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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 350673-III

**COURT OF APPEALS, DIVISION III,
FOR THE STATE OF WASHINGTON**

Anne Marshall (Monoskie), Appellant

v.

Phillip ("Cliff") Monoskie, Respondent

OPENING BRIEF OF MS. MARSHALL

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Issue No. 3: Based upon the findings of the trial court, and based upon applying the law of Washington State to those findings, should all five children have been placed with Anne Marshall under modification law? Answer: Yes. The trial court erred in its failure to apply RCW 26.09.260(1) and (2)(c) to this case. (Assignments of Error 1-4 are implicated.)

Issue No. 4: Based upon additional authorities and facts, should the trial court have granted reconsideration? (CP: 197-98 is the Denial of Reconsideration). Answer: Yes. The trial court should have granted reconsideration (CP: 184-96) based upon legal authorities and the fresh evidence of Cliff's continued detrimental behavior.

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I. INTRODUCTION

“I think it goes without question that what I’d like to do is put all five of these children together.” (Oral Ruling of 10/28/16 at CP:72, lines 16-18. The Oral Ruling of 10/28/16 was incorporated into the Findings of Fact in final orders at CP: 153 and CP: 154.)

“This is one of the reasons why I asked both attorneys to brief this issue. I really was hoping that there was some legal authority or some way for me to put these children back together. I don’t believe I have that authority, even based upon the briefing provided by these attorneys... I am constrained by the statute.” (Ruling of 10/28/16 at CP:73, lines 15-23.)

“Turning from the *Marriage of Horner* to *In re Parentage of R.F.R.*, the ultimate decision still rests upon ‘an overall consideration of the best interests of the child’ (emphasis added):

The parental relocation act governs the trial court's decision on whether to allow a parent with primary custody to relocate his or her child. *See* RCW 26.09.405–.560. Under the act, courts have the authority to allow or disallow relocation based on an overall consideration of the best interests of the child. *In re Marriage of Grigsby*, 112 Wash.App. 1, 7, 57 P.3d 1166 (2002).

***In re Parentage of R.F.R.*, 122 Wash. App. 324, 328, 93 P.3d 951, 954 (2004).”** (Petitioner’s Post-Trial Memorandum on Relocation, CP: 26-27, with entire Memorandum at CP 25-39.)

The foregoing quotes distill the essence of the appellate decision to be made on this appeal. The court's oral ruling of 10/28/16 (CP: 49-95) summarizes the facts of this case in detail.

The facts regarding the five children of Anne Marshall and Cliff Monoskie, who divorced in 2013, are sketched, below:

After the 2013 divorce, Anne Marshall lived in South Carolina with her two male children (W.M. and P.M.), who were in junior high, and she and W.M. and P.M. lived in South Carolina with Anne's new husband, Shane Marshall.

After the 2013 divorce, Cliff Monoskie continued to live in Spokane with his and Anne's two younger female children (K.M. and L.M.).

A third common child (C.M.) lived 50/50 with each parent, six months at a time.

Anne and Shane Marshall planned to relocate with W.M. and P.M. to Washington State, after his release from military duty, to be near the two younger female siblings (K.M. and L.M.) who lived with Cliff Monoskie, in Spokane.

Upon receiving email notice in January of 2015 that Ms. Marshall was moving back to the Pacific Northwest from South Carolina, Mr. Monoskie declared an intention to relocate to Ohio in June of 2015.

Ms. Marshall filed an objection to relocation under RCW 26.09.480-.520, and she pled a petition to modify the parenting plan under RCW 26.09.260(1) and (2), because of Cliff Monoskie's detrimental behavior toward the girls and toward her relationship with the girls, and due to the substantial change in Mr. Monoskie's household of his remarriage and new children. (CP: 3-10: *Objection to Relocation/Notice of Relocation/ and Petition for Modification, filed 6/1/15.*)

Mr. Monoskie only filed an objection to relocation under RCW 26.09.480-.520. (CP: 19-24.)

