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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

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DIANA MAE BLOME,

Appellant,

v.

DOUGLAS R. BLOME,

Respondent.

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APPELLANT'S BRIEF

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ORIGINAL

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## I. INTRODUCTION

This appeal is about a modified parenting plan entered in January 2007 that reduced Diana Blome's residential time with her son, Spencer, age 5, from a shared 50 / 50 plan to restricted visitation schedule but included a provision allowing the mother to "move for increased custodial time and / or removal of reductions or restrictions on her visitation with the child based on those substantial changes..."<sup>1</sup> Diana Blome (the mother) established a change of circumstances relating to the basis for the restrictions and petitioned the court for removal of restrictions and increased residential time.

The court held that although the mother had met the requirement to increase her residential time, the court's discretion was limited by the minor modification limits set forth in RCW 26.09.060 and could not increase mother's residential time beyond the mandated 90 overnights per year. The court further held that a more expansive review provision pursuant to In Re Marriage of Possinger, 105 Wn. App. 326 (2001) did not apply.<sup>2</sup>

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<sup>1</sup> Final Order Parenting Plan (January 30, 2007; Docket/Sub. No. 213) (Designated in Diana Blome's Designation of Clerk's Papers)

<sup>2</sup> Findings and Order Re: Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (September 11, 2009; Docket/Sub. No. 267)(Designated in Diana Blome's Designation of Clerk's Papers)

**II.**  
**ASSIGNMENT OF ERROR**

The trial court erred by applying the minor modification provisions of RCW 6.09.260 rather than the review provisions pursuant to In Re Marriage of Possinger, 105 Wn. App. 326 (2001).

**III.**  
**STATEMENT OF ISSUES**

The January 2007 Modified Parenting Plan restricted mother's residential time to limited supervised visitation based on a finding of two restrictions under RCW 26.09.191. Paragraph 7.2(19) allowed mother a chance to increase her residential time as follows:

The mother should have an opportunity to demonstrate a substantial change in circumstances specifically related to the basis for limitation, to have these substantial changes corroborated by data independent of the mother or father, and to move for increased custodial time, and/or removal of reductions or restrictions on her visitation with the child based on those substantial changes . . .

1. Does this provision grant mother the right to seek a review in which the trial court has the authority to revisit the plan and apply the criteria contained in RCW 26.09.187 for establishing permanent parenting plans rather than the criteria contained in RCW 26.09.260 governing modification of parenting plans?

2. If Paragraph 7.2(19) of the January 30, 2007 parenting plan authorizes the trial court to revisit the plan and apply the criteria contained in RCW 26.09.187 for establishing permanent parenting plans, then what should be the terms of the parenting plan?

#### IV. STATEMENT OF THE CASE

**A. January 30, 2007 Parenting Plan Modification.** The January 30, 2007 parenting plan was ordered after a trial for major modification and modified the original 50 / 50 shared residential schedule to a restricted schedule in which the mother was given limited supervised visitation.<sup>3</sup> Diana Blome's residential time was restricted under RCW 26.09.191 based on (a) "A long-term emotional or physical impairment which interferes with the performance of parenting functions as defined in RCW 26.09.004" and "The abusive use of conflict by the respondent which creates the danger of serious damage to the psychological development of the child."<sup>4</sup> Paragraph 7.2(19) of the January 30, 2007 parenting plan provides for a review of the parenting plan upon Diana Blome taking specific actions as follows:

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<sup>3</sup> Final Order Parenting Plan (January 30, 2007; Docket/Sub. No. 213)(Designated in Diana Blome's Designation of Clerk's Papers)

<sup>4</sup> Final Order Parenting Plan (January 30, 2007; Docket/Sub. No. 213)(Designated in Diana Blome's Designation of Clerk's Papers)

“The mother should have an opportunity to demonstrate a substantial change in circumstances specifically related to the basis for limitation, to have these substantial changes corroborated by data independent of the mother or father, and to move for increased custodial time, and/or removal of reductions or restrictions on her visitation with the child based on those substantial changes...”<sup>5</sup>

