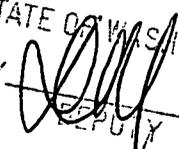


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COURT OF APPEALS  
DIVISION II  
2013 AUG 19 AM 10:58  
STATE OF WASHINGTON  
BY  REPLY

No. 44692-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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TODD BROOKS,

Appellant,

vs.

ZEECHA BROOKS (nka VANHOOSE),

Respondent.

---

**BRIEF OF APPELLANT**

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

TODD BROOKS

Appellant,

vs.

ZEECHA BROOKS (nka VANHOOSE)

Respondent.

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**I. ASSIGNMENTS OF ERROR**

**A. Assignments of Error**

1. The court erred in eliminating the father's mid-week visits during the summer despite no evidence at trial and no finding that the elimination was in any way necessitated by the Respondent mother's relocation geographically closer to the Appellant father.
2. The court erred in eliminating eight (8) overnight visits of the appellant father's despite no evidence at trial and no finding that the elimination was in any way necessitated by the Respondent mother's relocation geographically closer to the appellant father.
3. The court erred in reducing the appellant father's parenting time when the Respondent mother's relocation resulted in no practical change which needed to be accommodated.

**B. Issues Pertaining to Assignments of Error**

1. Does a relocation, regardless of any practical effect, automatically grant the court the ability to modify a parenting plan?
2. May the court modify a parenting plan due to a relocation for reasons that are unrelated to the relocation?
3. Does the adequate cause standard regarding modifying a parenting plan remain when a relocation has no practical effect on the parenting plan?
4. Does a relocation of a primary parent automatically result in the reduction of time for the non-residential parent?

**II. STATEMENT OF THE CASE**

This appeal arises from a relocation of the Respondent mother closer to the Appellant father and the court's subsequent modification of the parenting plan. The relocation brought the parties approximately forty (40) miles geographically closer but did not eliminate the need for continued highway commuting between the parties' residences. The Respondent mother used the relocation as a means to modify the previously agreed parenting plan to reduce the appellant father's time despite the fact that there was no practical change which resulted from the

relocation. At trial, the relocation was no longer contested but modifications to the parenting plan were. The court modified the parenting plan reducing the appellant father's time. Appellant father appeals the court's reduction of his parenting time.

### **III. STATEMENT OF THE FACTS**

A Petition for Dissolution of Marriage was filed on June 15, 2010 (Clerk's Papers 1). The parties reached an agreed resolution on October 22, 2010 which included an Agreed Parenting Plan (Clerk's Papers 9, 10 and 11). This parenting plan afforded the appellant father one hundred and twenty (120) overnights per year. (Clerk's Papers 11, 51 (page 2)). A part of this parenting plan was that the appellant father had Wednesday and Sunday overnights with his child. (Clerk's Papers 11, 51).

On November 3, 2010 (twelve days later), the Respondent mother filed to relocate from Toutle, Washington to Portland, Oregon. (Clerk's Papers 16). On December 15, 2010, the parties again reached an Agreed Parenting Plan to accommodate the relocation. (Clerk's Papers 19). This parenting plan afforded the appellant father one hundred and eight (108) overnights per year. (Clerk's Papers 19, 51). The appellant father's Wednesday and Sunday overnights were eliminated given the distance but

additional “floating” nights were added in the summer and school year weekends to compensate for the loss of the appellant father’s Wednesday and Sunday overnights. (Clerk’s Papers 19, 51). The appellant father’s additional overnights amounted to approximately sixteen (16) overnights (eight weekends) during the school year and sixteen additional overnights (16) during the summer. (Clerk’s Papers 19, 51). The appellant father’s time was reduced (despite these extra overnights) by twelve overnights per year (six weekends). (Clerk’s Papers 19, 51). The appellant father continued to exercise mid-week visits year round. (Clerk’s Papers, 19, See Paragraphs 3.2, 3.5 and 3.13).

On May 21, 2012 (nineteen months after the December 2010 parenting plan), the Respondent mother again filed a notice of proposed relocation from Portland, Oregon to Kalama, Washington. (Clerk’s Papers 21). This represented a relocation that was actually forty (40) miles closer to the appellant father but still required highway travel for both parents between Toutle and Kalama. (Clerk’s Papers 21A, 51). The Respondent mother’s relocation request was accompanied by a Proposed Parenting Plan which reduced the appellant father’s time approximately thirty percent (30%) without any relation to accommodating the geographic move closer. (Clerk’s Papers 22, 51). The appellant father initially objected to the relocation due to the significant mental health

distress of the child. (Clerk's Papers 25). By the time of trial, the appellant father no longer contested the relocation but contested any reduction to his parenting time. (RP (12/10) 4:4-7).

