

original

Nº. 35015-7 *Chm*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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BRENDA KAY HIGGINS and DANNIE EDWARD HIGGINS,

Appellants,

v.

BIANCA MAYA CROCKETT and JASON EVANS,

Respondents.

---

REPLY BRIEF OF APPELLANTS

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Appeal from the Superior Court of Pierce County,

Cause No. 00-3-02604-7

The Honorable Brian Tollefson, Presiding Judge

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ORIGINAL

LAW OFFICES OF  
BRIAN L. MEIKLE, INC. P.S.

11071/2 TACOMA AVENUE SOUTH  
TACOMA, WASHINGTON 98402  
TELEPHONE (253)272-5220  
FAX (253)272-5687  
[brian@meikleandwood.com](mailto:brian@meikleandwood.com)

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17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**TABLE OF CONTENTS**

	<u>Page</u>
<b>I. INTRODUCTION.....</b>	1
<b>II. REPLY TO BRIEF OF RESPONDENT.....</b>	1
<b>A. Petitioners properly assigned errors, stated the issues presented on appeal, and made argument on the erroneous findings and issues supported by citations to authority.....</b>	1
<b>B. Even if Findings of Fact 2.13(10), 2.13(11), and 2.13(12) were supported by substantial evidence, they are erroneous.....</b>	3
1. <u>Whether Mr. Evans was “unfit as a parent” was not properly before the trial court in the modification proceedings.....</u>	3
2. <u>The Higginses had no burden to provide a psychological evaluation of MRE or to show that placement with Jason Evans would cause psychological detriment to MRE.....</u>	5
3. <u>Finding of Fact 2.13 (12) is not supported by substantial evidence.....</u>	6
<b>C. The trial court did not have discretion to act outside of statutory requirements.....</b>	6
1. <u>RAP 2.5 does not preclude review of the trial court’s failure to find adequate cause to consider a petition for modification.....</u>	7
2. <u>The trial court’s abuse of discretion was not “an error of the Higgins’ own making.”.....</u>	8
3. <u>Grigsby applies to this case without distinction.....</u>	10

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**D. The trial court did not act “within its discretion in granting the custody modification.”**.....12

1. Whether the custody award to the Higginses was proper was not an issue before the trial court in the modification proceedings...... 12

2. Mr. Evans’ “fundamental liberty interest in raising MRE” was not implicated in the modification proceedings...... 12

3. Changes in Mr. Evans’ circumstances do not justify modification of MRE’s custody...... 14

**E. The Higginses are MRE’s de facto parents.** .....15

**F. There is not sufficient evidence in the record to support a finding that a change of custody would not be detrimental to MRE.**..... 17

**III. CONCLUSION**.....18

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**TABLE OF AUTHORITIES**

Page

Table of Cases

**United States Supreme Court Cases**

*Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551  
(1972).....13

**Washington Cases**

*Custody of Shields*, 157 Wn.2d 126, 150, 136 P.3d 117 (2006).....4-5, 12-14

*George v. Heliar*, 62 Wash.App. 378, 382-383, 814 P.2d 238 (1991).....5

*In re Custody of S.H.B.*, 118 Wn. App. 71, 74 P.3d 674 , *affirmed*,  
153 Wn.2d 646, 105 P.3d (2005).....17

*In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981).....12-13

*In re Marriage of Grigsby*, 112 Wn. App. 1, 16, 57 P.3d 1166 (2002).....10-11

*In re Marriage of McDole*, 122 Wn.2d 604, 859 P.2d 1239 (1993).....14

*In re Stell*, 56 Wn.App. 356, 783 P.2d 615 (1989).....13

*Marriage of Tomsovic*, 118 Wn. App. 96, 103, 74 P.3d 692 (2003).....7, 14

*Parentage of L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005),  
*cert. denied*, 126 S.Ct. 2021, 164 L.Ed.2d 806 (2006).....15, 17

*Pulcino v. Federal Exp. Corp.*, 94 Wash.App. 413, 423-424,  
972 P.2d 522 (1999), *affirmed*, 141 Wn.2d 629, 9 P.3d 787 (2000).....7

*Schuster v. Schuster*, 90 Wn.2d 626, 628, 585 P.2d 130 (1978).....4, 12, 15

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25  
26

*Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476,  
488, 585 P. 2d 71 (1978).....2

**Statues**

RCW 26.09.260.....1, 3, 4-5, 7-8, 10, 11, 13-15, 18  
RCW 26.10.030.....14  
RCW 26.10.190.....3-8, 14  
RCW 26.10.200.....8

**Court Rules**

RAP 10.3.....2

**Other Authorities**

Kenneth W. Weber, 20 WASHINGTON PRACTICE,  
*Family and Community Property Law With Forms* (1997).....6  
III WASHINGTON FAMILY LAW DESKBOOK (2<sup>nd</sup> ed. 2000).....4

1  
2 **I. INTRODUCTION**

3 This appeal is from a decision that took a seven-year old child from her grandparents, in  
4 whose custody she had resided since the age of 16 months, and placed the child with a biological  
5 father previously found to be unfit. This decision was reached when the trial court