After trial held on 9/19/16 to 9/21/16 (CP: 151), the trial court found that it would be in the best interests of the children if the court followed the Guardian ad Litem recommendation that all children be placed with Ms. Marshall. (CP:72, lines 16-18.) However, the trial court believed that the presumption in favor of Mr. Monoskie's relocation with K.M. and L.M. was an insuperable barrier to this result. (CP:73, lines 15-23, and Finding "F" on CP:156 in the *Findings and Final Order.*)

Thus, C.M., W.M., and P.M. were placed with Anne Marshall in Vancouver, WA, and Cliff Monoskie was allowed to relocate L.M. and K.M. to Ohio.

Given the detrimental behaviors of Mr. Monoskie, and given the findings of the trial court of detriment to the girls of not living with their

brothers (CP: 156 at Finding “D”), Division III is asked to correct the trial court’s error of law on appeal, and this court is asked to place all five children with Anne Marshall in Vancouver, WA.

A. Standard of Review: De Novo as to Issues of Law

The standard of review in any parenting plan action is typically highly deferential to the trial court:

We review a parenting plan for a manifest abuse of discretion, which occurs when the trial court’s “ ‘decision is manifestly unreasonable or based on untenable grounds or untenable reasons.’ ” *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014) (quoting *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012)). We treat the trial court’s findings of fact as verities on appeal so long as they are supported by substantial evidence. *Id.* Evidence is “substantial” when it is “sufficient to persuade a fair-minded person of the truth of the matter asserted.” *Id.* We do not review the trial court’s credibility determinations or weigh conflicting evidence “even though we may disagree with the trial court in either regard.” *In re Welfare of Seago*, 82 Wn.2d 736, 740, 513 P.2d 831 (1973).

In re the Marriage of: RACHELLE K. BLACK, Petitioner, & CHARLES W. BLACK, Respondent., No. 92994-7, 2017 WL 1292014, at *6 (Wash. Apr. 6, 2017).

However, errors of law are an abuse of discretion. “Untenable reasons include errors of law.” *Council House, Inc. v. Hawk*, 136 Wash. App. 153, 159, 147 P.3d 1305, 1307 (2006), citing *Estate of Treadwell v. Wright*, 115 Wash.App. 238, 251, 61 P.3d 1214 (2003); *Lawrence v. Lawrence*, 105 Wash.App. 683, 686, 20 P.3d 972 (2001).

And errors of law are reviewed de novo. *Curhan v. Chelan Cty.*, 156 Wash. App. 30, 35, 230 P.3d 1083, 1085 (2010).

B. Unchallenged Findings are Verities on Appeal

Unchallenged findings are a verity on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 808, 828 P.2d 549, 553 (1992), citing *Nearing v. Golden State Foods Corp.*, 114 Wash.2d 817, 818, 792 P.2d 500 (1990).

The factual findings by the court are not challenged in this appeal, as Ms. Marshall does not agree with all the findings, but she concedes that they all have sufficient evidence to sustain them. Both parties are bound by the trial court findings that are supported by substantial evidence. *In re Marriage of Kim*, 179 Wash. App. 232, 244–45, 317 P.3d 555, 562 (2014).

In an appellate decision that was maximally deferential to the trial court on relocation, the *In re Marriage of Kim* court wrote:

A trial court's decision to permit relocation is necessarily subjective. *In re Marriage of Grigsby*, 112 Wash.App. 1, 14, 57 P.3d 1166 (2002). Our task on review is limited to determining whether the court's findings are supported by the record and whether they, in turn, reflect consideration of the appropriate factors. *Horner*, 151 Wash.2d at 896, 93 P.3d 124. We do not reweigh the evidence. *In re Marriage of Kovacs*, 121 Wash.2d 795, 810, 854 P.2d 629 (1993).

We uphold trial court findings if they are supported by substantial evidence. *In re Marriage of McDole*, 122 Wash.2d 604, 610, 859 P.2d 1239 (1993). “ ‘Substantial evidence’ exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.”

In re Marriage of Fahey, 164 Wash.App. 42, 55, 262 P.3d 128 (2011).

