102448-7

Consolidated No: 39457-3-III

SUPREME COURT
OF THE STATE OF WASHINGTON

BRYCE BITTERMAN, Petitioner

v.

TED FUKUZAWA, Respondent
and
TRACY PIEPEL, Respondent

Petition for Review

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A. IDENTITY OF PETITIONER

COMES NOW Bryce Bitterman, Petitioner, and submits this Motion for Discretionary Review of the decision designated herein.

B. COURT OF APPEALS DECISION

The underlying decision from the Court of Appeals, Division III, is the September 8, 2022 Order Denying Motion to Modify Commissioner's Ruling and Related Motions, a copy of which is attached hereto as Appendix A, pg. 1-2. The related Decision of the Commissioner is attached hereto as Appendix A, pg. 3-4.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in denying Mr. Bitterman's Motion to Modify the Commissioner's ruling dismissing this case:

    a. Whether the Court of Appeals erred in making a factual determination upon a disputed issue not fully developed in the trial

court, in conflict with *Doyle v. Lee*, 166 Wn.App. 397, 272 P.3d 256 (2012) and *King County Emp. Ass'n. v. State Emp. Retirement Bd.,* 54 Wn.2d 1, 336 P.2d 387 (1959); or *Garcia v. Henley*, 190 Wn.2d 539, 415 P.3d 241 (2018).

b. Whether the Court of Appeals erred in dismissing Mr. Bitterman's appeal on the basis that he affirmatively disobeyed the appealed order, in conflict with *Jones v. Jones,* 75 Wn. 50, 134 P. 528 (1913).

2. Whether the issues presented herein invoke a significant question of Constitutional law; and

3. Whether the issues presented herein invoke a substantial public interest.

D. STATEMENT OF THE CASE

This case involves K.B., the son of Bryce Bitterman and his late separated partner, Taylor Fukuzawa (d. 1/13/2022). *CP*

at 6. After her death, her parents, Ted Fukuzawa and Tracey Piepel, hired an attorney to contact Mr. Bitterman concerning visitation with their grandson. *See CP* at 40-41. For the same reason articulated in their own Appellate Court filings, we refer to Mr. Fukuzawa and Ms. Piepel collectively as the "Grandparents," intending no disrespect to them or the non-party paternal grandparents.

When the Grandparents and Mr. Bitterman could not reach agreement, they each filed Nonparental Visitation Petitions in Douglas County Superior Court on September 6, 2022, which were consolidated for further proceedings. *See e.g. CP* at 3 (Fukuzawa Petition).

Mr. Bitterman accepted service through counsel; while the pleading is undated, it was filed on September 22, 2022. *CP* at 191. Mr. Bitterman responded on September 27, 2022, disputing the grandparents' factual assertions and asking the Court to deny the Petitions for visits. *CP* at 229-35. He did not challenge the Court's (or Washington's) jurisdiction. *Id.*

On September 30, 2022, without holding a hearing, the trial Court issued a Memorandum Order stating in relevant part: "I have reviewed all of the parties' various filings and don't believe it is necessary to have oral argument as to whether the Petitioners have met the threshold requirements as set forth in RCW 26.11." *CP* at 266-67.

A hearing was then scheduled for November 1, 2022, by Zoom. *See RP* at 7:5-9. As the Court noted, counsel was requesting a continuance of the hearing due to the slew of declarations filed by both Parties on October 31, 2022 and some question concerning whether the Court would take live testimony. *See CP* at 268-335; *RP* at 7:20-8:2. At this hearing, the Court also itself had not had time to review the October 31 filings. *RP* at 10:24-11:4, 13-15.

But the Court continued, stating: "…it strikes me that we should be talking about a temporary order of some kind if we're going to talk about a continuance." *RP* at 12:6-8. Counsel for the Grandparents, without mentioning RCW 26.11.030(9), requested

a structured weekend visitation plan. *RP* at 13:2-8. Mr. Collier responded that he was "not sure that the statute provides a temporary order…" *RP* at 13:22-23. Mr. Collier did not agree to any visitation at that time. *RP* at 14:1-3.

After a discussion of procedures and additional filings, the Court determined: "I am going to put a temporary order in place." *RP* at 21:21-22. The date for the continued hearing was set for the next week, on November 9, 2022. *RP* at 22:13-17. The Court then issued an oral temporary order that "will at least get us to the… next hearing." *RP* at 25:15-19. After a brief colloquy, the Court ordered that visitation would be "the standard Friday at 5:00 to Sunday at 5:00 with the grandparents this weekend." *RP* at 26:15-16.

After the Court made this oral order, Mr. Collier again asked the Court for "a finding of the authority to enter that temporary order… What basis the Court is using to enter a temporary order in this specific statute." *RP* at 29:12-13, 18-19. The Court responded that RCW 26.11.040(4) provided the

authority for the order and found that the temporary visitation was in the best interests of K.D.B. *RP* at 29:23-30:17.

The Court confirmed twice on the record that Mr. Bitterman was not present at this hearing. *RP* at 7:13-15, 27:24. No written order was entered on November 1, 2022. *See CP*. However, there is no dispute that Mr. Bitterman obeyed the Court's oral order. *Respondents' [Grandparents'] Motion to Dismiss Appeal* at 9.