6  
7 (1) erroneously applied the statutes and standards for an **initial** determination of  
8 custody between a third party and a biological parent to the **modification** proceedings below;

9 (2) erroneously found “adequate cause” to change residential placement based on a  
10 “substantial change of circumstances” of the **noncustodial** parent;

11 (3) erroneously modified residential placement **without** entering findings of fact  
12 mandated by RCW 26.09.260;

13 (4) erroneously refused to consider the best interests of the child, stating it was  
14 instead “compelled to apply the parental unfitness standard and detriment standard” in the  
15 **modification** proceedings; and

16 (5) erroneously ruled that the child’s grandparents were not her *de facto* parents  
17 because her biological father did not give **formal consent** to the Higginses forming a parent-like  
18 relationship with the child and the court did not know “**whether or not [she] thinks that the**  
19 **Higgins are her grandparents.**” RP 656.  
20

21 **II. REPLY TO BRIEF OF RESPONDENT**

22 **A. Petitioners properly assigned errors, stated the issues presented on**  
23 **appeal, and made argument on the erroneous findings and issues supported**  
24 **by citations to authority.**  
25  
26

1 Mr. Evans' first argument is that the Appellants' "brief fails to develop or to put forth any  
2 legal citation to support" assignments of error to Findings of Fact 2.13(10), 2.13 (11), and  
3 2.13(12). Brief of Respondent, pages 4-5.

4 Under RAP 10.3, the Opening Brief of an appellant must contain assignments of error,  
5 defined under the rule as "a separate concise statement of each error a party contends was made  
6 by the trial court, together with issues pertaining to the assignments of error." These two  
7 requirements are met at pages 1-4 of Appellant's Opening Brief.

8 Rules of Appellate Procedure, Appendix of Forms, Form 6, sets out the requirements for  
9 each section of a brief. Under "Argument," Form 6 states: "The argument should ordinarily be  
10 separately stated under appropriate headings **for each issue presented for review.**" (Emphasis  
11 added.) Appellant's Issues Presented numbers 1 and 2 are argued at pages 12-13 of the Brief;  
12 Issues Presented numbers 3 and 4 are argued at pages 14-20; Issue Presented number 5 is argued  
13 at pages 23-27; and Issue Presented number 6 is argued at pages 27-30.

14 "A party abandons assignments of error to findings of fact **if it fails to argue them in its**  
15 **brief.**" *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 488, 585 P. 2d 71  
16 (1978). However, it is not necessary that individual Findings of Fact be identified and discussed  
17 by number. *In Seattle School Dist. No. 1 of King County*, the Court made this clear:  
18

19  
20 Appellants have assigned error to 9 of 698 findings of fact. Except for number 172  
21 and 446 no other finding is again referred to in appellants' brief by identifiable  
22 number **or otherwise**. . . . Since there is no further **argument, discussion or**  
23 **reference** to these findings, we deem them abandoned." (Emphasis added.)

24 *Id.*

25 Here, the Higginses presented argument and discussion relating to each and every one of  
26 the erroneous Findings of Fact even though the individual Findings were not referenced by  
number in the body of the argument.

1           **B.     Even if Findings of Fact 2.13(10), 2.13(11), and 2.13(12) were supported by**  
2           **substantial evidence, they are erroneous.**

3           Mr. Evans' second argument is that Findings of Fact 2.13(10), 2.13(11), and 2.13(12) "are  
4 supported by substantial evidence." Brief of Respondent, page 5. Even if these Findings were  
5 supported by "substantial evidence," the evidence does not support the conclusion that  
6 modification of the existing custody plan was proper, as the trial court's own language makes  
7 clear. *See* RP 651 ("the evidence is overwhelming" that the Higginses provided MRE with  
8 "excellent care," MRE is "thriving . . . happy and . . . well adjusted . . . and has a good school  
9 environment."). *See also* Finding of Fact 2.13(3) ("the evidence is overwhelming that the  
10 Petitioners provided excellent care to M.R.E. and that she has thrived in their care.").

11  
12           Appellants assigned error to these findings because they are directly related to the court's  
13 fundamental error, which was to apply the standards for making an initial custody determination  
14 between a parent and a third party instead of applying RCW 26.10.190 and RCW 26.09.260 and  
15 following the mandatory procedures for modification of an existing custody plan.

16  
17           1.     Whether Mr. Evans was "unfit as a parent" was not properly before the  
18           trial court in the modification proceedings.

19           Finding of Fact 2.13(10) states, "The Petitioners have not shown that the Respondent is  
20 unfit as a parent." CP 169.

21           The Higginses filed a nonparental custody action in 2000 and were awarded custody of  
22 MRE on September 10, 2001. CP 45; CP 166. Mr. Evans was awarded limited visitation with  
23 conditions imposed. CP 46. Whether or not Mr. Evans was a fit parent was an important  
24 question during that initial 2000 custody action: "a court may award custody to a nonparent in an  
25 action against a parent only if the parent is unfit or if placement with an otherwise fit parent  
26

1 would cause actual detriment to the child's growth and development." *Custody of Shields*, 157  
2 Wn.2d 126, 150, 136 P.3d 117 (2006).

