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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 BRIEF

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A. INTRODUCTION

COMES NOW Appellant Mindy Miksch, by and through her undersigned attorneys of record, and appeals the denial of her Motion for Revision from Grant County Superior Court.

Ms. Miksch, facing unemployment and foreclosure, petitioned the Court for temporary permission to relocate with the minor child, E.A.M., from Ephrata to Lynden, WA. Her petition was denied upon initial review, and denied again upon motion for revision.

Thus, Ms. Miksch appeals, arguing herein that the Superior Court erred by looking outside the scope of the clearly defined parenting plan to determine which parent had the dominant residential schedule for purposes of the relocation statutes.

B. ISSUES FOR REVIEW

As discussed below, there were not findings and conclusions entered following the Superior Court's denial of Ms. Miksch motion for revision. Thus, the assignments of error below are, with apologies, generalized.

1. Whether the Superior Court erred by looking outside the scope of the parenting plan to determine which parent is the "person with whom the child resides a majority of the time."

Assignments of Error Pertaining to Issues for Review:

1. The Superior Court erred in finding that the parenting plan in this case is a 50/50 parenting plan.
2. The Superior Court erred by exceeding its proper scope of inquiry to determine which parent is the “person with whom the child resides a majority of the time.” RCW 26.09.430.

C. STATEMENT OF THE CASE

Mindy and Jamie Miksch appeared *pro se* and were divorced by an agreed decree entered in Grant County Superior Court on May 21, 2010. *See Clerk's Papers (CP)* at 13. They have one child in common, E.A.M., who was four at the time of divorce; a Parenting Plan was entered pursuant to the decree of dissolution. *Id.* at 21. This plan appears to be a joint proposal, as both parties' names appear on the “proposed by:” line. *Id.*

Under this plan, while E.A.M. was under school age, she was to reside with Ms. Miksch, except for Fridays from 6:00 PM to Sundays at 6:00 PM – i.e. weekend visitation. *Id.* at 23. Upon enrollment in kindergarten, E.A.M. was to reside with Ms. Miksch. *Id.* at 23-24. There are no provisions for Mr. Miksch to be afforded visitation during the school schedule. *Id.* E.A.M. was to reside with Ms. Miksch during winter vacation and school breaks as well, without provision for Mr. Miksch's visitation. *Id.* at 24. The summer schedule was the same as the school schedule (i.e. –

affording no visitation to Mr. Miksch). *Id.* Ms. Miksch is also designated as the custodian:

The children named in this parenting plan are scheduled to reside the majority of the time with the [] petitioner [X] respondent. This parent is designated the custodian of the child(ren) solely for purposes of all other state and federal statutes which require a designation or determination of custody. This designation shall not affect either parent's rights and responsibilities under this parenting plan.

Id. at 27 (emphasis added). The parenting plan contains an "Other" provision, ¶ 3.13, reading: "While petitioner is working 4 days on, 4 days off schedule, child shall reside with petitioner **every other** 4 days off." *Id.* (emphasis added).

The parenting plan includes an additional provision of relevance here – the priorities provision, ¶ 3.9. The priorities provision is filled out, but the boxes indicating its applicability are not checked. *Id.* at 26. The parties filled out the ordinal provision for which paragraphs of the parenting plan are the most important, but did not reference ¶ 3.13. The parenting plan contains the instruction: "Paragraphs 3.1 through 3.9 are one way to write your residential schedule. If you do not use these paragraphs, write in your own schedule in Paragraph 3.13." *Id.* at 23. However, Paragraphs 3.1 through 3.9 are filled in. *Id.* at 23-26.

A child support order¹ was also entered pursuant to the parenting plan. In the child support worksheets, which are signed by both parties, the parties offer Other Factors for Consideration (§ 22):

Petitioner and respondent have agreed upon a monthly payment of \$400 a month to be paid to respondent. Special considerations would be **due to the fact that petitioner will have child 40% of month** because of work schedule i.e. rotating shifts.