The trial court here entered findings of fact for each of the 11 factors listed in the relocation statute. Mr. Kim assigns error to all of the court's findings of fact in the court's oral decision "to the extent they provided for relocation and denied shared parenting." Appellant's Br. at 4. However, Mr. Kim does not offer argument on all the assignments of error. We will not review assignments of error not supported by legal argument. *Herring v. Dep't of Soc. & Health Servs.*, 81 Wash.App. 1, 13, 914 P.2d 67 (1996).

In re Marriage of Kim, 179 Wash. App. 232, 244–45, 317 P.3d 555, 562 (2014).

With the foregoing law as context, the Assignments of Error are presented, below.

II. ASSIGNMENTS OF ERROR AND ISSUES OF LAW

The basic trial court error in this case is the legal error that the trial court did not place all five children with Anne Marshall, even though the *trial court found that it would be the best interests of the children to all be placed with Anne Marshall* (CP: 72, lines 16-18, CP: 156: Findings "D" and "F,"), **and** *the trial court found detriment in the father's home.* (CP: 155, Finding "g(2)," CP: 157, Findings "P, Q, and V," and CP: 158, Finding "X.")

Nonetheless, the trial court operated under the legal conclusion that the law did not allow the trial court to place all five children in the home

of Anne Marshall, *even though the court found detriment to the girls from living apart from their siblings.* (CP: 156: Findings “D,” and “F.”)

Anne Marshall argues (a) that the trial court did have the authority to place all five children with her under the relocation statute and its case law, and (b) the trial court certainly had the authority to place all children with her under Ms. Marshall’s independent ground of RCW 26.09.260(1) and (2), as articulated in her Petition, and as Cliff’s detrimental behaviors were shown (and found) and as it was detrimental to the girls not to be living with their brothers.

A. Assignments of Error

Assignment of Error No. 1: It was error of the court to allow Cliff to relocate to Ohio with the two girls (K.M. and L.M.).

Assignment of Error No. 2: It was error of the trial court to believe that the case law on relocation did not allow the trial court to place all five children primarily with Anne Marshall.

Assignment of Error No. 3: It was error for the trial court not to find Anne Marshall’s Petition to Modify the Parenting Plan as a separate, distinct, and sufficient basis to place all five siblings with their mother, Anne Marshall.

Assignment of Error No. 4: It was error of the trial court not to grant this relief on reconsideration after presentation of further legal authorities and

argument (CP: 184-88), and after Cliff Monoskie continued his detrimental behaviors (CP: 189-92, 194-96).

B. Issues of Law

Issue No. 1: Does the law of Washington State prevent the trial court from changing the placement of two of the children (L.M. and K.M.) in the home of Anne Marshall with their other three siblings (C.M., W.M., and P.M.) under the findings made by the trial court? Answer: No. The trial court erred as a matter of law. (Assignments of Error 1-4 are implicated.)

Issue No. 2: Based upon the findings of the trial court, and based upon applying the law of Washington State to those findings, should all five children have been placed with Anne Marshall under relocation law? Answer: Yes. The trial court erred in its application of RCW 26.09.520. (Assignments of Error 1-4 are implicated.)

Issue No. 3: Based upon the findings of the trial court, and based upon applying the law of Washington State to those findings, should all five children have been placed with Anne Marshall under modification law? Answer: Yes. The trial court erred in its failure to apply RCW 26.09.260(1) and (2)(c) to this case. (Assignments of Error 1-4 are implicated.)

Issue No. 4: Based upon additional authorities and facts, should the trial court have granted reconsideration? (CP: 197-98 is the Denial of Reconsideration). Answer: Yes. The trial court should have granted reconsideration (CP: 184-96) based upon legal authorities and the fresh evidence of Cliff's continued detrimental behavior.

III. STATEMENT OF THE CASE

A. Brief Factual Summary

The key facts are as Judge McKay summarizes them in the beginning of her Oral Ruling of 10/28/16 (CP: 49-95, esp. 50-51).

