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Grant Co. Superior Court Cause No. 10-3-00074-7

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

JAMIE MIKSCH,

Respondent,

vs.

MINDY MIKSCH,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR	3
RESTATEMENT OF THE CASE.....	3
A. Parenting plan.	3
B. Relocation proceedings.	5
C. Subsequent modification proceedings.....	9
ARGUMENT	10
A. The superior court did not err in considering evidence of the parties’ intent and conduct, along with the parenting plan, to determine whether their daughter resided with Ms. Miksch a majority of the time.	10
1. RCW 26.09.430 refers to “a person with whom the child <i>resides</i> a majority of the time,” using the present tense and indicative mood of the verb “reside” to denote a presently existing fact	12
2. RCW 26.09.430 does not limit the evidence that the superior court may consider in determining whether a child resides the majority of the time with the parent seeking relocation, and this Court should not add language to the statute.....	14
3. Ms. Miksch’s interpretation of RCW 26.09.430 would lead to absurd results.....	14
4. Allowing the Court to consider the parties’ intent and conduct along with the terms of a parenting plan	

promotes the objective of maintaining residential continuity in children’s lives.....	16
5. Contrary to Ms. Miksch, the decision of Division II in <i>Fahey</i> is not controlling, nor is it persuasive.	17
a. The decision of Division II in <i>Fahey</i> can be explained by the standard of review.	17
b. The decision of Division II in <i>Fahey</i> is factually distinguishable.	18
c. To the extent the Court interprets the decision of Division II in <i>Fahey</i> as giving dispositive effect to the parties’ parenting plan, the Court should decline to follow it.	20
B. The superior court finding that the parties’ daughter did not reside with Ms. Miksch the majority of the time is supported by substantial evidence.	22
C. Ms. Miksch’s appeal is moot because the parenting plan is no longer operative and the parties’ daughter now resides the majority of time with Mr. Miksch.	23
CONCLUSION.....	25
CERTIFICATE OF SERVICE	26
APPENDIX	

TABLE OF AUTHORITIES

Cases

<i>Burns v. City of Seattle</i> , 161 Wn. 2d 129, 164 P.3d 475 (2007)	16
<i>Goldman v. Standard Ins. Co.</i> , 341 F.3d 1023 (9th Cir. 2003)	13
<i>In re Marriage of Fahey</i> , 164 Wn. App. 42, 262 P.3d 128 (2011), <i>rev. denied</i> , 173 Wn. 2d 1019 (2012).....	passim
<i>In re Marriage of Heslip, noted at</i> 190 Wn. App. 1012, 2015 WL 5566229 (Div. II, Sept. 22, 2015).....	24
<i>In re Marriage of Horner</i> , 151 Wn. 2d 884, 93 P.3d 124 (2004)	23-25
<i>In re Parentage of R.F.R.</i> , 122 Wn. App. 324, 93 P.3d 951 (2004).....	13, 15, 20-22
<i>In re Wieber</i> , 182 Wn. 2d 919, 347 P.3d 41 (2015)	15
<i>Lyle Schmidt Farms, LLC v. Mendon Twp.</i> , 891 N.W.2d 43 (Mich. App. 2016)	13
<i>Matter of Arnold</i> , — Wn. 2d —, — P.3d —, 2018 WL 894468 (Feb. 15, 2018)	17
<i>People v. Wills</i> , 73 Cal. Rptr. 3d 104 (Cal. App. 2008)	13
<i>State v. Bigsby</i> , 189 Wn. 2d 210, 399 P.3d 540 (2017)	12
<i>State v. Larson</i> , 184 Wn. 2d 843, 365 P.3d 740 (2015)	14

State v. Lopez,
— Wn. 2d —, — P.3d —, 2018 WL 894443 (Feb. 15, 2018) .. 22

State v. Saint-Louis,
188 Wn. App. 905, 355 P.3d 345 (2015), *aff'd sub nom.*
In Matter of Dependency of D.L.B.,
186 Wn. 2d 103, 376 P.3d 1099 (2016)..... 12

Sutton v. United Air Lines, Inc.,
527 U.S. 471 (1999) 13

United States v. Gertz,
249 F.2d 662 (9th Cir. 1957)..... 13

Statutes and Rules

GR 14.1(a) 24

RCW 26.09.002 16

RCW 26.09.405-.560 7, 10

RCW 26.09.430.....passim

RCW 26.09.480(2)..... 11

RCW 26.09.520 1, 8, 11

I. INTRODUCTION

While representing themselves in marital dissolution proceedings, Appellant Mindy R. Miksch¹ and Respondent Jamie D. Miksch jointly presented an agreed parenting plan that was intended to provide that their daughter would reside with each of them an equal amount of time, although the terms of the parenting plan were not drafted to unambiguously reflect their intent. Over the course of eight years, the parties acted in accordance with their intent, and their daughter spent equal time with each of them on a rotating 4-day schedule.

Mindy Miksch subsequently sought to move from Ephrata to Lynden with the parties' daughter. She argued that she was entitled to a presumption in favor of such relocation (pursuant to RCW 26.09.520) because the terms of the parenting plan could be construed as providing that their daughter should reside with her a majority of the time. However, Ms. Miksch admitted that the parties shared equal time, and the superior court found that they intended to share equal time and did, in fact, share equal time. Accordingly, the court declined to apply the presumption in favor of relocation.

¹ Ms. Miksch's last name was changed to "Caraway" during the parties' dissolution, but this brief refers to her by the name "Miksch" following the usage in her opening brief.

In the meantime, the superior court found adequate cause to modify the existing parenting plan and entered a new temporary parenting plan pending trial on a final modified parenting plan. The terms of the parenting plan under which Ms. Miksch sought to relocate are no longer in effect. Nonetheless, Ms. Miksch has appealed the denial of her request to relocate with the parties' daughter.

