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Division III  
State of Washington  
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No. 375315-III

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

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**Paul Cardwell, Respondent**

v.

**Regan Cardwell, Appellant**

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**REPLY BRIEF OF REGAN CARDWELL**

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## I. INTRODUCTION TO REGAN CARDWELL'S REPLY BRIEF

Paul Cardwell's Response Brief does not address the fact that there is no precise appellate authority interpreting RCW 26.09.260(5)(b). The issue that remains to be determined is this: Is the statute to read:

**(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow. (*First Interpretation*)**

**OR**

**(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time - - or an involuntary change in work schedule by a parent -- which makes the residential schedule in the parenting plan impractical to follow (*Second Interpretation*)?**

The 3/6/20 Superior Court ruling says, on its page 3, that the construction that connects "impractical to follow" clause to the "change of residence" clause violates the normal rules of statutory construction and of grammar -- the "last antecedent rule." Referencing his interpretation that the case law that follows the *Second Interpretation*, above, the trial court wrote:

These holdings seem to be contrary to the "last antecedent rule." Under this rule, the absence of a comma between the second alternative and the qualifying phrase indicates the qualifying phrase indicates the qualifying phrase does not apply to the first alternative, as the Respondent [Regan Cardwell] argues. (citations omitted)

CP:332.

That is the crucial issue on appeal and for which an authoritative appellate decision precisely on point is sought. The second (and related) issue on which there is no authoritative decision is this: Does “impractical to follow” mean impossible or unreasonable?

## **II. PAUL CARDWELL’S ARGUMENTS ELIDE THE POINT**

Regan Cardwell had conceded at the December 2019 hearing that the CPS recods had not timely arrived to argue for a major modification. The RCW 26.09.260(5)(b) decision was under advisement for nearly three months, and construction of that statute is the only appellate issue.

Neither .260(5)(a) nor (c) are appealed. They are irrelevant for Paul to discuss, as is Regan losing her prior modification request, made based upon Paul’s extensive criminal behavior. It was losing her appeal (No. 354989-III) that led Regan to move to Moses Lake, and that move led to her Petition for a Minor Modification and then to this appeal.

Construing RCW 26.09.260(5)(b) is the sole issue before this court. The trial court’s finding that Regan’s move to Moses Lake was a substantial change of circumstances under the threshold portion of .260(5)(b) was not challenged by either party. It is a verity on appeal.

The trial court commissioner clearly felt bound by his interpretation of the RCW 26.09.260(5)(b) case law. CP:330-33. That interpretation is the appellate issue.

Paul Cardwell tries to emphasize the permissive “may” in the statute at page 5 of his Response Brief. However, the trial court clearly felt bound to follow its *legal conclusion* that turned entirely upon interpretations of RCW 26.09.260(5)(b).

Regan believes that the trial court’s interpretation of .260(5)(b) is an error of law. That said, Regan realizes that there is no guarantee that the “first antecedent rule” will be applied by Division III, nor what “impractical” will be determined to mean, as there is no legal authority precisely on-point, as the legal authorities are unclear. This issue is a matter of first impression.

Paul Cardwell concedes that Reagan moving from Spokane to Moses Lake was a “substantial change of circumstances,” Paul does not challenge that finding. It is a verity on appeal. See, e.g., *Curtis v. Clark*, 29 Wash. App. 967, 970, 632 P.2d 58, 60 (1981), citing *Davis v. Department of Labor & Indus.*, 94 Wash.2d 119, 615 P.2d 1279 (1980). And Paul concedes the trial court made a finding that Regan’s move was a substantial change of circumstances. (Response Brief at p.5)

Paul’s largest red-herring is this statement, from page 6 of his Response Brief:

It becomes clear that use of this logic [Interpretation One] would mean that the mother could literally move next door or across the street to qualify for a change to the parenting plan.

Of course, Paul's statement that "moving across the street" could trigger a minor modification, as RCW 26.09.260(5) has a threshold requirement of a substantial change of circumstances *before* the court can move to Section (5)(b). That threshold finding was made in this case.