The trial court made detailed Findings of Fact as to Diana Blome’s compliance with the review requirements of paragraph 7.2(19) of the January 30, 2007 parenting plan as follows:

**B. Diana Blome Demonstrates Change in Circumstances Specifically Related to Restriction Based on Long Term Emotional or Physical Impairment.**

The residential time of Diana Blome is subject to limitations. This parent has demonstrated a substantial change in circumstances specifically related to the basis for the limitations. Specifically:

a. Diana Blome has demonstrated a substantial change in circumstances specifically related to the limitation based on “A long-term emotional or physical impairment which interferes with the performance of parenting functions as defined in RCW 26.09.004” as follows:

1. Diana has been in treatment and psychological evaluation since September 2007 with Dr. Richard Reinking, Dr. Darla Capatillo and Dr. Clark Ballard and Diana Blome does not presently suffer from an

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<sup>5</sup> Final Order Parenting Plan (January 30, 2007; Docket/Sub. No. 213)(Designated in Diana Blome’s Designation of Clerk’s Papers)

emotional or physical impairment which interferes with the performance of parenting functions.<sup>6</sup>

**C. Diana Blome Demonstrates Change in Circumstances Specifically Related to Restriction Based On Abusive Use of Conflict.**

The residential time of Diana Blome is subject to limitations. This parent has demonstrated a substantial change in circumstances specifically related to the basis for the limitations. Specifically:

.....  
b. Diana Blome has demonstrated a substantial change in circumstances specifically related to the limitation based on “The abusive use of conflict ...which creates the danger of serious damage to the psychological development of the child” as follows:

1. Based on a long-term longitudinal psychological evaluation by Dr. Reinking, in consultation with Drs. Ballard and Capatillo, Diana Blome does not presently suffer from any emotional or psychological condition that would pose any safety issue to Spencer, either emotionally, psychologically or physically.

2. No evidence was presented at trial to support a finding that Diana Blome has engaged in any “abusive use of conflict” since the January 30, 2007 trial.

3. The evidence shows that Diana Blome has a close and loving relationship with her son.<sup>7</sup>

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<sup>6</sup> Findings and Order re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (September 11, 2009; Docket/Sub. No. 267)(Designated in Diana Blome’s Designation of Clerk’s Papers)

<sup>7</sup> Findings and Order re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (September 11, 2009; Docket/Sub. No. 267)(Designated in Diana Blome’s Designation of Clerk’s Papers)

**D. Trial Court Finds That Restrictions Under RCW 26.09.191 No Longer Apply and Are Not Included in Modified Parenting Plan.**

c. The limitation based on “A long-term emotional or physical impairment which interferes with the performance of parenting functions as defined in RCW 29.09.004” no longer applies and should not be included in the modified parenting plan.

d. The limitation based on “The abusive use of conflict ...which creates the danger of serious damage to the psychological development of the child” no longer applies and should not be included in the modified parenting plan.<sup>8</sup>

**E. Diana Blome Completed the Requisite Evaluations and Treatment In Order to Move For Increased Residential Time and / or Remove Restrictions.**

a. Ronald L. Field, MA, CDP, MAC, NCAC II, NCC, CCFC, BCPC performed a comprehensive court ordered chemical dependency assessment report, including random urinalysis, and concludes that Diana is not drug dependent and does not require any treatment program.

b. Dr. Reinking completed a long-term longitudinal psychological evaluation in consultation with Dr. Darla Capatillo and Dr. Clark Ballard.

c. Diana Blome completed a certified parenting course in November 2007.

d. Diana Blome has been in counseling with Dr. Capatillo and Dr. Ballard.

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<sup>8</sup> Findings and Order re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (September 11, 2009; Docket/Sub. No. 267)(Designated in Diana Blome’s Designation of Clerk’s Papers)

**F. The Trial Court Found That Diana's Actions Since the January 30, 2007 Parenting Plan Are a Substantial Change In Circumstances.**

The following substantial change has occurred in the circumstances of either party or of the child:

.....

