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Court of Appeals  
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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**OPENING BRIEF OF REGAN CARDWELL**

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## I. INTRODUCTION AND ISSUES ON APPEAL

The issue in this case is one that is of first impression in that there is no precise statutory construction of RCW 26.09.260(5)(b), especially in instances, as in this case, in which the non-residential parent makes a long-distance move back to the area in which the children live.

The two interpretations, below, are to be selected between by this court. The RCW 26.09.260(5) lead-in paragraph reads:

RCW 26.09.260 (5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time ...

Then Section (5)(b), to be applied if a substantial change of circumstances has been found, has been interpreted two ways by courts.

The first interpretation simply reads RCW 26.09.260(5)(b) with the plain grammar and language in which it is written regarding a “change of residence”:

*INTERPRETATION No. 1 of Section 5(b):*

**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.**

The alternative interpretation assumes an implied parenthetical and has the later condition (“impractical to follow”) “leap back” to apply to the earlier part of the sentence (“change of residence”):

*INTERPRETATION No. 2 of Section 5(b), which interposes an implicit parenthetical (parenthetical added as “dashes”):*

**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.**

The other issue to be determined is whether “impractical” in the statute means “impossible” or simply “unreasonable.”

The factual situation to which the statute applies is this: When a fit mother moves back to the town in which her children reside is that adequate cause for a minor modification?

**Issue No. 1:** Is the proper interpretation of RCW 26.09.260(5)(b) that a substantial change of residence is sufficient for adequate cause to be found for a minor modification? (Interpretation No. 1, above.)

Appellant Regan Cardwell answers, “yes.”

**Issue No. 2:** If the second portion of RCW 26.09.260(5)(b) is assumed to be a parenthetical and “impractical to follow” applies to the change of residence of a parent, does impractical mean “unreasonable or

unwise” such that Regan Cardwell’s relocation from Spokane to Moses Lake is sufficient for adequate cause to be found for a minor modification?

Appellant Regan Cardwell answers, “yes.” Section (5) requires a substantial change of circumstances, and Section (5)(b) simply requires that there be a “change of residence” that is part of the substantial change of circumstances. In short, putting the two together, a substantial change of circumstances due to (substantial) change of residence provides adequate cause for a minor modification.

## **II. STATEMENT OF THE CASE**

Regan Cardwell previously was before this court when the trial court originally found “bases” (plural) for adequate cause on a major modification, and then later retracted adequate cause declaring the only (singular) basis for adequate cause was the possibility that Paul Cardwell would go to jail. Her appeal was denied in Division III case No. 354989-III.

After the court’s ruling, Regan Cardwell then moved from Spokane back to the residential town of the children and of Paul Cardwell, Moses Lake, and she brought a Petition for a Minor Modification. CP:4-14.

*NOTE:* At the last moment, Regan amended her Petition to a major and a minor modification based upon new CPS reports whose hard copies did

not arrive in time for the 12/13/19 hearing, and so the major modification was abandoned at the hearing of 12/13/19 (and was denied by concession at CP:157-60 in the Order of 12/13/19), and only this minor modification issue is on appeal. A major modification has since been filed after the CPS records became available (CP:337-347), but that is not currently on appeal, and has not even been heard due to COVID 19.

The 12/13/19 hearing proceeded as to the minor modification and the commissioner took the interpretation of RCW 26.09.260(b)(5) under advisement in his Order of 12/13/19. CP:157-60.

On 3/9/20, the court entered its ruling of 3/6/20 (CP:330-33), and formalized the denial of adequate cause by the Order of 3/9/20 (327-29 – misnamed by the clerk as granting adequate cause in the clerk’s papers index).

In that ruling of 3/6/20, the Superior Court Commissioner conceded the straight forward grammar of the statute (consistent with Interpretation No. 1, above), but the commissioner read the case law to require “Interpretation No. 2,” cited in the introduction, above. CP:330-33.