The superior court should be affirmed because: (1) substantial evidence supports the court's finding that the parties' daughter resided with neither of them a majority of the time; (2) the relevant statute, RCW 26.09.430, does not limit admissible evidence to the four corners of a parenting plan, nor does it preclude consideration of the parties' intent or conduct, especially where the terms of a pro se parenting plan are contradictory and ambiguous; (3) Ms. Miksch's interpretation of the statute would lead to absurd results, giving conclusive effect to the terms of a parenting plan in determining whether that parent is entitled to a presumption in favor of relocation, even under circumstances where the children have actually resided with the other parent 100% of the time for the duration of the parenting plan; and (4) this appeal is moot because

the parenting plan is no longer operative and the parties' daughter now resides a majority of time with Mr. Miksch.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. In making the factual determination "with whom the child resides a majority of the time" under RCW 26.09.430, what evidence may the court consider? In particular, must the court base its determination solely on the written terms of the parenting plan, without giving the parties an opportunity to explain what they intended and how they acted? Or, may the court consider evidence regarding the parties' intent and conduct?

2. Is a request to relocate under a parenting plan that is no longer operative moot?

III. RESTATEMENT OF THE CASE

A. Parenting plan.

In the course of pro se dissolution proceedings, the parties jointly presented an agreed parenting plan for their daughter, then age 4. CP 21-31. The standard form provisions provided that she would reside with her father, Jamie Miksch, on weekends before she enrolled in school. CP 23 (¶ 3.1). The standard form provisions did not provide for her to reside with him at any time after she enrolled in school, CP 23-24 (¶¶ 3.2-3.6), except for odd-year holidays, CP 24

(¶ 3.7), and father's day, CP 24 (¶ 3.8). However, the parties hand-wrote a non-standard "other" provision into the parenting plan that stated: "While petitioner is working 4 days on, 4 days off schedule, child shall reside with petitioner every other 4 days off." CP 28 (¶ 3.13).²

The parties also presented an agreed child support order and child support worksheet. They recognized that the agreed child support amount deviated from the standard child support calculation. CP 36 (¶ 3.7). On the child support worksheet, they noted, under "Other Factors For Consideration":

Petitioner and respondent have agreed upon a monthly payment of \$400.00 a month to be paid to respondent. Special considerations would be due to the fact that petitioner will have child 40% of the month because of work schedule, i.e., rotating shifts.

CP 47.

At the hearing to grant the parties' dissolution, the following colloquy occurred:

THE COURT: Okay, one dependent child, Emrie?

PETITIONER [Mr. Miksch]: Yes.

² A standard form provision was also checked designating the mother, Mindy Miksch, as custodian of the parties' daughter. CP 27 (¶ 3.12). This provision expressly provides that the "designation shall not affect either parent's rights and responsibilities under this parenting plan." *Id.*

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

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

THE COURT: Okay. That's right, you were four days on, four days off?

PETITIONER: Yes.

THE COURT: Okay. Is the parenting plan that you've presented to the Court in the best interest of the child?

PETITIONER: Yes.

THE COURT: Okay.

RP 9:5-20 (brackets added).

For a period of approximately eight years, beginning before entry of the foregoing parenting plan and child support order and continuing until early 2017, the parties shared residential time with their daughter equally on a rotating 4-day schedule. CP 95 & 131; RP 15:18-16:18.

B. Relocation proceedings.

On February 2, 2017, Mindy Miksch gave notice of her intent to relocate with the parties' daughter from Ephrata to Lynden, a distance of approximately 267 miles and travel time of approximately 4 1/2 hours. CP 48-52.³ Jamie Miksch objected to the

³ Travel distance and time from www.mapquest.com (viewed Feb. 21, 2018).

relocation, and the matter was heard by a superior court commissioner.

At the hearing, Mindy Miksch acknowledged that the parties' daughter is "actually with Jamie every four days off that he has and not every other four days." RP 15:12-14. She explained:

RESPONDENT [Ms. Miksch]: Jamie works four days on day shift where he's gone for 14 hours for four days straight during the day, and then four days off, and then four days nightshift, again gone for 14 hours though the graveyard shift And we, we have been working with that schedule for, for eight years—

THE COURT: Okay. So, so when he's off the four days he has the child—

RESPONDENT: Yes.

THE COURT: —when he's working the four days, you have the child?

RESPONDENT: Exactly.

THE COURT: And four and four, that's how it goes?

RESPONDENT: Exactly.

RP 15:18-16:18 (brackets added). She added that this schedule was what the original parenting plan stated. RP 29:9-12 ("THE COURT: I thought you just told me you'd been doing four days on, four days off for the last eight years. RESPONDENT: Well, that's what the plan, plan was stated ...").

Based on the statements of Mindy Miksch and other evidence presented at the hearing, the court commissioner found that the parties' daughter resided with neither parent a majority of the time, and, as a result, declined to apply the presumption in favor of relocation. CP 131-34. The commissioner explained his reasoning in a letter ruling as follows:

At the hearing, both parties acknowledged that the child had been with the father during his 4 days off, then with the mother for 4 days while father worked, then back with the father for 4 days, and so on. The parties further acknowledged that this is the schedule they have been following since entry of the parenting plan in 2010. While the mother argued that she actually had the child with her more than the father because of overtime worked by the father, the father denied that assertion. The Court need only look at the language of the parenting plan to determine the schedule of the parties. From this Court's reading, the parenting plan is a "50/50" parenting plan, and neither parent has the child with that parent a majority of the time.

At issue is whether the relocation statutes (RCW 26.09.405 - 26.09.560) apply, and, if they do, to what extent they apply. Conversely, if the relocation statutes do not apply, then what is the standard to be applied?

Relocation of minor children is commenced by the giving of notice. RCW 26.09.430 states:

"Except as provided in RCW 26.09.460, a person with whom the child resides a majority of the time shall notify every other person entitled to residential time or visitation with the child under a court order if the person intends to relocate. Notice shall be given as prescribed in RCW 26.09.440 and 26.09.450."