On November 8, 2022, Mr. Bitterman left the State of Washington. His attorney mistakenly informed counsel for the grandparents that he left to look for new job opportunities at that time. *CP* at 778. Mr. Bitterman *already* had a job, which he accepted in the first week of September of 2022. *Id.* There is limited information on this point in the record before the Court of Appeals, though additional information has been developed on this point at the trial Court level.

The Grandparents have not produced any evidence that Mr. Bitterman left the State of Washington after the Court's

Order on November 9, 2022. *See CP*. Mr. Bitterman's December 15, 2022 declaration provides the competent evidence upon this issue. *See CP* at 777-84.

On November 9, 2022, the Court held a hearing upon the various affidavits filed by the parties, hearing oral argument from the parties' respective attorneys. *See RP* at 31-76 (ruling follows). Mr. Bitterman was not present at this hearing either. *RP* at 32:1-2. The Court recited the factors in RCW 26.11.040(4) and ordered a visitation schedule consisting of the second weekend of each month from Friday at 5 PM to Sunday at 5 PM, including attached three-day weekends, and the fourth Wednesday of the month from School until 6 PM; two days following Christmas; two non-consecutive week-long summer periods. *RP* at 89-96. The Court did not issue a written order on November 9, as there were details for which the Court would "just depend on the lawyers to talk" to resolve. *RP* at 97:9-10.

The Grandparents knew that Mr. Bitterman left the state shortly after the hearing on November 9, 2022. *See Respondents'*

Motion to Dismiss Appeal at 10. When the visitation after the November 9, 2022 hearing did not occur, the Grandparents set a presentation hearing on the oral order and filed a Motion to Enforce the same. These filings do not appear in the Clerk's Papers; a hearing was set for December 5, 2023. *See RP* at 103-04 (mentioning filings); *CP* at 669-70 (Order on Motion to Enforce).

At the end of November, Mr. Bitterman changed counsel. *RP* at 98:10. On December 1, 2022, the Grandparents filed an objection to Relocation and a Motion for a Temporary Order Preventing Move with Children. *CP* at 374-384. On December 5, 2022, Mr. Bitterman's new attorney filed objections to the proposed final orders and requested to continue the hearing. *CP* at 385-88.

The Court stated: "Now I'm hearing that post this Court's orders, Mr. Bitterman has apparently decided to relocate with the child, Washington being the home state with jurisdiction over the child." *RP* at 99:17-20. Ms. Mellergaard responded that this was

not her understanding. *RP* at 99:25-100:3. Later in the hearing, the trial Court was openly derisive and dismissive of this issue:

> You mentioned three more weeks. I'm struggling with what is expected, what's this Court expected to do when I've made that finding? It makes it a bit awkward I think to just -- if all Mr. Bitterman has to do is change lawyers and all of a sudden yet another monkey wrench is thrown, and oh, jeez, he's got a home in New Mexico, and he's had it for some time. I don't see how that affects anything to do with this case, by the way. It has not been demonstrated to me that that makes any difference or that it affects any order that the Court has made.
>
> So change lawyers all you want, Mr. Bitterman. I'm going to talk about what we're going to do about visitation.

RP at 102:11-22. Counsel for the Grandparents raised the issue that visitation in November had not occurred as per the November 9, 2023 oral ruling. *RP* at 103. The trial Court then signed the Grandparents' proposed Final Orders. *CP* at 81, 389 (each case).

However, at the time of the entry of these Orders, the trial Court knew that Mr. Bitterman was not in the State of Washington – recognizing this, the Court inquired about Zoom

visitation. *RP* at 105:16-18. Nevertheless, the December 5th Order was for in-person visitation with exchanges in East Wenatchee. *CP* at 394-95.

Thereafter, Mr. Bitterman moved for reconsideration. *CP* at 402-05. His Motion sought relief from the December 5, 2022 Final Order; more specifically, he sought a full evidentiary hearing on the petitions and objected to the trial Court's denial of attorneys' fees. *Id.* Before the motion for reconsideration was adjudicated, Mr. Bitterman appealed the December 5, 2022 rulings to the Court of Appeals, Division III. *CP* at 420-21.

The Notice of Appeal also includes "all rulings and orders which were entered in this case prior to the entry of the above orders." *CP* at 420. Mr. Bitterman contends that this would sweep in for review the threshold decision on September 30, 2022 under RAP 2.4(b), as well as the pending Motion for Reconsideration, under RAP 2.4(f)(3). Mr. Bitterman clarified as to the threshold decision by Amended Notice of Appeal filed January 25, 2023. *CP* at 91-105. As successive Contempt

proceedings related to the appealed order unfolded in the trial Court, Mr. Bitterman designated Orders thereon for review as well by Supplemental Notice of Appeal filed March 3, 2023. *CP* at 543.

In the Court of Appeals, the Grandparents moved to Dismiss the Appeal, arguing that Mr. Bitterman had fled the jurisdiction of the Court. *See Motion to Dismiss Appeal* at 10, 19 *et seq*. Mr. Bitterman's Answer thereto raised similar issues to his argument herein. *See Answer to Motion to Dismiss* at 15-21.