The *Marriage of Tomsovic* case established that (a) a substantial change in circumstance had the same meaning in major and minor modifications, but (b) that the standards of a minor modification were more "relaxed" (emphasis added):

Nothing in the minor modification subsection of RCW 26.09.260 indicates that the Legislature intended to apply a different standard for a substantial change in circumstances than is used for a major modification. Once a threshold showing of a substantial change in circumstances is made, the petitioner must meet stringent requirements for a modification that is considered major and less stringent requirements for a modification that is considered minor. See RCW 26.09.260(1), (2), (5). In either case, however, the petitioner must first show a substantial change in circumstances. The only difference is that the change must be to the circumstances of the nonmoving party or the child for a major modification, or to either parent or the child for a minor modification. RCW 26.09.260(1), (5). While a new residence or domestic situation may constitute a change in circumstances, it is in the trial court's broad discretion to determine whether that change should be characterized as substantial. *Hoseth*, 115 Wash.App. at 572, 63 P.3d 164.

*In re Marriage of Tomsovic*, 118 Wash. App. 96, 106, 74 P.3d 692, 696 (2003), citing *In re Marriage of Hoseth*, 115 Wash. App. 563, 573, 63 P.3d 164, 169 (2003) (affirming trial court finding of adequate cause).

Paul knows better. Simply moving “next door or across the street” would not be a substantial change of circumstances. It would not be a “substantial change of residence.”

Paul addresses the “impractical to follow” issue on page 7 of his Response Brief, but in a misleading way, or, more precisely, Paul Cardwell tries to beg the question by quoting the commissioner’s understanding that Regan had to make a showing that the “current parenting plan was impractical to follow.”

*The need to make that showing of “impracticality” is what this appeal is to determine, and this appeal is to determine what “impractical” means in the context of RCW 26.09.260(5)(b).*

In other words, Paul tries to assume as a “closed question” the very “open question” that Division III is to determine.

The issues remain: (a) Does “impractical to follow” modify “change of residence,” and (b) does “impractical to follow” mean “impossible to follow,” or does it mean “unreasonable to follow?”

Did the trial court commissioner commit an error of law? Regan answers: “Yes.” But Division III is to establish the authoritative answer.

As his last legal issue, Paul reviews the abuse of discretion standard, but leaves out the most crucial point that an error of law is an abuse of discretion:

And a discretionary ruling based on error of law is an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993).

*Lopez-Stayer ex rel. Stayer v. Pitts*, 122 Wash. App. 45, 51, 93 P.3d 904, 908 (2004).

All issues of law are reviewed de novo. *King Cty. v. King Cty. Water Districts Nos. 20, 45, 49, 90, 111, 119, 125*, 194 Wash. 2d 830, 841, 453 P.3d 681, 687 (2019).

Statutory interpretations -- as here with RCW 26.09.260(5)(b) -- are reviewed de novo. *State v. Wentz*, 149 Wash.2d 342, 346, 68 P.3d 282 (2003), and *Williams v. Tilaye*, 174 Wash. 2d 57, 61, 272 P.3d 235, 237 (2012).

To revisit the *Tomsovic* quote above, determination of a “substantial change of circumstances” is within broad discretion of the court (emphasis added):

While a new residence or domestic situation may constitute a change in circumstances, it is in the trial court's broad discretion to determine whether that change should be characterized as substantial. *Hoseth*, 115 Wash.App. at 572, 63 P.3d 164.

*In re Marriage of Tomsovic*, 118 Wash. App. 96, 106, 74 P.3d 692, 696 (2003). And, in the Cardwell case, the trial court *did* exercise its “broad discretion” to *find* that Regan’s move from Spokane to Moses Lake was a

substantial change of circumstances. The issues on appeal are questions of law.

Finally, Paul asks for fees for the appeal. However, Regan's appeal is not frivolous as she did meet the high threshold of a substantial change of circumstances with her substantial change of residence (a verity on appeal as an unchallenged finding of the trial court), and, as in *Tomsovic*, she is presenting a case of first impression to this court.