Id. at 47 (emphasis added).

Nearly seven years later, on February 2, 2017, Ms. Miksch, still *pro se*, filed a Motion for Temporary Order Allowing Move with Children (Relocation). *CP* at 53-57. In her Motion, she states that her house is about to be foreclosed upon, and that she had just learned she had been given an employment opportunity in Blaine, WA (about 16 miles from Lynden). *Id.* At the hearing on this matter, she informed the Court that she had been unemployed for four months, unable to find a job, despite applications all over the state. *RP* at 20:2-4. By the hearing date, Ms. Miksch's home had already been foreclosed upon, and she had an apartment. *Id.* at 20:17-20.

Mr. Miksch, now moving through counsel, filed an Objection About Moving with Children and Petition about Changing a Parenting/Custody Order (Relocation). *CP* at 94-103. Concurrently, his counsel filed a

¹ This document is also outside the parenting plan, but is included here because the Superior Court considered it *sua sponte* below. *See Verbatim Report of Proceedings* (RP) at 56:8 *et seq.* (“... what I’ve independently brought up are these worksheets...”).

Memorandum of Law RE Restraining Relocation. *Id.* at 104-114. This memorandum argued that the relocation statutes did not apply to a 50/50 parenting plan, and in the alternative, that the detrimental effect of relocation to Lynden significantly outweighed the benefit of any change to the child and mother. *Id.* at 105.

At the hearing, Ms. Miksch argued *pro se* that the parenting plan was dispositive of the issue and that it stated that the child would reside with the Petitioner every *other* four days off. *See RP* at 15:4-11. She also raised the issue with ¶ 3.12 (designating the custodian) of the parenting plan, asserting that she was the custodial parent. *Id.* at 17:22-18:1. Ms. Miksch also asserted that the amount of overtime worked by Mr. Miksch caused the actual split of parenting time to no longer be 50/50. *Id.* at 29:5-19. Mr. Miksch argued that the behavior of the parties, rather than the language of the plan controlled, and that the behavior of the parties was a 50/50 split. *Id.* at 26:18-24. The Commissioner denied Ms. Miksch's motion. *CP* at 131-34. The Commissioner's holding focused on ¶ 3.13 (the "Other" paragraph), but did not touch on the other residential paragraphs of the order, though it did mention ¶ 3.12 (the designation of custodian). *Id.* at 131. Ultimately, the Commissioner held that the relocation statutes do not apply to this case and that neither parent was entitled to the relocation presumption. *Id.* at 134. An

order was entered memorializing the Commissioner's memorandum decision. *Id.* at 138-39.

Ms. Miksch, now appearing through counsel, moved the Court for revision of the Commissioner's order. *Id.* at 140-46. At the hearing thereon, Ms. Miksch argued that the plain language of the parenting plan controlled, and that Ms. Miksch was entitled to the determination that she has the dominant residential schedule with E.A.M. *RP* at 34:4-9. She additionally argued that the Commissioner had exceeded the bounds of the *Fahey* and *R.F.R.* cases. *Id.* at 34:10-23.

In response, Mr. Miksch argued that it was Ms. Miksch's own assertions about the parties' behavior regarding a four on, four off schedule, that controlled the issue. *Id.* at 39:14-40:4. However, Mr. Miksch also admitted that "...the case law states that, that we look at the parenting plan..." *Id.* at 39:1-2.

The Court acknowledged familiarity with the *Fahey* and *R.F.R.* cases. *Id.* at 51:1-2. However, the Court also indicated:

... when I look at what the parenting plan provides... I came across the conclusion or I concluded that sometimes we need to look at other things outside the four corners of the parenting plan to see what the parties' intent was as to the parenting plan.

Id. at 52:8-13. Ultimately the court found that the parenting plan was an equal division of time, despite the language therein. *Id.* at 57:1-2. Then the

Court concluded that there was no person with whom the child resides a majority of the time. *Id.* at 57:14-17.