2. At the time the January 30, 2007 parenting plan was entered, Diana Blome's behavior led to imposition of a restriction in paragraph 2.2 of the parenting plan based on her mental and emotional instability. Since that time Diana Blome has demonstrated that she is mentally stable by completion of a comprehensive psychological evaluation.

3. At the time the January 30, 2007 parenting plan was entered, Diana Blome's behavior led to imposition of a restriction in paragraph 2.2 of the parenting plan based on her mental and emotional instability. Since that time Diana Blome has demonstrated that she is mentally stable by engaging in stable full-time employment by working 40 hours per week at Massage Envy as a massage therapist since January 2009.

4. At the time the January 30, 2007 parenting plan was entered, Diana Blome's behavior led to imposition of a restriction in paragraph 2.2 of the parenting plan based on her mental and emotional instability. Since that time Diana Blome has demonstrated that she is mentally stable by maintaining a regular twice weekly visitation schedule with Spencer Blome.

5. At the time the January 30, 2007 parenting plan was entered, Diana Blome's behavior led to imposition of a restriction in paragraph 2.2 of the parenting plan based on her engaging in abusive use of conflict dangerous to the psychological safety of Spencer Blome. Since that time Diana Blome has demonstrated that she is not a danger to her son's psychological safety and has not engaged in any abusive use of conflict.

6. At the time the January 30, 2007 parenting plan was entered, Diana Blome's behavior led to continuing concerns about her use of illegal drugs. Since that time Diana Blome has demonstrated that she is clean and sober by discontinuing use of illegal drugs in May 2005.

7. At the time the January 30, 2007 parenting plan was entered, Diana Blome's behavior led to continuing concerns about her use of illegal drugs. Since that time Diana Blome has demonstrated that she is clean and sober a comprehensive chemical dependency evaluation by Ronald Fields who concluded without reservation that Diana Blome is not drug dependent and does not require any treatment program.<sup>9</sup>

**G. The Trial Court Held That Paragraph 7.2(19) of the January 30, 2007 Parenting Plan Does Not Grant Diana Blome a Right to a Review Pursuant to In Re Possinger, 105 Wn. App. 326 (2001) But Rather Provides Guidance to Diana Blome Regarding How She Might Achieve Minor Modifications of the Residential Schedule Pursuant to RCW 26.09.260.**

The trial court held as follows:

Under paragraph 7.2(19) of the January 30, 2007 parenting plan, Diana Blome has the right to return to court to establish a substantial change of circumstances specifically related to the basis for limitation and to move for "increased custodial time, and/or removal of reductions or restriction to her visitation with the child." The Court concludes that Judge Doyle intended paragraph 7.2(19) as guidance to Diana Blome regarding how she might achieve minor modifications of the residential schedule pursuant to RCW 26.09.260, rather than as a more expansive review provision pursuant to In Re Possinger, 105 Wn. App. 326 (2001). Otherwise, it is unlikely that Judge Doyle would

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<sup>9</sup> Findings and Order re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (September 11, 2009; Docket/Sub. No. 267)(Designated in Diana Blome's Designation of Clerk's Papers)

have used the term “substantial change,” which is the identical language used in RCW 26.09.060.

In addition, the circumstances existing in this case at the time of the January 2007 parenting plan are distinguishable from those in Possinger. In Possinger, the trial court adopted the father’s parenting plan but provided for a review after one year because of uncertainties regarding the parents’ work and school schedules. Here, paragraph 7.2(19) contains no time limitations. In addition, unlike the situation in Possinger, there was no indication at the time Judge Doyle included the “substantial change” language in paragraph 7.2(19) that Diana Blome would be able to satisfy its terms in the near future. This open-ended situation also distinguishes this case from In Re Marriage of True, 104 Wn.App.291 (2000) where the court held that “a trial court may retain jurisdiction over the matter *for a limited period of time.*” True, 104 Wn.App. at 646 (emphasis added)(trial court retained jurisdiction for several months). Similarly, in contrast to this case, in In Re Marriage of Adler, 131 Wn. App. 717 (2006), the court approved a modification of a parenting plan pursuant to a provision agreed to by the parties that either could request a review of the plan before the end of the year. <sup>10</sup>