Anne Monoskie (Marshall) and Cliff Monoskie finalized their divorce in Spokane County on May 20, 2013. The two older boys, then 11 (W.M.) and 9 (P.M.) moved with Anne to South Carolina with her soon-to-be new husband, Shane Marshall, who was in the military.

Cliff Monoskie remained in Spokane with the two daughters, 7 (L.M.) and 5 (K.M.). The youngest child, age 1, spent first 6 months with Anne, then six months with Cliff, with his primary placement to be determined before school began.

Anne indicated to Cliff, informally, that she would be moving back to the Northwest in January of 2015, to have the siblings closer to each other. (CP: 14, lines 19 to 25.) Then just before she moved back to Washington State, Cliff informally told Anne that he would be moving to

Ohio with the girls. Anne then filed her formal Objection to Relocation and Petition to Modify the Parenting Plan. (CP: 3-10: *Objection to Relocation/Notice of Relocation/ and Petition for Modification, filed 6/1/15.*)

Anne Marshall presented in her Petition, under Section 2.8 (CP: 6-7) that there was a substantial change in circumstances in the girl's home in that Cliff had two new, young children, and that he could not provide emotional and physical support for his new children and L.M. and K.M. (CP: 7, at 2.13(d)). And Anne alleged that Cliff's home was detrimental to the children, due to Cliff's interference with the mother's relationship with the girls. (CP: 6 at 2.8, and CP: 7 at point 2.18, esp. (d)-(f).)

(Note: CP: 11-15 are from another case, and this will be investigated for supplementing and correcting the record.)

Cliff Monoskie then filed his Objection to Relocation/Petition for Modification (CP: 19-24). However, as is clear from the face of his Petition, while Anne also alleged an RCW 26.09.260(1)&(2) major modification, Mr. Monoskie did not.

In short, Anne Marshall clearly pled all elements of an RCW 26.09.260(1)&(2) major modification, and Cliff Monoskie did not.

The implication of these additional, major modification, elements in Ms. Marshall's Petition is that the court had a second, independent, legal

basis – modification law, as well as relocation law -- for placing all five children with Anne Marshall, as the court said it wanted to do, in its ruling of 10/28/17 (quoted, above). And the Oral Ruling of 10/28/16 was incorporated into the written final orders at CP: 153, third and fourth lines from the top, and at CP: 154: just before Section “a. Relationships.”

As can be seen from the Oral Ruling of 10/28/16 (CP: 49-95) and from the Final Findings and Order (CP: 151-59), a Guardian ad Litem was appointed, some of whose findings the court adopted in the ruling at issue.

The court placed C.M. with Anne, Shane and W.M. and P.M., and the court allowed Cliff to leave for Ohio with L.M. and K.M. (The Parenting Plan is at CP: 160-66.)

B. Relevant Findings from Final Order and Findings of 12/16/16

The relevant findings from the Order of 12/16/16 will be presented as they appear in the Order (CP: 151-59).

These findings begin at page 6 of the Oral Ruling of 10/28/16, and are summarized below, and the Oral Ruling is incorporated herein. **(CP: 153)**

These findings begin at page 10 of the Oral Ruling of 10/28/16, and are summarized below, and the Oral Ruling is incorporated herein. **(CP: 154)**

(2) the GAL reported that Cliff performs parenting functions, and that he is a good father, although she had concerns about Cliff’s “ability to foster a relationship with the mother and foster a continued relationship with the mother (transcript of 10/28/16 at p. 11, lines 4-5), and the GAL reported concerns about mature videos and dancing posted on Youtube. **(CP: 154-55, point “a.”)**

(5) The GAL reported that the girls crave Anne's affection and attention and "crawl all over her" when they see her; (6) the girls have a positive relationship with Shane Marshall and with Sue Marshall [Shane's mother]. **(CP: 155, point "a," cont. from CP: 154.)**

(2) The GAL reported that Cliff is interfering with Anne's involvement in the girls' lives, and this would be a developmental detriment. (Transcript of Oral Ruling of 10/28/16 at p. 18, lines 20-25.) **(CP: 155, point "g.")**

