

NO. 45612-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

In re the Marriage of:

**JODI HESLIP, nka
JODI VINES,**

Respondent,

vs.

FREDERICK J. HESLIP,

Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On October 13, 2011, Respondent Jodi Vines filed a Petition for Modification of a Custody Decree previously entered on May 21, 2010, that had given custody of the parties' three-year-old child MH to Appellant Mr. Heslip. CP 1-9, 10-18. In the Petition for Modification Ms Vines asked that the court give her primary residential custody of MH. *Id.* Ms Vines alleged the following facts as adequate cause for the modification:

The child's environment under the custody decree/parenting plan/residential schedule is detrimental to the child's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the child.

CP 5.

Respondent Ms Vines also filed a Motion for Temporary Orders seeking a change of custody to her and enjoining Mr. Heslip from taking MH out of the State of Washington. CP 19-24. In response Mr. Heslip filed a Motion for Order Allowing Relocation to permit him to move to Utah with MH. CP 37-41. On December 9, 2011, the Cowlitz County Superior Court entered an order finding adequate cause for Ms Vines to proceed on her Petition for Modification, denying Mr. Heslip's motion for temporary relocation, and setting an evidentiary hearing on Petitioner's Motion for Temporary Orders for November 7, 2011. CP 60-61.

On November 7, 2011, the court began an evidentiary hearing that

was continued to November 10, 2011, and finished on December 1, 2011, with both parties presenting extensive testimony. *See* Verbatim Report of Proceedings on 11/7/11, 11/10/11 and 12/1/11. Finally, On December 20, 2011, the court entered the following Findings of Fact on the evidentiary hearing:

I. Findings

1. Court finds that it will proceed in accordance with the modification motion
2. Adequate cause was found by Judge Bashor.
3. Court finds that the best interest of the child standard applies.
4. Court finds that the evidence showed a pattern of domestic violence by Mr. Heslip and that he has a controlling nature.
5. Court finds that domestic violence is a generational issue and often children repeat behaviors that they are around.
6. Court finds that the evidence showed that Mr. Heslip made 5, 6, or 7 moves within an 18 month period of time.
7. Court finds that the evidence showed that Ms. Vines is married, has a job, a school schedule, and a plan for [MH] in North Carolina.
8. Court finds that the evidence presented by Mr. Campbell showed that Mr. Heslip is not currently employed in Utah.
9. Court finds that the evidence presented showed Ms. Vines to have been treated for mental diagnosis and completed her treatment. Court finds that she is no longer taking medication.
10. Court finds that after pleadings were filed Mr. Heslip proceeded to stop communication between Ms. Vines and [MH].

11. Court finds that both parents have a strong connection to [MH].

12. Court finds that the mental and emotional well-being of [MH] is at issue in this matter.

13. Court finds that there has been a substantial change in circumstances in the child due to the instability.

14. Court finds that in the best interests of [MH], he will reside with his mother in North Carolina pending a full Family Court investigation.

CP 64-65.

Based upon these findings the court ordered (1) that MH was to reside with Ms Vines in North Carolina during the pendency of her Petition to Modify Custody, (2) that Mr Heslip was to turn custody of MH over to Ms Heslip by January 6, 2012, at the Salt Lake City Airport, and (3) that the matter was to be referred to family court for investigation. CP 65-66. The Cowlitz County Family Court later filed its report with the Superior Court and made the following recommendation:

Family court recommends that the petitioner, Jodi Vines, be designated the primary residential parent of [MH], age 4 years 10 months.

Family Court recommends that the respondent's residential time be limited until he successfully completes a certified program for domestic violence perpetrators. Specifically, it's recommended that the respondent's visitation take place in the town where the petitioner and the child reside (in the event the mother moves from Raleigh, North Carolina). The respondent's residential time shall consist of 48 to 72 hours with 14 days' notice of the mother.

Family Court recommends that the father's residential time be limited to one visit a quarter, plus a week at Christmas and two weeks in the summer until he completes treatment. Upon completion of domestic violence treatment, the respondent can move the court to expand his residential time.