In the instant case, neither parent is "a person with whom the child resides a majority of the time." Therefore, under the statute, neither is required to give notice. The relocation statutes apply in situations where there is a primary parent. RCW 26.09.520 tells the Court that there is a rebuttable presumption in favor of the relocation by the primary parent and tells the Court what factors are to be considered to determine whether that rebuttable presumption has been overcome by the non-relocating parent. That rebuttable presumption favors the primary parent. *In re Marriage of Fahey*, 164 Wash.App. 42, 262 P.3d 128 (2011). The *Fahey* court noted the inapplicability of the relocation statutes in cases such as the case at bar.

"We note that, by the plain language of the child relocation statutes, the notice requirements are triggered by the intended relocation of a person "with whom the child resides a majority of the time." RCW 26.09.430. This plain language suggests that if neither parent qualifies as a parent with whom a child resides a majority of the time, for example when residential time is split 50/50, that neither parent can invoke the child relocation statute and receive the rebuttable presumption in his/her favor. . . ."

Id., 164 Wash.App. at 58.

Additionally, the factors set forth in RCW 26.09.520 have no application in a case such as this because they are specifically designed to be considered when determining whether the rebuttable presumption has been overcome by the non-primary residential parent. Here, there simply is no rebuttable presumption because there is no primary residential parent.

CP 131-32 (formatting in original; footnote omitted). The commissioner entered an order based on the letter ruling. CP 138-39.

A superior court judge conducted de novo review of the commissioner's decision on a motion for revision and reached the same conclusion, rendering the presumption in favor of relocation inapplicable. RP 49:12-59:17; CP 167. While the judge acknowledged considering evidence outside of the four corners of the original parenting plan, he also found that the evidence was consistent with the parenting plan:

I believe that my ruling is that it's consistent with the parenting plan that it's a 50/50 plan, that we did have to go outside the four corners to, to get to that, but that's what I think I, I did was to be faithful to the parenting plan, but I do recognize that I went outside the four corners in order to do that, so ... To, to interpreter [sic] it.

RP 59:9-17 (ellipses in original; brackets added).⁴

C. Subsequent modification proceedings.

Mindy Miksch appealed the denial of her motion for revision. CP 170-71. In the meantime, the superior court entered an order finding adequate cause to modify the parenting plan. CP 218-19. The court also entered a new temporary parenting plan pending trial on a final modified parenting plan. CP 250-63. Under the new

⁴ Ms. Miksch contends that her lawyer "asked the Court for formal findings and conclusions[.]" App. Br., at 7 (citing RP 58:1-2; brackets added). In actuality, her lawyer stated an "[o]ral ruling is fine with me, Your Honor." RP 58:15 (brackets added). In any event, the superior court judge on revision stated "I reached the same conclusion that the Commissioner did[.]" RP 57:18-20 (brackets added).

temporary parenting plan, the parties' daughter resides the majority of the time with Mr. Miksch. CP 255 (¶¶ 8-9). Ms. Miksch did not timely appeal either the adequate cause order or the temporary parenting plan. Accordingly, Jamie Miksch filed a motion to dismiss on grounds of mootness, since Ms. Miksch's relocation request was based on a parenting plan that is no longer in effect. The commissioner denied the motion to dismiss, but granted permission for the new temporary parenting plan to be entered.

IV. ARGUMENT

A. The superior court did not err in considering evidence of the parties' intent and conduct, along with the parenting plan, to determine whether their daughter resided with Ms. Miksch a majority of the time.

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 subject to court orders regarding residential time. Subject to an exception that is not applicable here, "a person with whom [a] child resides a majority of the time 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 (brackets added). If a person entitled to residential time or visitation objects, the person seeking to relocate

with the child must obtain authorization from the court. RCW 26.09.480(2). The court must conduct a fact-finding hearing to determine whether relocation will be allowed. RCW 26.09.520. At the hearing, the person “with whom the child resides a majority of the time” per RCW 26.09.430 is entitled to the benefit of “a rebuttable presumption that the intended relocation of the child will be permitted.” RCW 26.09.520; *see generally In re Marriage of Fahey*, 164 Wn. App. 42, 56-57, 262 P.3d 128 (2011) (describing procedure), *rev. denied*, 173 Wn. 2d 1019 (2012).

On appeal, Mindy Miksch argues that the superior court erred in looking outside the four corners of the original parenting plan to determine whether the parties’ daughter resided with her a majority of the time, and in declining to apply the presumption in favor of relocation on this basis. This argument is contrary to the language and purpose of the relocation act and will lead to absurd results. The Court should hold that the parenting plan is relevant but not dispositive, and that the superior court below properly considered the parties’ intent and conduct in concluding that their daughter did not reside with Ms. Miksch a majority of the time.

- 1. RCW 26.09.430 refers to “a person with whom the child *resides* a majority of the time,” using the present tense and indicative mood of the verb “reside” to denote a presently existing fact.**

The purpose of statutory interpretation is to ascertain and carry out legislative intent. *See, e.g., State v. Bigsby*, 189 Wn. 2d 210, 216, 399 P.3d 540 (2017). Legislative intent is ascertained primarily from the plain meaning of the language used in the statute. *See id.*, 189 Wn. 2d at 216. As it appears in RCW 26.09.430, the phrase “a person with whom the child *resides* a majority of the time” uses the verb “reside” in the present tense and indicative mood. The present tense “is a grammatical tense whose principal function is to locate a situation or event in present time.” Wikipedia.org, s.v. “present tense” (viewed Feb. 21, 2018). The indicative mood “is a grammatical mood which is used principally to indicate that something is a statement of fact.” *Id.*, s.v. “realis mood.” Thus, the tense and mood of the verb “reside” denote a presently existing state of fact. *See State v. Saint-Louis*, 188 Wn. App. 905, 917, 355 P.3d 345 (2015), *aff’d sub nom. In re Dependency of D.L.B.*, 186 Wn. 2d 103, 117, 376 P.3d 1099