The Court of Appeals Commissioner ruled that Mr. Bitterman had disobeyed and made execution of the trial Court's orders impossible by way of "affirmative act done after the superior [court] rendered its decision…" *Appx. A* at 3.

After the Commissioner's decision, Mr. Bitterman brought a timely Motion to Modify, which was denied by the September 8, 2023 Order that is the subject of this Petition for Review. *Appx. A* at 1-2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Bitterman argues that the issues before this Court can be succinctly distilled. The Court of Appeals erred by making a factual determination upon a disputed issue not fully developed in the trial court – namely, whether Mr. Bitterman left the State before or after the appealed order. Upon the limited competent evidence in the record (Mr. Bitterman's declaration rather than Mr. Collier's statements), the conclusion that he left the State prior to the appealed order is plainly unsupported.

The Court of Appeals declined to hear his case on the merits, ruling that he disobeyed and frustrated the appealed orders by way of affirmative act done after the trial Court issued the same. Mr. Bitterman argues that the record shows (and can be further supplemented) he left the State before the appealed order; that he did so lawfully; and that the trial Court could and should have made a different Final Order. In other words, it was not Mr. Bitterman leaving the State that made execution

impossible because his departure predates the order. More importantly, his departure long predates both the Court's *written* order *and* his own notice of *any* order from November 9, 2023. *CP* at 778.

1. The Court of Appeals Ruling Conflicts with This Court's Precedent

Whether Mr. Bitterman left the State before or after the Court's November 9, 2022 oral ruling was not developed fully in the trial court below. Additional evidence was later developed in the trial Court's record, but the only evidence on this point before the Court of Appeals was Mr. Bitterman's declaration.

In *Garcia v. Henley,* 190 Wn.2d 539, 415 P.3d 241 (2018), this Court stated that it "…generally cannot make findings of fact, and will not endeavor to do so based on an incomplete record…" *Id.* at 544. This is because a trial court's function is to inform an appellate court what material questions were decided, and in what manner. *Id.* Similarly, in *Doyle v. Lee*, 166 Wn.App. 397, 272 P.3d 256 (2012), the Court of Appeals stated that "…in

its ordinary role as a reviewing court, an appellate court does not make findings of fact." *Id.* at 406 (citing *King County Emp. Ass'n v. State Emp. Retirement Bd.,* 54 Wn.2d 1, 5, 336 P.2d 387 (1959) (appellate court is not a trier of facts)).

Whether Mr. Bitterman left the state before or after November 9, 2022 was never properly developed in the trial Court. While the Court mentioned the issue at the December 5, 2022 hearing, Mr. Bitterman subsequently clarified with his Declaration. *RP* at 99:17-20; *CP* at 778. This did not become an issue until the Grandparents moved to dismiss the appeal, arguing that Mr. Bitterman had fled the jurisdiction. The trial Court did not receive or develop evidence on this point other than Mr. Bitterman's declaration.

The Court of Appeals Commissioner's ruling then settled this fact dispute against Mr. Bitterman, and on that basis, ordered his compliance with the appealed order upon consequence of dismissal. From the record before the Court of Appeals, the only substantially supported conclusion is that Mr. Bitterman left the

State *before* the Court's November 9, 2022 oral ruling, and well before the December 5, 2022 Final Order.

2. Mr. Bitterman did not Leave Washington State in Violation of a Court Order

Several facts in this case are of critical importance. First, it is undisputed that (a) the Court's November 1, 2022 oral Order was temporary in nature – until November 9, 2022; and (b) Mr. Bitterman complied with this Order.

Second, it is undisputed that Mr. Bitterman was under no order to refrain from leaving the State of Washington with K.D.B. This is not a family law case between parents where the Court issues an "Auto-TRO[1]" or a Temporary Family Law Order that contains such a provision. Such orders are, instead, expressly forbidden. RCW 26.11.030(9).

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[1] *See, e.g., Okanogan County Local Form A-3*; or *Chelan County Ex. D to LSPR 94.04.* In short, a Court Order which automatically issues upon the filing of any family law case involving custody of minor children, and which forbids the parties from changing the residence of the children until further Order or upon written agreement.

Third, the Court made an important finding on November 1, 2022 – that Mr. Bitterman is a fit parent. *RP* at 30:18-22. Or, rather, that the Court had no information that he was not a fit parent. *Id.* In other words, the presumption under RCW 26.11.040(2) was fully intact. Hand in hand with this, there is no dispute that, even if the November 1, 2022 oral temporary order constitutes a "Court Order" within the meaning of the Child Relocation Act, the Grandparents were not K.D.B.'s primary caregivers for a substantial period in the thirty-six months preceding November of 2022. RCW 26.09.540; *see also* RCW 26.09.410(1).