Family Court recommends that any telephone/computer contact (i.e. Skype) that takes place between the father and the minor be under the direct supervision of the mother.

Finally, Family Court recommends that the petitioner maintains her mental health by seeking the appropriate professional services/medication as needed.

CP 205-206.

On July 11, 2013, the court called this case for an evidentiary hearing on Ms Vines' original petition to change custody. *See* Verbatim Report of Proceedings for 7/11/13. After receiving evidence the court adjourned to July 18, 2013, for the presentation of more testimony, and then to July 31, 2013 for the presentation of more evidence. *See* Verbatim Report of Proceedings for 7/11/13, 7/18/13 and 7/31/13. Finally, on August 13, 2013, the court entered the following Findings of Fact and Ruling granting Ms Vines' Petition to change custody:

1. The findings included in Judge Evans' Order of December 30, 2011 after a three day evidentiary hearing in which both parties were represented by counsel are verities as to the factual circumstances of this matter as of that date. This Court in making its ruling did not engage in reexamination of those findings.
2. The respondent's testimony regarding his failure to participate in the Family Court investigation is not creditable. Likewise, his allegation that the Family Court Investigator was prejudiced against

him based on his race and religion was not supported by evidence. The Family Court Report and Recommendation was admitted pursuant to ER 904.

3. The entry of the Order on Show Cause re Contempt/Judgment on November 9, 2012 finding the respondent to be in violation of the Temporary Parenting Plan, established that his action of not returning the child from the August 2012 visitation was a willful and intentional act in violation of the plan and not justified. This Court in making its ruling did not engage in a reexamination of the finding of contempt.

4. The Order of November 9, 2012 paragraph (7) ordered that the child be enrolled in counseling and established a procedure for the selection of the counselor allowing the respondent input into the selection of the child's counselor. The testimony and evidence establish that the petitioner and her attorney followed the procedure set forth in the Order and that the respondent did not participate in the selection. The counselor, Jennifer Freifeld's report of June 3, 2013 (exhibit 2) indicates progress in addressing the mental health issues being experienced by M.H.

5. Since the entry of the Temporary Parenting Plan on January 6, 2012, the respondent has exercised only one of the visitations available to him, the August 2012 visit.

6. The parties continue to have difficulties regarding telephone contact and contact by mail. Judge Evans, in his Order filed November 9, 2012 in paragraph (1) set forth a specific schedule for the phone contact. After hearing the testimony of the parties and the exhibits concerning this issue, the Court finds that while neither party has violated the order, the "spirit" of the order is not being followed. The petitioner's testimony on this issue is not creditable and her unwillingness to accept calls from phone numbers unknown to her during the hours set forth in the Order, 7:00 p.m. - 9:00 p.m. on Monday's and Wednesday's Eastern Standard Time, is at best problematic. MH needs to have regular, uninterrupted communication with his non-custodial parent. The distance between the household and the resulting extended periods of time without visitation make this even more important in this case.

7. MH has been fully integrated into the petitioner's household. The evidence establishes he has addressed significant behavioral issues arising from either his original placement or the removal of him from that placement. It appears from the testimony that he is happy, secure, and bonded to the members of the petitioner's household, including his half-brother.

8. The integration of MH into the petitioner's home was an involuntary act on the part of the respondent and resulted from the entry of the Temporary Order of December 30, 2011.

9. The result of the Temporary Order is that MH has now lived in the petitioner's home for the last twenty (20) months or the last 1/3 of his life. The evidence establishes that this is the longest period of sustained physical placement in MH's life.

10. The August 2012 visitation episode was significantly traumatic for MH. The allegations raised by the respondent were fully investigated by the police and Child Protective Services personnel and found to be factually un-sustainable.

11. The child's present environment (placement with the respondent pursuant to the May 21, 2010 Parenting Plan) is detrimental to the child's mental and emotional health and the harm to the child, if any, as a result of the change is outweighed by the benefits to the child. RCW 26.09.260(2)(c).

