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

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**IN THE COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON**

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IN RE THE MARRIAGE OF:

KATHLEEN M. BRIX,

Appellant,

and

CHARLES E. STEWART,

Respondent.

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**BRIEF OF RESPONDENT,  
CHARLES E. STEWART**

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## COUNTER STATEMENT OF THE CASE

CHARLES STEWART and KATHLEEN BRIX were married for six years and divorced in 2011. KATHLEEN has been a Registered Nurse for 15 years. RP 47. CHARLES has been a Trooper with the Washington State Patrol for 21 years. RP 29, 30.

From 2011 to January, 2017, the parties followed the Final Parenting Plan which they agreed to at the conclusion of their divorce. In February, 2017, CHARLES petitioned to modify custody due to the tumultuous state of Appellant KATHLEEN's life, including her involvement in a domestic violence relationship (which their young son was exposed to) as well as to her alcohol abuse. CP 99. The child, C.S., was 9 years old at the time. Following a hearing on March 6, 2017, the Court ordered a Temporary Parenting Plan under which KATHLEEN was only allowed supervised visitation with their son. The Temporary Family Law Order of March 7, 2017, not only ordered a change of custody of the child to CHARLES but also the requirement that **all** visitations with the mother, KATHLEEN, be supervised as well as that no alcohol be consumed by her while with the child. CP 130. Temporary Family Law Order. The residential schedule in this Temporary Family Law Order which was prepared by KATHLEEN's attorney, provided that:

“A) The custodian is Charles Stewart solely for the purpose of all state and federal statutes which require a designation of custody. The mother shall have substantial visitation as follows:

“Every week from Thursday at 5:00 p.m. to Monday at 8:20 a.m.

“If the father has weekends off from work the mother shall have visitation as follows:

“Week 1: Thursdays at 5:00 p.m. to Monday at 8:20 a.m.

“Week 2: Tuesday at 5:00 p.m. to Friday at 5:00 p.m.”

CP 130.

At the conclusion of an Adequate Cause Determination hearing on May 22, 2017, the court found adequate cause, and the supervised visitations continued. Counsel for KATHLEEN prepared and presented an Amended Temporary Family Law Order to the Court on June 22, 2017, which appointed a different Guardian ad Litem. In their new order, the supervised visitation requirement was removed but the requirement that the mother not consume alcohol while caring for their son was retained. The Order also retained custody with CHARLES along with the same visitation schedule set forth in the March 7, 2017, Order. CP 148.

From March 2017, until the July 23, 2019, trial, a total of 26.5 months, the same residential schedule and other requirements laid out in the aforementioned Order were followed which resulted in each parent

spending almost equal time with their son. RP 35. Both parents were apparently satisfied with the Temporary Order as evidenced by the fact that neither sought any change for many months. This was also evidenced by the Guardian ad Litem's report of July 15, 2018, which concluded:

“If the temporary parenting plan is working well as both parties have stated it does then it appears to be in [C.S.’s] best interest to adopt the Temporary Parenting Plan as the final parenting plan in this modification action.”

CP 157. Sealed confidential report of family court investigator, July 15, 2018.

### ARGUMENT

Preserving a challenge for appeal requires following RAP 10.3 (g), a basic and important rule governing appellate procedure:

**“(g) Special Provision for Assignments of Error.** A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the findings by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.”

This court rule has been often cited. Typical of the cases interpreting RAP 10.3 (g) is *Marriage of Knight*, 75 Wn.App 721, 800 P.2d 71 (1994), at 732:

“Jeffrey Knight fails to assign error to the trial court’s findings. Thus, we treat the findings as verities on appeal.”

Here, the Appellant has failed to assign error to the trial court’s Findings of Fact and therefore they are “verities on appeal”. The issue that remains is whether the Conclusions of Law are supported by the Findings.

#### **ASSIGNMENT OF ERROR NO. 1**

In her assignment of error Appellant only states that pursuant to RCW 26.09.260 the trial court erred in modifying the parenting plan. She does not assign error to the any of the Findings which she prepared for the trial court’s signature and therefore they are verities on appeal.