Mr. Chase asked the Court for formal findings and conclusions, indicating that the case may be appealed. *Id.* at 58:1-2. The Court declined to do so, but agreed that “this probably is a case that deserves to be up on appeal.” *Id.* at 58:4-5.

D. SUMMARY OF ARGUMENT

The Superior Court erred by looking outside the scope of the parenting plan. Where a parenting plan exists, the language of the plan controls which parent is the dominant parent. Evidence of the parties’ behavior under the plan is properly disregarded by a Court because the parenting plan, *qua* Order of the Court, delineates the visitation rights of the parties. In the interest of co-parenting, parents may deviate from a parenting plan without losing their rights to enforce the Court’s order, and without losing the rebuttable presumption of relocation.

The Court should have also looked beyond merely ¶ 3.13 of the parenting plan and considered the remainder of the residential provisions therein. Moreover, the Court should not have looked *beyond* the language of the parenting plan and considered evidence of the behavior of the parties. Finally, upon consideration of the provisions of the parenting plan, the residential provisions’ plain language allows for a 75/25 split of parenting

time favoring Ms. Miksch, *but only so long as* Mr. Miksch is working a four on, four off schedule. Otherwise, the plan provides virtually no visitation for Mr. Miksch except holidays.

Ms. Miksch is the primary custodial parent under the parenting plan in place at the time of her proposed relocation. The plan language of the parenting plan is all that the Court need, or is empowered to, consider.

E. ARGUMENT & AUTHORITY

Washington's child relocation act is codified at RCW 26.09.405–.560. The act imposes notice requirements and sets standards for relocating children who are the subject of court orders regarding residential time. *In re Custody of Osborne*, 119 Wn.App. 133, 140, 79 P.3d 465 (2003).

A person “with whom [a] child resides a majority of the time” must provide notice of an intended relocation to every person entitled to residential time with the child. RCW 26.09.430. If a person entitled to residential time objects, the person seeking to relocate the child may not do so without a court order. RCW 26.09.480(2). A trial court must conduct a fact-finding hearing, at which the relocating parent benefits from a rebuttable presumption that the relocation will be allowed. RCW 26.09.520. The objecting person may rebut the presumption by a showing that the detrimental effect of the relocation outweighs the benefit of the change to the child and relocating person. RCW 26.09.520. After the hearing, the trial

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

1. A Reviewing Court is Bound by the Terms of the Parenting Plan.

“When there is an existing parenting plan, the parent who is entitled to the presumption of relocation under RCW 26.09.430 is more easily determined.” *R.F.R.*, 122 Wn.App. at 330. “[T]he parenting plan in place at the time of a proposed relocation is used to determine primary residential parenting status. *In Re Marriage of Fahey*, 164 Wn.App. 42, 60, 262 P.3d 128 (2011). “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.” *Id.* at 57 (citing *R.F.R.*).

In *R.F.R.*, the parents were living in California; a DV assault case was filed against the father in 1996 and 1998, resulting in a conviction in 1998. *R.F.R.*, 122 Wn.App. at 326. The mother relocated to Washington in 2000; the father followed in 2001, after the terms of his probation were complete. *Id.* The parents both provided care for R.F.R., but soon began to

have conflicts when transferring R.F.R. back and forth. *Id.* The mother then moved to modify the parenting schedule; the Court appointed a GAL, placed R.F.R. with the mother, and restrained both parties from transporting the child out of state. *Id.* at 327. In 2002, the mother petitioned to relocate with R.F.R. to Indiana. *Id.* The Court denied the petition and determined that R.F.R. would reside with the father until further proceedings, and to finish the school year in Washington. *Id.* In 2002, after having moved to Indiana (without R.F.R.), the mother again petitioned for relocation and a trial on the matter was scheduled. *Id.* By the time of trial, the GAL had submitted a report recommending placement with the father. *Id.* However, the Court determined, on the basis of the testimony before it, that the mother was the primary care giver, and thus the parent with whom the child resided a majority of the time. *Id.*