12. There has been a substantial change in the circumstances of both parents and child since the entry of the prior plan and it is in the child's best interest to modify that plan. The new parenting adopted by the court is attached as Exhibit "A".

13. The issue of child support was addressed only sparingly during the 3 days of trial. The testimony of the mother is that she is first of all a student and her income from various employments varies. The court finds her income should be imputed using full time employment at the federal minimum wage. The father testified that recently (July 12, 2012) has been re-employed and is now earning a salary of \$112,500.00 per year. The current Child Support Order entered January 6, 2012 set the father's income at \$0 and his support obligation at \$50 per month. The court will allow the parties to

address the issue of the respondent's child support obligation at the time of presentation. The court is unaware of whether either of the parties are ordered to pay support for children arising from other relationships.

14. The Court will sign pleadings consistent with the above upon presentation.

CP 208-210.

Following entry of this order Mr. Heslip filed a timely notice of appeal. *See* Notice of Appeal.

ARGUMENT

I. APPELLANT DID NOT ASSIGN ERROR TO THE FINDINGS OF FACT THE TRIAL COURT ENTERED ON 12/30/11 OR ON 8/13/13 AND THOSE FINDINGS ARE NOW VERITIES ON APPEAL.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *Ford v. Bellingham–Whatcom County Dist. Bd. of Health*, 16 Wn.App. 709, 558 P.2d 821 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *Holland v. Boeing Co.*, 90 Wn.2d 384, 583 P.2d 621 (1978). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In addition, the placement of a finding of fact in the section marked "Conclusions of Law," or the placement of a conclusion of law in a section marked "Findings of Fact," is not dispositive on which standard of review applies to an error assigned to that "finding" or "conclusion." *State v.*

Hutsell, 120 Wn.2d 913, 845 P.2d 1325 (1993). Rather, if the term or phrase describes factual issues or determines credibility between two witnesses, it is a finding of fact and will be reviewed under the substantial evidence rule even if included in a section marked “Conclusions of Law.” *Id.* By the same token, a term or phrase carrying legal implications is a conclusion of law and will be reviewed *de novo* even if included in a section marked “Findings of Fact.” *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

In the case at bar the trial court entered 14 written findings of fact on December 30, 2011, after a three day evidentiary hearing on the motion for temporary orders. The court thereafter entered 14 more detailed written findings on August 13, 2013, after a further three day evidentiary hearing on the petition to modify the original custody order. Appellant has failed to assign error to any one of these 28 findings. As a result they are verities on appeal.

II. THE TRIAL COURT DID NOT ERR IN ITS APPLICATION OF RCW 26.09.260.

In the second assignment of error and the second argument in the body of his brief Appellant claimed that the trial court erred in “its application of the facts of this case to the underlying Parenting Plan Modification Statute, RCW 26.09.260.” *See* Brief of Appellant, pages 1, 32. As the following explains, this assignment of error is not well-taken.

Sections (1) and (2) of RCW 26.09.260 state as follows:

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, 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. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

RCW 26.09.260(1)&(2).

In the case at bar the trial court relied upon subsection (2)(c) as the basis for changing the original parenting plan to give primary custody to Ms Vines. Appellant argued that the facts as presented by Mr. Heslip at the two

evidentiary hearings do not support the trial court's conclusion that the original placement with Mr Heslip was "detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." *See* Brief of Appellant, pages 33-36. This claim is at odds with the majority of the trial court's findings of fact on this issue, which were as follows from the first evidentiary hearing:

4. Court finds that the evidence showed a pattern of domestic violence by Mr. Heslip and that he has a controlling nature.

5. Court finds that domestic violence is a generational issue and often children repeat behaviors that they are around.

6. Court finds that the evidence showed that Mr. Heslip made 5, 6, or 7 moves within an 18 month period of time.

7. Court finds that the evidence showed that Ms. Vines is married, has a job, a school schedule, and a plan for [MH] in North Carolina.