(1) The GAL and Anne Marshall testified that Cliff Monoskie interfered with the girls' telephonic relationship with Anne, while Cliff testified that Anne was often unavailable. **(CP: 156, point "i.")**

D. It is in the best interests of the children to be living together in the same household, and it is detrimental to them to be living apart from each other. **(CP: 156 at point "D.")**

E. The parents made a parent-centered decision to separate the children in 2013, and the court is now constrained by that original parenting plan decision of the parties. (Transcript of 10/28/16 at pp. 24-25.) **(CP: 156 at point "E.")**

F. In this case, the court lacks the legal authority to place the children all in one home, as the detriment of the children living apart from each other is insufficient to overcome the presumption in favor of the primary parent being able to relocate under RCW 26.09.520 and related statutes. This is the determining conclusion of law. (Transcript of 10/28/16 at pp. 24-25.) **(CP: 156 at point "E.")**

O. The report of the GAL, Ms. Roecks, becomes significant in making the determination of likely performance of future parenting. (Transcript of 10/28/16 at p.29, lines 23-25.) **(CP: 157 at point "O.")**

P. The GAL reported concerns about whether Cliff would foster [C.M.]'s relationship with Anne; and the GAL reported concerns about Cliff's judgment in having [C.M.] watch violent, R-rated movies, play violent video games, and participate in the "White Face" video. **(CP: 157 at point "P.")**

Q. The court finds concerns about Cliff's willingness to foster a relationship between [C.M.] and Anne; and the court finds concerns about Cliff's "parenting judgment" in regards to [C.M.]. (Transcript of 10/28/16 at p. 30, lines 17-20.) **(CP: 157 at point "Q.")**

V. The testimony of the GAL regarding Cliff's approach to the relationship of the girls and [C.M.] with Anne was not sufficient to overcome the presumption in favor of relocation; however, the weight of the evidence regarding Cliff impeding Anne's phone calls, impeding Anne's visitation with the children in Spokane, Cliff's disparaging Anne to [P.M.] in text messages, and Cliff's problems of parenting judgment regarding [C.M.] is sufficient to lead the court to conclude that [C.M.] should be placed with Anne. (Transcript of 10/28/16 at pp. 35-40.) Communication with all children will occur more freely and openly if [C.M.] is placed with Anne. (Transcript of 10/28/16 at p. 40, lines 18-20.) **(CP: 157 at point "V.")**

X. The court finds that Anne is more likely to foster [C.M.]'s relationship with Cliff, than Cliff is likely to foster it with Anne. (Transcript of 10/28/16 at p.40.) **(CP: 158 at point "X.")**

C. Additional Findings from the Incorporated Ruling of 10/28/16

The following key findings are from the Oral Ruling of 10/28/16 (CP: 49-95):

I believe that all the parties understood from my questions whether there was anything I could do to reunite all these children. I think it goes without question that what I'd like to do is put all five of these children together...I can see no reason for why these children were separated in 2013....These children were put in a position that was not in their best interest.
(Oral Ruling of 10/28/16 at CP:72, lines 14-24.)

This is one of the reasons why I asked both attorneys to brief this issue. I really was hoping that there was some legal authority or some way for me to put these children back together. I don't believe I have that authority, even based upon the briefing provided by these attorneys. The parents are the only ones with

that authority...but I am constrained by the statute. (**Ruling of 10/28/16 at CP:73, lines 15-23.**)

Do I like the result of that? I certainly do not. But from my ability to act within the statute, and my analysis of the statutory factors, that's where I am. (**Ruling of 10/28/16 at CP:74, line 24 to CP: 75, line 2.**)

IV. SUMMARY OF ARGUMENT

The court erred to think that it could not place all five children with Anne Marshall under relocation law. The court erred not to place all five children with Anne under RCW 26.09.260(1)&(2) as raised at trial and as raised on Motion for Reconsideration.

V. ARGUMENT

A. Relocation Law Allowed All Children to Be Placed with Anne

There are two key aspects of the findings, above, that amount to reversible error: The error of law, and the clear misapplication of fact (likely rooted in the error of law).

