

**FILED**

NOV. 16, 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 332756

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

---

DAVID MAULEN, Respondent

And

NANCY PIMENTEL, Appellant

---

APPEAL FROM THE SUPERIOR COURT

OF ADAMS COUNTY

HONORABLE STEVEN B. DIXON

---

BRIEF OF APPELLANT

---

Robert Cossey  
Attorney for Respondent  
Robert Cossey & Associates, P.S.  
902 N. Monroe  
Spokane, WA 99201  
(509) 327-5563

## TABLE OF CONTENTS

	<u>Page</u>
I. PETITIONER'S ASSIGNMENTS OF ERROR .....	iv
ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR .....	vi
II. STATEMENT OF THE CASE .....	1
III. STANDARD OF REVIEW .....	1
IV. ARGUMENT.....	2
V. REQUEST FOR ATTORNEY FEES.....	10
VI. CONCLUSION.....	11

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>In re Marriage of Caven</u> , 966 P.2d 1247 (1998).....	1
<u>In re Marriage of Crump</u> , 175 Wn.App. 1045 (2013).....	1
<u>In re Marriage of King</u> , 66 Wn. App. 134, 831 P.2d 1094 (1992).....	11
<u>In re Marriage of Kovacs</u> , 121 Wash.2d 795, 854 P.2d 629 (1993) .....	3
<u>In re Marriage of Littlefield</u> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	1,3
<u>In re Marriage of Rockwell</u> , 170 P.3d 572 (2007) .....	2
<u>In re Welfare of Woods</u> , 20 Wash.App. 515, 581 P.2d 587 (1978) .....	5
<u>Mayer v. Sto Indus., Inc.</u> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	1-2
<u>Murphy v. Miller</u> , 85 Wash.App. 345, 932 P.2d 722 (1997) .....	10
<u>Murray v. Murray</u> , 28 Wash.App. 187, 622 P.2d 1288 (1981).....	6-7
<u>Wold v. Wold</u> , 7 Wash.App. 872, 503 P.2d 118 (1972) .....	5-6

<b><u>Statutes and Codes</u></b>	<b><u>Page</u></b>
RCW 26.09.140 .....	10
RCW 26.09.187 .....	2-3,5,7-8
RCW 26.19.080 .....	9-10
<b><u>Court rules</u></b>	<b><u>Page</u></b>
RAP 18.1.....	10

I.

**ASSIGNMENTS OF ERROR**

1. The trial court erred by entry of ¶ 2.19 of the Findings of Fact & Conclusions of Law, *i.e.* “The parenting plan signed by the court on this date is approved and incorporated as part of these findings.” (CP 62).
2. The trial court erred by entry of ¶ 3.11 of the Decree of Dissolution, *i.e.* “The parties shall comply with the Parenting Plan signed by the court on this date. The Parenting Plan signed by the court is approved and incorporated as part of this decree.” (CP 68).
3. The trial court erred by entry of ¶ 3.2, 3.3, 3.4, and 3.5 of the Final Parenting Plan, *i.e.* All residential provisions under these paragraphs. (CP 52-53).
4. The trial court erred by entry of ¶ 3.11 of the Final Parenting Plan, *i.e.* “Transportation costs are included in the Child Support Worksheets and/or the Order of Child Support and should not be included here. Transportation arrangements for the children, between parents shall be as follows: Visitation under ¶ 3.2 shall be at the mother’s expense and shall take place in Washington.

For visitation under ¶ 3.3, 3.5, the mother shall arrange for and pay for transportation to her residence, and the father shall arrange for and pay for transportation to return the children to his home.” (CP 53-54).

5. The trial court erred by entry of ¶ 3.12 of the Final Parenting Plan, *i.e.* “The child named in this parenting plan is scheduled to reside the majority of the time with the Father.” (CP 54).
6. The trial court erred by entry of ¶ 4.2 of the Final Parenting Plan, *i.e.* “Major decisions regarding each child shall be made as follows: ... Non-emergency health care – Father ...” (CP 55).
7. The trial court erred by entry of VI. Other Provisions of the Final Parenting Plan, *i.e.* “The habitual residence of the children is found to be in Adams County, Washington, USA.” (CP 56).

### **ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Whether the trial court erred by failing to provide findings of fact either in its oral decision or its written findings sufficient to allow appellate review?
2. Whether the trial court erred by failing to apply the statutory factors of RCW 26.09.187(3) in making its decisions concerning the residential schedule and parenting plan?
3. Whether the trial court erred in failing to base its findings on substantial evidence to support denial of Ms. Pimental's request for primary placement of the children?
4. Whether the trial court erred in failing to order the proportional share of transportation costs as required by RCW 26.19.080(3)?

**II**  
**STATEMENT OF THE CASE**

This appeal arises from a Petition for Dissolution that was originally filed on December 12, 2013. (CP 1-10). A contested trial was held before the Honorable Judge Steven B. Dixon on February 26, 2015 (RP 1) where both parties were represented by counsel. At the close of the trial, Judge Dixon gave his oral ruling. (RP 176-180). Final pleadings were entered on April 6, 2015. (CP 32-59).