A trial was held on December 10, 2012 and the parties each relied on declarations. (Clerk's Papers 49, 51, 54, 55). At trial, both parents presented identical parenting plans with the exception of four (4) sections of the parenting plan which were the remaining disputed items. (Clerk's Papers 50, 52, 53). The trial was based on the affidavits of both parties and their attached exhibits. (Clerk's Papers 49, 51, 54, 55). Additionally, the Appellant father submitted briefing regarding the issue of modifying a parenting plan as a result of relocation. (Clerk's paper 56). The practical effect of the Respondent mother's relocation was to reduce a forty-five (45) minute highway drive between the parties' homes to a twenty-five (25) minute drive. (Clerk's Papers 56).

The Respondent mother's assertions regarding her requested reduction of the appellant father's parenting time were not related to the relocation. Instead, the Respondent mother specifically stated that the reduction she requested was because the appellant father already had a "generous schedule" with the child, the Wednesday visits were "not necessary" and she wanted the court to "adopt a plan which is more like a

normal parenting plan.” (Clerk’s Papers 49, page 6, 15-18 and page 4, 5-6).

At trial, the court repeatedly stated that the case of a modification based on relocation of the parties geographically closer, was a novel issue and likely one of first impression. (RP (12/10) 23: 4-9), (RP (12/10) 24: 1-5). The court went on to state that “the Court doesn’t want to be involved in changing provisions in a parenting plan if it’s not necessary.” (RP (12/10) 53: 2-4). The court then reduced the appellant father’s existing “floating” overnights from eight to four per school year. (RP (12/10) 54:13-17.) The court determined that the appellant father’s summer Wednesday visits should be eliminated because they were “too disruptive” to the Respondent mother’s time. (RP (12/10) 57:24-25). Neither of these changes was related to the Respondent mother’s relocation forty (40) miles closer to the appellant father. The final parenting plan was entered on January 28, 2013 (Clerk’s Papers 59).

#### **IV. SUMMARY OF ARGUMENT**

A relocation which presents no practical change in need accommodation should not result in a modification of a parenting plan or the reduction of either parent’s residential time absent a showing of adequate cause to otherwise modify the parenting plan. The court erred by

modifying the parties' parenting plan to reduce the appellant father's time despite no finding that these reductions were in anyway related to the relocation.

## V. ARGUMENT

### A. The Standard of Review

The trial court's decision is reviewed for abuse of discretion. *In re Marriage of Horner*, 114 Wash.App. 495, 501 n. 30, 58 P.3d 317 (2002), review granted, 149 Wash.2d 1027, 78 P.3d 656 (2003). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). See also *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Ricketts*, 111 Wash.App. 168, 171, 43 P.3d 1258 (2002). A trial court's decision is "manifestly unreasonable" if it is outside the range of acceptable choices given the facts and the applicable legal standard. *In re Marriage of Littlefield*, 133 Wash.2d 39, 47, 940 P.2d 1362 (1997), *In re Parentage of R.F.R.*, 122 Wash.App. 324, 329-30, 93 P.3d 951, 954 (2004).

### B. Case of First Impression

This matter presents a novel set of case facts which appear to be a case of first impression. While there is significant case law regarding

relocations of children, it is entirely focused on cases where one party is moving away from the other, necessitating a change in the parenting plan. The trial court itself noted the lack of case law regarding the issue of modifying a parenting plan where the parties were moving closer to one another. (RP (12/10) 23:4-24), (RP (12/10) 52:1). “Cases of first impression are not frivolous if they present debatable issues of substantial public importance.” *Olson v. City of Bellevue*, 93 Wash.App. 154, 165-66, 968 P.2d 894, 900 (1998) citing *Cary v. Allstate Ins. Co.*, 78 Wash.App. 434, 440-41, 897 P.2d 409 (1995), *Aff’d*, 130 Wash.2d 335, 922 P.2d 1335 (1996). Case law should be established which clearly outlines that the relocation statutes cannot be used as the proverbial “carte blanche” to modify a parenting plan absent a showing of a practical change which needs to be accommodated.