As the court summarized in the published portion of *In re Marriage of Wehr*, the best interests of the children still matter in a relocation decision (emphasis added):

After the hearing, the trial court has authority “to allow or not allow a person to relocate the child” based on an overall consideration of the RCW 26.09.520 factors and the child's best interests. RCW 26.09.420; *In re Parentage of R.F.R.*, 122 Wash.App. 324, 328, 93 P.3d 951 (2004); *In re Marriage of Grigsby*, 112 Wash.App. 1, 7–8, 57 P.3d 1166 (2002).

In re Marriage of Wehr, 165 Wash. App. 610, 612, 267 P.3d 1045, 1046–47 (2011) (published in part – quote from published portion).

The *Grisby* court clearly stated that the purpose of the Child Relocation Act (CRA) was to free up the court’s ability to prevent relocation, to increase the court’s discretion, not to handcuff the court as the legislature explicitly overruled by statute the *Pape* and *Littlefield* cases (emphasis added):

Under the provisions of the notice requirements and standards for parental relocation, RCW 26.09.405 through RCW 26.09.560, courts have the authority to “allow or not allow a person to relocate the child.” RCW 26.09.420. In enacting these provisions, the Legislature specifically stated that its intent was to supersede the Supreme Court's decisions in *In re Marriage of Littlefield* and *In re Marriage of Pape*.⁴

In *Littlefield*, the court held that a court may not prohibit a parent from relocating a child unless relocation would harm the child. The court further held that the harm to the child must be “more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships which predictably result from a dissolution of marriage.”⁵

The decision in *Pape* further restricted the authority of courts to prohibit a parent from relocating a child. In *Pape*, the court held that while a court making an initial residential placement determination should consider the best interests of the child, a court determining whether to allow relocation must presume that the best interests of the child require the primary placement remain intact. The effect of this holding is that a primary residential parent will be able to relocate a child unless circumstances aside from the relocation would favor a change in the residential schedule of the child.

In a modification action the presumption is in favor of “custodial” continuity, not environmental stability or environmental continuity. It is only where the nonprimary residential parent overcomes that presumption by showing

continued placement with the other parent is not in the child's best interest that the principal residence of the child may be changed.^[6]

The Relocation Act of 2000 reflects a disagreement with the rationale of these cases and gives courts the authority to allow or disallow relocation based on the best interests of the child.

In re Marriage of Grigsby, 112 Wash. App. 1, 6–7, 57 P.3d 1166, 1169 (2002) (footnotes omitted).

Application of *Wehr* and *Grigsby*: Given the trial court's findings of the detriment to the children of (a) living apart from each other, and (b) in the father's home (from interference with the mother's relationship and from the father's bad judgment, and from the court's (c) clear finding that the best interests of the children would be served by being placed together with Anne Marshall, it was an error of law for the court to find that it "lacked authority" to place all the children with Anne Marshall.

As the findings are undisturbed by this appeal, the court is asked to place all five children with Anne Marshall by its own ruling, without remand.

B. RCW 26.09.260(1) and (2) Authorized Placement With Anne

The *Wehr* court was clear that a relocation decision is one thing, and a modification under RCW 26.09.260(1)&(2) is another:

Furthermore, relocation decisions and their effects can be re-evaluated, and parenting plans altered, if the non-residential parent moves to modify the new parenting plan under RCW 26.09.260. See *Fahey*, 262 P.3d at 141 n. 10.

Accordingly, we hold that due process is satisfied when a preponderance of the evidence standard is applied to rebut the statutory presumption favoring a primary residential parent's relocation decision.

In re Marriage of Wehr, 165 Wash. App. 610, 615, 267 P.3d 1045, 1048 (2011) (emphasis added) (published in part – quote from published portion). Note: The preponderance of evidence standard was also clarified, in *Wehr*, as quoted, above.

The best interests of the child is still the governing concern of the courts, and the courts retain broad discretion:

RCW 26.09.184(1)(g) provides that parenting plans shall be designed, “[t]o otherwise protect the best interests of the child consistent with RCW 26.09.002.”