(2016) (noting present tense verb in statute denotes a presently existing state of fact).⁵

While the parenting plan may be relevant to the presently existing state of fact regarding a child’s residence, it may also be contrary to existing fact. Determining residence based solely on the language used in the parenting plan, as Mindy Miksch urges the Court to do, no matter how far it departs from the existing state of fact, would be contrary to the verb tense and mood used by the Legislature in adopting RCW 26.09.430.⁶

⁵ See also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (stating “[b]ecause the phrase ‘substantially limits’ appears in the [definition of disability in the Americans with Disabilities Act], in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability”; brackets added); *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1030 (9th Cir. 2003) (citing *Sutton* for this proposition); *United States v. Gertz*, 249 F.2d 662, 665 (9th Cir. 1957) (“Since the verb ‘brings’ is in the present tense, it must be that the term ‘foreign country,’ used in this context, means a currently-existing country”); *Lyle Schmidt Farms, LLC v. Mendon Twp.*, 891 N.W.2d 43, 49 (Mich. App. 2016) (“The fact that the verbs in the definition of the word ‘owner’ are in the present tense means that the term ‘owner’ refers to a condition that is ‘being, existing, or occurring at this time or now’”; quotation omitted); *People v. Wills*, 73 Cal. Rptr. 3d 104, 111 (Cal. App. 2008) (“use of the present tense verb ‘is’ in section 1203.066(c)(2) (“[a] grant of probation ... is in the best interest of the child”) indicates a plain and clear legislative intent that the sentencing court must evaluate the circumstances existing at the time of sentencing in determining whether a grant of probation would be in the “best interest” of the “child” victim”).

⁶ Division 2 overlooked the significance of the verb tense and mood when it stated that “RCW 26.09.430 is silent as to the relevant time period for determining who is the parent ‘with whom the child resides a majority of the time’” in *In re Parentage of R.F.R.*, 122 Wn. App. 324, 330, 93 P.3d 951 (2004).

- 2. RCW 26.09.430 does not limit the evidence that the superior court may consider in determining whether a child resides the majority of the time with the parent seeking relocation, and this Court should not add language to the statute.**

In the process of interpreting a statute, the Court does not have authority to add words or phrases to the language adopted by the Legislature. *See, e.g., State v. Larson*, 184 Wn. 2d 843, 851, 365 P.3d 740 (2015). RCW 26.09.430 does not limit evidence that may be considered in determining the person with whom the child resides a majority of the time. In order to impose such a limitation, the Court would have to effectively add language to the statute along the following lines:

a person with whom the child resides a majority of the time, as determined from the parenting plan, if there is a parenting plan in effect, 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). The Court should reject Mindy Miksch's invitation to add to the language of the statute in this way.

- 3. Ms. Miksch's interpretation of RCW 26.09.430 would lead to absurd results.**

The Court should strive to avoid interpretations of statutory language that yield unlikely, absurd or strained consequences." *See*,

e.g., In re Wieber, 182 Wn. 2d 919, 927, 347 P.3d 41 (2015). Adopting Ms. Miksch's interpretation of RCW 26.09.430 would lead to at least two absurd results. First, it would treat parents with a parenting plan differently than parents without a parenting plan, without any justification. Those with a parenting plan, according to her interpretation, are entitled to a presumption in favor of relocation based solely on terms of a parenting plan providing that the child resides the majority of the time with the relocating parent, no matter how long ago the parenting plan was entered or whether the parties' followed it. On the other hand, those without a parenting plan would be entitled to a presumption in favor of relocation only if they can establish that the child resides the majority of the time with the relocating parent at the time of relocation. *See App. Br.*, at 9-10 (discussing *R.F.R., supra*). There is no good reason for treating these parents so differently.

Second, Ms. Miksch's interpretation of RCW 26.09.430 would give conclusive effect to the terms of a parenting plan in determining whether that parent is entitled to a presumption in favor of relocation, even under circumstances where the children have actually resided with the other parent 100% of the time for the duration of the parenting plan. There is no good reason for the

presumption in favor of relocation unless the child resides with the relocating parent at the time relocation is sought.

4. Allowing the Court to consider the parties' intent and conduct along with the terms of a parenting plan promotes the objective of maintaining residential continuity in children's lives.

The Court should interpret statutory language in a way that furthers “the general object to be accomplished.” *Burns v. City of Seattle*, 161 Wn. 2d 129, 146, 164 P.3d 475 (2007) (quotation omitted). The Legislature has clearly stated its objective to maintain residential continuity in children's lives. *See* RCW 26.09.002 (recognizing, as a matter of policy, that “the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm”). This policy is evident in the presumption in favor of relocation when a child resides the majority of the time with the relocating parent. This objective is not served by giving a parent the benefit of the presumption when the child does **not** reside the majority of the time with the relocating parent at the time of the proposed relocation. It is only served by

giving the parent the benefit of the presumption when the child **does** reside the majority of time with the relocating parent at that time.

5. Contrary to Ms. Miksch, the decision of Division II in *Fahey* is not controlling, nor is it persuasive.

Ms. Miksch wrongly contends that the decision of Division II in *Fahey* “controls this case.” App. Br., at 12. Decisions of a coordinate division of the Court of Appeals are not binding on this Court. *See Matter of Arnold*, — Wn. 2d —, — P.3d —, 2018 WL 894468, at *6 (Feb. 15, 2018) (“reject[ing] any kind of ‘horizontal stare decisis’ between or among the divisions of the Court of Appeals”; brackets added). The decision in *Fahey* can be explained by the standard of review and is distinguishable. To the extent the Court interprets the decision as giving dispositive effect to the parties’ parenting plan, the Court should decline to follow it.

a. The decision of Division II in *Fahey* can be explained by the standard of review.

