

No. 46078-5- II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Garrett Lail, Respondent,
and
Kimberly Briggs, Appellant.

BRIEF OF APPELLANT

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I. Assignments of Error

Assignments of Error

1. The trial court erred in entering Finding 2.3.1
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15. The trial court erred in entering Order granting the petition to modify the parenting plan.

Issues pertaining to the Assignments of Error

1. Whether the trial court erred in denying relocation where substantial evidence in the record does not support a finding that the detrimental effect of relocation outweighs the benefit of the change to the child and the relocating party, where some of the findings were based upon the trial court's own subjective opinions rather than credible evidence in the record.

2. Whether the trial court erred in modifying the Parenting Plan where substantial evidence in the record does not support a finding that a substantial change has occurred in the child's environment.

II. Statement of the Case

On May 15, 2006 an agreed Parenting Plan was entered in the Grays Harbor Superior Court designating myself as primary residential parent of ML. (SCP 15). I resided with ML in Olympia for one year while I pursued my Bachelor's Degree from The Evergreen State College (12/10/13 VRP 19) until I received notice from the Grays Harbor Housing Authority I was

eligible for Section 8 housing assistance (12/10/13 VRP 54). I relocated to Elma with ML in fulfillment of the Section 8 requirement of residing in Grays Harbor for at least one year (12/10/13 VRP 54), where we lived for approximately 2 years while finishing my degree and working at the on-campus childcare center ML attended at Evergreen (12/10/15 VRP 131; SCP 96). In April of 2009, Mr. Lail abruptly discontinued the \$300/month payments we had agreed upon him giving me in lieu of me seeking full time employment after graduation and enrolling ML in full time childcare, in order to allow ML to participate in Headstart(12/10/13 VRP 17, SCP 96). This resulted in me having to immediately seek employment to maintain the same standard of living for ML and myself (SCP 24, 26). After applying for several positions in the Grays Harbor area within my field of study and attending several interviews, including a Social Worker I position at the Aberdeen DCFS office, I was told I needed to get experience working specifically with adolescents with emotional and behavioral issues in order for me to qualify for a position with them in the future (SCP 34). Shortly after this, I met a man who worked at a group home for adolescents with severe emotional and behavioral issues in Spokane, WA (SCP 34). After speaking with the hiring manager at Lighthouse, Inc. and traveling to Spokane for an interview, I was offered a position which required me to attend a mandatory training that started on

April 27th (SCP 34). This necessitated me filing my first Notice of Intended Relocation on April 23, 2009 (SCP 24). The Parenting Plan I proposed retained Mr. Lail's alternating weekend overnight residential time with ML but removed the 7-hour Sunday visitations in favor of a one month visitation for Mr. Lail during the summer and included restrictions on joint decision making due to abusive use of conflict (SCP 25). Mr. Lail objected and obtained an Ex Parte Restraining Order requiring me to leave ML in his care while in the event I had to leave Grays Harbor County for any reason including the training (SCP 22) After the matter was heard on May 22nd, the court entered an order on June 8, 2009 denying the my proposed relocation and Mr. Lail's Modification Motion (SCP 46). I opted to remain in Grays Harbor County (SCP 53; 12/10/13 VRP 17, 35, 48). Due to the fact I had exhausted all my options for getting a position within my field of study in the local area and was in immediate need of full time employment (SCP 24, 26), I accepted a position as a Verizon Wireless customer care representative at a call center in the Olympia (12/10/13 VRP 48, SCP 53). In lieu of filing a motion with the court to modify the then-current support order to incorporate child care (12/10/13 VRP 35) I agreed to register ML in the Aberdeen School District and to transport him every morning to Mr. Lail's home in Cosmopolis and allow his neighbor to provide the childcare in exchange for Mr. Lail agreeing to

pay the \$150 monthly childcare expense (12/10/13 VRP 85, 95); To facilitate this arrangement, ML and I moved to Montesano to be closer to Mr. Lail's residence (12/10/13 VRP 36). This arrangement became financially unsustainable for me (SCP 53). At the end of December 2010, ML and I moved to my father's residence in Hoquiam (12/10/13 VRP 85) to be closer to Mr. Lail's residence, in order to start saving money in preparation of our anticipated move to Olympia at the end of ML's school year (SCP 53). I began communicating with Mr. Lail regarding my need to relocate to the Olympia area (12/10/13 VRP 18, 19, 82) which he did not initially have an issue with (SCP 76). My work schedule changed at this time as well (12/10/13 VRP 34, 84). In order to help alleviate some of my commuting costs and allow me to spend more quality time with ML on my days off, Garrett and I agreed to swap his weekly overnight Saturday residential time with ML to Monday and Tuesday overnights (12/10/13 VRP 34). In March of 2011, I asked for Mr. Lail's cooperation in agreeing to help pay for ML's childcare when I moved to Olympia in lieu of going to court again, which he was amenable to until I gave him an estimate of his proportional share (12/10/13 VRP 19, 20; SCP 76). This is when Mr. Lail, via text message (12/10/13 VRP 19; SCP 76) and voicemail (12/10/13 VRP 14, 17, 19; SCP 96), told me to take him to court because he could not afford to help with childcare and intended on wasting the