Thus, under the Parenting Act, the best interests of the child continues to be the standard by which the trial court determines and allocates parenting responsibilities-as was true under previous statutory and common law. Moreover, although “[t]he Parenting Act revised the factors previously considered by the court under former law, [it] continues to give the trial court broad discretion when making [residential placements]” (footnotes containing citations omitted). *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993).

In re Marriage of Possinger, 105 Wash. App. 326, 335, 19 P.3d 1109, 1114 (2001), *as corrected on denial of reconsideration* (May 16, 2001).

In short, the trial court erred to believe it could not serve the best interests of the girls by placing them with Anne and their brothers.

The elements of a major modification are first, that there has been a substantial change in circumstances of Cliff Monoskie’s home – that was

not challenged that his marriage, two new young children, and his choice to be unemployed were substantial changes of circumstance, even without the substantial change of his plan to move to Ohio. RCW 26.09.260(1).

Second, the detriment in his home, or that the best interests of the children are served by a change of placement. RCW 26.09.260(2)(c). That element was met by (a) Cliff's misbehavior and disruption of the relationship of the girls with Anne, and (b) the GAL and court's finding that it was detrimental to the girls not to be living with their brothers, and (c) the fact that the court applied all of Cliff's detrimental behaviors regarding the girls, as well as his bad judgment regarding C.M., as a basis to place C.M. with Anne.

Anne's un-rebutted Petition to Modify under RCW 26.09.260(1)&(2) should have been granted as a basis for all five children to be placed with their mother.

Point (a) and Point (b) are verities. Point (c) addresses a logical inconsistency that the court applied its findings of detriment in Cliff's home, regarding his harm to the girls(!), as the basis to place C.M., but the trial court did not apply these findings of Cliff's detrimental behavior to the placement decision regarding the girls, likely due to application of the wrong legal standard, as outlined, above.

To conclude this section, as summarized in *In re Marriage of Zigler & Sidwell*, upholding a change of placement:

If the moving party establishes adequate cause and the court holds a full hearing, the court may then modify the existing parenting plan if it finds that (1) a substantial change occurred in circumstances as they were previously known to the court, (2) the present arrangement is detrimental to the child's health, (3) modification is in the child's best interest, and (4) the change will be more helpful than harmful to the child. RCW 26.09.260(1), (2)(c).

In re Marriage of Zigler & Sidwell, 154 Wash. App. 803, 809, 226 P.3d 202, 205 (2010).

Application of *In re Marriage of Zigler & Sidwell*: (1) The alleged substantial change in circumstances (CP: 7) was never rebutted or denied; (2) the findings of detriment in (a) the father's home, and (b) to the girls living apart from their brothers (see findings, above) were never appealed, and are verities; (3) the placement of the girls with Anne Marshall was found to be in their best interest by the court; and (4) the girls were found by the court to benefit from placement with Anne, which the court would have ordered, "but for" the court's legal error that it could not issue such an order.

C. The Trial Court's Contradictory Treatment of Facts

In the trial court's findings regarding C.M., all of Cliff's detrimental behaviors in disrupting the girls' relationship with their

mother were taken as determinative facts in that decision, and yet these same findings were minimized (nearly omitted) as applied to the placement of the girls.

It is not rational for the court to apply these findings only to C.M.'s placement, and not to the girls. The court found detriment that the girls are not living with their brothers. The court found that Cliff Monoskie was harming them by disrupting their relationship with their mother, and yet the court felt constrained to keep them placed with Cliff.

The trial court abused its discretion:

A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* "A trial court's decision is manifestly unreasonable if it 'adopts a view "that no reasonable person would take." ' " *In re Pers. Restraint of Duncan*, 167 Wash.2d 398, 402–03, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006) (quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003))). "A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." *Id.* (citing *Mayer*, 156 Wash.2d at 684, 132 P.3d 115).

Salas v. Hi-Tech Erectors, 168 Wash. 2d 664, 668–69, 230 P.3d 583, 585 (2010).