The commissioner did not explicitly define the meaning of “impractical,” but the ruling seemed to assume it meant “impossible” in RCW 26.09.260(5)(b). *Id.* It is certainly unreasonable to refuse the possibility of a minor modification when a long-distance parent moves

back to the hometown of the children, as the court had found Regan's move to be a substantial change of circumstances. CP:331.

### III. ARGUMENT: QUESTION OF LAW – RCW 26.09.260(5)(b)

Regan Cardwell opposes the Superior Court's reading of the case law, and argues that the case law establishes that the relocation of either parent is sufficient for a minor modification, as long as the plan did not contemplate the relocation:

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. *Hoseth*, 115 Wash.App. at 572–73, 63 P.3d 164.

*In re Marriage of Tomsovic*, 118 Wash. App. 96, 106, 74 P.3d 692, 697 (2003). Regan and the trial court disagree on the meaning of *Tomsovic*.

The *Hoseth* case -- relied upon in *Tomsovic* -- was a case in which the non-residential father moved back to Spokane from Idaho. The trial court granted adequate cause, which was appealed.

The *Hoseth* court said:

In summary, two major facts indicate a substantial change in circumstances, James's relocation, and his involvement with a new domestic partner. Another fact largely overlooked is Cody's more recent involvement in extracurricular activities. Accordingly, James met the substantial change threshold of RCW 26.09.260(5).

*In re Marriage of Hoseth*, 115 Wash. App. 563, 573, 63 P.3d 164, 169 (2003) (affirming trial court finding of adequate cause).

Discussing the father's move back to Spokane, Division III wrote  
(emphasis added):

Although he has *not* established the move made the 1997 plan impractical, we consider the move to Spokane a proper factor for the court to consider in terms of a circumstance that enhances access for the benefit of both the child and the visiting parent. Cumulatively, this circumstance bears on the best interests of the child, more fully discussed below.

*In re Marriage of Hoseth*, 115 Wash. App. 563, 573, 63 P.3d 164, 169 (2003).

**NOTE:** The meaning of “impractical” in the statute is obliquely referenced throughout these cases, but there is no precisely on-point statutory construction as to whether “impractical” means “impossible,” or if “impractical” means something more like, “unreasonable, unwise, imprudent, or not sensible.” In short, the proper meaning of “impractical” in the context of RCW 26.09.260(5)(b) has not been definitively established in the case law.

#### **A. The Superior Court Commissioner's 3/6/20 Ruling**

The Superior Court Commissioner's Ruling sets up the issue nicely for determination by Division III. The court said that the mother's move from Spokane to Moses Lake was a substantial change of circumstance:

The move was not a move next door or across town, it was one of 100 miles. As indicated at the December 13, 2019 hearing, the Court finds this to be a substantial change of circumstances. (3/6/19 Letter Ruling at p. 2, CP:331.)

The Superior Court also acknowledged that the issue of making the parenting plan “impractical to follow” has yet to be determined since the year 2000 amendments to the statute:

This question [meaning of “impractical to follow”] has not been addressed directly since the most recent reenactment of RCW 26.09.260(5)(b). (3/6/19 Letter Ruling at p. 2, CP:331.)

The court then turns to two older cases, decided prior to the year 2000 Child Relocation Act (CRA), for guidance: (a) *In re Marriage of Flynn* and (b) *Bower v. Reich*.

In *Flynn*, the mother was moving to California, making the shared parenting plan “impractical” in the sense of “essentially impossible”:

The impracticality of holding to the present parenting plan without modification was recognized by the commissioner when commenting on Ms. Manis's ability to honor the existing parenting plan while living in California.

*In re Marriage of Flynn*, 94 Wash. App. 185, 193, 972 P.2d 500, 504 (1999).

In *Bower* the primary parent was moving to California:

Barbara Bower proposed a modification of the parenting plan based on a “change of residence ... which makes the residential schedule in the parenting plan impractical to follow.” She thereby satisfied the statutory requirements to have her petition heard as a minor modification.

*Bower v. Reich*, 89 Wash. App. 9, 18, 964 P.2d 359, 364 (1997), (Jan. 29, 1998).