The *Tomsovic* court denied a request for fees, and the same logic applies to Regan, as well:

RAP 18.9 allows this court to sanction a party who files a frivolous appeal. An appeal is frivolous if it is so totally devoid of merit that there is no reasonable possibility of reversal. *Wagner*, 111 Wash.App. at 18–19, 44 P.3d 860. The fact that an appeal is unsuccessful is not dispositive. *Id.* We consider the record as a whole and resolve all doubts in favor of the appellant. *Id.*

Although Mr. Tomsovic's petition for modification of the residential schedule was properly dismissed, his appeal is not frivolous. He raises an issue never directly addressed in a published opinion: whether the standard for finding a substantial change of circumstances is the same for both major and minor modifications of a parenting plan under RCW 26.09.260. Consequently, Ms. Tervonen's request for attorney fees as a sanction for filing a frivolous appeal is denied.

*In re Marriage of Tomsovic*, 118 Wash. App. 96, 109–10, 74 P.3d 692, 698 (2003).

Regan's appeal is not frivolous, and, in fact, Regan raises a question that needs a precisely on-point statutory construction from Division III.

### **III. PRECISELY ON-POINT STATUTORY CONSTRUCTION IS REQUESTED**

The case law is a muddle of over-lapping considerations in decisions that reference RCW 26.09.260(5)(b), preventing any fair-minded reader of the case law from being certain how to advise clients.

In a recent Division II case, *In re C.M.* -- presented under GR 14.1, and identified herein as unpublished, for such persuasive value as the court sees fit to give it under GR 14.1 -- was a situation similar to Regan's in that the non-residential parent moved closer to the residential parent, and the trial court refused adequate cause for a minor modification.

Division II reversed the trial court in *C.M.*:

The trial court did not address RCW 26.09.260(5)(b). The court stated that "[u]nder no reading of the statute can the Court consider the Petitioner's proposed parenting plan that changes visitation by 130 days qualifies as a minor modification." But the court failed to recognize that regardless of the extent of the change, a minor modification may be allowed based on a parent's change in residence. And as a result, the court did not determine whether a minor modification was allowed under RCW 26.09.260(5)(b).

We conclude that the trial court applied the wrong legal standard and therefore abused its discretion when it did not consider whether Mittge's change in residence provided a basis for a minor modification under RCW 26.09.260(5)(b).

### 3. Summary

We hold that the trial court erred (1) to the extent that the first two requirements of RCW 26.09.260(5) precluded a finding of adequate cause to schedule a hearing on Weisenberger's motion to modify, and (2) in failing to address whether Mittge's move to Lewis County provided adequate cause for a hearing under RCW 26.09.260(5)(b). Therefore, we reverse the trial court's finding of no adequate cause and remand for the court to reconsider adequate cause under RCW 26.09.260(5). Specifically, the trial court must address whether RCW 26.09.260(5)(b) allows a minor modification.

*In re C.M.*, No. 51956-9-II, 2020 WL 1696188, at \*5 (Wash. Ct. App. Apr. 7, 2020) (unpublished).

## IV. CONCLUSION AND RELIEF REQUESTED

“Relocation of either parent is a changed circumstance that may justify a minor modification, but only if the original parenting plan did not anticipate relocation.” *In re Marriage of Tomsovic*, 118 Wn. App. 96, 106, 74 P.3d 692 (2003). The Cardwell plan did not anticipate Regan moving from Spokane to Moses Lake.

The move was found by the trial court to be a substantial change of circumstance, and that is a verity on appeal, as that exercise of broad discretion was not challenged by either party.

The court is asked to adopt the *First Interpretation* of RCW 26.09.260(5)(b):

**(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which**

makes the residential schedule in the parenting plan impractical to follow. (*First Interpretation*)

Division III is also asked to construe “impractical to follow” as “unreasonable to follow,” and not as “impossible to follow.”

Remand for entry of an order granting adequate cause is requested.

Respectfully submitted on 7/10/20,



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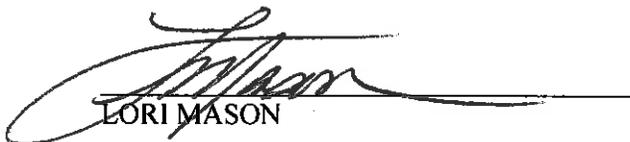
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CERTIFICATE OF SERVICE

I declare that on the 10<sup>th</sup> day of July, 2020, under penalty of perjury under the laws of the State of Washington that I served, via the WA State Appellate Courts' Secure Portal, a copy of this document to the following:

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