8. Court finds that the evidence presented by Mr. Campbell showed that Mr. Heslip is not currently employed in Utah.

9. Court finds that the evidence presented showed Ms. Vines to have been treated for mental diagnosis and completed her treatment. Court finds that she is no longer taking medication.

10. Court finds that after pleadings were filed Mr. Heslip proceeded to stop communication between Ms. Vines and [MH].

11. Court finds that both parents have a strong connection to [MH].

12. Court finds that the mental and emotional well-being of [MH]

is at issue in this matter.

13. Court finds that there has been a substantial change in circumstances in the child due to the instability.

14. Court finds that in the best interests of [MH], he will reside with his mother in North Carolina pending a full Family Court investigation.

CP 64-65.

These findings on the factual issue all support the trial court's conclusion that continued placement with Mr Heslip under the original custody decree was "detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." This conclusion was supported by the family court's report and the trial court's factual findings after the second evidentiary hearing, which included the following:

2. The respondent's testimony regarding his failure to participate in the Family Court investigation is not creditable. Likewise, his allegation that the Family Court Investigator was prejudiced against him based on his race and religion was not supported by evidence. The Family Court Report and Recommendation was admitted pursuant to ER 904.

3. The entry of the Order on Show Cause re Contempt/Judgment on November 9, 2012 finding the respondent to be in violation of the Temporary Parenting Plan, established that his action of not returning the child from the August 2012 visitation was a willful and intentional act in violation of the plan and not justified. This Court in making its ruling did not engage in a reexamination of the finding of contempt.

4. The Order of November 9, 2012 paragraph (7) ordered that the

child be enrolled in counseling and established a procedure for the selection of the counselor allowing the respondent input into the selection of the child's counselor. The testimony and evidence establish that the petitioner and her attorney followed the procedure set forth in the Order and that the respondent did not participate in the selection. The counselor, Jennifer Freifeld's report of June 3, 2013 (exhibit 2) indicates progress in addressing the mental health issues being experienced by M.H.

5. Since the entry of the Temporary Parenting Plan on January 6, 2012, the respondent has exercised only one of the visitations available to him, the August 2012 visit.

6. The parties continue to have difficulties regarding telephone contact and contact by mail. Judge Evans, in his Order filed November 9, 2012 in paragraph (1) set forth a specific schedule for the phone contact. After hearing the testimony of the parties and the exhibits concerning this issue, the Court finds that while neither party has violated the order, the "spirit" of the order is not being followed. The petitioner's testimony on this issue is not creditable and her unwillingness to accept calls from phone numbers unknown to her during the hours set forth in the Order, 7:00 p.m. - 9:00 p.m. on Monday's and Wednesday's Eastern Standard Time, is at best problematic. MH needs to have regular, uninterrupted communication with his non-custodial parent. The distance between the household and the resulting extended periods of time without visitation make this even more important in this case.

7. MH has been fully integrated into the petitioner's household. The evidence establishes he has addressed significant behavioral issues arising from either his original placement or the removal of him from that placement. It appears from the testimony that he is happy, secure, and bonded to the members of the petitioner's household, including his half-brother.

8. The integration of MH into the petitioner's home was an involuntary act on the part of the respondent and resulted from the entry of the Temporary Order of December 30, 2011.

9. The result of the Temporary Order is that MH has now lived in the petitioner's home for the last twenty (20) months or the last 1/3

of his life. The evidence establishes that this is the longest period of sustained physical placement in MH's life.

10. The August 2012 visitation episode was significantly traumatic for MH. The allegations raised by the respondent were fully investigated by the police and Child Protective Services personnel and found to be factually un-sustainable.

11. The child's present environment (placement with the respondent pursuant to the May 21, 2010 Parenting Plan) is detrimental to the child's mental and emotional health and the harm to the child, if any, as a result of the change is outweighed by the benefits to the child. RCW 26.09.260(2)(c).

12. There has been a substantial change in the circumstances of both parents and child since the entry of the prior plan and it is in the child's best interest to modify that plan. The new parenting adopted by the court is attached as Exhibit "A".

CP 208-210.