**III**  
**STANDARD OF REVIEW**

Although a trial court has broad discretion when crafting a parenting plan, its decisions may be reviewed for an abuse of discretion. In re Marriage of Caven, 966 P.2d 1247 (1998). A trial court “abuses its discretion when its decision is manifestly unreasonable or made on untenable grounds or for untenable reasons.” In re Marriage of Crump, 175 Wn.App. 1045 (2013)(citing Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 132 P.3d 115 (2006)). In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997), explained “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.” This standard is also violated when a trial court bases its decision on an erroneous view of the law. Id. (citing Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

The trial court’s challenged findings are reviewed for substantial evidence. In re Marriage of Rockwell, 170 P.3d 572 (2007). Substantial evidence is defined as “a sufficient quantity of evidence to persuade a fair-minded, rational person that the finding is true.” Id. at 242.

#### IV ARGUMENT

The court in this case did not properly address the factors of RCW 26.09.187(3) in making its residential provisions for the children. The trial court must analyze the factors in RCW 26.09.187(3) when making decisions regarding residential placement. These factors include:

- (i) The relative strength, nature, and stability of the child's relationship with each parent;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions as defined in \*RCW

26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
- (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.  
RCW 26.09.187(3)(a).

The development of a parenting plan must be based on the statutory factors contained in RCW 26.09.187(3)(a), and the circumstances of the parties as they exist at the time of trial. In re Marriage of Littlefield, 133 Wn.2d 39, 56, 940 P.2d 1362 (1997). The statute requires that the court consider all seven factors, giving the greatest weight to the child's relationship with each parent. See In re Marriage of Kovacs, 121 Wash.2d 795, 800, 854 P.2d 629 (1993). The trial court underwent an extremely limited evaluation and analysis of the factors of RCW.26.09.187(3)(a) when determining the residential schedule for the children. In fact, the analysis was limited to a statement

that, "I think the evidence shows that they're both very good parents," (RP 176) and the following:

I think that he and his significant other are the parents who are most attentive to the children's medical and educational issues. I think that they are more likely to put their trust in professionals and to make calculated health and education decisions as opposed to default decisions.

I think the children are probably equally integrated into both homes. But I'm going to award primary residential responsibility to Mr. Maulen. I'm not basing my decision one iota on Ms. Pimentel's lack of citizenship or lesser financial status. I just think that Mr. Maulen's philosophy of parenting and his lifestyle are much more stable than Ms. Pimentel's lifestyle which seems to be a little peripatetic. I put a, you know, some of the things that you make your decisions on are just small things that tell you a lot about somebody. Ms. Pimentel told that – that their son received an F in something, but she didn't know whether it was reading or math. I would remember whether if it was reading or math and I think Mr. Maulen would remember too. That's the

type of detail that's a telling detail. I don't think Ms. Pimentel loves these kids one iota less than Mr. Maulen does, but I like the stability of his lifestyle.

(RP 177-178).

The court's minimal comments are insufficient to allow appellate review. The court did not even make an effort to apply the evidence presented to the factors of RCW 26.09.187(3)(a). In fact, the court's comments don't even marginally address the majority of factors required to be analyzed. It is impossible to determine how the court came to its conclusion that a change in primary placement from Ms. Pimentel to Mr. Maulin was supported by the evidence and thus Ms. Pimentel is prejudiced on appeal. The purpose of findings of fact is to enable an appellate court to determine the basis on which the case was decided in the trial court and to review the questions raised on appeal. In re Welfare of Woods, 20 Wash.App. 515, 516, 581 P.2d 587 (1978).

It is necessary that the court "make findings of fact concerning all of the ultimate facts and material issues." Wold v. Wold, 7 Wash.App. 872, 875, 503 P.2d 118 (1972). The court in Wold stated, "Ultimate facts are the essential and determining facts upon which the conclusion rests

and without which the judgment would lack support in an essential particular. They are the necessary and controlling facts which must be found in order for the court to apply the law to reach a decision.” Id. at 875. It should be noted that, “[i]t is improper for an appellate court to ferret out a material or ultimate finding of fact from the evidence presented. Such a practice would place the appellate court in the initial decision making process instead of keeping it to the function of review.” Id. at 876.

The written findings of fact entered by the court do not address any of the statutory factors. (CP 60-65). The appellate court may look to the trial court’s oral opinion “[w]hen written findings of fact do not clearly reflect a consideration of the statutory factors...” Murray v. Murray, 28 Wash.App. 187, 189, 622 P.2d 1288 (1981). *Even if* the trial record contains substantial evidence to provide a basis for analysis of the statutory factors there is nothing in this case to support a finding by the appellate court that the trial court “made its determination by applying those statutory factors.” Id. at 189. Just as in Murray, “[a]ny presumption that the trial court considered the statutory factors is rebutted by the failure of the written findings or oral opinion to reflect any application of the statutory elements or to even mention the best interests of the child.