money on court so he did not have to “give it to [my] dumbass”. Despite my repeated attempts to communicate and negotiate with Mr. Lail in order to prevent another contested relocation case and the unnecessary expense of litigation (12/10/13 VRP 82, 95; SCP 76), I found it necessary to file a Notice of Intended Relocation On June 2nd 2011 (SCP 53). With this was included a Temporary Order Permitting Relocation, Modified Child support Schedule and a Proposed Parenting Plan which replaced Mr. Lail’s 7-hour Sunday visitation provision with a Saturday overnight visitation with ML (SCP 55). Mr. Lail filed his objection on June 10th. At a hearing on June 13th, my Motion for Temporary Order Permitting Relocation of Children was denied by Honorable Judge Edwards (SCP 67), a Temporary Order restraining me from “removing the minor child’s residence herein from Grays Harbor County” (SCP 69) and an expedited hearing regarding our motions was set (SCP 68). At the June 22nd evidentiary hearing, Honorable Judge Godfrey verbally denied relocation of ML and changed custody of ML to Mr. Lail “temporarily” in order to allow me to relocate to pursue my educational goals and get established in the Olympia area (12/10/13 VRP 25; SCP 4, 5). On August 8th, due to the inability of Mr. Lail and I in negotiating a “liberal” parenting plan per Judge Godfrey’s previous instruction, he vacated his prior “temporary” provision of the custody ruling and set the matter again for a final hearing

on September 15, 2011 (SCP 93) after I had relocated to Olympia on June 16th per the courts order (12/13/10 VRP 55) On August 26, 2011 I filed a Motion for Reconsideration regarding relocation and Declaration in support of it (SCP 96). On the date of the hearing regarding modification, after opening arguments and a recess initiated by Judge Godfrey, my attorney requested to withdraw from my case which Judge Godfrey granted (SCP 103, 106). A handwritten order “re temporary residential schedule” was entered denying my relocation request, retaining the temporary residential schedule designating Mr. Lail as the primary residential parent and stating “adequate cause is found” (SCP 100). In addition, the final Order on Objection to Relocation was entered (SCP 101). On October 13, 2011, appearing pro se, I filed my first Notice of Appeal to this court. The Mandate in appellate cause number 42698-6-II was filed with the Grays Harbor Superior Court on November 2, 2013. This Court reversed Judge Godfrey’s previous decisions and remanded it for a new hearing in front of a different judge (CP 13,14).On September 24, 2013, over a month prior to the Mandate being issued to the trial court, Mr. Lail’s attorney, Mr. Micheau filed an affidavit of prejudice against Judge McCauley (SCP 140). On October 4th, I filed an affidavit of prejudice against Judge Edwards (SCP 141). On October, 14th, Mr. Micheau filed an objection stating my affidavit was “untimely” as Judge

Edwards had made a prior discretionary ruling in this case on June 13, 2011 denying my Temporary Order Allowing Relocation. In addition, Mr. Micheau also requested "an award of terms of at least \$500.00 for having to bring this objection." (SCP 142). On October 30, 2013, the same day I was supposed to have midweek visitation with ML, Mr. Micheau filed a Motion/Declaration for Ex Parte Restraining Order and for Order to Show Cause which restrained me from "disturbing the peace of the other party or the child" and "from going onto the grounds of or entering the home or work place of the other party." which was granted by Judge Edwards (SCP 143). The Mandate and Opinion from this court was received at the trial court on November 2nd (CP 1-15). On November 8th, I responded to Mr. Lail's restraining order with a Motion to Deny Restraining Order (CP 16-57). On November 12th Mr. Micheau and I were present for the show cause hearing in front of Judge McCauley (VRP 11/12/13). Judge McCauley declined to make any discretionary rulings due to the affidavit filed by Mr. Lail but acknowledged both affidavits on file and the fact Judge Godfrey was removed from this case. He continued the matter and directed us to talk to the court administrator to have it set before a visiting judge (VRP 11/12/13). I filed another affidavit of prejudice against Judge Edwards on November 13th to ensure I had a valid affidavit on file (CP 58) and Mr. Lail filed another affidavit against Judge McCauley on November