In *Fahey*, Division II properly noted that a superior court determination regarding whether a child resides the majority of the time with the relocating parent is subject to review for substantial evidence. *See* 164 Wn. App. at 55-56. Division II found that the superior court decision was supported by substantial evidence because the parenting plan established that the relocating parent was

the primary residential parent. *See id.* at 58 & 60. In conducting substantial evidence review, Division II did not refuse to consider evidence regarding actual residency of the child at the time of relocation. Instead, the Court stated that “[e]ven if [the non-relocating parent] actually had a majority of the residential time with the children ... the circumstances of this residential time did not warrant a per se negation of [the relocating parent’s] primary residential parenting designation in the original parenting plan.” *Id.* at 60 (brackets & ellipses added). As with any substantial evidence review, the existence of contrary evidence in the record does not establish an absence of substantial evidence to support the superior court’s decision.⁷

b. The decision of Division II in *Fahey* is factually distinguishable.

The parenting plan in *Fahey* unambiguously established that the children presumptively resided the majority of the time with the relocating parent. The plan “designated the [relocating parent] as the custodial parent and stated that the children ‘are scheduled to reside the majority of the time with [her].’” 164 Wn. App. at 46-47 (brackets

⁷ In contrast to *Fahey*, this case involves a superior court finding that the child did not reside the majority of time with the relocating parent. That finding is supported by substantial evidence as noted in part B, below.

added). The plan simply permitted the non-relocating parent “to have access to [the] children up to 50% of the time to the best it can be worked out.” *Id.* at 47 (brackets in original). In light of these provisions, Division II did not find it necessary to go outside the four corners of the parenting plan in *Fahey*.

In contrast, the terms of the parenting plan in this case are contradictory and ambiguous. While the parties checked the standard form box designating Ms. Miksch as the custodian of their daughter, the provision expressly provides that the “designation shall not affect either parent’s rights and responsibilities under this parenting plan.” CP 27 (¶ 3.12).⁸ Certain paragraphs of the parenting plan allow Mr. Miksch no time with their daughter except odd holidays and father’s day. CP 23-24 (¶¶ 3.2-3.8). Another paragraph allows him “every other 4 days off,” CP 28 (¶ 3.13), which Ms. Miksch characterized as equal time before the superior court, RP 15:18-16:18 & 29:9-12, but which she characterizes as a 75/25 split before this Court, App. Br., at 7-8. In the contemporaneous child support worksheet, the parties described the split as 60/40. CP 47. Under these circumstances, it is not possible to confine the inquiry to the

⁸ The majority opinion in *Fahey* may have overlooked this limiting language in the form. *See* 164 Wn. App. at 71-72 (Armstrong, J., dissenting).

four corners of the parenting plan, and *Fahey* does not provide any guidance.

- c. To the extent the Court interprets the decision of Division II in *Fahey* as giving dispositive effect to the parties' parenting plan, the Court should decline to follow it.**

Fahey does contain language seeming to suggest that the terms of a parenting plan are dispositive in determining whether a parent is entitled to the presumption in favor of relocation. *See* 164 Wn. App. at 60 (stating “the parenting plan in place at the time of a proposed relocation is used to determine primary residential parenting status”). In support of this statement, *Fahey* cited another Division II decision, *R.F.R.*, 122 Wash. App. at 330. However, *R.F.R.* does not provide any support for *Fahey*. *R.F.R.* involved a request for relocation in the absence of a parenting plan. *See R.F.R.*, 122 Wn. App. at 326 (noting “no parenting plan or schedule had ever been filed”); *id.* at 330 (noting “[h]ere ... there was no parenting plan in place”; brackets & ellipses added). Any statements about the effect of a parenting plan in *R.F.R.* are dicta.

Moreover, *R.F.R.* did not state that the parenting plan has dispositive effect. Division II merely stated that “[w]hen 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.***” 122 Wn. 2d at 330 (brackets & emphasis added). This common-sense observation regarding the evidentiary value of a written document does not permit or require the parenting plan to be given dispositive effect. *R.F.R.* otherwise recognized that the person with whom the child resides the majority of the time is a question of fact to be determined based on all relevant circumstances, subject only to review for substantial evidence. *See id.* at 330-31.

Fahey does not ground the statement seeming to give to dispositive effect to the parenting plan in the language of RCW 26.09.430 or other provisions of the relocation act. It does not deal with the potential absurd consequences of giving dispositive effect to the parenting plan, nor does it address the legislative purpose of maintaining residential continuity in children’s lives. These points were all emphasized in an extended dissent. *See Fahey*, 164 Wn. App. at 70-73 (Armstrong, J., dissenting). To the extent *Fahey* is read as giving dispositive effect to the parenting plan, this Court should decline to follow Division II.

B. The superior court finding that the parties' daughter did not reside with Ms. Miksch the majority of the time is supported by substantial evidence.

Whether a child resides the majority of the time with the relocating parent is reviewed for substantial evidence. *See Fahey*, 164 Wn. App. at 55-56, 58 & 60; *R.F.R.*, 122 Wn. App. at 330-31. Substantial evidence means evidence sufficient to persuade a rational, fair-minded person of the truth of the superior court's finding. *See, e.g., State v. Lopez*, — Wn. 2d —, — P.3d —, 2018 WL 894443, at *6 n.8 (Feb. 15, 2018). A reviewing court may not substitute its judgment for the superior court, even though it might have resolved a factual dispute differently. *Id.* The admissions of Ms. Miksch and the testimony of Mr. Miksch about their intent to share time equally on a rotating 4-day schedule and the fact that they followed this schedule at least since entry of the parenting plan constitute substantial evidence that the parties' daughter did not reside the majority of the time with Ms. Miksch. The superior court's decision not to apply the rebuttable presumption in favor of relocation under these circumstances should be affirmed.⁹

⁹ The parties appear to agree that the relocation act is inapplicable when the child does not reside the majority of the time with the relocating parent. *See Fahey*, 164 Wn. App. at 58 (noting "if neither parent qualifies as a parent with whom a child resides a majority of the time, for example when residential time is split 50/50, that neither parent can invoke the child relocation statute and receive the rebuttable presumption in his/her favor").