**Bower and Flynn as the “Impossible” form of “Impractical” When**

**Parents Move Away:** To attempt the impossible is certainly unwise and unreasonable, but the question of statutory construction is this: Does “impractical” in the statute mean unwise or unreasonable, and thus is “impractical” the larger class that includes the smaller class of impossible actions?

It is significant that *Bower* and *Flynn* addressed a parent moving away, and those cases do not address the parent moving back to the residential area of the children.

**B. Superior Court Commissioner’s Acknowledgement of Interpretation No. 1 and Interpretation No. 2 in the Commissioner’s “Last Antecedent Rule” Discussion.**

The 3/6/20 Superior Court ruling says (at its page 3, CP:332):

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)

This is a precise statement of one of the two issues on this appeal.

The two interpretations of .260(5)(b) are again presented for ease of reference:

**INTERPRETATION No. 1 of Section 5(b):**

**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.**

**INTERPRETATION No. 2 of Section 5(b), which interposes an implicit parenthetical (parenthetical added as “dashes” to show that interpolation):**

**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.**

RCW 26.09.260(5)(b).

**Superior Court’s “Last Antecedent Rule” Should Apply:** There is no precise appellate authority on this issue of statutory grammar and construction. Regan Cardwell asks the court to apply the “last antecedent rule” and not interpose a parenthetical that makes “impractical to follow” apply to the “change of residence” phrase in RCW 26.09.260(5)(b).

**C. Meaning of “Impractical to Follow”**

If the court does impose a parenthetical that applies “impractical to follow” to the “change of residence” phrase, then Regan Cardwell asks the court to adopt a meaning of “impractical” that impractical in this context means “unwise,” “unreasonable,” “imprudent,” or “not sensible.”

Merriam-Webster has just such a definition of “impractical”:

***Impractical***

im·prac·ti·cal | \ (,)im-'prak-ti-kəl \

Definition of *impractical*

: not practical: such as

a : not wise to put into or keep in practice or effect

b : incapable of dealing sensibly or prudently with practical matters

<https://www.merriam-webster.com/dictionary/impractical>

Collins Dictionary has an even more flexible definition of impractical (emphasis in original):

***Impractical*** (ɪmpræktɪkəl)

1. ADJECTIVE [usually verb-link ADJECTIVE]

If you describe an object, idea, or course of action as impractical, you mean that it is not sensible or realistic, and does not work well in practice.

*When stalking subjects, a tripod is impractical.*

*It became impractical to make a business trip by ocean liner.*

2. ADJECTIVE [usually verb-link ADJECTIVE]

If you describe someone as impractical, you mean that they do not have the abilities or skills to do practical work such as making, repairing, or organizing things.

*Geniuses are supposed to be eccentric and hopelessly impractical.*

<https://www.collinsdictionary.com/dictionary/english/impractical>

In the federal class action context, “impractical” is distinguished from “impossible.”

In establishing this element, plaintiffs need not show that the number of class members is so large that it would be impossible to join all of them; impracticability does not mean impossibility.

*Rodriguez v. Carlson*, 166 F.R.D. 465, 471 (E.D. Wash. 1996).

**Proposed Meaning of Impractical Under RCW 26.09.260(5)(b):** Of course, Regan Cardwell’s first argument is that “impractical to follow” does not apply to the “change of residence” provision; however, if it does, then, given the parental and child interests at stake, the court is asked to adopt “unreasonable, unwise, imprudent, or not sensible” as the meaning of “impractical” in RCW 26.09.260(5)(b).

The interpretation should keep in mind the best interest of the children, and the imprudence of not allowing more shared time between the parent and the children. In sum, to keep a fit and bonded mother from increased time with her children, after she moves from a long-distance back to the hometown of the children, is clearly unreasonable and is therefore “impractical” under the statutory scheme.

#### **IV. ABUSE OF DISCRETION: DE NOVO STANDARD OF REVIEW ON LEGAL QUESTIONS**

The standard of review is abuse of discretion:

The trial court's adequate cause determination may be overturned only for abuse of discretion. *In re Parentage of Jannot*, 149 Wash.2d 123, 126, 65 P.3d 664 (2003).