Appellant appears to argue that the court modified the original parenting plan from 2011; however it is clear the court intended to modify and did modify the 2017 Temporary Family Law Order. RP 5, 6. Under RCW 26.09.270, the statute requires there be a threshold hearing to establish adequate cause. Adequate cause was found in this case on

May 22, 2017. CP 148. As stated above, the court entered first a Temporary Family Law Order on March 7, 2017, CP 130, and thereafter on June 22, 2017, an Amended Temporary Family Law Order, CP 148, which appointed CHARLES as custodian, put limitations on the Appellant, and set out a residential schedule. This residential schedule was followed until the hearing on July 23, 2019, nearly 2 ½ years later, when the trial court heard testimony from CHARLES about the original parenting plan versus the Temporary Family Law Orders adopted by the court in 2017:

“Q. Okay. So you’ve been exercising a residential schedule with [C.S.’s] mom for the last approximately two and half years, correct?”

“A. Yes.

“Q. And that’s something that was different than when you first got divorced?”

“A. Correct. We had a temporary order starting in 2017.”

RP 33.

At that hearing CHARLES went on to explain the details of the current residential schedule before moving on to explain that the custody calendar he employed, which was marked and admitted as Exhibit 2 (RP 43, 44) calculated the total number of overnights from March 6, 2017 to June 1, 2019, under the 2017 Temporary Family Law Order, as 47% or

382 overnights for himself and 53% or 431 for Appellant KATHLEEN.

RP 35. Mathematically, this results in a 49 night difference over 26 months, which equates to a difference of 1.88 nights per month, or 22.6 nights annually.

Using the information gleaned from the custody calendar, it is clear that CHARLES' residential time was increased from an average of 176.3 nights annually to 182 overnights annually, (an increase of 5.7 nights); and therefore, contrary to what Appellant asserts, "(a) does not exceed twenty-four days in a calendar year". RCW 26.09.260 (5) (a).

After hearing testimony from both parties and of the Guardian ad Litem, and hearing argument from both counsel the court concluded:

"Well, by statute a major modification is one that changes 24 or more residential days in a year and this doesn't come close to doing that."

RP 74.

The court found the modification of the parenting plan to be a minor modification.

RP 78.

The trial court properly held that the modification of the Temporary Family Law Order was a minor modification.

## ASSIGNMENT OF ERROR NO. 2

Appellant complains that the court also erred in changing which parent the child, C.S., was scheduled to live with the majority of the time.

Appellant is correct that the wording of RCW 26.09.260 (5) states:

“the court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time.”

There was no finding by the court which addressed this. However, it is widely accepted that “there is a strong presumption in favor of custodial continuation and against modification.” *In re Marriage of McDole*, 122 Wn.2d 604, 859 P.2d 1239 (1993); *In re Parentage of Schroeder*, 106 Wn.App. 343, 22 P.3d 1280 (2001); *In re Marriage of Taddeo-Smith and Smith*, 127 Wn.App. 400, 110 P.3d 1192 (2005). The 2017 Temporary Family Law Order became the norm for C.S. and it continued on for nearly 2½ years. The trial court correctly identified that this continuity was in C.S.’s best interest. Under the Temporary Family

Law Order, C.S. spent slightly more overnights with Appellant but nearly completely equal time with each parent as far as hours went:

“Q. And what kind of conclusions did the app give you?

“A. That for total hours, I was in the neighborhood of 50.4.  
And for Katie, her total hours were 49.6.”

RP 35.

After hearing all testimony and arguments, the trial court found it to be in the best interest of this child to split time equally between the parties’ residences, as C.S. had been doing:

“I think this is an extremely minor change. I think after a very short period of time it would – it’s going to be unnoticeable to [C.S] that the amount of time he’s spending with his parents have - have - his two parents have changed in any meaningful sense. This is a minor modification.”

RP 77, 78.

**RESPONDENT’S REQUEST FOR ATTORNEY FEES  
AND EXPENSES**

The Respondent respectfully requests he be awarded attorney fees and expenses on appeal. This request is made pursuant to RAP 18.1(b) and RCW 26.09.140.

## CONCLUSION

The Appellant seeks to retry this case on appeal. The trial court spent many hours in numerous pre-trial hearings and at trial hearing testimony and considering exhibits. Any reasonable judge would have decided this case in the same way as Judge Edwards did. His decision should be upheld.

DATED: May 13, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the 13<sup>th</sup> day of May, 2020, I caused the foregoing “Brief of Respondent” to be filed with the Court of Appeals, Division II, and served upon counsel for the Appellant listed below, via the Washington State Appellate Courts’ Portal:

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**Transmittal Information**

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