Mr. Bitterman *welcomes* an inspection of the Report of Proceedings upon this issue, at 136-197 thereof. In a hearing where Mr. Bitterman and his attorney were inexplicably absent, the trial Court questioned the Petitioners upon this specific issue, feeling that it "require[d] some additional factual development." *RP* at 145:14-15. The Grandparents argued they were the primary caregivers for 29, not 36 months. *RP* at 145:19-21. The Court

wanted to "really drill[] down on this 36-month issue" and took testimony from Ms. Piepel. *RP* at 155:13-18. The testimony that developed revealed that the care provided was for both Ms. Fukuzawa and K.D.B., and that the 29-month period "wasn't exactly consecutive." *RP* at 156:13-20; 157:9-15. After the Court's own lengthy *sua sponte* examination of the witness and additional questioning from the Grandparents' counsel, the Court "[came] up with in the preceding 36 months prior to the intended relocation… 23 months." *RP* at 175:2-4. Counsel for the Grandparents confirmed: "…we're just running the months, too, and 23 months seems accurate." *RP* at 175:8-9. Even after adding in the time period from "post-April 2022" (i.e. no more than 9 months at the December 19, 2022 hearing), the absolute maximum time at issue would be 32 months. *See RP* at 178:9-12. The Court then found "no question... that it's a substantial period of time if we're talking 23 out of 36 months.." *RP* at 178:16-18. Despite acknowledging moments before that the Grandparents met less than two thirds of the required time under

the statute, the Court then found that the Grandparents were entitled to object to relocation under RCW 26.09.540. *RP* at 179:11-12. The Grandparents' Objection was also later Dismissed by agreement for want of proper service of the Summons and Objection. *CP* at 686-87 (meaning no personal jurisdiction over Mr. Bitterman with respect to the Objection). Whether Mr. Bitterman left before or after the Court's order is only material to the *notice* requirement of the CRA; but even if they were entitled to notice, the Grandparents were not entitled to object.

In other words, no provision of law (e.g. RCW 26.09.480(2)) or court order prevented a fit parent from moving out of the State of Washington with his child. Without a *primary caregiver* relationship arising after final orders, RCW 26.11.060, not the 11-factor test in the CRA, would control.

With all due respect to the Court of Appeals Commissioner, the ruling that Mr. Bitterman "relocated with the child to New Mexico **after the Court granted Respondents'**

Petitions for in-person visitation" is incorrect. *Appx. A* at 3 (emphasis added). Mr. Bitterman relocated with K.D.B. to New Mexico **before** the Court made its decision. Mr. Bitterman supplied the trial Court with this information in his December 15, 2022 declaration supporting his Motion for Reconsideration:

> I had no knowledge of any further visitation schedule that the court ordered on November 9, 2022 until will after the fact. No orders were provided to me and I had already relocated before that hearing. I was not informed of the November 1, 2022 hearing until after the fact but did comply with the court's ruling regarding the visitation ordered that day. I was already preparing to move and did so before the November 9, 2022 hearing; a hearing I did not know was scheduled until after I moved. I was never provided any written order of the visits that were to take place in mid-November until after the hearing on December 5, 2022. I was never told that I could not move, a plan that I had made long before these orders were entered.
>
> [. . .]
>
> I was offered a job back in early August and I accepted the job the first week of September. I also worked down here previously at the end of 2019 start of 2020… Mr. Collier states that he informed Ms. Bratton that I left to look for new job opportunities on November 8th. This is false I already had a job.

CP at 778.

3. This Case is Different from Pike and Similar Cases

The Court of Appeals Commissioners' Ruling relies on the case of *Pike v. Pike*, 24 Wn.2d 735, 167 P.2d 401 (1946). *See Appx. A* at 3. In *Pike*, the trial court issued an interlocutory divorce decree awarding custody of the children to the Respondent father. *Id.* at 737. The Mother appealed; filed an appeal bond three days later; and, "[i]t was **subsequent to that date** that appellant removed the children from their home and placed them at a place unknown to either respondent or [appellant's] attorney." *Id.* (emphasis added).

The Grandparents cited to *State ex rel Hunter v. Roland*, 106 Wn. 413, 180 P. 125 (1919) as example below. In *Hunter*, the plaintiff (relator Hunter) filed suit seeking divorce and custody of the parties' minor child. *Id.* at 413. The trial court entered an order pending trial directing Hunter to keep the child

within the court's jurisdiction; she failed to comply, and moved the Court for voluntary dismissal of the divorce petition. *Id.*

But the *Hunter* Court noted the general rule – "that a person in contempt has no right to be heard as to matters of favor, but on matters of strict right the court is compelled to hear him, notwithstanding he may be in contempt." *Id.* at 414. Affirmative action, after decision is an exception to this in equitable[2] cases. *Id.* Mr. Bitterman is appealing a Final Judgment and post-Judgment Orders affecting his *fundamental* rights. *See* RAP 2.2(a)(1), (13)

Helard v. Helard, 22 Wn.2d 950, 155 P.2d 499 (1945), also cited by the Grandparents, does no work for either party. *Helard* is the 1945 equivalent of a RAP 18.9(b) order, but *only* the order – not even the underlying equivalent of the RAP 18.9(a) order, though it is mentioned. *Id.* at 950.

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[2] Given the guidance in *Parentage of L.B.,* 155 Wn.2d 679, 697 *et seq*, 122 P.3d 161 (2005), it seems highly likely that Chapter 26.11 actions are fundamentally equitable in nature.