3 However, the issue of parental unfitness having been determined in the 2000 action, and  
4 no appeal having been taken from that determination, it was not properly before the court during  
5 the 2006 modification proceedings. See *Schuster v. Schuster*, 90 Wn.2d 626, 628, 585 P.2d 130  
6 (1978) (where no appeal had been taken from the original custody decree, whether custody was  
7 properly awarded to lesbian mothers was not before the court in modification proceedings).

8 The issues properly before the court in the 2006 modification proceedings were (1)  
9 whether there had been a change in the circumstances **of MRE or of the Higginses**; (2) whether  
10 modification of MRE's custody was necessary to serve her best interests; (3) whether the  
11 environment at the **Higginses'** home was detrimental to MRE's physical, mental, or emotional  
12 health; and (4) whether the harm likely to be caused to MRE by a change in environment was  
13 outweighed by the advantage of a change. RCW 26.10.190; RCW 26.09.260.

14 The fact that the trial court found Mr. Evans is now a "fit parent" was irrelevant during the  
15 modification proceedings: "Changes in the circumstances of the noncustodial parent do not  
16 warrant a modification." III WASHINGTON FAMILY LAW DESKBOOK (2<sup>nd</sup> ed. 2000), § 51.6(8),  
17 page 51-11 (citing *Schuster*, 90 Wn.2d at 629, 585 P.2d 130 (acknowledging a change had  
18 occurred in the circumstances of the noncustodial parent, but stating, "the statute requires a  
19 change in the circumstances of either the child or the custodian . . .")).

20 Finding of Fact 2.13(10) is "erroneous" even if there were sufficient supporting facts in  
21 the record because it is irrelevant under the applicable governing statutes (RCW 26.10.190; RCW  
22 26.09.260).  
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- 1                   2.     The Higginses had no burden to provide a psychological evaluation of  
2                                    MRE or to show that placement with Jason Evans would cause  
3                                    psychological detriment to MRE.

4                   Finding of Fact 2.13(11) states, “The **Petitioners** have not provided a psychological  
5                   evaluation of the child to show that there would be any psychological detriment to the child if  
6                   M.R.E. were placed with Jason Evans.” CP 169. The Higginses were not the “Petitioners” in the  
7                   modification proceeding: Mr. Evans was the Petitioner.

8                   The only issue properly related to “detriment” during the modification proceedings was  
9                   whether the environment in the **Higginses’** home, i.e., MRE’s “present environment,” was  
10                   detrimental to MRE’s physical, mental, or emotional health. RCW 26.10.190; RCW 26.09.260.

11                   Whether placing MRE with Mr. Evans would be detrimental to MRE was not properly  
12                   before the trial court during the modification proceedings, although it may have been a relevant  
13                   issue during the initial custody determination in 2000. *See Shields*, 157 Wn.2d at 150, 136 P.3d  
14                   117 (custody may be awarded to a nonparent “if placement with an otherwise fit parent would  
15                   cause actual detriment to the child’s growth and development.”).

16                   Because Mr. Evans was the petitioner in the modification proceedings, the Higginses’  
17                   Petition for Relocation having previously been dismissed, it was Mr. Evans who bore the burden  
18                   of establishing the necessity for a change of custody. *George v. Heliar*, 62 Wash.App. 378, 382-  
19                   383, 814 P.2d 238 (1991) (“the party seeking a custody modification must demonstrate that a  
20                   substantial change in circumstances has occurred that requires a modification to protect the best  
21                   interests of the child”).

22                   Because the Higginses were not required to prove that there would be a psychological  
23                   detriment to MRE if she were placed with Mr. Evans, whether or not there is substantial evidence  
24                   in the record to support Finding of Fact 2.13(11) is erroneous because it is irrelevant and is based  
25                   in the record to support Finding of Fact 2.13(11) is erroneous because it is irrelevant and is based  
26

1 on the trial court's incorrect application or interpretation of law. It is also erroneous insofar as  
2 Finding of Fact 2.13(11) implies that the Higginses failed to bear a burden of proof regarding  
3 detriment to MRE.  
4

5  
6 3. Finding of Fact 2.13(12) is not supported by substantial evidence.

7 Finding of Fact 2.13(12) states, "Guardian ad Litem William Abbott identified what can  
8 happen to a child who suffers from significant lack of contact with one parent – the negative  
9 impact on a child deprived of contact with one parent."<sup>1</sup> CP 169.

10 The quoted paragraph discusses the "negative impact" not of "significant lack of contact  
11 with one parent," but of negative results that may occur when a child feels that he or she has been  
12 "abandoned, rejected, and or betrayed." Finding of Fact 2.13(12) is not supported by substantial  
13 evidence because it mischaracterizes the evidence it is based upon.

