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Court of Appeals  
Division II  
State of Washington  
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No. 54051-7-II

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

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In re the Marriage of

**KATHLEEN BRIX,**

Appellant,

v.

**CHARLES STEWART,**

Respondent.

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BRIEF OF APPELLANT

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## **1. Assignments of Error and Issues Pertaining**

### ***Assignments of Error***

1. Pursuant to RCW 26.09.260, the trial court erred in modifying a final parenting plan.

### ***Issues Pertaining to Assignments of Error***

1. Whether the trial court improperly modified a final parenting plan without a statutory basis under RCW 26.09.260. Issues of modification are reviewed for abuse of discretion. (assignment of error 1)

## **2. Statement of the Case**

Kathleen Brix and Charles Stewart have a 12-year-old son, C.S. In 2011, the parents entered a final parenting plan by agreement. CP 1-8. Under the 2011 final parenting plan, Ms. Brix is the custodial parent with a majority of overnights. Under that parenting plan, Mr. Stewart has “48 to 72 hours of visitation every week during his scheduled time off from work”. CP 2.

On February 16, 2017, Mr. Stewart petitioned for a major modification, alleging Ms. Brix was in a domestic violence relationship and had a problem with alcohol that interfered with her ability to parent. CP 9-18. Mr. Stewart also sought a temporary order for supervised visitation, which the court granted. CP 29-35. Ms. Brix’s visitation was supervised under the temporary order, but

she continued to have a majority of overnights with C.S. CP 39-42 (see temporary order dated March 7, 2017).

On May 22, 2017, the court found adequate cause as to Mr. Stewart's petition to modify the parenting plan and appointed a Guardian ad litem. CP 46-49. However, the court also ordered that supervised visits were no longer necessary for Ms. Brix. CP 43-45 (see amended temporary order dated June 22, 2017). The temporary order was limited in scope compared to a parenting plan, without sections such as a holiday schedule or summer schedule. CP 43-45.

In April of 2019, Ms. Brix filed a petition for a minor modification, citing a substantial change in circumstances in Mr. Stewart's work schedule. When the parents agreed on a final parenting plan in 2011, Mr. Stewart had a different work schedule every 30 days. RP 36. Ms. Brix's petition for minor modification was based on Mr. Stewart's work schedule changing due to a promotion. Ms. Brix proposed an eight and six day rotation for the parenting plan, which kept the amount of overnights the same as the final parenting plan but reduced the number of exchanges. CP 60-68. RP 53-54.

A testimonial hearing was held on July 23, 2019. The hearing was set for both Mr. Stewart's petition to modify and Ms. Brix's petition to modify. CP 9-18, 51-54, 57-58. Mr. Stewart was proposing a major modification, but no longer due to concerns of a domestic violence relationship or alcohol use. RP 25-26. Instead, Mr. Stewart was proposing a 50/50 split and requesting to be the custodian. RP 25-26.

Prior to testimony, the trial court put the parties on notice as to its outlook on the case:

I will tell each of you right now, in the absence of some compelling reason, which I'm not hearing right now, when I have two competent parents in front of me – by competent I mean able to provide safe and suitable housing and supervision and care for a child – I'm at 50/50, that's where I start. And somebody is going to need to present something compelling to convince me that it shouldn't be 50/50 in this case.

RP 9. The trial court said it was taking a recess so the parties could discuss an agreed schedule and instructed the parties to agree on something as close to 50/50 as possible. RP 18-19. The parties could not agree. RP 23. Then again, prior to testimony, the trial court further explained it's "general policies and philosophies" as to 50/50 parenting plan. RP 23-24. The trial court continued to explain:

And the reason I'm telling you what I'm telling you now is that I want you to understand what's going to be important to me when you testify is, is there some reason why I shouldn't impose a parenting plan... that is seven on and seven off or some other variation of a 50/50. That's where I am right now. So if you want me to do something other than that, you need to present me with a reason why that doesn't work, as opposed to something that you just don't want. You need to convince me [50/50] is not in your son's best interest.

RP 24.