The distinguishing feature of cases justifying dismissal is that the party seeking relief had *affirmatively* violated the court's order *with knowledge* of the same, *after* the order was made. If one or both of these factors is different, then the outcome is the opposite. In *Pike*, the Court noted and distinguished *Jones v. Jones*, 75 Wn. 50, 134 P. 528 (1913), and discussed another case cited therein, *Vosburg v. Vosburg,* 131 Cal. 628, 63 P. 1009 (1901), stating:

> The last question presented is whether the appeal should be dismissed because of the failure of appellant to comply with the order of the trial court respecting the care, custody, and control of the children. Our attention has been called to *Jones v. Jones*. That was a divorce case in which the trial court directed that certain property in Vancouver, B. C., should be deeded to the defendant by the plaintiff. An order was also entered restraining plaintiff from leaving the county in which the action was instituted until the further order of the court. Plaintiff, however, departed from the jurisdiction of the trial court and did not execute the deed as directed. **We held that the plaintiff was not guilty of contempt because of two facts**: First, that the direction relative to the deed was not binding upon plaintiff in that the court first stated that, if the deed was not made and deposited, a money judgment would be entered against plaintiff in lieu thereof, and '…**after the appellant and his**

counsel had departed from the presence of the court, the court announced that the deposit of the deed would not be optional, but that the appellant would be required absolutely to deposit the deed or subject himself to a penalty for contempt.' And, second, that **the order requiring plaintiff to remain within the jurisdiction of the court was only an interlocutory order which was not carried into the final judgment and therefore had no binding effect.** The court then went on to assume that plaintiff was in contempt, and upon that assumption held that the appeal should not be dismissed, and in so doing based its opinion upon *Vosburg v. Vosburg*, , and said that it was '…in many respects similar to the one here presented.'

It appears that **Vosburg took his son, Roydon, to the state of New York. Subsequently, his wife successfully sued him for divorce**, and among the orders made there was one directing him to return the boy to the state of California. Vosburg appealed from all orders made, including the one just mentioned. Motion was made to dismiss his appeal on the ground that he was in contempt, and reliance was had on the rule customarily enforced when one under criminal sentence attempts an appeal although he has fled the jurisdiction. The reason for this rule is based upon the fact that if the conviction should be sustained with the defendant absent from the jurisdiction the judgment could not be executed. **In refusing to apply the criminal appeals rule**, **the court said** in the Vosburg case: 'In such a case **the defendant**, **by an act done after judgment**, has so **changed his status** as to make the execution of the judgment impossible. **But there is no such situation in the**

> **case at bar**. **The status of appellant and of the boy Roydon is exactly the same as it was at the rendition of the judgment and order from which he appeals.** Whatever part of the judgment was enforceable at the time it was rendered and at the time the appeals were taken, would in like manner be enforceable upon its affirmance.'
>
> The situation in the case at bar is quite different. **In the Vosburg case, the appellant merely failed to perform the order of the court. In this case, the appellant has done more than disobey the judgment of the court by an affirmative act done after decision** of the trial court. She has made the execution of the judgment impossible.
>
> *Pike*, 24 Wn.2d at 740-42 (emphasis added).

The only order concerning visitation that existed on November 8, 2022, was the temporary order for one visitation with which Mr. Bitterman complied. Like *Jones*, this was interlocutory in nature, not carried over into the final order, setting aside the issue of its lawfulness under RCW 26.11.030(9). And like the plaintiff in *Jones*, Mr. Bitterman was not in the courtroom when the order was made, though his compliance demonstrates he was informed.

But critically, in the Vosburg case, where Mr. Vosburg took the child out of the state *before* the Court made any order prohibiting him from doing so; *and* where the trial court ordered his return, on appeal, the Court declined to dismiss. The Court of Appeals should have similarly declined to dismiss; the Court's order is in conflict with *Jones*.

4. A Significant Question of Constitutional Law is Presented

In *Eggert v. City of Seattle*, 81 Wn.2d 840, 505 P.2d 801 (1973), this Court recited a lengthy analysis of the right to intra- and interstate travel. *Id.* at 841-47. The right to travel from one State to another is a fundamental constitutional right, particularly where "travel" is "in the sense of migration with intent to settle and abide…" *Id.* at 845-46 (citing *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322 (1969) (disapproved on other grounds by *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974))).

Mr. Bitterman argues that the trial Court's Order Enforcing the Final Order (*CP* at 669-70) compelling him to

"return the child to the State of Washington" and to be responsible for the costs thereof is an unlawful infringement upon his and his child's right to travel to, settle, and abide in New Mexico.

The Constitutional question is this: Does Chapter 26.11, RCW prohibit a fit parent (or parents) from leaving the State with his (or their) child where an action has commenced, but no Final Order has issued?

The express prohibition on temporary orders in RCW 26.11.030(9) and the *unqualified* requirement for transportation expenses in RCW 26.11.050(2), particularly where jurisdiction is not in question (*CP* at 231 (Response)) indicates that Mr. Bitterman lawfully left the State. But no provision of law authorized the trial Court to *compel* his return.

