

**FILED**  
**Court of Appeals**  
**Division II**  
**State of Washington**  
**7/16/2020 8:00 AM**

NO. 54162-9-II

IN THE COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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AMY LYNN CANN (SOLIS), Appellant/Petitioner

v.

HERNANDO MARTINEZ SOLIS, Appellee/Respondent.

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REPLY BRIEF OF APPELLANT

Trial Court No. 19-3-00062-16

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## II. TABLE OF AUTHORITIES

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### III. ASSIGNMENTS OF ERROR

#### Issues in Reply

1. The Trial Court Erred When It Did Not Review The 11 Factors As They Pertain To Relocation Under RCW 26.09.520.
2. The Trial Court Erred When it Modified the Parenting Plan Pursuant to RCW 26.09.260(2)(c), Without Having Followed the Proper Procedures.
3. The Trial Court Abused Its Discretion when it Found that the Petitioner had filed the Petition for Relocation in Bad Faith.
4. The Trial Court Erred when it Considered Petitioner's Failure to Give Notice and Withheld Visitations when Denying Relocation.
5. The Trial Court Erred when it Modified the Parenting Plan Regardless if the Petitioner Decided to Forgo their Relocation.
6. The Trial Court Abused its Discretion when it did not recuse itself due to impartiality or bias pursuant Judicial Canon 2, Rule 2.3.
7. The Request for Attorney Fees should be denied.

#### IV. STATEMENT OF THE CASE

#### V. ARGUMENT

##### *Analysis*

##### 1. The Trial Court Erred When It Did Not Review The 11 Factors As Pertain To Relocation Under RCW 26.09.520.

Respondent Counsel argues that the Trial Court has met the necessary standard by stating its findings on the 11 factors set out in RCW 26.09.520. However, for the Trial Court to have met the standard, the Trial Court must show how its findings, “[demonstrate] that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person.” *Id.* As discussed in the Petitioning Brief, In re the Marriage of McNaught, held that, “A trial court must consider all 11 statutory factors in child relocation matters to determine if a detrimental effect outweighs the benefits to both the child and the parent wishing to relocate.... A trial court abuses its discretion when it fails to consider each factor.” 189 Wash. App. 545, 556, 259 P.3d 811 (2015). Respondent’s Counsel gives no authority to the contrary.

In the current case, the Trial Court neglected to address any detriments or benefits of relocation in all but one of the factors. The only discussion of the effect of the intended relocation is under Section (h): Quality of Life, which states, “The schools appear to be better in the Kitsap/Jefferson area.”

(Final Order and Findings, page 6 of 9, lines 17). In each of the other factors, the Court set out findings that would be present regardless of a relocation petition or are specific to the upheaval caused by the intermediate order denying the relocation. By not addressing the relocation, specifically, in the other factors, the Court did not meet the standard to deny the relocation. Therefore, the Court abused its discretion and the reviewing Court should reverse and allow the relocation of the child with the mother and reverse the trial court's decision to change the custodial parent from the mother to the father.

2. The Trial Court Erred When it Modified the Parenting Plan Pursuant to RCW 26.09.260(2)(c), Without Having Followed the Proper Procedures.

The Final Order and Findings specifically state that the Modification of the Parenting Plan was not pursuant to relocation, but based on factors under RCW 26.09.260(2)(c), which was not properly in front of the Court. Consequently, proper procedure and constitutional due process was not followed. The Final Order and Findings states:

Regardless of whether the Petitioner continues to reside in Whatcom County (where she is currently residing), the Court finds that the evidence presented at trial makes clear that the Child's present environment (with the mother) is detrimental to the child's physical, mental, or emotional health, and the harm likely to be cause by a change of environment is outweighed by the advantage of a change to

the child if she lives primarily with the father. Therefore, and pursuant to RCW 26.09.260(2)(c), the court is modifying the Parenting Plan entered on January 22, 2019 as reflected in the Final Parenting Plan presented and entered on the date that this Order is signed.

Clearly, the Court's final decision *was not specific to relocation or the detrimental effect outweighing the benefits of relocation. Supra*, RCW 26.09.520.

As discussed earlier, failure to make findings specifically addressing whether the detrimental effects outweigh the benefits of relocation is an abuse of discretion. *Supra In re McNaught*.

Therefore, the Trial Court did not meet the standard necessary to overcome the presumption and deny the relocation.