C. Ms. Miksch’s appeal is moot because the parenting plan is no longer operative and the parties’ daughter now resides the majority of time with Mr. Miksch.

To the extent the determination the parent with whom the child resides the majority of the time is based on the parenting plan, this appeal is moot because the parenting plan on which Ms. Miksch relies is no longer operative. To the extent the determination is based on all relevant circumstances, including the parties’ intent and conduct, this appeal is moot because circumstances have changed and the parties’ daughter now resides the majority of time with Mr. Miksch.

"A case is moot if a court can no longer provide effective relief." *See In re Marriage of Horner*, 151 Wn. 2d 884, 891, 93 P.3d 124 (2004). In an unpublished decision, Division II recognized without expressly holding that granting a petition to modify a parenting plan renders a request for relocation under the former parenting plan moot:

In an evidentiary hearing on December 1, 2011, the trial court first decided [one parent's] petition to modify the parenting plan, ruling that she would receive primary custody of [the child]. The trial court also stated that, in light of its decision on the petition to modify, "the motion for relocation is really kind of moot." VRP (Dec. 1, 2011) at 58. Both parties agreed that the motion for relocation was moot.

In re Marriage of Heslip, noted at 190 Wn. App. 1012, 2015 WL 5566229 (Div. II, Sept. 22, 2015) (brackets added).¹⁰

This recognition is consistent with the holding in *Horner*, *supra*, that review of a request for relocation under a parenting plan becomes moot when the parenting plan is no longer applicable. Specifically, the Court in *Horner* concluded that review was moot because "the main reason the trial court denied the relocation (to further the parenting plan's goal of promoting the sibling relationship between [the children]) no longer applies because [one child] turned 18 and is no longer subject to the parenting plan." 151 Wn. 2d at 892 (brackets added).

Similarly, the modification of the parenting plan in this case renders the appeal of Appellant's request for relocation moot. There is no way that this Court can grant effective relief on appeal of the denial of Ms. Miksch's relocation request now that the parenting plan has been changed.

While there are exceptions to the mootness doctrine, they are inapplicable here. In order to overcome the courts' normal reluctance to issue an advisory opinion regarding a moot controversy, the party

¹⁰ Although unpublished, *Heslip* is properly cited as persuasive authority under GR 14.1(a), and a copy of the decision is attached.

seeking review must show a "continuing and substantial public interest" in the issue, as distinguished from a private dispute that is unlikely to recur. *See Horner*, at 891. The issues raised on review in this case do not satisfy the criteria for ignoring the mootness doctrine.¹¹

V. CONCLUSION

Based on the foregoing, Jamie Miksch asks the court to affirm the superior court.

Respectfully submitted this 22nd day of February, 2018.

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¹¹ Counsel has found no authority suggesting that the Commissioner's denial of Mr. Miksch's motion to dismiss on grounds of mootness has preclusive effect, or would prevent this Court from addressing the issue of mootness even though no motion to modify was filed.

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email and U.S. Postal delivery, postage prepaid, as follows:

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and upon Respondent's co-counsel, Melissa K. Chlarson, via email pursuant to prior agreement for electronic service, as follows:

Melissa K. Chlarson at melissa@krashleylaw.com

Signed at Moses Lake, Washington on February 22, 2018.



Shari M. Canet, Paralegal

APPENDIX

In re Marriage of HeslipA-1

190 Wash.App. 1012

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

In re the MARRIAGE OF:
Jodi Heslip nka Vines, Respondent,
and
Frederick J. HESLIP, Appellant.

No. 45612–5–II.

|
Sept. 22, 2015.

Appeal from Cowlitz Superior Court; Hon. Dennis Philip
Maher, J.

Attorneys and Law Firms

Nicholas Robert Franz, Attorney at Law, Tacoma, WA,
for Appellant.

John A. Hays, Attorney at Law, Longview, WA, for
Respondent.

Opinion

UNPUBLISHED OPINION

SUTTON, J.

*1 Frederick Heslip appeals the trial court's order modifying the parties' parenting plan and awarding primary custody of the minor child, MH¹ to the mother, Jodi Heslip. Frederick² argues that the trial court (1) erred in applying RCW 26.09.260 to the facts because the evidence favored him as the primary custodial parent, (2) erred in not applying the relocation factors under RCW 26.09.520, and (3) abused its discretion in limiting the evidence at trial to the facts that occurred after its December 2011 order awarding temporary custody of MH to Jodi, pending trial.

¹ We refer to MH by his initials to protect his privacy.

² To avoid confusion, we refer to the parties by their first names. We mean no disrespect.

We hold that the trial court did not err in applying RCW 26.09.260 to the facts and in modifying the parenting plan. Applying RCW 26.09.260(2)(c), the trial court's unchallenged findings of fact found that there was a substantial change in MH's circumstances since entry of the May 21, 2010 parenting plan, that MH was fully integrated into Jodi's new family and her home provided him stability, and that continued placement with Frederick would be detrimental to MH's mental and emotional health. We hold that the trial court's findings support the court's conclusion that it was in MH's best interests to award primary custody to Jodi. We also hold that, because Frederick did not object to the trial court's ruling limiting the evidence at trial to facts since the December 30, 2011 temporary order,³ and because he agreed that the relocation issue was moot, he waived these issues on appeal under RAP 2.5(c). Accordingly, we affirm the trial court's October 14, 2013 order modifying the parenting plan.⁴

³ Order on Hearing (December 30, 2011 temporary order).

⁴ Order Re: Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (October 14, 2013 order).