These findings also support the trial court's conclusion that continued placement with Mr Heslip under the original custody decree was "detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child."

In this case appellant has cited to numerous factual claims by Mr. Heslip and his witnesses that he claims contradict both sets of written findings in this case. The fatal flaw with this argument is that, as was mentioned in Argument I of this brief, appellant did not assign error to these findings. As a result they are now verities on appeal and Appellant should

not be heard to contest them. Since they fully support the trial court's decision to place custody with Ms Vines, the trial court did not err in its application of RCW 26.09.260 as claimed by appellant.

III. THE TRIAL COURT DID NOT ERR IN ITS APPLICATION OF RCW 26.09.520.

In the third assignment of error and the third argument in the body of his brief Appellant claimed that the trial court erred in "its application of the facts of this case to the underlying Parenting Plan Modification Statute, RCW 26.09.520." *See* Brief of Appellant, pages 2, 36. As the following explains, this assignment of error is not well-taken.

The initial paragraph of the Washington modification statute found in RCW 26.09.520 states as follows:

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

RCW 26.09.520 (in part).

The purpose of the relocation statute is to create a rebuttable presumption that the relocation of the child with the custodial parent will be allowed, thereby placing the burden of overcoming that presumption on the

non-custodial parent, who can then prevail only by demonstrating that the detrimental effect of the relocation upon the child outweighs the benefit of the change to the child and the relocating custodial parent. *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004). By its very language, it only applies when the custodial parent seeks permission to relocate to a new state and the non-custodial parent seeks to maintain the original state as the *locus* for the custody of the child.

As the foregoing explains, the conditions precedent to the application of that statute are (1) that a custodial parent seeks to move a child out of the state of original jurisdiction, and (2) the non-custodial parent who lives in the state of original jurisdiction objects to that move. Thus, under the facts of the case at bar, RCW 26.09.520 does not apply for two reasons. First, as of the date of the temporary orders the trial court had transferred custody to Ms Vines. Thus, as of that date Mr. Heslip was no longer the custodial parent seeking to move the child out of the state of original jurisdiction. Second, as of the date of the of the temporary orders, Mr. Heslip was not a non-custodial parent living in the state of original jurisdiction objecting to moving the child out of the state of original jurisdiction. For these two reasons RCW 26.09.520 did not apply in this case. As a result the trial court did not err when it found that RCW 26.09.520 had no application to the case.

IV. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO ALLOW APPELLANT TO RELITIGATE FACTUAL ISSUES ALREADY DETERMINED BY THE COURT AT A PRIOR FACT FINDING HEARING AND LATER REDUCED TO WRITING.

In the case at bar Appellant argued in his first assignment of error and his fourth argument in the body of his brief that the trial court erred “when it ruled that it would apply only those facts and circumstances that occurred following the entry of the order of December 30, 2011, and not those that may have occurred following entry of the May 21, 2010 Parenting Plan.” See Brief of Appellant, pages 1 and 40. Appellant’s argument fails for two reasons. First, appellant failed to preserve this claim of error for appeal when he failed to make an offer of proof as to what evidence he would have presented and when he failed to argue why it would have been admissible. Second, the trial court did not fail to consider the facts as they existed prior to the entry of the temporary orders. The following presents these arguments.

(1) Appellant Failed to Preserve this Claim of Error for Appeal.

In order to preserve an argument for appeal that a trial court erred in excluding evidence, a party must make a contemporaneous offer of proof setting out the substance of that excluded evidence and its relevance in the proceeding before the court. ER 103(a); *Mason v. Bon Marche Corp.*, 64 Wn.2d 177, 179, 390 P.2d 997 (1964). That offer of proof informs the court of the specific nature of the evidence and the legal theory under which it

should be admitted thereby creating an adequate record for review. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 26, 864 P.2d 921 (1993). The failure to present an adequate offer of proof precludes review of that argument. *Seattle-First Nat. Bank v. West Coast Rubber, Inc.*, 41 Wn.App. 604, 705 P.2d 800 (1985).

Evidence Rule 103(a) states the following on this issue:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

ER 103.