14 **C. The trial court did not have discretion to act outside of statutory**  
15 **requirements.**

16 Mr. Evans' third argument is that the trial court "acted within its discretion in finding  
17 adequate cause to consider modification of the 2001 visitation and decree and custody  
18 arrangements." Brief of Respondent, page 8.

19 RCW 26.10.190(1) provides:

20 **The court shall hear and review petitions for modifications of a parenting plan,**  
21 **custody order, visitation order, or other order governing the residence of a child,**

22  
23 <sup>1</sup> At pages 4-5 of the Preliminary Report of Guardian ad Litem/Parenting Investigator,  
24 Mr. Abbott quotes what he identifies as "[t]he appendix to RCW 26.10." CP 77-78. The  
25 quotation is **not** from "the appendix to RCW 26.10," but is from an appendix that appears  
26 in 20 WASHINGTON PRACTICE, *Family and Community Property Law With Forms* (1997),  
Chapter 33, p. 1488. The quoted paragraph has no citations to any authority whatsoever  
and appears to be the personal opinion of Scott J. Horenstein, who has authored and  
edited material for this volume of WASHINGTON PRACTICE since Kenneth W. Weber's  
death in 1999. *See Id.*, Preface.

1 and conduct any proceedings concerning a relocation of the residence where the  
2 child resides a majority of the time, **pursuant to chapter 26.09 RCW**. (Emphasis  
3 added.)

4 RCW 26.09.260(1) provides:

5 Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this  
6 section, the court **shall not** modify a prior custody decree or a parenting plan  
7 **unless** it finds, upon the basis of facts that have arisen since the prior decree or  
8 plan or that were unknown to the court at the time of the prior decree or plan, that  
9 a **substantial change has occurred in the circumstances of the child or the**  
10 **nonmoving party** and that the modification is in the best interest of the child and  
11 is necessary to serve the best interests of the child. (Emphasis added.)

12 A trial court has no discretion whether to comply or not comply with these statutes:  
13 compliance with RCW 26.09.260 is mandatory. *Marriage of Tomsovic*, 118 Wn. App. 96, 103,  
14 74 P.3d 692 (2003) (citing *Bower v. Reich*, 89 Wn. App. 9, 14, 964 P.2d 359 (1997)). The trial  
15 court failed to consider or comply with these statutes, which was either an abuse of discretion or  
16 an incorrect interpretation and application of the statutes.

- 17 1. RAP 2.5 does not preclude review of the trial court's failure to find  
18 adequate cause to consider a petition for modification.

19 Mr. Evans argues at page 8 of his Brief that the Higginses “failed to raise this objection in  
20 a timely manner.”

21 Appellants’ issue that the court abused its discretion in finding adequate cause to consider  
22 modification is based on RCW 26.10.190 and RCW 26.09.260, neither of which was considered  
23 by the trial court. “A statute not addressed below but pertinent to the substantive issues which  
24 were raised below may be considered for the first time on appeal.” *Pulcino v. Federal Exp.*  
25 *Corp.*, 94 Wash.App. 413, 423-424, 972 P.2d 522 (1999), *affirmed*, 141 Wn.2d 629, 9 P.3d 787  
26 (2000) (citing *State v. Fagalde*, 85 Wash.2d 730, 732, 539 P.2d 86 (1975)).

RCW 26.10.190 (requiring the court to refer to Chapter 26.09 when considering

1 modification of a visitation order), and RCW 26.10.200 and RCW 26.09.260, both of which  
2 require a finding of adequate cause before modification may take place, were certainly “pertinent  
3 to the substantive issues which were raised below,” but were not considered by the trial court.  
4 This Court may therefore consider the statutes and review the trial court’s failure to comply with  
5 those statutes.

6 2. The trial court’s abuse of discretion was not “an error of the Higgins’ own  
7 making.”

8 At page 10 of the Brief of Respondent, Mr. Evans argues that the trial court’s proceeding  
9 into a trial on the merits of Mr. Evan’s Petition for Modification immediately after dismissal of  
10 the Higginses’ petition to relocate with MRE was “an error of the Higgins’ own making[.]” This  
11 assertion is not supported by the record.

12 On Monday, April 17, 2006, the trial court heard the Higginses’ motion to dismiss their  
13 petition to relocate with MRE. 4/17/06 RP 1-2. Even before the court granted the motion to  
14 dismiss, counsel for Mr. Evans (Ms. Bottimore) stated:

15  
16 We certainly have objected to the relocation, so now that they’re dropping their  
17 request to relocate to Montana, I can’t oppose that; however, we – at the same time  
18 we objected to relocation on June 29<sup>th</sup>, 2005, filed a petition for modification of  
19 custody, citing that my client is fit to parent his child, McKayla. . . .

20  
21 But the guardian ad litem report does indicate that my client is fit, and we are  
22 prepared to go forward for our request for a change in custody.

23 4/17/06 RP 3-4.

24 The court then granted to motion to dismiss, noting that “Ms. Bottimore admits she can’t  
25 oppose it,” and Ms. Bottimore responded:

26  
27 Well, my only opposition would be if, you know, Your Honor were inclined to not  
28 hear my client’s petition for modification of custody, because certainly relocation  
29 or no relocation we’re prepared to present a case that he is fit and ready and  
30 willing to parent his child, McKayla.