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<sup>10</sup> Findings and Order re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (September 11, 2009; Docket/Sub. No. 267)(Designated in Diana Blome’s Designation of Clerk’s Papers)

V.  
ARGUMENT

**A. This Case is Properly Characterized as a Review Under the Principles of Marriage of Possinger, 105 Wn. App. 326 (2001) Rather than Strictly as a Modification Under the Provisions of RCW 26.09.260.**

In Marriage of Possinger, 105 Wn. App. 326 (2001) the Court of Appeals discussed the inherent power of the court to order a review of the parenting plan outside the statutory framework of a modification. The court defined the issue at pages 327 – 328 as follows:

To resolve this appeal we must determine whether under the Parenting Act of 1987 the superior court retains its equitable power to enter a temporary or interim parenting plan at the time of entry of a decree of dissolution of marriage, rather than a permanent parenting plan, and to reserve final disposition of parenting issues for a specified period of time pending significant changes that are expected to occur in the lives of the parents. To pose essentially the same question in slightly different terms, we must determine whether the court has the authority under the Parenting Act to adopt a permanent parenting plan that contains a residential schedule that will remain in effect for a specified period of time pending significant changes that are expected to occur in the lives of the parents, and then, at the end of that period of time, revisit the plan in order to make a final disposition of the parenting issues, applying the criteria contained in RCW 26.09.187 for establishing permanent parenting plans rather than the criteria contained in RCW 26.09.260 governing modification of parenting plans.

The Possinger court discusses the principals of the Parenting Act including the standard procedure of having a final parenting plan with all provisions settled and then allowing modification based on the standards of the modification statute, but then notes with approval the Supreme Court's decision in Potter v. Potter, 46 Wn.2d 526, 528, 282 P.2d 1052 (1955) (where welfare of child made postponement of a final decision desirable, trial court had equitable power to postpone final custody decision for a specified period in order to determine whether a mother with a history of mental instability could function as a custodial parent). The court goes on to hold at pages 336 – 337:

It would be strange indeed to construe an act designed to serve the best interests of the children of divorcing parents in such a manner as to require trial courts to rush to judgment on insufficient evidence with respect to the children's best interests, or to ignore the fact that the lives of the parents are in such a state of transition that the children's best interests would be served by deferring long-term parenting decisions for a reasonable period of time following entry of a decree of dissolution of marriage.

Accordingly, we conclude that the Act is consistent with prior policy as pronounced by our Supreme Court in *Potter*, *Phillips* and *Little*, and hold that where the best interests of the child requires it, the trial court is not precluded by the Parenting Act from exercising its traditional equitable power derived from common law to defer permanent decision-making with respect to parenting issues for a specified period of time following entry of the decree of dissolution of marriage.

So it is clear that a trial court may reserve a review provision in a parenting plan to allow parents to return to court to establish changes in their lives and the best interests of the child especially where, as here, the parents' lives are in transition. It is evident in this case that this is exactly what Judge Doyle did. Had she done nothing – had she just entered the parenting plan based on the restrictions stated, Diana would have had the same right as any other parent to establish “substantial change of circumstances” and seek a modification according to the provisions of RCW 26.09.260. If that was her intention, then there would be no reason for her to include paragraph 7.2(19) which states as follows:

The mother should have an opportunity to demonstrate a substantial change in circumstances specifically related to the basis for limitation, to have these substantial changes corroborated by data independent of the mother or father, and to move for increased custodial time, and/or removal of reductions or restrictions on her visitation with the child based on those substantial changes . . .<sup>11</sup>

In fact if this provision is simply advising Diana of her right to seek a minor modification on change in her circumstances, this provision would be redundant because she had that right already, by statute. But this provision specifically expands on Diana's rights and applies the principles of Possinger in allowing her, upon showing of change in her

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<sup>11</sup> Final Order Parenting Plan (January 30, 2007; Docket/Sub. No. 213)(Designated in Diana Blome's Designation of Clerk's Papers)

circumstances to seek "...removal of reductions or restrictions on her visitation..." And what can this mean other than to return to the parenting plan existing prior to the modification. "Removal of reductions or restrictions" does not make sense outside the context of the parenting plan preceding the modified plan. Clearly, the reductions to be removed are those contained in the January 2007 plan.