In the case at bar appellant has assigned error to the trial court's refusal to allow Appellant to relitigate facts already determined by the trial court had a preceding fact finding hearing. Although Appellant did object to the trial court's ruling on this point, Appellant did not make a contemporaneous offer of proof as to what that evidence would have been or as to why that evidence would have been relevant and admissible. As is set out in ER 103(a)(2) and the cases cited above this failure to present a

contemporaneous offer of proof precludes this argument on appeal.

In this case Appellant presented over two full pages of what he now claims his excluded evidence would have been. *See* Brief of Appellant, pages 41-43. The problem with this argument is that these factual claims are not followed with any citation to the trial record. The reason is that no such testimony was presented at trial and no such testimony exists in the record on appeal. An appellate court will not consider an assignment of error unsupported by citation to the record. RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992). As a result this court should not consider these claims

(2) The Trial Court Did Not Fail to Consider the Facts as They Existed Prior to the Entry of the Temporary Orders.

In this case appellant argued that the trial court erred when it refused to consider the facts that existed prior to the entry of the temporary order and instead only considered the facts that occurred after entry of that order. Appellant's argument was as follows:

In a modification proceeding, the court is required to allow its inquiry to any and all circumstance that occurred following the entry of the parenting plan being modified, unless there were other circumstances that were unknown to the court at the entry of that plan.

The trial court, in limiting its inquiry to the circumstances following the entry of the temporary order of December 31, 2011, committed an error of law.

Brief of Appellant, page 41.

The problem with this argument is that this is not what the trial court did. Rather, as was set out in the subsequent findings of fact, what the trial court did was to preclude appellant from relitigating factual issues already determined at the prior evidentiary hearing. As was set out in the trial court's first finding, it fully considered the facts that existed prior to the entry of the temporary orders. The court found as follows on this issue.

1. The findings included in Judge Evans' Order of December 30, 2011 after a three day evidentiary hearing in which both parties were represented by counsel are verities as to the factual circumstances of this matter as of that date. This Court in making its ruling did not engage in reexamination of those findings.

CP 208.

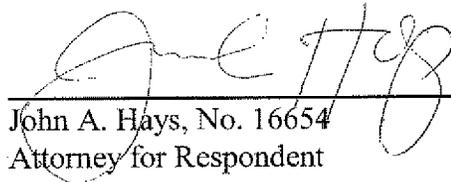
As the court clarified, it fully considered the facts prior to the entry of the temporary orders. What it did was preclude appellant from relitigating those facts as already determined by the court. Thus, appellant's argument fails.

CONCLUSION

This court should affirm the decision below because the trial court did not err when it gave primary custody of the parties' minor child to Respondent Ms Vines.

DATED this 24th day of November, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

RCW 26.09.260(1)&(2) Modification of Parenting Plan or Custody Decree

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, 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. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

RCW 26.09.540
Basis for Determination

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

(1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;

(2) Prior agreements of the parties;

(3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;

(4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;

(5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;

(6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;

(7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;

(8) The availability of alternative arrangements to foster and continue

the child's relationship with and access to the other parent;

(9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;

(10) The financial impact and logistics of the relocation or its prevention; and

(11) For a temporary order, the amount of time before a final decision can be made at trial.

ER 103 RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer in question and answer form.

(c) **Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Errors Raised for the First Time on Review.** [Reserved – See RAP 2.5(a).]

COURT OF APPEALS OF WASHINGTON, DIVISION II

In Re the Marriage of,

Jodi Heslip, nka Jodi Vines,

Respondent,

vs.

Frederick Heslip,

Appellant.

NO. 45612-5-II

**AFFIRMATION
OF SERVICE**

The undersigned states the following under penalty of perjury under the laws of Washington State. On this date, I personally e-filed and/or placed in the United States Mail the Brief of Respondent with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Nicholas R. Franz
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Dated this 24th day of November, 2014, at Longview, WA.



Diane C. Hays

HAYS LAW OFFICE

November 24, 2014 - 1:43 PM

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