1 So I guess the question would be, procedurally, who do you hear from first.

2 4/17/06 RP 4.

3 The Court then asked Ms. Bottimore if her case was “ready to go,” to which Ms.  
4 Bottimore replied, “Yes.” *Id.* The Court then asked the Higginses’ counsel (Mr. Meikle) for his  
5 comments. Mr. Meikle argued:

6 The concern now becomes the best interests of the child. With my clients not  
7 wishing to relocate, the Court should now focus on what are the best interests of  
8 the child, in light of the fact that my clients are the only parents which this child  
has known since August of 2000. . . .

9 . . . I believe [what] the Court has to do now is consider the best interests of the  
10 children, the best interests of the child in this case, Your Honor. . . . And in your . .  
11 . evaluation of any evidence presented, look at it from that perspective, rather than  
just whether or not Mr. Evans is a fit parent at this point in time.

12 . . . So I think we’re almost going to need an additional GAL investigation and  
13 probably a psychological investigation of this child to determine who truly does  
14 she identify with as the parents in order to determine what is in the best interests of  
this child – not is it solely is Mr. Evans fit – what’s the best interests of the child.

15 4/17/06 RP at 5-8.

16 Ms. Bottimore responded, stating that she would “like our petition to go forward. I don’t  
17 know which set of witnesses you want to hear from first, but, you know, we’re ready to go.” *Id.*  
18 at 9-10.

19 The court replied to Ms. Bottimore: “Mr. Meikle says maybe we need to have another  
20 GAL and possibly a psychological report. What do you say about that?” *Id.* at 11. Ms.  
21 Bottimore stated, “I would disagree with that . . . I think we have all that’s necessary. . . . I think  
22 this Court has all that it needs to make a decision that would be in line with the best interests of  
23 the child.” *Id.*

24 Mr. Meikle then argued:  
25

26

1 . . . And if you – and in the best interests of that child, if you were going to remove  
2 that child from that parent, from that family unit, and place it with – and place the  
3 child with Mr. Evans, I'd certainly respect the power and the authority of your  
4 black robe, Your Honor; however, I don't see any way that that could be done in  
the best interests of the child without a much more complete investigation as to  
how that transfer would affect this child.

5 4/17/06 RP at 13.

6 The trial court ruled immediately:

7 So after having heard all these things I don't think I'm going to need another GAL  
8 report, I just think we need to move forward.

9 So Ms. Bottimore, technically, is the petitioner, so she gets to go first and last, but  
she has the burden of proof too.

10 *Id.* at 14.

11 The Higginses certainly did not invite the court to proceed immediately into a hearing on  
12 Mr. Evans' Petition to Modify without further investigation into the best interests of MRE: rather,  
13 Mr. Evans' counsel urged to the court to proceed. The court's error was not one of the "Higgins'  
14 own making."  
15

16 3. Grigsby applies to this case without distinction.

17 Mr. Evans asserts at page 9 of his Brief that "the case law put forth by the Higgins' for  
18 their argument that the trial court lacks any discretion on whether to hold an adequate cause  
19 hearing when a relocation is no longer pending is not persuasive."  
20

21 The Higginses relied on *In re Marriage of Grigsby*, 112 Wn. App. 1, 16, 57 P.3d 1166  
22 (2002), as support for their argument that once relocation was no longer being pursued by the  
23 Higginses, the court was required to make a finding of adequate cause independent of relocation,  
24 and to consider the factors set forth in RCW 26.09.260(2). Brief of Appellants, page 13.

25 Making a distinction without a difference, Mr. Evans argues that because the *Grigsby*  
26

1 Court denied the motion for relocation and the Higgenses voluntarily dismissed their petition for  
2 relocation, the “situations are distinguishable.” Brief of Respondent, page 9. The reason why  
3 relocation is no longer being pursued is irrelevant under *Grigsby*:

4  
5 The Legislature's choice of language in RCW 26.09.260(6) is noteworthy. The  
6 statute provides that a hearing to determine whether there is adequate cause for the  
7 modification is not required “so long as the relocation is being pursued.” Had the  
8 Legislature indicated that a showing of adequate cause is not required after  
9 relocation is proposed, for example, the trial court's modification of the parenting  
10 plan here would have been proper. But the normal requirement of a showing of  
11 adequate cause is excused only so long as relocation is being pursued. **Where, as  
12 here, the parent is no longer pursuing relocation, the parent proposing  
13 modification of the parenting plan must show a substantial change in  
14 circumstances, considering the factors set forth in RCW 26.09.260(2).**

15 *Grigsby*, 112 Wn. App. at 16, 57 P.3d 1166 (emphasis added).