RCW 26.09.260 contains different limits on modifications depending upon the threshold met – either any change up to and including change in primary residence for a major modification upon showing of strict standards and showing of detriment or a minor modification upon a lesser showing but with limits on the extent of changes. A major modification is not applicable here because detriment in father's home is not alleged and "removal of reductions or restrictions" refers back to the 50/50 plan of 2004, not a change in custody. The minor modification of RCW 26.09.260 is likewise not applicable either by the terms of the January 2007 order set forth above, and in the adequate cause order dated October 13, 2008 in which "minor modification" is specially defined as

the review set forth in paragraph 7.2(19) of the January 2007 parenting plan.<sup>12</sup>

**B. As a Review, the Court Must Use the Best Interest of the Child Standard Under RCW 26.09.187 Rather than the More Restrictive Modification Standards of RCW 26.09.260.**

In Marriage of Adler, 131 Wn. App. 717 (2006) the court discusses Possinger and describes the ruling as follows:

*Possinger* establishes that at the time of dissolution the trial court has the authority to build in a review of the terms of the parenting plan and that it is irrelevant whether the plan is labeled as temporary or permanent. *Possinger* also establishes that in such a review the court may properly apply the criteria in RCW 26.09.187 rather than treating the review as a modification. Possinger, 105 Wn. App. at 337.

In Adler, similar to the present case, there was built into the parenting plan a provision for review. Upon challenge of invalidity in part for failure to follow the prescribed modification statute provisions, the court held at page 724 that:

But there was no failure to adhere to a prescribed rule or mode of proceeding. The provision in the original parenting plan was essentially a contingency that left the terms of the plan open to review by either party within a certain period of time. At the time the original plan was entered, the parties contemplated that a review might be necessary to see if the plan was working. Two Washington cases show that this sort of provision is permissible.

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<sup>12</sup> Motion Hearing/Order on Family Law Motion Re: Respondent's Motion For Adequate Cause for Major Modification and Temporary Order (October 13, 2008; Docket / Sub. No. 233) (Designated in Diana Blome's Designation of Clerk's Papers)

The present case exactly follows the reasoning in both Possinger and Adler in that the changes were anticipated in a parent in transition, [or here, hoped] and so the court left the door open for a review in the future. Here, the principle worked perfectly in that the child was protected during the transitional period, and now Diana Blome has completed her transition and is able to resume her substantial parenting role to the advantage and best interest of her son, Spencer.

## **VI. CONCLUSION**

Washington law has a well established value that the purpose of a parenting plan is to foster the best interest of the child. The child's best interest is best served by having two parents actively involved in the child's life. Unfortunately a parent may suffer any number of disabilities or circumstances that interrupt a previously healthy and nurturing parent-child relationship. (In this case mental health issues.) Washington courts have wisely carved out a wise and compassionate exception to the hard rules of res judicata and the statutory modification standards. That exception allows a court to offer a lifeline, or roadmap that allows a parent to resolve limiting issues that separate the child from that parent's care. Of special note here is the trial court's ruling on the Final Parenting Plan that:

Were it not for the Court's conclusion that the prior parenting plan was subject only to minor modifications of the residential schedule, the Court would likely have found

that, after a transition period, the residential schedule should be relatively equal between the parents.<sup>13</sup>

The best interest of this child – full reunification of his mother – is denied by the rigid application of the modification statute. Application of the review standards of Possinger are both just and within the tradition and values of Washington Law.

RESPECTFULLY SUBMITTED February 26, 2010.

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<sup>13</sup> Letter to Counsel re Parenting Plan, Judge Bruce Heller, Dept. 52 (February 2, 2009; Docket / Sub. No. 277) (Designated in Diana Blome's Supplemental Designation of Clerk's papers)