelby $1,000 per month; more importantly, Shelby lied to the court when she testified that Pixie Honey Company had been paying her $1,000 since the purchase of Skalitude in September 2018, RP 133, as Pixie later testified that any funds he had provided her were "gifts."
- Shelby testified that she was going to be the

"manager/caretaker" of Skalitude, although the evidence demonstrated that she lacked the education, experience, or skills required to perform any of these functions. She had little to no experience or training in bookkeeping, no experience in tax issues, no experience operating a retreat, and no experience maintaining equipment or infrastructure.

- Shelby testified that she believed that, despite its remote location, Skalitude was a safe place to raise her children; she nevertheless acknowledged that the current caretaker, who was described as "key to Skalitude's future direction," had been killed in a one-car accident on the road to Skalitude a month before trial and that his body had not been discovered for at least a day. RP 232. Yet Shelby refused to acknowledge that the road to Skalitude is accurately characterized as "primitive."
- When asked what would happen if Shelby and Pixie were unable to meet the operating expenses of Skalitude, or whether they were unable to pay or finance the balloon payment due in ten years, Shelby's only response was that they would rely on a 28-year-old man (William Dickey) who inherited a lot of money from his family to step in and rescue

Skalitude. RP 241. Everyone acknowledged that Mr. Dickey has no legal obligation to contribute any more than his initial investment.

Through the testimony and exhibits presented at trial, Dain did in fact demonstrate that Skalitude was probably not a viable or stable long-term business, particularly in light of the relatively large monthly mortgage payment and the balloon payment due in ten years. In her Opening Brief, Shelby cites testimony of the former owner of Skalitude, Lindsey Swope, who stated "it was a pretty good business. You get to live at home in a beautiful place. You get to set your own schedule. And yes, you make -- make enough money to pay your mortgage and have a nice life." RP 349. However, when Ms. Swope was asked whether she had a mortgage, she acknowledged that she had paid off the mortgage ten years earlier in 2008 and that she had no mortgage payments in any of the years she testified that Skalitude was "profitable." RP 349. Ms. Swope also testified that while she had owned the property for eighteen years, it took her five years to actually start the retreat business due to zoning issues. RP 346. She testified further that she didn't start "making money" until 2010, two years after she had paid off the mortgage. Ms. Swope was also unable to tell the court exactly, or even approximately, what she

actually earned operating Skalitude. RP 347-350. She testified that she operated the business as a sole proprietorship and reported its income (or loss) on Schedule C of her tax return but that no one asked to review the Schedule C. RP 345. She testified that she "went away for the winter" and made improvements to the property "because we could afford to." RP 350.

Shelby contends that the court erred by considering the overwhelming evidence rebutting her assertions that Skalitude was a profitable, viable and stable enterprise which provided her with "free" housing and "considerable improvement in earnings." Shelby is wrong. While there is a ***presumption*** that a fit parent acts in the best interest of the child, that presumption is rebuttable. In this case, that presumption was rebutted by substantial evidence.

The trial court appropriately found that Skalitude "does not appear to be particularly stable at this point." RP 294. The court found that Skalitude is "remote and secluded." RP 294. The court also questioned Shelby's judgment in enrolling both of her children in school in the Methow Valley even before the relocation was approved as her decision necessitated significant weekly travel for her and for E.B. "when weather conditions are predictably poor." Shelby faults the trial court for even considering the fact that she and

Pixie were not married. But the trial court made clear that it considered that fact relevant only because it corroborated the court's view that the situation was "less than stable." Other courts have considered factors such as this in determining the stability of a proposed relocation. *See In re Marriage of Grisby,* 112 Wash.App. 1, 12, 57 P.3d 1166 (2002) ("Finally, while Rice and her fiance had been dating for several years, they were not married, and had not lived together for any significant period of time. The court properly considered the tenuous nature of their relationship in assessing the emotional needs of the children.") It is also likely that the court considered the fact that Shelby lied when she testified that the reason for delaying their marriage until 2020 was because they wanted to get married at Skalitude and Skalitude was "fully booked" in 2019, RP 127,– a fact refuted by the evidence at trial. RP 130.