16 While it is true, as Mr. Evans points out, that the *Grigsby* Court did not consider the issue  
17 of whether a trial court would have authority to modify a parenting plan when withdrawal of a  
18 petition to relocate was “disingenuous or made in bad faith” **because such facts were not  
19 present in that case**, it is also true that such facts are not present in **this** case. See 4/17/06 RP 3  
20 (“after reviewing the report by the . . . guardian ad litem in this matter and the potential of  
21 separating the two children, Biante and McKayla, my clients have no desire whatsoever to  
22 separate the two children. And so we would ask the Court grant a . . . motion to dismiss their  
23 intention to relocate[.]”).

24 The passing comment made by the *Grigsby* Court regarding a situation that did not exist  
25 in that case does not affect the applicability of *Grigsby* here because, like in *Grigsby*, the  
26 Higgenses’ withdrawal of their petition to relocate was not disingenuous or made in bad faith.

*Grigsby* is not only “persuasive,” it applies directly to this case without distinction. The  
trial court was required to make an independent finding of adequate cause once the Higgenses

1 were no longer pursuing relocation.  
2

3  
4 **D. The trial court did not act “within its discretion in granting the custody modification.”**

5 At pages 11-14 of Mr. Evans’ Brief, he argues that the court’s findings of fact related to a  
6 substantial change in **Mr. Evans’** circumstances, upon which adequate cause for changing  
7 custody was found, and the court’s decision to change custody “are supported by applicable case  
8 law.”

- 9  
10 1. Whether the custody award to the Higginses was proper was not an issue before the trial court in the modification proceedings.

11 When the trial court made its initial custody determination during the 2000-2001  
12 proceedings, Mr. Evans did not appeal. In essence, his Petition for Modification and arguments  
13 based on his “fundamental right” to custody of MRE constitute an attempted substitute for an  
14 appeal from the initial custody decision. This is not permitted:

15 At the outset we emphasize that these cases do not involve the question of whether  
16 it was proper to award custody of the children to lesbian mothers. **That question was litigated in the original divorce actions. No appeal was taken by any party. There being no appeal, the original award of custody with all limitations contained therein is binding on all parties and upon this court. The issue is simply not before us.**

17  
18  
19 *Schuster*, 90 Wn.2d at 628, 585 P.2d 130 (emphasis added).

- 20 2. Mr. Evans’ “fundamental liberty interest in raising MRE” was not implicated in the modification proceedings.

21  
22 At page 13 of Mr. Evans’ Brief, he correctly concedes that “this case is different [from  
23 *Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006) and *In re Marriage of Allen*, 28 Wn.  
24 App. 637, 626 P.2d 16 (1981)] in that both of those cases involved an initial determination of  
25 custody rather than a custody modification.”  
26

1 In spite of this concession, Mr. Evans argues that “the distinction between Mr. Evans’  
2 situation and those in *Shields* and *Allen* is immaterial,” and Mr. Evan’s “constitutional right to  
3 raise MRE without government interference” “must trump” RCW 26.09.260. Brief of  
4 Respondent, pages 13-14. Mr. Evans cites no legal authority for this argument: this is not  
5 surprising, since none exists.

6 Biological parents of a child do have a fundamental constitutional right to the custody of  
7 their child (*Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972); *In*  
8 *re Stell*, 56 Wn.App. 356, 783 P.2d 615 (1989); *Allen*, 28 Wn.App. 637, 626 P.2d 16), although  
9 that right is not absolute, as the *Allen* Court explained:  
10

11 Great deference is accorded to parental rights, based upon constitutionally  
12 protected rights to privacy and the goal of protecting the family entity. (Citations  
13 omitted.) Parental rights are balanced by the state’s interest as *parens patriae* in the  
14 child’s welfare (citations omitted); and parents’ rights may be outweighed when  
15 these interests come into conflict. (Citations omitted).

16 As stated in *State v. Koome*, *supra* 84 Wash.2d at 907, 530 P.2d 260:

17 Although the family structure is a fundamental institution of our  
18 society, and parental prerogatives are entitled to considerable legal  
19 deference, they are not absolute and must yield to fundamental  
20 rights of the child or important interests of the State.

21 *Allen*, 28 Wn.App. 637, 646, 626 P.2d 16 (1981).

22 The fundamental right of a biological parent to the custody of his child is highly protected  
23 in an **initial** custody action brought by a nonparent. First, a nonparent must meet the  
24 “threshold” requirements for standing to bring a custody action against a parent: the child must  
25 not be in the physical custody of one of its parents or the nonparent must allege that neither parent  
26 is a suitable custodian. RCW 26.10.030. A nonparent then bears the heavy burden of proving

1 parental unfitness or establishing that the child's growth and development would be detrimentally  
2 affected by placement with an otherwise fit parent. *Shields*, 157 Wash.2d at 150,136 P.3d 117.

3 Consideration and protection of Mr. Evans' fundamental right to custody of MRE was  
4 "built in" to the initial 2000-2001 third-party custody action by the statutory requirements for  
5 nonparental custody and by the rigorous standards set out in case law.