FACTS

I. THE MAY 2010 PARENTING PLAN

Frederick and Jodi Heslip married in August 2005. In November 2007, Frederick was convicted of a misdemeanor assault against Jodi. Their son, MH, was born in December 2007. Due to his criminal conviction, Frederick lost his job, then worked various jobs, had difficulty paying bills, and moved five to seven times during the first 18 months after MH was born. Frederick and Jodi divorced in May 2010. On May 21, 2010, the superior court entered a final parenting plan awarding primary residential placement of MH, age three, to Frederick. At the time the court entered the final parenting plan, Jodi was in the process of relocating to North Carolina, but she had not yet relocated.

II. JODI'S PETITION TO MODIFY AND FREDERICK'S MOTION TO RELOCATE

On October 13, 2011, Jodi filed a petition to modify the May 2010 parenting plan, seeking primary custody of MH. She alleged that, under RCW 26.09.260(2)(c), MH's environment was detrimental to his physical, mental or emotional health and that the advantages of the change in MH's environment outweighed any potential harm to MH. Jodi also filed a motion for temporary custody of MH so he could live with her temporarily in North Carolina pending trial and a motion to enjoin Frederick from taking MH out of Washington State. In response, Frederick filed a motion to relocate to Utah with MH; Jodi objected.

*2 The trial court, finding adequate cause for Jodi to proceed on her petition to modify custody, set an evidentiary hearing. After three days of testimony, the trial court found that Frederick showed a pattern of domestic violence and moved several times within an 18 month period of time, that he was currently unemployed, and that he stopped communicating with MH and Jodi after she filed her pleadings. The trial court also found that Jodi was married and employed, that she had a consistent schedule and a plan for MH in North Carolina, and that while she had been treated for a prior mental health issue, she no longer required medication. The trial court further found that Frederick's instability created a substantial change in MH's circumstances, and that it was in MH's best interests to live with Jodi in North Carolina until the Cowlitz County Family Court completed a full investigation.

The trial court (1) granted Jodi's motion for temporary custody on December 30, 2011, and entered a temporary parenting plan on January 6, 2012, (2) ordered Frederick to exchange the child at the Salt Lake City Airport no later than January 6, 2012, and (3) referred the matter to the Cowlitz County Family Court for investigation. After granting Jodi's motion for temporary custody and entering the temporary parenting plan, the trial court stated that Frederick's motion for relocation was "moot." Verbatim Report of Proceedings (VRP) (December 1, 2011) at 58. Both parties agreed with the trial court. MH subsequently moved to North Carolina to temporarily live with Jodi.

In accordance with the trial court's orders, the Cowlitz County Family Court investigated and filed a report recommending that (1) Jodi be designated as Mil's primary custodial parent, (2) Frederick's residential time be limited until he successfully completed a certified program for domestic violence perpetrators, (3) Jodi directly supervise any telephone or computer contact between MH and Frederick, and (4) Jodi seek professional services or medication as needed to maintain her mental health.

Before the modification trial began in August 2013, the trial court ruled that the evidence would be limited to the facts occurring after the December 30, 2011 temporary order because Frederick had not appealed that order. The trial court treated those findings of fact and conclusions of law as verities. Frederick did not object. After a three-day trial, the trial court granted Jodi's petition to modify custody and awarded her primary custody of MH.

The trial court found that (1) Frederick failed to participate in the family court's investigation, (2) his testimony about his failure to participate in the investigation was not credible and his allegation that he was discriminated against by the family court due to his race and religion was not supported by evidence, (3) Frederick was held in contempt for failing to return MH to Jodi after summer vacation in August 2012, (4) Frederick failed to participate in selecting MH's counselor, and (5) Jodi's home was stable, she had a job, and was in school.

*3 The trial court also found a substantial change in MH's circumstances since the initial parenting plan in May 2010, that MH "was fully integrated into Jodi's household, and, under RCW 26.09.260(2)(c),⁵ that continued placement with Frederick would be detrimental to MH's mental and emotional health. The trial court concluded that it was in MH's best interest to award Jodi primary custody.

5 RCW 26.09.260 provides, in relevant part:

(1) Except as otherwise provided ... 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.

....

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

....

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(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.

On October 14, 2013, the trial court entered its findings and order modifying the May 2010 parenting plan. Frederick appeals the October 14, 2013 order and the October 14, 2013 modified parenting plan.

ANALYSIS

Frederick argues that the trial court (1) erred in applying RCW 26.09.260 to the facts because the evidence favored him as the primary custodial parent, (2) erred in not applying the relocation factors under RCW 26.09.520, and (3) abused its discretion in limiting the evidence at trial to the facts after the December 30, 2011 temporary order. We hold that the trial court did not err or abuse its discretion. The trial court's unchallenged findings of fact in its temporary and final orders support its conclusion to award primary custody of MH to Jodi under RCW 26.09.260(2)(c). Because Frederick did not object to the trial court's ruling limiting the evidence at trial, and because he agreed that the relocation issue was moot, he waived these issues on appeal under RAP 2.5(a).

I. STANDARD OF REVIEW

We review a trial court's decision to modify a parenting plan for abuse of discretion. *In re Marriage of Zigler*, 154 Wn.App. 803, 808, 226 P.3d 202 (2010). We will not reverse the decision unless the trial court's reasons are untenable. 154 Wn.App. at 808.

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; [and] 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.

154 Wn.App. at 808 (alteration in original) (quoting *In re Marriage of Fiorito*, 112 Wn.App. 657, 664, 50 P.3d 298 (2002)). We look at the evidence and draw reasonable inferences in the light most favorable to the non-moving party. 154 Wn.App. at 812. On appeal, we do not reweigh the evidence or evaluate a witness's credibility. *Bale v. Allison*, 173 Wn.App. 435, 458, 294 P.3d 789 (2013).

We will uphold the trial court's findings of fact if those findings are supported by substantial evidence. *In re Marriage of Raskob*, 183 Wn.App. 503, 510, 334 P.3d 30 (2014). We review de novo whether the trial court's conclusions of law flow from its findings. 183 Wn.App. at 510. Unchallenged factual findings are verities on appeal. 183 Wn.App. at 510.