Both parents testified. RP 29, 46. After testimony and closing arguments, the trial court held:

The change from eight and six<sup>1</sup> to seven and seven is by any measure a minor change. Whether that's in reference to the statutes that talk about what constitutes a minor modification versus a major modification or just looking at it from a practical sense point of view, it's one day a month, it's 12 days a year. And I understand that Cohen has expressed to the guardian ad litem that he doesn't like change. I think this is an extremely minor change. I think after a short period of time it would – it's going to be unnoticeable to Cohen that the amount of time he's spending with his parents have... changed in any meaningful sense. This is a minor modification.

RP 77-78.

The final parenting plan and findings of fact and conclusions of law were entered on August 9, 2019. CP 89-101.

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<sup>1</sup> For clarification, at no point in time did the parties have a parenting plan that was an "eight and six" day rotation. Ms. Brix was proposing an eight and six day rotation. CP 60-68.

### 3. Argument

Under RCW 26.09.260, a modification to a parenting plan is characterized as either a major or minor modification. Compliance with the statute governing modification of a parenting plan is mandatory. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 103, 74 P.3d 692 (2003).

Modification of a final parenting plan follows a two-stage process. First, the party seeking modification must establish adequate cause to change the existing plan—requiring evidence of a significant change of circumstances unknown at the time of the original final parenting plan. *McDevitt v. Davis*, 181 Wn App. 765, 769, 326 P.3d 865, 867 (2014). If adequate cause is established, the matter will proceed to a hearing. *Id.*

For a major modification to a final parenting plan, like Mr. Stewart was initially seeking, there must be a substantial change in the circumstances of the child or the nonmoving party and the modification must be in the best interest of the child and is necessary to serve the best interests of the child. See RCW 26.09.260(1).

For a minor modification, the court may order adjustments to the residential aspects of a parenting plan upon showing a

substantial change in circumstances of either parent or the child. See RCW 26.09.260(5). However, the modification must not change the residence the child is scheduled to reside in the majority of the time and “(a) [d]oes not exceed twenty-four days in a calendar year”. RCW 26.09.260(5)(a).

Under the original final parenting plan, Mr. Stewart has “48 to 72 hours of visitation every week during his scheduled time off from work”. CP 2. Calculating the total days per year, if Mr. Stewart has two to three overnights per week, then he has 104 to 156 overnights per calendar year under the original parenting plan. Ms. Brix would then have 208 to 261 overnights per year, depending on how many overnights Mr. Stewart had with C.S. per week.

Under the modified parenting plan, both parents have 182 overnights in a calendar year. CP 96. This means Mr. Stewart’s overnights increased, under the modified parenting plan, ranging from 26 to 78 overnights. For a minor modification, the increase in overnights cannot exceed 24 calendar days, which means the modification by the trial court did not adhere to the mandatory provisions of RCW 26.09.260(5)(a) if the minimum is 26 days.

Further, RCW 26.09.260(5) states the court may order adjustments to the residential aspects of a parenting plan “if the

proposed modification... does not change the residence the child is scheduled to reside in the majority of the time.” See RCW 26.09.260(5). Under the original final parenting plan, C.S. was scheduled to live a majority of the time with Ms. Brix. The original parenting plan was modified, and now C.S. does not spend a majority of time with either parent due to the 50/50 split. CP 96. The modification runs contrary to subsection (5) of RCW 26.09.260. The trial court erred in changing who C.S. lives with a majority of the time.

Throughout the hearing, the trial court asked whether there was a “compelling reason” not to modify the final parenting plan by ordering an equal split of residential time, specifically seven days on and seven days off. See e.g., RP 9, 16, 23, 75. However, the relevant statute does not include any such “compelling reason” standard. See RCW 26.09.260.

The trial court erred by not strictly adhering to the modification statute.

#### **4. Request for Attorney Fees Pursuant to RAP 18.1**

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

## 5. Conclusion

The trial court's modification of the original parenting plan was an abuse of discretion. For the reasons set forth above, Ms. Brix respectfully requests that this Court vacate the modified parenting plan entered August 9, 2019 and remand for further proceedings.

DATED this 13<sup>th</sup> day of April, 2020.

/s/ Hannah Campbell

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on April 13, 2020, I caused the foregoing document to be filed with the Court and served on Mr. Stewart's counsel listed below by way of the Washington State Appellate Courts' Portal.

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**Transmittal Information**

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