5. These Issues are of Substantial Public Interest

Chapter 26.11, RCW was enacted in 2018; guidance on this Chapter is thus far from the Court of Appeals, in particular the constellation of cases from Division III: *Matter of R.V.*, 14

Wn.App.2d 211, 470 P.3d 531 (2020); *Matter of A.S.A.*, 21 Wn.App.2d 474, 507 P.3d 28 (2022); *see also unpublished cases: Matter of K.B.,* 2022 WL 6596422 (Div III, 2022)*; Matter of W.D.C.,* 2022 WL 2036212 (Div III, 2022)*; Matter of R.J.,* 2022 WL 1322881 (Div III, 2022)*; and Matter of C.S.,* 2021 WL 164849 (Div. III, 2022).

The issue of substantial public interest presented here is whether the Court of Appeals should have dismissed this appeal where (1) the reason for dismissal involved a disputed fact not developed below; and (2) the appeal presented meritorious questions. *See Motion to Modify Commissioner's Rulings* at 18-30. This case also presents an opportunity to re-address the distinction between contempt sanctions by the trial court for disobedience of an order vs. dismissal as a sanction for affirmative contumacious acts. In other words: whether the difference between the *Pike* and *Vosburg* scenarios remains a distinguishing line.

F. CONCLUSION

Mr. Bitterman implores this Court to take up his Petition. The dismissal below not only deprives him of his day in Court upon meritorious claims, but doubles and cements the punishments of contempt in the trial Court for the very same acts.

The Court of Appeals arrived at its ruling on the basis of a disputed issue not developed below, thereby making a critical factual finding on an issue easily susceptible to supplementation of the record or a reference hearing in the trial court. This first error caused the second, where the Court of Appeals applied dismissal under RAP 18.9 as a sanction while the trial court was also sanctioning the very same conduct by contempt. The dismissal was in conflict with this Court's precedent.

Mr. Bitterman respectfully requests that this Court accept review.

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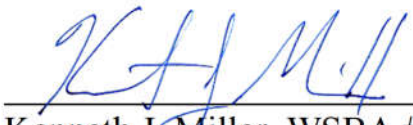
Respectfully submitted this 5th of October, 2023.



Kenneth J. Miller, WSBA #46666
Attorney for Mr. Bitterman

Appendix A

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FILED
Sep 08, 2023
COURT OF APPEALS
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COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of Visits with K.D.B., TED FUKUZAWA, Respondent, v. BRYCE BITTERMAN, Appellant.	)	No. 39456-5-III Consolidated with No. 39457-3-III ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING AND RELATED MOTIONS
In the Matter of Visits with K.D.B., TRACY PIEPEL, Respondent, v. BRYCE BITTERMAN, Appellant.	)	

THE COURT has considered Appellant's motion to modify the Commissioner's ruling of July 17, 2023, the answer and reply thereto, and "Respondent's motion to partially strike reply in support of motion to modify or, in the alternative, to submit surreply," the answer and reply thereto, and is of the opinion the motions should be denied. Therefore,

IT IS ORDERED, Appellant's motion to modify the Commissioner's ruling is denied and Respondent's motion to strike or submit surreply is denied. The court's August 30, 2023, "Order Denying Motion to Partially Strike Reply in Support of Motion to

Modify Commissioner's Ruling, or in the Alternative to Submit Surreply" is rescinded and superseded by this clarifying order.

PANEL: Judges Cooney, Pennell, Lawrence-Berrey

FOR THE COURT:

GEORGE B. FEARING
Chief Judge

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington
Division III

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June 30, 2023

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Case #: 394565
Ted Fukuzawa v. Bryce Bitterman
Douglas County Superior Court No. 22-3-00048-2
Consolidated with
Case #: 394573
Tracy Piepel v. Bryce Bitterman
Douglas County Superior Court No. 22-3-00049-1

Dear Counsel:

Pursuant to Respondent's Motion to Dismiss Appeal, the following notation ruling was entered:

June 2, 2023
Because Appellant Bryce Bitterman has done more than disobey the appealed decisions of the superior court but, by an affirmative act done after the superior rendered its decision, (i.e., relocated with the child to New Mexico after the court granted Respondents' petitions for in-person visitation with K.D.), Appellant has made execution of the appealed decisions impossible. Pike v. Pike, 24 Wn.2d 735, 741-42, 167 P.2d 401 (1946). Accordingly, the court conditionally grants Respondents' motion to dismiss Appellant's consolidated appeals unless within 10 days of the effective date of this ruling (1) Appellant resumes compliance with the superior court's decision regarding Facetime visits between Respondents and K.D., and (2) Appellant provides K.D.'s current physical address to this court, the superior court, and Respondents.
Hailey Landrus
Commissioner

Continued…

Since the ruling was missed for processing and not prepared until now, the fore-mentioned conditions 1 & 2 are now due by July 10, 2023.

Also, pursuant to Appellant's Motion to Stay Appeal, the following notation ruling was entered:

> **June 23, 2023**
> **Appellant's motion to stay these proceedings is denied. A stay of the appeal is not necessary to insure effective and equitable review while Appellant pursues a post judgment motion for relief in the trial court. RAP 7.2(e) permits post judgment motion practice while an appeal is pending and contains a process that ensures continued effective and equitable review.**
> **Hailey Landrus**
> **Commissioner**

Therefore, the hearing date set for July 27, 2023 at 10:00am is hereby stricken.

