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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 352200

**COURT OF APPEALS, DIVISION NO. III
OF THE STATE OF WASHINGTON**

Mindy R. Miksch,

Appellant,

v.

Jamie D. Miksch,

Respondent.

APPELLANT'S REPLY BRIEF

Kenneth J. Miller, WSBA #46666
Andrew J. Chase, WSBA #47529
Attorneys for Respondent

PO Box 978
Okanogan, WA 98840
509-861-0815 (P)
509-557-6280 (F)
Ken@MillerChaseLaw.com
Andy@MillerChaseLaw.com

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A. INTRODUCTION AND SUMMARY

COMES NOW Appellant Mindy Miksch, by and through her undersigned attorneys of record, and submits this Reply to Mr. Miksch's Responsive Brief:

Mr. Miksch argues that the Superior Court did not err by considering evidence of the parties' intent and conduct. Ms. Miksch counters by referring again to the *Fahey* case, where such an approach was raised and rejected.

Next, he argues that Ms. Miksch invites the constructive addition of language to RCW 26.09.430. However, Ms. Miksch makes no such invitation, and points out that to the extent *either* party is inviting addition of language therein, Mr. Miksch makes the same invitation.

Finally, Ms. Miksch responds to address the issue of horizontal stare decisis; in *Matter of Arnold*, a case decided in February of 2018, our Supreme Court rejected this concept, thus requiring clarification in the *Fahey-R.F.R.* analysis herein.

B. ARGUMENT & AUTHORITY

1. Respondent's Argument was Rejected in *Fahey*

The Respondent herein is advancing the same argument that was soundly rejected in *Marriage of Fahey*, 164 Wn.App. 42, 60, 262 P.3d 128 (2011). In *Fahey*, the father provided self-prepared charts of residential time

to show the percentage of time the children slept at his home. *Id.* at 50. Here, Mr. Miksch has presented similar charts regarding his work schedule for the same effect. *CP* at 154-55. In *Fahey*, the father argued that the factual circumstances rather than the parenting plan controlled the court's decision. *Fahey*, 164 Wn.App. at 54-55. Here, Mr. Miksch raises the same argument. In *Fahey*, the father argued that the presumption did not apply because "the original parenting plan in this case intended that he and [the mother] share residential time equally." *Id.* at 58. Here, Mr. Miksch advances the same argument. In *Fahey*, the father argued that he had been the actual primary residential parent. *Id.* at 59. Here, Mr. Miksh argues that neither parent is the actual primary residential parent.

Instead of delving into the factual assertions in the record, the *Fahey* court looked to the language of the parenting plan. *Id.* at 59-60. This is the same inquiry that should be done in this case. The question of whether a party is "a person with whom the child resides a majority of the time" is a question of fact, but only where there is no parenting plan. *Id.* at 57 ("If there is no parenting plan, whether a party is "a person with whom the child resides a majority of the time" under RCW 26.09.430 is a question of fact.").

Where there is a parenting plan, "the parenting plan in place at the time of a proposed relocation is used to determine primary residential parenting status." *Id.* at 60.

Here, the parenting plan clearly establishes Ms. Miksch as the primary residential parent. The final-order parenting plan at issue here (CP at 21-31) clearly designates Ms. Miksch as the custodian in ¶ 3.12 (“Designation of Custodian”). As in *Fahey*, Mr. Miksch “...cites no authority for the proposition that actual residential circumstances negate the express intent of a primary residential parent designation in a permanent parenting plan.” *Fahey*, 164 Wn.App. at 59. Respondent’s brief even acknowledges this, citing to a colloquy on the record:

THE COURT: Okay. And who is the child going to primarily reside with?

PETITIONER: It’d be Mindy for the most part.

See Respondent’s Brief at 5 (citing *RP* at 9:5 *et seq.*).

Moreover, and unlike *Fahey*, there is no question as to the balance of residential time in this plan. In *Fahey*, the issue arose that the original parenting plan “envisioned *approximately* equal residential time...” *Id.* at 59. The plan in this case envisions no such thing. First, the schedule in paragraph 3.13 of the plan is an *alternative* schedule per the instructions of the document – i.e. the parenting plan is contained in ¶3.1 through ¶3.9. Under this schedule, the visitation time is far removed from equal visitation time. In fact, under the terms of this parenting plan, Mr. Miksch is entitled

to visitation on holidays during even years, father's day every year, and (because the child is in school now) *no other visitation*.