Finally, Shelby argues that because the court declined to restrain the relocation at the hearing in October, she was therefore free "to decide what was best for her and for her family, which was to pursue her the life [sic] she desired while fulfilling her obligation under the temporary parenting plan." Opening Brief, p. 35. Shelby ignores the fact that the only reason the court declined to restrain the move was her insistence that she continued to reside in Irondale, a fact which

was refuted by substantial evidence at trial. And in deciding what was best for her, Shelby completely ignored what was best for E.B. and created a situation which required him to spend significant time travelling between Irondale and Skalitude. She also ignored what was best for her other child, Helios, who was without his primary caretaker most of the time as a result of Shelby's choice. Moreover, her decision to enroll E.B. in preschool in the Methow Valley was over the strong objections of Dain despite the joint decision making provision of the temporary parenting plan. In effect, Shelby ignored everyone's interests other than her own in making the decision to relocate to Skalitude in September 2018.

5. The trial court's analysis of the sixth relocation factor was not merely an expression of the court's "preference for the child to live in an area with more people nearby;" instead, the court's discussion reflects a reasoned analysis of what is in the child's best interest.

The sixth relocation factor requires the court to consider "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." RCW 26.09.520(6). This statutory provision necessarily presumes that a superior court judge is in a position to evaluate these factors based on the court's

experience and training. A court's assessment of these factors is not merely an expression of its "personal preferences" about what is best for a child. Instead, a court's assessment of these factors is based on the court's experience and training. This assessment, moreover, is "inherently subjective."

In this case, the court reasonably concluded, based on its experience and training, the following:

> The child is 5 years old. Aside from actual education, he is in his formative years; needs socialization with peers; needs stability, structure and a stable environment; and there appears to be more peers, activities and opportunities in Jefferson County and places relatively nearby in the Kitsap and Puget Sound areas than what is available at or near Skalitude.

CP 303. Shelby characterized this finding as "peculiar if only because both parents live in the country." Opening Brief, p. 36. This assertion flies in the face of all available evidence. Dain does not live "in the country." He lives on State Highway 101 in Port Townsend with neighbors 150 yards away and the fire station across the street. By contrast, Shelby lives in a "secluded basin in the renowned Methow Valley surrounded by thousands of acres of National Forest wildlands" with access via an 8 ½ mile gravel road. CP 119-20. What is more interesting about this statement, however, is that Shelby is finally admitting to the court that she "lives" at

Skalitude which she has consistently denied since the commencement of these proceedings.

Shelby argues that the court should have considered the fact that living at Skalitude offers E.B. "the opportunity to continue living with his lifetime primary residential caregiver," a factor which the court is statutorily required to disregard. Shelby also argues that living at Skalitude allows E.B. to live with his half-brother, Helios, but ignores the fact that, if the parenting plan she advocated had been entered, Helios and E.B. would have spent scant time together. E.B. would be spending the entire summer with Dain, as well as virtually all holidays and school breaks and every other weekend. The only time E.B. and Helios would be together would be after school during the week and every other weekend. Under the parenting plan entered by the court, Helios and E.B. are scheduled to spend far more time together – the entire summer, every other weekend and virtually all school breaks.

Shelby further argues that the court should consider E.B.'s relationship with Pixie's children. But the evidence clearly demonstrated that E.B. has spent very little time with Pixie's children as Shelby and Pixie had never lived together in the same household. Pixie's characterization of his son as E.B.'s "best friend" is dubious

at best. And at least at the time of trial, they were not a "blended family" as Pixie and Shelby were not married and they were not living together.

6. The court did not ignore the alleged benefits of the relocation to Shelby and to E.B.; instead, the court conducted a thoughtful analysis of the respective benefits based on the evidence presented at trial.

The court did not ignore the alleged benefits of relocation to Shelby and E.B. Instead, the court appropriately weighed the evidence presented and agreed with Dain as follows:

> [Dain] argues that there overall is a better quality of life in Jefferson County with more resources; more opportunities; less severe weather; more extracurricular activities and opportunities; and proximity to more cities for additional resources, activities and resources. [Dain] believes Port Townsend and Jefferson County have unlimited opportunities for children and that Methow Valley does not. He also had concerns regarding safety at Skalitude due to the extreme weather; seclusion; and distance from emergency and medical services. ***The Court agrees with [Dain].***

CP 295. The burden is on Shelby to demonstrate that the court's findings were not supported by substantial evidence. She has not even attempted to do so. Instead, Shelby's position is that the court must simply accept whatever she says, without regard to any evidence to the contrary and without consideration of any other evidence other than her testimony.