15th along with a Motion to Set aside Untimely Affidavit of Prejudice and for Terms in which Mr. Micheau again requested “attorney fees in the amount of at least \$750.00 for having to bring this motion.” (SCP 149, 150) While waiting to receive a Notice of Hearing, I received an Order Disallowing Affidavit of Prejudice signed by Judge Edwards on November 20th stating my affidavit was “untimely, since Judge Edwards had previously made a discretionary ruling, [my] affidavit against Judge Edwards was disallowed (CP 59). With the Order I also received a Notice of Trial Date Setting notifying me “The above-entitled cause has been set for trial on Tuesday, December 10, 2013 before Judge David Edwards” (SCP 152) On November, 27th I filed an Objection to Order Disallowing Affidavit of Prejudice (CP 60-67). On December 2nd Mr. Micheau and I were present for a Pretrial Management Hearing in which I reiterated to the court my need to relocate for employment purposes hadn’t changed (12/2/13 VRP 3) but also that I did not plan on pursuing relocation if court denied it (12/2/13 VRP 4). I also tried to bring to the court’s attention the fact that proper adequate cause had not been established up to that point and holding a hearing on modification the following week would be improper (12/2/13 VRP 5) which the court apparently disregarded by asking Mr. Micheau, “Is there a motion for modification-a petition to modify that is going to be heard next week?” to which his response was,

“Yes.” The court then concluded “All right. There you go. Okay. We’ll see everybody back next Tuesday.” (12/2/13 VRP 5) At a motion hearing I scheduled on December 9th to address the Restraining Order, Judge Edwards declined to reconsider his decision disallowing my affidavit of prejudice (12/9/13 VRP 2) and responded my concerns regarding the Ex Parte temporary restraining order by asking Mr. Micheau, “Matter is set for trial tomorrow?” in which Mr. Micheau responded “Yes.” Judge Edwards then ruled, “The motion to set aside the restraining order is denied. We’ll see you tomorrow at 8 o’clock” (VRP 12/9/13 5). On December 10, 2013, an evidentiary hearing was held. In response to my continued concern for the propriety of holding a hearing on modification that day due to lack of adequate cause (12/10/13 VRP 6,8, 9, 10 11, 13), Judge Edwards determined there had already been an adequate cause finding made by Judge Godfrey in 2011 (12/10/13 VRP 8, 9, 11) which I tried to inform him had no present effect due to the appellate decision. After consulting with Mr. Micheau who replied, “I think technically she is probably right on that point.” (12/10/13 VRP 11); the court then sua sponte decided to start the hearing with an adequate cause determination, despite my objections. (12/10/13 VRP 11). After returning from a recess to review documents contained in the clerk’s file (12/10/13 VRP 13), the court stated, “During the recess, I reviewed the petition to modify, the

declaration supporting it, other documents in the file opposing the petition” and made a finding that “The declarations in this case clearly establish adequate cause...So I’m going to make a finding of adequate cause. And we will proceed today on the petition to relocate and the petition to modify.” (12/10/13 VRP 14). After hearing testimony of myself, Mr. Lail and my witness; the court orally addressed all 11 factors required regarding relocation (12/10/13 VRP 146-158) Judge Edwards denied relocation concluding “it is clear that the requested relocation would have detrimental effects that would outweigh any what I perceive to be minor, almost immeasurable benefit, to Ms. Briggs”. On the petition to modify submitted by Mr. Lail, the court opted to take that matter under advisement stating, “I want to read some of the case law. I do believe that the evidence presented regarding the amount of residential time that Mason spent with Mr. Lail prior to June of 2011-I think that was that date the Court of Appeals found to be significant-was significantly greater than that provided for in the parenting plan, and it was by agreement.” and “I am going to tell you right now that I believe the evidence supports a finding that there was integration by agreement.” (12/10/13 VRP 158, 159) On January 6th, the court issued a written decision via mail granting Mr. Lail’s Motion to Modify the Parenting Plan changing primary residential placement of ML to Mr. Lail (CP 68-70). Despite my specific

objections to the findings in that order I filed with the court on January 17th (CP 71-82), the court signed and entered all of Mr. Lail's proposed orders at the hearing on January 21, 2014 (CP 83-87; SCP 166). I filed a Notice of Appeal on these orders on February 20, 2011.