Mr. Miksch relies solely on ¶ 3.13. Even if the Court ignores the parenting plan in ¶3.1-3.9, the plan in ¶3.13 clearly establishes a visitation schedule affording Mr. Miksch only 25% of the visitation time (i.e. every other four days off). *CP* at 27.

Finally, this Court need not engage in Respondent's proposed lexicological gymnastics regarding the verb tense of "reside" as used in the statute. "Plain language does not require construction." *State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003) (quoting *State v. Wilson* 125 Wn.2d 212, 217, 883 P.2d 320 (1994)). The argument that RCW 26.09.430 requires construction was also rejected, *sub rosa*, in *Fahey* where the Court considered the "plain language" of the statute. *Fahey*, 164 Wn.App at 58.

2. Ms. Miksch does not Invite Addition of Language to RCW 26.09.430.

As stated above, the language of RCW 26.09.430 is clear. Ms. Miksch does not invite the addition of language into this statute – in fact, the language that Respondent claims she adds is language from *Fahey* and *R.F.R.*: "...the parenting plan in place at the time of a proposed relocation is used to determine primary residential parenting status." *Id.* at 60 (citing *R.F.R.*, 122 Wn.App. at 330).

Moreover, Respondent fails to consider that to any extent his argument deviates from the statute or the *Fahey* and *R.F.R.* cases, he is asking the Court to read language into the statute that is not there – for example:

...a person with whom the child resides a majority of the time, as determined by the Court's factual inquiry, shall notify every other person entitled to residential time or visitation with the child under a court order if the person intends to relocate.

RCW 26.09.430 (underlined text added). This Court need not delve into considerations of adding language to this statute because the statute's "plain language" and the decisions in *Fahey* and *R.F.R.* provide ample analysis of the statute absent any additional language.

3. Ms. Miksch's Interpretation of RCW 26.09.430 does not Result in an Absurdity.

Respondent argues that Ms. Miksch's interpretation of RCW 26.09.430 would result in an absurdity. Generally, this argument is along two lines: first that it would treat parents with a parenting plan differently than those without; and second that it would result in the "wrong" conclusion where the child resided with the other parent 100% of the time in deviation from a parenting plan.

These arguments are not well-taken. First, as demonstrated by *Fahey* and *R.F.R.*, the Court *does* treat parents with a plan differently than

those without. Where there is a plan, the question of primary residence is not a question of fact. Where there is not a plan, the question *is* a question of fact. It is not absurd for the Court to treat distinct analytical scenarios differently. Second, under circumstances where the parenting plan is not being followed, the proper procedure is modification pursuant to RCW 26.09.260. If the deviation is minor, then modification may proceed under RCW 26.09.260(5)(b). If the deviations are major deviations, then a contempt proceeding may be required to force compliance, which in turn is contemplated as a reason for major modifications of the parenting plan. RCW 26.09.260(2)(d). If it is a consented major deviation, modification may be appropriate under RCW 26.09.260(2)(a) or (b).

In short, Respondent fails to identify an absurdity. The first scenario is not absurd and is in fact how Courts approach the difference between having a parenting plan and not having a parenting plan. In the second scenario, modification is the appropriate mechanism to correct the alleged absurdity. Courts follow the parenting plan, if one exists; otherwise, the Court engages in the factual inquiry Respondent seeks. Here, the Court did not follow the parenting plan, and should not have engaged in a factual inquiry.

4. Horizontal Stare Decisis

Matter of Arnold, --- Wn.2d ---, 410 P.3d 1133, 2018 WL 894468 (2018) is a new case that was handed down while this matter was pending in the Court of Appeals. In short, *Arnold* stands for the proposition that there is no horizontal stare decisis between the divisions of the Washington Court of Appeal, and that the proper mechanism for resolving conflicts is appeal to the Washington Supreme Court. *Id.* at 1141 (pincite to Pacific Reporter). However, “This is not to imply that the appellate court's concern with uniformity is misplaced.” *Id.*

Ms. Miksch’s reference to *Fahey* and *R.F.R.* controlling this case is a reference to those cases’ control of issues in Grant County Superior Court, not before Division III of the Court of Appeals. An appellate decision, regardless of the division, controls the decisions of all Superior Courts throughout the State, not just those within the same appellate division.