Furthermore, pursuant to Appellant's Motion for Second Extension of Time to File Opening Brief, the following notation ruling was entered:

> **June 30, 2023**
> **Motion for Second Extension of Time to File Opening Brief is denied.**
> **Tristen Worthen**
> **Clerk**

Appellant's brief remains due July 12, 2023.

Sincerely,

TRISTEN WORTHEN
Clerk/Administrator

Ronelle Seymour, Case Manager

TLW: res

PDF **RCW 26.09.410**

Definitions.

The definitions in this section apply throughout RCW **26.09.405** through **26.09.560** and **26.09.260** unless the context clearly requires otherwise.

(1) "Court order" means a temporary or permanent parenting plan, custody order, visitation order, or other order governing the residence of a child under this title.

(2) "Relocate" means a change in principal residence either permanently or for a protracted period of time, or a change in residence in cases where parents have substantially equal residential time as defined by RCW **26.09.525**.

[**2019 c 79 § 4**; **2000 c 21 § 2**.]

NOTES:

Intent—Captions not law—2000 c 21: See notes following RCW **26.09.405**.

PDF **RCW 26.09.480**

Objection to relocation or proposed revised residential schedule.

(1) A party objecting to the intended relocation of the child or the relocating parent's proposed revised residential schedule shall do so by filing the objection with the court and serving the objection on the relocating party and all other persons entitled by court order to residential time or visitation with the child by means of personal service or mailing by any form of mail requiring a return receipt to the relocating party at the address designated for service on the notice of intended relocation and to other parties requiring notice at their mailing address. The objection must be filed and served, including a three-day waiting period if the objection is served by mail, within thirty days of receipt of the notice of intended relocation of the child. The objection shall be in the form of: (a) A petition for modification of the parenting plan pursuant to relocation; or (b) other court proceeding adequate to provide grounds for relief.

(2) Unless the special circumstances described in RCW **26.09.460** apply, the person intending to relocate the child shall not, without a court order, change the principal residence of the child during the period in which a party may object. The order required under this subsection may be obtained ex parte. If the objecting party notes a court hearing to prevent the relocation of the child for a date not more than fifteen days following timely service of an objection to relocation, the party intending to relocate the child shall not change the principal residence of the child pending the hearing unless the special circumstances described in RCW **26.09.460**(3) apply.

(3) The administrator for the courts shall develop a standard form, separate from existing dissolution or modification forms, for use in filing an objection to relocation of the child or objection of the relocating person's proposed revised residential schedule.

[**2000 c 21 § 10**.]

NOTES:

Intent—**Captions not law**—**2000 c 21:** See notes following RCW **26.09.405**.

PDF **RCW 26.09.540**

Objections by nonparents.

A court may not restrict the right of a parent to relocate the child when the sole objection to the relocation is from a third party, unless that third party is entitled to residential time or visitation under a court order and has served as the primary residential care provider to the child for a substantial period of time during the thirty-six consecutive months preceding the intended relocation.

[**2000 c 21 § 16**.]

NOTES:

Intent—Captions not law—2000 c 21: See notes following RCW **26.09.405**.

PDF **RCW 26.11.030**

Venue—Filing requirements—Affidavit—Notice—Hearing—Temporary visitation orders not authorized.

(1) If a court has jurisdiction over the child pursuant to chapter **26.27** RCW, a petition for visitation under RCW **26.11.020** must be filed with that court.

(2) Except as otherwise provided in subsection (1) of this section, if a court has exclusive original jurisdiction over the child under *RCW **13.04.030**(1) (a) through (d), (h), or (j), a petition for visitation under RCW **26.11.020** must be filed with that court. Granting of a petition for visitation under this chapter does not entitle the petitioner to party status in a child custody proceeding under Title **13** RCW.

(3) Except as otherwise provided in subsections (1) and (2) of this section, a petition for visitation under RCW **26.11.020** must be filed in the county where the child primarily resides.

(4) The petitioner may not file a petition for visitation more than once.

(5) The petitioner must file with the petition an affidavit alleging that:

(a) A relationship with the child that satisfies the requirements of RCW **26.11.020** exists or existed before action by the respondent; and

(b) The child would likely suffer harm or the substantial risk of harm if visitation between the petitioner and child was not granted.

(6) The petitioner shall set forth facts in the affidavit supporting the petitioner's requested order for visitation.

(7) The petitioner shall serve notice of the filing to each person having legal custody of, or court-ordered residential time with, the child. A person having legal custody or residential time with the child may file an opposing affidavit.

(8) If, based on the petition and affidavits, the court finds that it is more likely than not that visitation will be granted, the court shall hold a hearing.

(9) The court may not enter any temporary orders to establish, enforce, or modify visitation under this section.

[**2018 c 183 § 3**.]

NOTES:

***Reviser's note:** RCW **13.04.030** was amended by 2020 c 41 § 4, deleting subsection (1)(j).

PDF **RCW 26.11.040**

Orders granting visitation—Factors for consideration by the court—Best interest of the child—Presumption in favor of fit parent's decision—Rebuttal.