III. Argument

A. The trial court erred in denying relocation where substantial evidence in the record does not support a finding that the effect of relocation outweighs the benefit of the change to the child and the relocating party, where some of the findings were based upon the trial court's own subjective opinions rather than credible evidence in the record.

Standard of Review

A trial court's decision regarding the relocation of children is reviewed for abuse of discretion. *In re Marriage of Horner* 151 Wash. 2d 893, 93P.3d. 124 (2004); A trial court manifestly abuses its discretion when a review of the record shows that its decision is based on untenable grounds or untenable reasons. *In re Marriage of Littlefield* 133 Wash. 2d 46, 47, 940 P.2d 1362 (1997); A court's decision is based on untenable grounds if the factual findings are unsupported by the record. *Littlefield*, 133 Wash. 2d. 39, 47, 941 P.2d 1362 (1997); A trial court's factual findings are reviewed

for substantial evidence. *In re Marriage of McDole*, 122 Wash. 2d 604, 610 859 P.2d 1239 (1993).

1. Factor 2.3.1 Findings: “The child has a good solid relationship with each parent. The child has a relationship with th paternal grandmother, who resides in Grays Harbor County. The child also has a relationship with the maternal grandmother and grandfather, who reside separately in Grays Harbor County. The father has taken steps to ensure that the child maintains a relationship with the maternal grandparents. The child has a close relationship with the a neighbor of the father who provides childcare services for the father, as well as the children of that neighbor. The child also has a relationship with friends from school in Grays Harbor County. And friends in the neighborhood where the father resides. The father has a strong support network in Grays Harbor County, including his neighbors, and his employer who is also a neighbor. The child has a close relationship within the father’s support network. The mother has little or no support network in the immediate vicinity of where she resides in the Lacey area. The child has no identified friends residing near the mother’s residence in Lacey, Washington.”

The proposed parenting plan I filed with my Notice of Intended

Relocation allowed Mr. Lail overnight visitation with ML every weekend (SCP 55). Under this plan ML would have been able to maintain the same frequency of weekly residential time he had been previously accustomed to before ML’s change in residential placement in 2011 (12/10/13 VRP 117).

ML’s paternal grandmother does reside in Grays Harbor County, more specifically Porter, WA (12/10/13 VRP 92) which is 32 minutes estimated drive time from both Mr. Lail’s residence in the Cosmopolis area and my residence in the Olympia area. Mr. Lail describes her extent of

involvement with ML as “once in a while” (12/10/13 VRP 92). The record to shows I have historically facilitated frequent and regular contact between ML and his paternal grandmother when I utilized her for childcare when we both resided in Elma (SCP 17).

The only statement referencing ML’s relationship with my mom was Mr. Lail’s testimony, “I let ML see her once a week since he can’t see...used to be like on weekends, he’d go over there on Saturdays. So I let him go over on Tuesday nights and he spends the night with his grandma and they have dinner together.” (12/10/13 VRP 91) Granting relocation would not have prevented any change in ML’s level of involvement with my mom as Mr. Lail would have still been able to allow ML to visit her on Saturdays prior to ML’s residential placement change in 2011.

ML’s relationship to my father includes Mr. Lail’s statement, “I always tell his grandpa if-any time he ever wants to see him, just get ahold of me. So he went clam digging with his grandpa probably 3 weeks ago.” (12/10/13 VRP 91, 92), in addition to my testimony regarding the limited contact we had with him while living in his home prior to filing my Notice of Relocation (12/10/13 VRP 53, 54) and the limited nature of support he is able to provide due to his own obligations (VRP 21, 48).

Mr. Lail acknowledged I had previously voiced concerns about inappropriate television and media ML had been exposed to while she provided unlicensed child care services to ML in her home (12/10/13 VRP 124; SCP 96); which have been shown to be detrimental to ML's emotional development (12/10/13 VRP 77, 121, 122). In contrast, ML would have been enrolled in the licensed YMCA childcare program in Olympia he had attended full-time during summer 2011 while the relocation/modification case was pending (SCP 96). However, due to my situation of being unemployed at the time of the hearing, I was actually available to personally provide full time care to ML which Mr. Lail has historically agreed was in ML's best interest (12/10/13 VRP 17, 124; SCP 83).

Although ML naturally formed a friendship with Annabelle, Cameron and Bryce (12/10/ 13 VRP 46, 92, 93) while being cared for by their mother in their home, ML would have been able to maintain regular contact with them during his weekly visit to Mr. Lail's residence as they reside next door to him. The presence of other friendships ML has in the Grays Harbor Area through Mr. Lail consists of Austin who makes fun of him (12/10/13 VRP 46, 92, 93, 119); Brayden and Josh, who aren't allowed over to Mr. Lail's for sleepovers anymore but still visit occasionally

(12/10/13 VRP 92) and Peja, whom is unavailable for sleepovers (12/10/13 VRP 93).