As the trial court's factual findings are not challenged on this appeal, only its errors of law, the review should be *de novo*.

Statutory construction is a matter of law reviewed *de novo*. *Marriage of Hansen*, 81 Wash.App. 494, 498, 914 P.2d 799 (1996).

In re Marriage of Flynn, 94 Wash. App. 185, 190, 972 P.2d 500, 502

(1999). And as the case cited within *Flynn* put it:

The trial court's factual determinations will be upheld if they are supported by substantial evidence. *McDole*, 122 Wash.2d at 610, 859 P.2d 1239. The construction of a statute is a matter of law, and the construction given a statute by a trial court is reviewed de novo. *City of Montesano v. Wells*, 79 Wash.App. 529, 531, 902 P.2d 1266 (1995).

In re Marriage of Hansen, 81 Wash. App. 494, 498, 914 P.2d 799, 802

(1996).

To repeat, this appeal is a narrowly legal one, in that the abuse of discretion review is challenging the application of the law to facts as found by the trial court, not the factual findings.

Here, back to the detriment to the girls of (a) Cliff's behavior and their (b) living away from their brothers, the court has "supported facts" that it applied to the placement of C.M., and yet the court failed to apply those same facts to overcome its erroneously high presumption in favor of Cliff relocating the girls to Ohio, against the best interests of the girls, by the court's own findings.

Reversal upon *de novo* review is requested.

VI. CONCLUSION

The appellate court is asked to take the trial court's findings as supported by substantial evidence, and then to apply the law to those

findings and, reversing the trial court, to place the girls (L.M. and K.M.) in the home of Anne Marshall, with their brothers (W.M., P.M. and C.M.). Although the court narrowly found that disrupting the contact with Cliff was more harmful than disrupting it with Anne, once the siblings were factored in, the calculus was found to be reversed by the court, and keeping the girls from living with Anne and their brothers was a detriment to the girls that the court felt constrained to impose upon the girls.

The trial court misunderstood its constraints, and its desire to serve the best interests of the girls by placing them with their mother and brothers is an outcome authorized by the law on relocation (CRA and its case law) and is an outcome separately authorized by RCW 26.09.260 and its case law.

This relief is respectfully requested.

Submitted on 5/15/17,



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APPENDIX

RCW 26.09.260(1) & (2)(c): Modification Statute

Modification of parenting plan or custody decree.

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless...

(c) The 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 26.09.520: Relocation Factors

Basis for determination.

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

- (1) 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;
- (2) Prior agreements of the parties;
- (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more

detrimental to the child than disrupting contact between the child and the person objecting to the relocation;

(4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;

(5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;

(6) 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;

(7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;

(8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;

(9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;

(10) The financial impact and logistics of the relocation or its prevention; and

(11) For a temporary order, the amount of time before a final decision can be made at trial.

ORIGINAL

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MAY 15 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 350673

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FOR THE STATE OF WASHINGTON**

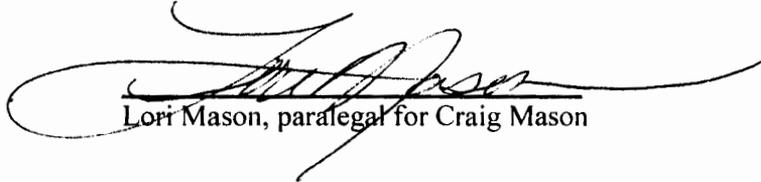
Anne Monoskie (Marshall),)	
)	DECLARATION OF SERVICE
)	RE: Appellant's
Appellant,)	Opening Brief
and)	
)	
Phillip (Cliff) Monoskie,)	
)	
Respondent.)	

I certify that on the 15th day of May, 2017, I caused a true and correct copy of Appellant's Opening Brief to be served on the following in the manner indicated below:

Counsel for Respondent
Mark Hodgson
902 N. Monroe St.
Spokane, WA 99201

() U.S. Mail
(x) Hand Delivery
via EWAS

Signed and Sworn on the date above.



Lori Mason, paralegal for Craig Mason

CERTIFICATE OF SERVICE