C. **Relocations Do Not Automatically Give Rise to a Modification of a Parenting Plan.**

Washington’s relocation statute (RCW 26.09.405 et seq) provides a notice structure for relocations and differentiates between relocations which will have almost no effect and those with significant effect. For example, RCW 26.09.450 relates to an “in district” relocation where a child is simply relocating within his or her city and not changing schools. RCW 26.09.450. These types of relocations are assumed to have little to no effect and

therefore, require very little notice to the other party. *Id.* The parenting plan is not anticipated to change for relocations within a district and in fact, no formal pleading or paperwork is required. *Id.*

This is contrasted with significant moves which are anticipated to have a significant impact on the child. RCW 26.09.520. RCW 26.09.440 relates to relocations where a parent is moving out of a child's school district. It is anticipated that the move will have real and practical problems which in turn will require a change to the parenting plan. RCW 26.09.520. Given the fact that the parenting plan may need to change to accommodate the relocation, significant notice is required. RCW 26.09.440.

One change requires almost no accommodation by either party while the other relocation requires significant changes. Case law, as well as statutes, focus on whether there is a substantial change of circumstances that warrant a change. RCW 26.09.260., *Fairfax v. Simpson* 170 Wash.App. 757, 286 P.3d 55, corrected, *review granted* 176 Wash.2d 1019, 297 P.3d 707 (2012). *In re Marriage of Little* 26 Wash.App. 814, 614 P.2d 240, *review granted*, reversed on other grounds 96 Wash.2d 183, 634 P.2d 498 (1980), (court's power to modify parenting plans was intentionally restricted to protect children from contentious parents).

In this case, the move is already "out of district" and will result in no practical change for the parents or the child. (Clerk's Papers 51). The parties continue to live in different cities that will continue to require highway

driving to transport the child. (Clerk's Papers 51). The parties will still need to drive to pick up the child, coordinate care and participate in the child's life. The Respondent mother's relocation does not result in a significant change in circumstances and in fact, the trial court could only make the finding that the December 2010 parenting plan was "disruptive" to the Respondent mother's time. (RP (12/10) 57: 24-25) This finding was not one that resulted from the relocation. Instead, any issues regarding the appellant father's additional mid-week and "floating" weekend time existed at the time of the December 2010 agreed parenting plan. These issues were agreed between the parties and the presumption is that both parents agreed to the December 2010 parenting plan because it was in the best interests of their child. (Clerk's Papers 19) The best interests of the child do not change based simply upon one parties move forty (40) miles closer to the other.

It is not necessary to change the parties' parenting plan to accommodate the Respondent mother's move. Nothing about the current plan is impractical given the parties' change from being a forty-five (45) minute drive apart to being a twenty-five (25) minute drive apart. The Respondent mother's desire for a "normal" parenting plan is insufficient to order a modification of the parenting plan that is otherwise not warranted under the law.

**D. If a Relocation Does Not Result in a Substantial Change of Circumstances No Modification is Permissible.**

Change of a parenting plan is only warranted when a substantial change of circumstances has occurred. RCW 26.09.260. In fact, the statutory language is:

The court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a 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.

RCW 26.09.260. The statute additionally gives exceptions to this rule for several conditions which generally result in a substantial change of circumstances. *Id.* Specifically, sub-section six (6) states, “the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.” RCW 26.09.260(6). The statute waives the issue of adequate cause if a relocation is pursued, but the analysis does not and should not end there. The court may make modifications *pursuant to the* relocation. *Id.* The statute places a significant burden on the parent requesting the change to show that that some practical change to the current parenting plan is necessitated by the relocation of the child. *Id.*

Minor modifications are commonly used to resolve issues related to one parent’s relocation. The statute specifically states these changes:

- (a) Do not exceed twenty-four full days in a calendar year; or
- (b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent who makes the residential schedule in the parenting plan impractical to follow.

RCW 26.09.260(5). When a parent relocates, a change of the parenting plan may or may not be necessary. RCW 26.09.260(6). Both major and minor modifications require a substantial change in circumstances. The change in circumstances must be to the circumstances of the nonmoving party for a major modification and to either parent, or the child, for a minor modification. *In re Marriage of Tomsovic*, 118 Wn.App. 96, 106, 74 P.3d 692 (2003). The key difference in this hierarchy is the necessitated changes to the parenting plan to facilitate the relocation. Without a substantial change in circumstances or any practical change requiring accommodation the court's statutory duty is to maintain the parenting plan.

In this matter, the Respondent mother attempted to remove thirty-two (32) days from the appellant father's time. (Clerk's Papers 52, 50). This exceeds the twenty-four (24) day limit. The court's order eliminating half of the appellant father's "floating" weekends and summer Wednesday visits represents a minor modification but one that is completely unrelated to the relocation. In fact, the requested changes are not in any way related to the

move. The Respondent mother does not cite any problem with maintaining the current schedule in her declarations. (Clerk's Papers 49, 54). Respondent's mother's reasons for the change are because the appellant father's time is already "generous", her desire for a "normal" schedule and because the appellant father's time is "not necessary." (Clerk's Papers 49, P 6, 15-18 and P 4 5-6).