6  
7 Six years elapsed from that determination until Mr. Evans appeared in court to object to  
8 relocation and seek modification, during which time MRE grew from a baby into a well-adjusted  
9 young girl in the excellent care of the Higginses, as the trial court acknowledged. In the  
10 modification proceedings below, Mr. Evans' "fundamental right" to custody was no longer an  
11 issue: instead, the operating standard for modification was a determination based on MRE's best  
12 interests, including the presumption that a change of custody is detrimental to the child. RCW  
13 26.10.190(1); RCW 26.09.260; *In re Marriage of McDole*, 122 Wn.2d 604, 859 P.2d 1239  
14 (1993). Mr. Evans' argument that his "fundamental right" "trumps" these statutes is meritless.

15 3. Changes in Mr. Evans' circumstances do not justify modification of MRE's  
16 custody.

17 At page 14, Mr. Evans argues that RCW 26.09.260 should not be "rigidly enforced"  
18 because "Mr. Evans is now a fit parent and it would not be a detriment to place MRE in his care."  
19 A trial court has no discretion in whether or not to "rigidly enforce" RCW 26.09.260: compliance  
20 with the statute is mandatory. *Tomsovic*, 118 Wn. App. at 103, 74 P.3d 692 (citing *Bower v.*  
21 *Reich*, 89 Wn. App. 9, 14, 964 P.2d 359 (1997)).

22 Mr. Evans also argues that the court's determination that he is "now" a fit parent "is a  
23 substantial change that permits modification, although not stated in RCW 26.09.260." Mr.  
24 Evans' argument contradicts the statute, which provides, in pertinent part:  
25

1 (1) . . . the court **shall not modify** a prior custody decree or a parenting plan unless  
2 it finds, upon the basis of facts that have arisen since the prior decree or plan or  
3 that were unknown to the court at the time of the prior decree or plan, that a  
4 substantial change has occurred in the circumstances of the **child** or the  
**nonmoving party** and that the modification is in the best interest of the child and  
is necessary to serve the best interests of the child.

5 RCW 26.09.260(1) (emphasis added).

6 No matter what changes have occurred in the circumstances of Mr. Evans, the **moving**  
7 party, they are not a basis for modification of MRE's custody.

8 The fact that a parent once found to be unfit makes positive changes in his or her own life  
9 is commendable, but it is not an issue in a modification proceeding. RCW 26.09.260 requires a  
10 substantial change in the circumstances of the child or the custodian – **not** of the noncustodial  
11 parent. Changes in the circumstances of the noncustodial parent do not warrant a modification.  
12 *See Schuster*, 90 Wn.2d at 629, 585 P.2d 130. It was an abuse of discretion or an incorrect  
13 interpretation of law for the court to modify MRE's custody on the basis of changes in Mr.  
14 Evans' circumstances.  
15

16  
17 **E. The Higginses are MRE's de facto parents.**

18 *De facto* parenthood is established on the basis of four criteria:

19 (1) the natural or legal parent consented to and fostered the parent-like  
20 relationship, (2) the petitioner and the child lived together in the same household,  
21 (3) the petitioner assumed obligations of parenthood without expectation of  
22 financial compensation, and (4) the petitioner has been in a parental role for a  
23 length of time sufficient to have established with the child a bonded, dependent  
relationship, parental in nature. In addition, recognition of a de facto parent is  
"limited to those adults who have fully and completely undertaken a permanent,  
unequivocal, committed, and responsible parental role in the child's life."

24 *Parentage of L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005), *cert. denied*, 126 S.Ct. 2021, 164  
25 L.Ed.2d 806 (2006).  
26

1 At page 16, Mr. Evans argues that substantial evidence supports the trial court's  
2 conclusion that the Higginses failed to establish factors (1) and (4).

3 •*Factor (1)*. Mr. Evans “consented to” and “fostered” the parent-like relationship between  
4 MRE and the Higginses because he did not contest the award of custody, did not seek to vacate  
5 the custody decision, and did not appeal from the custody decision.

6 •*Factor (4)*. The fact that MRE, now 7 years old, knows that she has biological parents  
7 and that the Higginses are her grandparents instead of her biological parents does not support a  
8 finding that the Higginses have not been in a parental role for a length of time sufficient to have  
9 established with MRE a bonded, dependent relationship, parental in nature.

10 Mr. Evans argues that because MRE calls the Higginses “grandpa or grandpa,” MRE does  
11 not consider the Higginses to be her parents, and therefore “their role to her is not parental.”  
12 Brief of Respondent, pages 17-18. How MRE may refer to the Higginses is no indicator of the  
13 character of her relationship with them.

14 Factor (4) has two prongs: the first is whether the Higginses had acted in a “parental role”  
15 to MRE. A “parental role” is what one fills when acting as a parent would act, i.e., by  
16 performing parenting duties. The Higginses raised MRE from the time she was a toddler of 16  
17 months – it cannot be suggested that they did not act in a “parental role,” because they fulfilled all  
18 of the parenting duties required to raise MRE to the age of seven years. Mr. Evans was an  
19 occasional visitor.