The Court's holding in *R.F.R.* gives deference to what few orders had been entered in the case before: "But more significantly, when [the mother] filed her notice of intent to relocate, a superior court commissioner had ordered '[c]hild resides with mother.'" *Id.* at 330. The consideration of the testimony augmenting the order provided sufficient evidence for a determination that the mother was entitled to the presumption in favor of relocation. *Id.*

In *Fahey*, however, a parenting plan existed, and it was not necessary to look beyond the language of the plan. In *Fahey*, the mother intended to relocate the children from Edmonds, WA, to Omak, WA, which would result in the children being approximately five hours removed from the father, who was also resident in Edmonds, WA. *Fahey*, 164 Wn.App. 42 at 48. The court in *Fahey* noted that the parenting plan substantially evidenced that the mother was the primary residential parent, focusing on the sections of the parenting plan designating that the children would reside with the mother except for when they would reside with the father. *Id.* at 58. Further the court relied on evidence that the children would spend three weekdays with the mother and two weekdays with the father. *Id.*

Of interesting note is that the trial court admitted evidence that provided a factual basis for the father's assertion that the children spent more time with him and not the mother, and yet the appellate court held that this evidence was not dispositive, nor even persuasive, because the holding in *R.F.R.* clearly limited the trial court to evaluating the parenting plan in place at the time of the proposed relocation when determining whom the primary residential parent was. *Id.* at 59 – 60.

In fact, the *Fahey* Court refused to consider the same arguments advanced by Mr. Miksch in this case:

Next, Lawrence argues that, even if the original parenting plan designated Lisa as the primary residential parent, in practice he has been the children's actual primary residential parent since 2006. Lawrence argues that because the children spent more than 50 percent of nights sleeping in his home since 2006, the trial court should not have considered Lisa the primary residential parent. **But Lawrence 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. We do not address arguments that are not supported by cited authorities.**

Id. at 59 (emphasis added) (citing RAP 10.3(a)(6) and *In re Marriage of Fiorito*, 112 Wn.App. 657, 50 P.3d 298 (2002)).

2. *Fahey* Controls this Case

This matter presents a near-identical set of facts to those in *Fahey* – so close that *Fahey* entirely controls the issue. Like *Fahey*, this case involves a final parenting plan. Like *Fahey*, the terms of the plan designate the mother as the custodian and grant the mother more residential time. And, like *Fahey*, the father requested that the Court consider evidence outside the plan that showed a deviation² from the plan.

Here, just like in *Fahey*, this Court should reject Mr. Miksch's argument that the Court may look to evidence outside the parenting plan in

² However, in the *Fahey* case, the father's evidence and declarations tended to establish that he was the dominant residential parent, not merely an equal 50/50 residential parent. To that extent, *Fahey* does differ from this matter, but the Court's rejection of the father's position therein merely tends to strengthen Ms. Miksch's argument here. It does no work at all for the Respondent in this case.

order to determine whether there is a “person with whom the child resides with a majority of the time.” This argument was expressly rejected in *Fahey*, and this Court should reject it as well. The actual residential circumstances do not negate the express intent of the final parenting plan.

3. The Superior Court Erred by Failing to Consider the Remaining Provisions of the Parenting Plan.

Paragraph 3.13 is not the only residential provision in the parenting plan in this case. As noted above, the parenting plan directs the parties that Paragraphs 3.1-3.9 are a residential schedule, and Paragraph 3.13 is to be used if Paragraphs 3.1-3.9 are filled in. Here, the residential paragraphs are filled in, and it was error for the Court to fail to consider them.