In this case, not only did the Court not address the relocation, the Court made a finding under RCW 26.09.260(2)(c), under the guise of making findings under RCW 26.09.520 (and possibly RCW 26.09.260(5) which allows for modification in a relocation petition). By allowing this RCW 26.09.260(2)(c) modification under the guise of a relocation modification, the Court is allowing the Respondent to side-step important statutory requirements and necessary due process procedures. RCW 26.09.270 states as follows:

“The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to

show cause why the requested order or modification should not be granted.”

This procedure was never followed and as such, mother was not provided adequate notice of the accusations against her or even what legal issues to defend.

In fact, mother was never informed that the Court was trying the facts to determine whether, “[t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.” RCW 26.09.260 (2)(c). Mother, and mother’s counsel, were never given an opportunity to defend these accusations because the legal proceedings were to defend against the Respondent’s Objection to Relocation, a proceeding which has an entirely different statutory criteria than Modification under RCW 26.09.260(2)(c).

The proper procedures were not followed for a modification of parenting plan under RCW 26.09.260 (2)(c), the Trial Court erred in its final determination. Therefore, the reviewing Court should review this issue of law *de novo* and should reverse and reinstate the original parenting plan.

3. The Trial Court Abused Its Discretion when it Found that the Petitioner had filed the Petition for Relocation in Bad Faith.

Respondent’s Counsel argues that because of failure to follow proper

procedures, withholding visitations, and making reports to CPS that were found unfounded, that Petitioner acted in Bad Faith by bringing the relocation petition. This argument falls flat because “Bad Faith” refers to bringing a frivolous petition which is addressed under Civil Rule 11 which requires that all actions:

- (1) it is well grounded in fact;
- (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

In the current case, the Petitioner brought the Petition for Relocation because she was in fact, moving to Maple Falls. There were many reasons given for the move, and no one contends that the Petitioner did not actually intend to move. Based on the Petitioner’s intent to move, the Petition for Relocation was based in existing law and not brought to harass, cause unnecessary delay or needlessly increase cost of litigation.

Therefore, the Petition was brought in good faith, regardless of whether the Trial Court found that the reasons for the move were valid or worthy.

The Trial Court does not make clear if it found the Petitioner brought the petition to relocate in Bad Faith because she never really intended to relocate or if the “Bad Faith” refers to bad behavior and procedural missteps by the Petitioner. It appears from the ruling of the trial court, that the trial court determined the mother’s behavior was in bad faith and therefore the relocation petition was brought in bad faith.

Respondent’s Counsel acknowledges that Petitioner intended to relocate and has followed through with the relocation regardless of the Court’s holding. This petition was not brought in “Bad Faith” as the term is intended under Civil Rule 11.

Therefore, this reviewing Court should find that the Trial Court abused its discretion, and that no rational person could find that the Petitioner was acting in “Bad Faith” when they petitioned for relocation.

4. The Trial Court Erred when it Considered Petitioner’s Failure to Give Notice and Withheld Visitations when Denying Relocation.

The Court improperly considered the failure to give proper notice of relocation multiple times, discussed at length a single withheld visitation, and CPS reports which were found unfounded. The Washington State Supreme Court has held that, “Punishment of the parent for contempt may not be visited upon the child in custody cases. The custody of the child is not to be used as a reward or punishment for the conduct of the parents. The

best interest of the child is the paramount and controlling consideration. The only basis on which the trial court might properly have modified the divorce decree so as to change the custody of the child to the defendant is that such action was in the best interest and welfare of the child. *Johnson v. Johnson*, 53 Wn. (2d) 107, 330 P. (2d) 1075 (1958); *Chatwood v. Chatwood*, 44 Wn. (2d) 233, 266 P. (2d) 782 (1954); *Shafer v. Shafer*, 61 Wash. 2d 699, 703, 379 P.2d 995 (1963) (citing *Thompson v. Thompson*, 56 Wash. 2d 244, 352 P.2d 179 (1960) (citing *Malfait v. Malfait*, Wash. 1959, [54 Wash. (2d) 413] 341 P.2d 154; *Annest v. Annest*, 1956, 49 Wash.2d 62, 298 P.2d 483; *Norman v. Norman*, 1947, 27 Wash.2d 25, 176 P.2d 349). In the current case, the Trial Court did not consider if the effects surrounding the relocation of the minor child but considered at length what it considered to be bad behavior by the Petitioner.

The Court may not use child custody as punishment and should not impart the consequences to the parent on the child. Here, the Trial Court gave custody to the father without considering the benefits or detriments of the relocation. In doing so, the Trial Court cause major upheaval in the minor child's life lessening time with her primary custodial parent at the young age of four years old. The trial Court did so in reaction to decisions made by the mother that had nothing to do with her ability to parent the minor child or the impacts of relocation. Therefore, the Trial Court abused

its discretion and the reviewing court should reverse and allow the relocation and reinstate the parenting plan with mother as the custodial parent.