20 The second prong of this factor is related to time – whether the Higginses acted in a  
21 “parental role” for a sufficient period of time to establish a “bonded and dependent” relationship  
22 with MRE that is “parental in nature.” The period of time involved is approximately 5-1/2 years,  
23 certainly sufficient to establish a relationship “parental in nature.” In fact, the trial court found  
24  
25  
26

1 that MRE's relationship with the Higginses was "dependent" and "bonded." RP 656. A  
2 relationship between a child and adults that is "dependent" and "bonded" and in which the adults  
3 perform parenting duties is "parental in nature."

4 The trial court erred in finding that Factor (4) was not met because Factor (4) does not  
5 require a relationship that is, **in fact**, "parental." The question is whether the relationship is  
6 "parental in nature." A *de facto* parent, after all, is not, **in fact**, a parent.

7  
8 Mr. Evans cites *In re Custody of S.H.B.*, 118 Wn. App. 71, 74 P.3d 674 (2003), to point  
9 out that like the Higginses, the paternal grandmother in that case had custody of the minor child  
10 for six years, but was nevertheless not awarded custody on the basis of *in loco parentis*. *S.H.B.* is  
11 simply not applicable here, since it was handed down two years before the Supreme Court wrote  
12 that "henceforth, a *de facto* parent stands in legal parity with an otherwise legal parent, whether  
13 biological, adoptive, or otherwise." *Parentage of L.B.*, 155 Wn.2d at 708, 122 P.3d 161.

14 **F. There is not sufficient evidence in the record to support a finding that a**  
15 **change of custody would not be detrimental to MRE.**

16 Error was assigned to Finding of Fact 2.7, which states that a change of custody would not  
17 be detrimental to MRE. As alternate relief to reversing the trial court's custody change and  
18 reinstating the original custody arrangements, the Appellants asked that the Court reverse and  
19 remand for a determination of whether a change of custody would be detrimental to MRE. Brief  
20 of Appellant, page 27.

21 Aside from the Preliminary Report of the guardian ad litem, the only evidence identified  
22 by Mr. Evans to support Finding of Fact 2.7 is his own testimony and the testimony of his  
23 fiancée. Brief of Respondent, pages 18-19. It is not "nonsensical" (Brief of Respondent, page  
24 19) to ask for a remand to determine whether a change of custody would be detrimental to MRE  
25

1 where there is not substantial evidence in the record to support Finding of Fact 2.7.

2 The trial court's finding was based largely on the Preliminary Report of the guardian ad  
3 litem. It was indeed "preliminary only," based on interviews with the parties and four phone  
4 calls, and upon Mr. Abbott's misstatements of applicable law. No psychological evaluations --  
5 including an evaluation of MRE -- were obtained.

6 If the Court does not reverse the trial court's orders and reinstate the original custody  
7 arrangements, it should reverse and remand with instructions to make a determination of whether  
8 a change of custody would be detrimental to MRE based on a more complete guardian ad litem  
9 investigation and psychological evaluations.

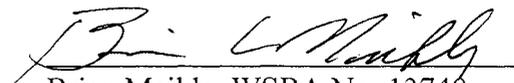
10  
11 **V. CONCLUSION**

12 The trial court failed to consider and apply the statutes governing modification of custody  
13 and failed to consider the best interests of MRE. Instead, the trial court erroneously applied  
14 standards applicable only in an initial third party custody action against a parent. The Court  
15 should vacate the orders entered by the trial court on June 9, 2006 and remand for reinstatement  
16 of the 2001 Visitation Decree.

17 Alternatively, the Court should vacate the orders entered by the court on June 9, 2006, and  
18 remand with instruction that the Higginases be granted the status of *de facto* parents of MRE and  
19 that custody be determined based on the best interests of MRE pursuant to RCW 26.09.260.

20  
21 Alternatively, the Court should vacate the orders entered by the court on June 9, 2006 and  
22 remand for a determination of whether change of custody would be detrimental to MRE.

23 Respectfully submitted this 18 day of April, 2007.

24  
25   
26 Brian Meikle, WSBA No. 13740  
Attorney for Appellants

LAW OFFICES OF  
BRIAN L. MEIKLE, INC. P.S.

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I hereby certify that on today's date, a true and correct copy of the above and foregoing REPLY BRIEF OF APPELLANT was served upon the following by sending the same ABC Legal Messenger Service on this 17<sup>th</sup> day of April, 2007, to:

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950 Broadway  
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Tacoma, WA 98402

Original + one copy

Leslie R. Bottimore  
Attorney at Law  
201 St. Helens Avenue  
Tacoma, WA 98402)622-8020

one copy

  
\_\_\_\_\_  
Manorma Naicker  
Assistant to Brian L. Meikle

I hereby certify that on today's date, a true and correct copy of the above and foregoing REPLY BRIEF OF APPELLANT was served upon the following by sending the same via U.S. postal mail on this 18<sup>th</sup> day of April, 2007, to:

Bianca Crockett  
637 37<sup>th</sup> St., S.E., #D  
Auburn, WA 98002

one copy

  
\_\_\_\_\_  
Manorma Naicker  
Assistant to Brian L. Meikle