The Respondent mother's requested changes are not "pursuant to" the relocation but in fact are simply her unabashed desire to reduce the appellant father's time. To allow a parent to move such a small distance and thereby eliminate or reduce the nonresidential parent's time is not in line with the relocation or modification statutes nor in the child's best interest. The Court erred in failing to maintain the residential time per the December 2010 parenting plan.

**E. Preference is Given to Maintaining the Continuity of a Parenting Plan.**

Washington courts have long given preference to maintaining a parenting plan if possible. Washington's modification statutes place high burdens on the parent requesting a modification. RCW 26.09.260. "Custodial changes are viewed as highly disruptive to children and there is a strong presumption . . . against modification." *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993); see also, *George v. Helliar*, 62 Wn.App. 378, 814 P.2d 238 (1991); *In re Marriage of Shryock*, 76 Wn.App.

848, 888 P.2d 750 (1995). The courts have long held that maintaining consistent parental contact is in the best interests of children and frequent changes to parenting plans are detrimental. *Id.*

Both parents have an interest in maintaining their bonds with their child. Both have consistently exercised their residential time, arguably, “to the letter” in this case. The child, therefore, enjoys the benefit of having two (2) involved and committed parents. Removing any of the appellant father’s previously agreed residential time only serves to disrupt one of the child’s most important bonds, that with his father. This disruption is detrimental and is simply a change for the convenience of one party. Convenience or creating a “standardized” or “normal” parenting plan is not in a child’s best interest. It is tragic to sacrifice a child’s critical parental bond for the sake of convenience and absent a showing of any change of circumstances which necessitates a modification.

## **VI. REQUEST FOR ATTORNEY FEES**

This portion of the brief is submitted to comply with the requirements of RAP 18.1.

RAP 18.1 provides for an award of attorney fees on review where a statute authorizes such an award. RCW 26.09.140 authorizes that the appellate court has discretion to order attorney’s fees in this case. Fees are appropriate as the Appellant father was forced to defend his parenting time

despite no finding of any change in circumstances for the child and no practical change which necessitated a modification to the parenting plan.

## VII. CONCLUSION

Inherently, the question before the court is, does a relocation permit a parent to modify every aspect of their parenting plan or are modifications based on relocation limited to changes of circumstances as a result of the relocation? The Respondent mother's attempt to use a relocation as pretext for a modification of the parties' parenting plan should not be allowed. Respondent does not argue that she would have sufficient facts to modify her parenting plan but for her relocation. In fact, the relocation should make the December 2010 parenting plan easier to accomplish. There is no practical change to the parties or to the child as a result of the move and given that the December 2010 parenting plan can continue to be executed without issue.

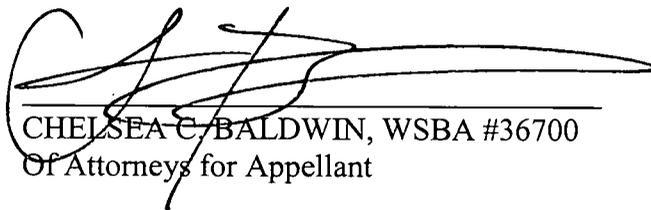
The court erred in modifying a parenting plan when there was no practical need or circumstances which necessitated a change to the parenting plan. The court made no finding that the changes made were related to the relocation. Modifications based on relocations should be limited to addressing the issues which are caused by the relocation and not be used as a means to re-litigate provisions of the parenting plan

unaffected by the relocation. A relocation should not automatically presume that the non-residential parent's time must be reduced, regardless of the circumstances.

Appellant respectfully requests that the trial court be reversed and that the appellant father be afforded residential time equal to that of the December 2010 parenting plan. Attorney fees should be awarded to the Appellant father.

DATED: August 15, 2013.

Respectfully submitted,



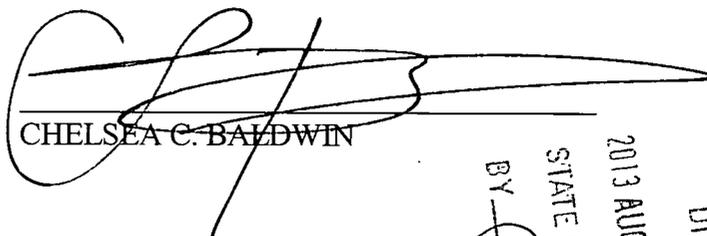
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CERTIFICATE

I certify that on this day I caused a copy of the foregoing Brief of Appellant to be served by email (per agreement) to Respondent's attorney at the following address:

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