*In re Marriage of Tomsovic*, 118 Wash. App. 96, 104, 74 P.3d 692, 696 (2003).

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:

These are all issues of law, which we review de novo. *Howe v. Douglas County*, 146 Wash.2d 183, 188, 43 P.3d 1240 (2002) (citing *Rivett v. City of Tacoma*, 123 Wash.2d 573, 578, 870 P.2d 299 (1994), *overruled in part on other grounds by Chong Yim v. City of Seattle*, — Wash.2d —, 451 P.3d 694 (Nov. 14, 2019)).

*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 interpretation, as here with RCW 26.09.260(5)(b) is reviewed de novo:

Statutory interpretation is a question of law reviewed de novo. *State v. Wentz*, 149 Wash.2d 342, 346, 68 P.3d 282 (2003).

*Williams v. Tilaye*, 174 Wash. 2d 57, 61, 272 P.3d 235, 237 (2012).

If a statute's meaning is plain, then the court gives effect to the plain meaning:

If the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended. *State v. Chapman*, 140 Wash.2d 436, 450, 998 P.2d 282, *cert. denied*, 531 U.S. 984, 121 S.Ct. 438, 148 L.Ed.2d 444 (2000). A statute that is clear on its face is not

subject to judicial construction. *Id.*

*State v. J.M.*, 144 Wash. 2d 472, 480, 28 P.3d 720, 724 (2001).

**Application of the Case Law to RCW 26.09.260(5)(b):** The two issues before the court in this appeal are:

**Issue No. 1:** Should the rules of grammar be assumed to apply, and therefore “impractical to follow” does not modify the first phrase regarding “change of residence” in RCW 26.09.260(5)(b)? *Answer:* Yes. The plain meaning is that as long as the substantial change of circumstances has occurred (.260(5), then change of residence (.260(5)(b) is adequate cause for a minor modification. On the face of the entire statutory scheme under .260(5) a “non-substantial change of residence” would not provide adequate cause; however, a “substantial change of residence” should provide adequate cause.

**Issue No. 2:** If the rules of grammar are not going to be applied, and if “impractical to follow” is considered to modify “substantial change of circumstances in a change of residence,” then should “impractical to follow” mean unwise or imprudent under the construction of the modification statute as a whole, and the parenting plan statutes in general? *Answer:* Yes. With the children’s interests in relationships with both parents in mind, once a parent has moved back to the residential town of the children, it should be deemed impractical to deny adequate cause;

there should at least be a full hearing on a minor modification. As noted, the superior court found Regan's move to be a substantial change of circumstances. CP:331. The court should have also found adequate cause.

On de novo review of this statutory question, Division III is asked to find that the Superior Court Commissioner made an error of law, and Division III is asked to find adequate cause for a minor modification.

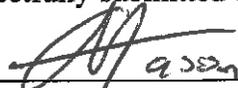
#### **V. CONCLUSION AND RELIEF REQUESTED**

Regan Cardwell asks the court to find that (a) given that the finding of a substantial change of circumstances has occurred under RCW 26.09.260(5) has occurred, and (b) given that the substantially new circumstance is a change of residence of the petitioning parent, then adequate cause for a minor modification should be granted under RCW 26.09.260(5)(b).

Further, Regan asks the court to establish that the meaning of "impractical" in the parenting plan context means a plan that is unwise or imprudent to follow, given the substantial change of circumstances.

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

Respectfully submitted on 6/3/20,



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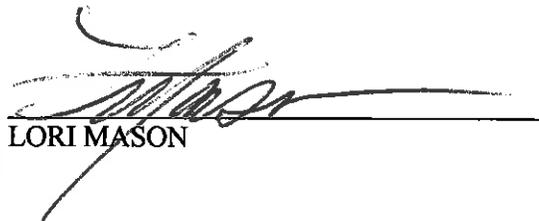
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CERTIFICATE OF SERVICE

I declare that on the 3<sup>rd</sup> day of June, 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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