(1)(a) At a hearing pursuant to RCW **26.11.030**(8), the court shall enter an order granting visitation if it finds that the child would likely suffer harm or the substantial risk of harm if visitation between the petitioner and the child is not granted and that granting visitation between the child and the petitioner is in the best interest of the child.

(b) An order granting visitation does not confer upon the petitioner the rights and duties of a parent.

(2) In making its determination, the court shall consider the respondent's reasons for denying visitation. It is presumed that a fit parent's decision to deny visitation is in the best interest of the child and does not create a likelihood of harm or a substantial risk of harm to the child.

(3) To rebut the presumption in subsection (2) of this section, the petitioner must prove by clear and convincing evidence that the child would likely suffer harm or the substantial risk of harm if visitation between the petitioner and the child were not granted.

(4) If the court finds that the petitioner has met the standard for rebutting the presumption in subsection (2) of this section, or if there is no presumption because no parent has custody of the child, the court shall consider whether it is in the best interest of the child to enter an order granting visitation. The petitioner must prove by clear and convincing evidence that visitation is in the child's best interest. In determining whether it is in the best interest of the child, the court shall consider the following, nonexclusive factors:

(a) The love, affection, and strength of the current relationship between the child and the petitioner and how the relationship is beneficial to the child;

(b) The length and quality of the prior relationship between the child and the petitioner before the respondent denied visitation, including the role performed by the petitioner and the emotional ties that existed between the child and the petitioner;

(c) The relationship between the petitioner and the respondent;

(d) The love, affection, and strength of the current relationship between the child and the respondent;

(e) The nature and reason for the respondent's objection to granting the petitioner visitation;

(f) The effect that granting visitation will have on the relationship between the child and the respondent;

(g) The residential time-sharing arrangements between the parties having residential time with the child;

(h) The good faith of the petitioner and respondent;

(i) Any history of physical, emotional, or sexual abuse or neglect by the petitioner, or any history of physical, emotional, or sexual abuse or neglect by a person residing with the petitioner if visitation would involve contact between the child and the person with such history;

(j) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference;

(k) Any other factor relevant to the child's best interest; and

(l) The fact that the respondent has not lost his or her parental rights by being adjudicated as an unfit parent.

[**2018 c 183 § 4**.]

PDF **RCW 26.11.050**

Attorneys' fees—Transportation costs.

(1)(a) For the purposes of RCW **26.11.020** through **26.11.040**, the court shall, on motion of the respondent, order the petitioner to pay a reasonable amount for costs and reasonable attorneys' fees to the respondent in advance and prior to any hearing, unless the court finds, considering the financial resources of all parties, that it would be unjust to do so.

(b) Regardless of the financial resources of the parties, if the court finds that a petition for visitation was brought in bad faith or without reasonable basis in light of the requirements of RCW **26.11.020** through **26.11.040**, the court shall order the petitioner to pay a reasonable amount for costs and reasonable attorneys' fees to the respondent.

(2) If visitation is granted, the court shall order the petitioner to pay all transportation costs associated with visitation.

[**2018 c 183 § 5**.]

PDF **RCW 26.11.060**

Modification or termination of orders granting visitation—Substantial change of circumstances.

(1) A court may not modify or terminate an order granting visitation under RCW **26.11.040** unless it finds, on the basis of facts that have arisen since the entry of the order or were unknown to the court at the time it entered the order, that a substantial change of circumstances has occurred in the circumstances of the child or nonmoving party and that modification or termination of the order is necessary for the best interest of the child.

(2)(a) If a court has jurisdiction over the child pursuant to chapter **26.27** RCW, a petition for modification or termination under this section must be filed with that court.

(b) Except as otherwise provided in (a) of this subsection, if a court has exclusive original jurisdiction over the child under *RCW **13.04.030**(1) (a) through (d), (h), or (j), a petition for modification or termination under this section must be filed with that court.

(c) Except as otherwise provided in (a) or (b) of this subsection, a petition for modification or termination under this section must be filed in the county where the child primarily resides.

(3) The petitioner must file with the petition an affidavit alleging that, on the basis of facts that have arisen since the entry of the order or were unknown to the court at the time it entered the order, there is a substantial change of circumstances of the child or nonmoving party and that modification or termination of the order is necessary for the best interest of the child. The petitioner shall set forth facts in the affidavit supporting the petitioner's requested order.

(4) The petitioner shall serve notice of the petition to each person having legal custody of, or court-ordered residential time or court-ordered visitation with, the child. A person having legal custody or residential or visitation time with the child may file an opposing affidavit.

(5) If, based on the petition and affidavits, the court finds that it is more likely than not that a modification or termination will be granted, the court shall hold a hearing.

(6) The court may award reasonable attorneys' fees and costs to either party.

[**2018 c 183 § 6**.]

NOTES:

***Reviser's note:** RCW **13.04.030** was amended by 2020 c 41 § 4, deleting subsection (1)(j).

MILLER & CHASE, PLLC

October 05, 2023 - 1:48 PM

Filing Petition for Review

Transmittal Information

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Tracy Piepel, et al v. Bryce Bitterman (394573)

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