7. Shelby did not offer the court any realistic alternative arrangements that would maintain the relationship E.B. has with Dain.

Factor eight requires the court to consider alternative arrangements to foster and continue the child's relationship with and access to the other parent. During the course of these proceedings, Shelby offered no alternative arrangements that would foster and continue the relationship E.B. has enjoyed with his father since the parties separated. Dain has had weekly and significant contact with E.B. since the parties separated. E.B. has been with Dain whenever Dain was not working. The parenting plan proposed by Shelby would have relegated Dain to less than an "every other weekend dad" because of the travel requirements. The court correctly concluded that, if Shelby relocated to Skalitude with E.B., there were not feasible alternatives to continue the nature and quality of the relationship E.B. has with Dain given the geographical distance.

8. The court did not ignore "facts and issues" in concluding it was not feasible or desirable for Dain to relocate to the Methow Valley.

With respect to this factor, Shelby's argument appears to be that Dain had to prove that there was no way he could relocate to the Methow Valley – that somehow her desire to relocate to Skalitude placed on him the burden of finding comparable employment there

or at least disproving his ability to do so. Shelby offers no legal authority to support this argument.

The court appropriately found that Dain had stable employment with the Department of Defense as a federal civil servant, with all of the attendant benefits and that it would have made "no sense" for him to leave his employment and relocate to the Methow Valley.

It is unclear what "facts and issues" the court ignored in making this finding.

9. The negative financial impact of the relocation would have exceeded any alleged financial benefits to Shelby and to E.B.

Shelby testified that her income would increase from $400 a month to $750 a month if she relocated to Skalitude. Her financial declaration stated that the travel costs between Port Townsend and Skalitude were $500 per month. RP 191. Those facts suggest that the financial impact of relocating to Skalitude would result in increased income of $350 per month but a concomitant increase in expense of $500 per month. This results in a net financial loss of $150 – a not insignificant amount in the context of Shelby's overall financial situation.

If Shelby did not relocate, the financial impact would be

beneficial to Shelby and her children. Both E.B. and Helios are now in school for at least eight hours a day, five days a week. E.B. spends every weekend with his father. If Shelby obtained even a minimum wage job while E.B. and Helios were at school or while E.B. was with Dain, she could earn at least $2,340 which is more than three times what she would earn at Skalitude with no costs associated with travel. E.B.'s relationship with Dain would be preserved and all parties would be better off financially.

10. The court's decisions to deny relocation and enter a final parenting plan identifying Dain as the primary residential parent were correct.

The trial court's decisions to deny relocation and enter a final parenting plan identifying Dain as the primary residential parent were not a manifest abuse of the court's discretion. The findings of fact were supported by substantial evidence. The court appropriately analyzed each of the factors set forth in RCW 26.09.520. The court properly weighed the evidence and determined the credibility of the witnesses. In short, it cannot be said that no reasonable judge would have reached the same conclusion. Therefore, the decision of the trial court should be upheld.

D. If the trial court erred by not specifically addressing the factors set forth in RCW 26.09.187, Shelby invited that error and is estopped from arguing error on that basis on

appeal.

In her Opening Brief, Shelby repeatedly criticizes the court for not applying the factors set forth in RCW 26.08.187 in entering the final parenting plan. Opening Brief, pages 2, 42, 44, 46, 47. But throughout the proceedings in this matter, Shelby insisted that the court was bound only by the factors set forth in RCW 26.08.520 and that these provisions "took precedence" over any consideration of the RCW 26.09.187 factors. This is the position Shelby took in her Trial Memorandum, in her opening statement to the court, in her closing argument, and in a subsequent ex parte communication with the court after trial but before the court issued its Memorandum Opinion. There is little doubt that Shelby took this position because, in her view, it provided her with the advantage of the rebuttable presumption that the relocation would be allowed and shifted the burden of persuasion and proof to Dain. The court ultimately accepted Shelby's argument and concluded that the relevant factors it must consider in deciding this case were set forth in RCW 26.09.520.

Shelby is now precluded from asserting error on the part of the trial court due its acceptance of her position that RCW 26.09.187 was inapplicable to these proceedings.