This Court, however, has the authority to say that *Fahey* and *R.F.R.* were wrongly decided or that they do not apply to the facts of this case. In such a circumstance, these cases would no longer control the issue in Superior Court because there would be a split of authority above. Otherwise, if the Superior Court’s ruling conflicts with *Fahey* and/or *R.F.R.*, the ruling was error.

5. Request for Fees

Generally, RAP 18.1 requires a party to devote a section of its opening brief to a request for fees. Ms. Miksch did not do so, as she was not requesting fees if she prevails in this appellate proceeding.

However, after Ms. Miksch filed her opening brief, Mr. Miksch moved to dismiss the appellate case as moot. Ms. Miksch prevailed in this hearing. Section C of her responsive brief was devoted to a request for fees, arguing that Respondent's Motion was frivolous and facially defective.

In her December 21, 2017 ruling, Commissioner Wasson reserved the issue of fees for the panel of judges deciding the matter. *See Ruling*, 12/21/17 at 3.

Because the conduct supporting Ms. Miksch's request for fees occurred *after* she filed her opening brief and because the request was referred to this Panel, Ms. Miksch includes this section of her brief to comply as best possible with RAP 18.1.

C. CONCLUSION

Under every metric at play here, Ms. Miksch is the primary residential parent. The parenting plan in this case that was in effect at the time of the relocation petition is overwhelmingly in Ms. Miksch' favor. If the Court ignores this plan and focuses on the alternate plan in ¶ 3.13, Ms.

Miksch still receives 75% of the parenting time by the plan language on the face of the plan.

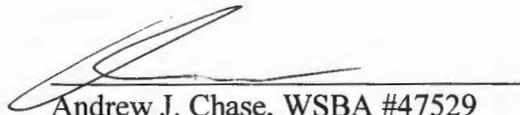
It is *only* where the Court ignores *Fahey* and *R.F.R.* that a conceivable argument may be had that there is a 50/50 parenting plan. But even in such a circumstance where a factual inquiry is conducted, Mr. Miksch stated at the time the plan was entered that Ms. Miksch is the primary residential parent.

This case is not meaningfully distinguishable from *Fahey*. Ms. Miksch asks this Court to reach a similar conclusion, provide her the relocation presumption, and remand this matter to Grant County Superior Court for consistent proceedings.

Respectfully submitted this 21st of March, 2018.



Kenneth J. Miller, WSBA #46666
Attorney for Respondent



Andrew J. Chase, WSBA #47529
Attorney for Respondent

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

In Re Marriage of:
MINDY R. MIKSCH

No.: 34326-0-III

Appellant,

DECLARATION OF SERVICE

v.

JAMIE D. MIKSCH,

Respondent.

Pursuant to RCW 9A.72.085, CR 5, and RAP 5.4(b) the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the dates below, the Appellant's Reply Brief was delivered to the following persons in the manner indicated:

Jamie Miksch c/o Melissa Chlarson, Attorney PO Box 1729 Moses Lake, WA 98837	<input checked="" type="checkbox"/> U.S. Mail on <u>3/21/18</u> <input type="checkbox"/> Hand Delivery on _____ <input type="checkbox"/> E-Mail on _____ <input type="checkbox"/> Other: _____
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Jamie Miksch c/o George Ahrend, Attorney 100 E. Broadway Ave. Moses Lake, WA 98837	<input checked="" type="checkbox"/> U.S. Mail on <u>3/21/18</u> <input type="checkbox"/> Hand Delivery on _____ <input type="checkbox"/> E-Mail on _____ <input type="checkbox"/> Other: _____
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Mindy Miksch 2204 Mercedes Place Lynden, WA 98264	<input type="checkbox"/> U.S. Mail on _____ <input type="checkbox"/> Hand Delivery on _____ <input type="checkbox"/> E-Mail on _____ <input checked="" type="checkbox"/> Other: <u>MyCase Portal 3/21/18</u>
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1 DATED this 21st of March, 2018 at Okanogan, WA.

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Kenneth J. Miller, WSBA #46666
Attorney for Appellant