II. PARENTING PLAN MODIFICATION UNDER RCW 26.09.260

Frederick argues that the trial court erred in applying the facts to RCW 26.09.260 because the evidence favored him as the primary custodial parent. He argues that because he had steady employment and stable housing, there were no issues of domestic violence, and MH's was never harmed, that, under RCW 26.09.260(2)(c), the trial court erred in determining that it was in MH's best interests to award primary custody to Jodi. We disagree.

*4 RCW 26.09.260(1) permits a court to modify a parenting plan if there has been a substantial change in the circumstances of the child or the nonmoving party. In determining whether a substantial change has occurred, the court looks to the factors in RCW 26.09.260(2), one of which is whether “[t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.” RCW 26.09.260(2)(c).

In its December 30, 2011 temporary order, the trial court found that (1) Frederick showed a pattern of domestic violence and controlling behavior, (2) he had moved between five and seven times in the first 18 months of MH's life, (3) he was not employed in Utah, and (4) he prevented Jodi from communicating with MH after she filed her petition to modify. In contrast, the trial court found that Jodi was married, in school and employed, and had a plan for MH to reside with her in North Carolina. The trial court found that while both parents had a strong connection to MH, because of the substantial change in MH's circumstances due to Frederick's instability, it was in MH's best interests to temporarily reside with Jodi in North Carolina pending a full family court investigation and trial.

In August 2013, after hearing the testimony and evidence, and based on RCW 26.09.260(2)(c), the trial court found that MH's environment with Frederick was detrimental to MH's mental and emotional health and that the benefits of changing MH's primary residential placement to Jodi outweighed any potential harm. In reaching its decision, the trial court considered (1) the findings from its December 30, 2011 temporary order which were verities, (2) the evidence presented since entry of that order, including Frederick's testimony, Frederick's failure to comply with the procedures in the temporary parenting plan filed January 6, 2012, and the family court's report and recommendation, (3) the evidence regarding MH's integration into Jodi's household, and (4) the evidence regarding the effect that placement at that time with Frederick would have on MH's development.

To the extent, Frederick asks us to reweigh the trial court's credibility findings in either the December 30, 2011 temporary order or the August 13, 2013 ruling,⁶ we decline to do so. *See Bale*, 173 Wn.App. at 458. Frederick failed to appeal the trial court's December 30, 2011 temporary order, its January 2012 temporary parenting plan, or its August 13, 2013 ruling; thus, we treat the findings of fact and conclusions of law in those orders as verities on appeal. *Raskob*, 183 Wn.App. at 510. Because the trial court's unchallenged factual findings support its conclusion and decision to grant custody of MH to Jodi, we find no error.

⁶ Court's Ruling on Trial (August 13, 2011 ruling).

III. RELOCATION UNDER RCW 26.09.520

Frederick argues that the trial court erred in failing to apply the 11 factor test in RCW 26.09.520⁷ when evaluating his motion to relocate MH. Frederick filed his motion to relocate after Jodi filed her petition to modify the parenting plan. In an evidentiary hearing on December 1, 2011, the trial court first decided Jodi's petition to modify the parenting plan, ruling that she would receive primary custody of MH. The trial court also stated that, in light of its decision on the petition to modify, "the motion for relocation is really kind of moot." VRP (Dec. 1, 2011) at 58. Both parties agreed that the motion for relocation was moot. In its December 9, 2011 written order,⁸ the trial court denied Frederick's motion for temporary relocation; he did not appeal this denial.

⁷ There are 11 factors for the trial court to weigh when it is considering modification of a parenting plan to relocate the child and those factors are not weighted. The factors are:

- (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.

RCW 26.09.520.

8 Order re: Adequate Cause (December 9, 2011 written order).

*5 Frederick argues that the trial court was required to make findings on each of the 11 relocation factors under RCW 26.09.520. But because he agreed that the relocation issue was moot, he waived this argument on appeal. RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”); *Hernandez v. Stender*, 182 Wn.App. 52, 61, 321 P.3d 1230 (2014). We decline to address his argument.

IV. LIMITING EVIDENCE AT TRIAL

Frederick argues that the trial court erred when it limited the evidence at the modification trial to facts after entry of the December 30, 2011 temporary order rather than allowing facts since entry of the May 2010 parenting plan. We hold that Frederick failed to preserve this issue for review, and affirm the trial court's order.

A party must object at trial in order to preserve an evidentiary issue for appellate review. *Hernandez*, 182 Wn.App. at 61; *See* RAP 2.5(a). In order to preserve an argument for appeal that a trial court erred in excluding evidence, a party must make a contemporaneous offer of proof setting out the substance of that excluded evidence and its relevance in the proceeding. *See* ER 103(a); *see State v. Benn*, 161 Wn.2d 256, 268, 165 P.3d 1232 (2007). Because Frederick failed to object or make an offer of proof, he waived this issue on appeal under RAP 2.5(a).

Accordingly, we affirm the trial court's order modifying the parties' parenting plan and awarding primary custody of MH to Jodi Heslip.

CONCLUSION

We hold that the trial court did not err in applying RCW 26.09.260 to the facts and in modifying the parenting plan. Applying RCW 26.09.260(2)(c), the trial court's unchallenged findings of fact found that there was a substantial change in MH's circumstances since entry of the May 2010 parenting plan, that MH was fully integrated into Jodi's new family and her home provided him stability, and that continued placement with Frederick would be detrimental to MH's mental and emotional health. We hold that the trial court's findings support the court's conclusion that it was in MH's best interests to award primary custody to Jodi. We also hold that, because Frederick did not object to the trial court's ruling limiting the evidence at trial to facts since the December 30, 2011 temporary order, and because he agreed that the relocation issue was moot, he waived these issues on appeal under RAP 2.5(c). Accordingly, we affirm the trial court's October 14, 2013 order modifying the parenting plan.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

WE CONCUR: MAXA, P.J., AND LEE, J.

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AHREND LAW FIRM PLLC

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