Under the residential provisions of this plan, Ms. Miksch is clearly the dominant residential parent. If the Court looks to Paragraphs 3.1-3.9 of the parenting plan, Ms. Miksch has almost the entirety of the residential time, excepting holidays every other year, and Father’s Day every year. *See CP* at 23-26

Even Paragraph 3.13, the provision relied upon by Mr. Miksch, gives him more time than Paragraphs 3.1-3.9, this provision merely gives him a 25% residential time with the child. Moreover, Paragraph 3.13 is a conditional provision, which only applies while Mr. Miksch is working a

four on, four off schedule (“While Petitioner is working 4 days on, 4 days off schedule, ...). *Id.* at 27.

Finally, the Court erred by refusing to consider the designation of custodian. The designation of custodian is a determination that “The children in this parenting plan are **scheduled to reside the majority of the time** with the [] Petitioner [X] Respondent.” *Id.* (emphasis added). While not the same sort of designation as in *Fahey*, the designation is still dispositive here. The designation of custodian is “solely for purposes of all other state and federal statutes which require a designation or determination of custody.” *Id.* RCW 26.09.430 is a “state... statute which requires a designation or determination of custody.” *See Id.*

In other words, the residential schedule is Paragraphs 3.1-3.9, and Paragraph 3.13 is a conditional paragraph that may or may not apply, depending on Mr. Miksch’s work schedule. If Mr. Miksch were not working that particular schedule, Paragraph 3.13 would not apply at all. The Superior Court erred by failing to consider the other provisions of the plan, including the designation of the majority residential custodian.

F. CONCLUSION

This case is a straightforward issue. The primary question to be resolved herein is whether the Superior Court may look outside the scope of the parenting plan, given one exists. If not, the inquiry is over, and the

denial of her Motion for Temporary Relocation should be reversed remanded to Grant County Superior Court for consistent proceedings. Ms. Miksch argues that this is indeed the case, and that the Superior Court's scope of inquiry is limited to the parenting plan in place at the time of relocation, pursuant to *Fahey*.

Ms. Miksch argues that the Superior Court erred by failing to consider the remainder of her parenting plan, instead focusing on a single provision. Paragraph 3.13, standing as a conditional paragraph, cannot be dispositive of the issue, as it makes no provisions for the other residential issues (e.g. ¶3.7 and 3.8 – Holidays and Special Occasions). Moreover, the Superior Court entirely ignored the designation of custodian in the parenting plan. This provision directly addresses the question of with whom the child resides the majority of the time.

Regardless of which provision the Court looks to, Ms. Miksch is the dominant residential parent. Under paragraph 3.13, she has 75% time. Under paragraphs 3.1-3.9, she has approximately 97% of the time in odd years, and approximately 99.7% of the time in even years. Under paragraph 3.12, she is designated as the person the children are scheduled to reside with the majority of the time.

The only avenue of argument for Mr. Miksch herein is to ask this Court to jettison *Fahey* and *R.F.R.* and instead look to the behavior of the

parties. If this were a situation where the parenting plan contemplated deviation, this argument may be colorable. Here, however, with no deviation contemplated in the language of the plan, this argument fails. Mr. Miksch may also argue that the language of the parenting plan requires the Court to look outside the parenting plan, at least to make a determination of his work schedule in order to determine whether paragraph 3.13 applies. But because paragraph 3.13 does not give Mr. Miksch the dominant residential schedule even upon its application, this argument also fails.

For the reasons above, Ms. Miksch respectfully requests that his Court reverse the Grant County Superior Court's denial of her Motion for Temporary Relocation, and remand this matter for consistent proceedings.

Respectfully submitted this 11th of September, 2017.



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6 COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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8 In Re Marriage of:
MINDY R. MIKSCH

9 Appellant,

10 v.

11 JAMIE D. MIKSCH,

12 Respondent.

No.: 34326-0-III

DECLARATION OF SERVICE

13
14 Pursuant to RCW 9A.72.085, CR 5, and RAP 5.4(b) the undersigned hereby certifies
15 under penalty of perjury under the laws of the State of Washington, that on the dates below, the
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1 DATED this 8th of September, 2017 at Okanogan, WA.

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