5. The Trial Court Erred when it Modified the Parenting Plan Regardless if the Petitioner Decided to Forgo their Relocation.

Respondent's Counsel cites In re Marriage of McDevitt in support of its argument that mother cannot abandon the relocation proceedings after the Court has ruled to modify the Parenting Plan. 181 Wn. App., 765, 772-23, 326 P.3d 865 (2014). This case is easily distinguishable where the parent in McDevitt filed a Motion to Reconsider and had a Change in Circumstances after the final Order had been entered. In the current case, the Final Order had not been entered and the mother should have been given an opportunity to forgo the relocation when the issue was raised by counsel.

6. The Trial Court Abused its Discretion when it did not recuse itself due to impartiality or bias pursuant Judicial Canon 2, Rule 2.3.

This reviewing Court should consider whether the Trial Judge improperly heard the case based on its prior improper rulings, reversal of prior findings, and clear bias in its Final Order and Findings against the Petitioner. Where the Court cannot be impartial and unbiased, *it should recuse itself*. The reviewing court should review the Trial Courts failure to recuse itself by the standard of Abuse of Discretion. In re Marriage of

Meredith, 148 Wash. App. 887, 903, 201 P.3d 1056 (2011) (citing Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wash. App. 836, 840, 14 P.3d 877 (2000)).

Respondent's Counsel improperly argues that Appellant bases its argument on the Court's denial of the affidavit of prejudice. In fact, the denial of the affidavit of prejudice was never discussed in Appellant's Brief. The issue is that the Trial Court Judge could not have been impartial and unbiased after the prior rulings and reversals. In fact, the court showed its partiality towards the father and bias in its final ruling. The reviewing Court should determine that the Trial Court abused its discretion by hearing this case and showing bias and partiality.

7. The Request for Attorney Fees should be denied.

The reviewing Court should deny the request for Attorney Fees and Sanctions. The Petitioner brought their Petition for Relocation in good faith based on their intent to relocate. The Trial Court made an outrageous determination that the parenting plan should be modified, not because of the relocation, but because of factors in RCW 26.09.260(2)(c). Further, such issues were not properly before the Court and mother and mother's counsel were not notified of the issues being raised under RCW 26.09.260(2)(c). The Court very clearly intended to punish the Petitioner for her failure in giving Notice of Intent to Relocate, withholding a weekend visitation, and

reporting claims to CPS that were determined unfounded; none of which are basis for changing custody; the Court showed bias and partiality towards the father in doing so. Every claim brought on appeal by the Appellant is brought in good faith, based in fact, and properly identifying the laws in which they base their claims.

Regardless of this reviewing Court's decision on this issue, the claim of bias and partiality is founded in fact and not frivolous. Therefore, the reviewing Court should deny the Respondent's request for Attorney Fees and Sanctions.

## **VI. CONCLUSION**

In conclusion, the Petitioner respectfully asks the reviewing Court to find that the Trial Court's decision to deny the relocation petition should be reversed and the child permitted to relocate with the mother and the parenting modified to name the mother as the custodial parent as was in the previous parenting plan.

The Trial Court erred in its application of the law in its analysis of the detriment to the child outweighing the benefits of relocation and erred in the application of the law for the use of failure to give proper notice in those factors. The Trial Court further abused its discretion in finding that the Petitioner acted in Bad Faith. Finally, the Court erred in its application of the law to whether the Court could modify the parenting plan if the

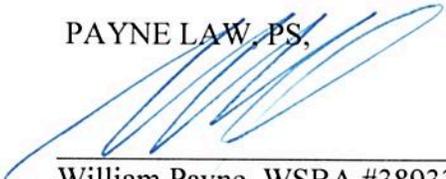
petitioner decided not to relocate herself. Therefore, the Court should reverse and enter new orders.

The reviewing Court should also find that the Trial Court failed to recuse themselves due to bias and impartiality under Judicial Canon 2, where the Court imposed a parenting plan structure that had been previously ordered by the Court, where the previous order was clearly based on improper sanctions and the Court used the basis for those sanctions- the failure to give notice- as the basis for the parenting plan provisions in its final order.

Finally, the Petitioner/Appellant/mother should be awarded her attorney fees and costs incurred herein.

Respectfully submitted and dated this 15<sup>th</sup> day of July, 2020

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