Id. at 189-190. In this case there is also a completely insufficient oral rendering of any consideration of the requisite statutory factors *especially* the best interests of the children. As such, the case should be remanded for a new trial or at a minimum for adequate findings reflecting the statutory factors.

Even if sufficient for appellate review, the brief explanation of reasoning as to why the children's primary residence should be changed from that of Ms. Pimentel to Mr. Maulen was completely inadequate to address the required factors of RCW 26.09.187(3)(a). Although the court mentioned that it believed both parents were "very good parents" (RP 176) it did not address RCW 26.09.187(3)(a)(i) in any way. The court did not address in even a cursory fashion "[t]he relative strength, nature, and stability of the child's relationship with each parent" RCW 26.09.187(3)(a)(i) even though this factor "shall be given the greatest weight." RCW 26.09.187(a). No mention whatsoever was made as to each child's relationship with the parents.

Instead, the court relied almost exclusively on what it deemed the additional stability of Mr. Maulen's household. (RP 177-178). This "stability" was apparently based on three things: the court's concern that Ms. Pimentel did not remember one class in which her son had received

an F grade (RP 178), Mr. Maulen's "philosophy" of parenting which included the court's feeling that he would be more attentive to the children's medical and educational issues (RP 177), and that Ms. Pimentel's lifestyle was "a little peripatetic" (RP 177). Although these observations could loosely be deemed to fall under factor (iii) of RCW 26.09.187(3)(a) this is apparently the only factor that was even minimally addressed by this court. Even in addressing this factor, the trial court completely failed to incorporate "whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child." RCW 26.09.187(3)(a)(iii). There was no question that the evidence established that the children had resided in the primary care of Ms. Pimentel from November 2013 to the date of trial in February 2015 yet the trial court made no mention of the division of responsibility for parenting functions. (RP 176).

The court in this case made no findings whatsoever on its basis for awarding transportation costs as it did. Nowhere in the court's oral ruling was any mention made of the parties' incomes or the court's basis for determining how transportation costs should be calculated. (RP 176-180). The only comment made by the court regarding child support was a ruling that, "[c]hild support will be pursuant to the calculation done by

the petitioner and that's on file herein. Except that I want her removed – I want her to be excused from child support each year in May so she can save her money for tickets.” (RP 180).

RCW 26.19.080(3) specifically states that “Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic support obligation.” The court stated in its oral ruling that for the visits granted to the mother the last full calendar week of every other month starting with the month of April “[t]ravel shall be at her expense.” (RP 178). As Ms. Pimentel does not have a residence where the father lives this would necessarily mean plane tickets, food, and a place to stay adequate for herself and the two children for a week. The court went on to state that for the summer residential time in Kentucky, “[s]he will pay for the flight or for the transportation of expenses to her house, and Mr. Maulen will pay for the return for that.” (RP 178). Other than the waiver of payment of child support by Ms. Pimentel during the month of May (RP 180), no other provision was made for determining the proportionate share of

transportation expenses. This was set out in Paragraph 3.11 of the Final Parenting Plan as well. (CP 51-59).

The trial court “has the discretion *only* to determine whether long-distance transportation costs are needed and whether a particular amount for those costs is reasonable.” Murphy v. Miller, 85 Wash.App. 345, 349, 932 P.2d 722 (1997) (emphasis added). In fact, “[o]nce the court determines that the costs are necessary and reasonable, the parties must share them in the same proportion as the basic support obligation” as required by RCW 26.19.080(3). Id. at 349. This provision is mandatory and must be enforced otherwise the statutory language is rendered meaningless. See Id. at 349-350. The trial court in this case was required to order the proportional share of transportation costs and failed to do so. The issue of transportation costs must be vacated.

## V

### REQUEST FOR ATTORNEY FEES

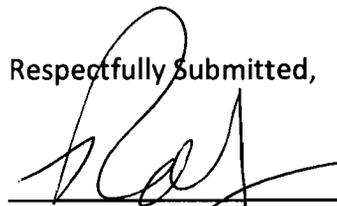
Ms. Pimentel requests that this court award her attorney fees on appeal pursuant to RAP 18.1 and RCW 26.09.140. Under this statute, the Court of Appeals may, in its discretion, award attorney fees and costs incurred on appeal from a dissolution proceeding. In exercising its

discretion, the Court of Appeals considers the arguable merit of the issues on appeal and the parties' financial resource. In re Marriage of King, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). Ms. Pimentel has shown that her issues have merit on appeal and her financial resources are not extensive and much less than Mr. Maulen's as was made clear in the evidence before the court. It is therefore respectfully requested that she be granted attorney fees on appeal.

**VI  
CONCLUSION**

It is therefore respectfully requested that this Court of Appeals reverse and remand this case for the bases set out in this brief.

Respectfully Submitted,



---

Robert R. Cossey WSBA # 16481  
Attorney for Appellant