> In some cases, courts have used the invited error doctrine to analyze the impact a party's tactical choices have on alleged error. The basic premise of the invited error doctrine is that a party who sets up error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so.

State v. Momah, 167 Wash.2d 140, 153, 217 P.3d 321 (2009).

Shelby made a tactical choice to rely on RCW 26.09.520 because it afforded her a clear advantage – shifting the burden of proof to Dain rather than providing a level playing field. While Dain disagreed with Shelby's position at trial, he does not assign error to the court's decision on that basis.

E. The trial court did not err in denying Shelby's motion for reconsideration and awarding attorney fees to Dain.

Following entry of final orders on April 11, 2019, Shelby filed a motion for reconsideration under Civil Rule 59. In support of that motion, Shelby filed a declaration stating that she was abandoning her plan to relocate to Skalitude, that she intended to stay in Jefferson County and enroll both her sons in school there, and essentially figure out how to maintain her marriage to Pixie who lives at Skalitude while she resides in Jefferson County. CP 267. Shelby complains that the court refused to allow her to present evidence regarding this issue. The court did not refuse to consider evidence.

On April 11th, the court considered Shelby's representations about her willingness to abandon her plans to move to Skalitude and stated:

> But at this point, given everything I've heard and so forth in connection with the trial, I have absolutely no reason to believe that the petitioner is making a sincere, genuine return to Jefferson County.

RP 652.

Shelby's motion for reconsideration was based on Civil Rule 59 which provides as follows.

> Civil Rule 59 provides as follows:
>
> (a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:
>
> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.
>
> (2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;

> (4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;
>
> (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
>
> (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
>
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
>
> (8) Error in law occurring at the trial and objected to at the time by the party making the application; or
>
> (9) That substantial justice has not been done.

Shelby did not even attempt to argue that any of the factors set forth in Civil Rule 59 applied. Instead, she just wanted a "second bite at the apple." Because of that failure, the court justifiably determined that the motion was frivolous and awarded attorney fees to Dain.

Shelby cites *In re Marriage of Grisby,* 112 Wn.App. 1, 57 P.3d 1166 (2002) for the proposition that if a parent abandons her or his plans to relocate, modification is not appropriate. That case is inapplicable. *Grisby* involved modification of a permanent parenting plan, not a temporary parenting plan. This case was about entry of a final parenting plan. Shelby's purported abandonment of her plan

to relocate had no effect on this case. The court still needed to enter a final parenting plan, which it did. And when it denied Shelby's motion for reconsideration, the court explicitly stated "the court believes that the parenting plan that has been entered is the plan which is in the best interest of the child." RP 273.

F. Dain should be awarded his attorney fees on appeal. This appeal was frivolous and without basis in law or fact.

Dain is requesting an award of attorney fees under RAP 18.9(a). In his view, "there are no debatable issues upon which reasonable minds might differ." *Presidential Estate Apartment Assocs. v. Barrett,* 129 Wash.2d 320, 330, 917 P.2d 100 (1996). In this case, the court meticulously and accurately recounted the testimony of the witnesses. There has been no suggestion that the court's recitation of the evidence is inaccurate. The court did exactly what the court was supposed to do. It weighed the evidence, it evaluated the credibility of the witnesses, it applied the applicable statutory factors, and it reached conclusions that any reasonable judge would reach.

In family law matters, finality is critical. Parents and children have a right to believe that after a multi-day trial before a superior court judge—after having expended thousands of dollars they don't

have – that they can move on with their lives and with the lives of their children. They shouldn't have to anticipate spending $25,000 or more defending the decision reached by the trial judge they elected to decide their cases. This is particularly true in a case such as this in which the trial court clearly expended the time and effort to draft an extensive Memorandum Opinion detailing all of the testimony and painstakingly analyzing all of the statutory factors.

Each of Shelby's objections were frivolous. At the end of the day, her basic argument was that she had been the primary residential parent in the past and that fact alone should have resolved the dispute. Any decision she made with respect to herself and to her children should have been respected and the court had no right to question that. Shelby made decisions that a fit parent would not have made. Dain was forced to defend his position at trial and on appeal and should be awarded his fees in doing so.

III. CONCLUSION

This Court should affirm the trial court's findings of fact, conclusions of law, final parenting plan, and order of child support and award Dain his attorney's fees on appeal.

Respectfully submitted this 21st day of January, 2020.

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