Throughout the period of time I had residential placement of ML and even now that I don't, I have cultivated and facilitated the continuation of close friendships ML has formed throughout the various areas ML and I have lived (SCP 96) during his early childhood, including current friendships he has in the Aberdeen area (12/10/13 VRP 46, 47, 54; SCP 96).

ML's relationship to Mr. Lail's support network, consisting of his boss and boss's wife (12/10/13 VRP 104, 105, 110), would not be significantly impacted due to relocation to Olympia. Mr. Lail's testimony only indicates an occasional level of involvement with ML which could easily be maintained during his weekly visits to Mr. Lail's house as they live next door to Mr. Lail (12/10/13 VRP 105).

The record clearly shows the presence of a strong support system available to me in the Thurston County area (12/10/13 VRP 47) comprised of close friends I had met through my job (12/10/13 VRP 22, 134; SCP 53), close friends from Grays Harbor that had moved up near me (12/10/13 VRP 23, SCP 96) and close family members (SCP 96; 12/10/13 VRP 23). In addition, my best friend Linda has been a major component of my support network before and after my relocation to Thurston County and has even

provided transportation to facilitate the visitation exchanges of ML (12/10/13 VRP 74, 134;S CP 16-57).

Furthermore, the record indicates a limited support network for me in the Grays Harbor area (12/10/13 VRP 21, 22, 48).

The record is full of evidence regarding friends ML has made in the Olympia area including several his age due to his participation in the Y program (SCP 96) during the summer I had first moved up here; at my apartment complex (12/10/13 VRP 24, 30, 41, 43, 44,45,60, 64, 96, 101); a close friend he made during his attendance at the Evergreen State College Campus Daycare in Olympia area he still maintained a relationship with (SCP 96; VRP 22); my friend Lori's son Jake, whom was one of ML's best friends when we lived in Elma, had recently moved to Lacey very close to where we live (12/10/13 VRP 23, SCP 96). In addition, there are family members, including cousins of ML's that were close to his age, in the area we had established relationships with (SCP 96; 12/10/13VRP 23) and, as stated previously, my friend Linda, who has a four year old daughter ML regularly plays with, has been a stable source of support for both Mason and I as she had been helping provide transportation for me to get ML for his weekly visits (CP 16-57; VRP 134).

There is clearly no evidence indicating relocation would have caused any detrimental effect on ML's relationships to the significant people in his life.

2. Factor 2.3.2 Findings: "Does not apply. There is no current agreement between the parties pertaining to relocation of the mother or child outside of Grays Harbor County."

Mr. Lail was aware for my need to seek employment outside of Grays Harbor and historically had been agreeable to ML and I residing distances up to and including Elma and Olympia (12/10/13 VRP 19; SCP 17, 46, 76). Furthermore, I had moved up to Olympia and resided there for an entire year after the parenting plan was agreed to with Garrett's full knowledge and apparent consent as demonstrated by the fact helped me move (SCP 96; 12/10/13 VRP 22, 120).

3. Factor 2.3.3 Findings: "Since late in 2010 the child has resided a majority of time with the father, and relocation of the mother and child would cause a disruption in the relationship that has been strengthened over the course of the last three years., however, since a large portion of that time that the child has resided primarily with the father has been due, in part, to a prior court order that has been vacated, the court does not rely up on this disruption factor as the primary basis to deny relocation."

For approximately 7 years prior to the 2011 order changing residential placement of ML (12/10/13 VRP 128), I had been the primary residential parent consistently having ML at least 5 days per week (12/10/13 VRP 117). I maintained a very active role in ML's education throughout his

childhood; first, when I worked at the daycare he attended for 3 years on-campus while I was obtaining my BA Degree from Evergreen State College in Olympia (12/10/13 VRP 131) and more recently when I have spent time volunteering in his classroom at Stevens Elementary which had continued all the way up to his 4th grade year (12/10/13 VRP 39, 47, 65,67, 71, 131; CP 16-57) when his teacher did not show an interest in having parent volunteer (12/10/13 VRP 71). Furthermore, I was actively involved in ML's care even after ML's residential placement change to Mr. Lail in 2011, as I was the parent who facilitated most of ML's medical care (12/10/13 VRP 129; CP 16-57).

Due to the unusual circumstances of this case which have resulted in Mr. Lail being the parent with whom ML has actually "resided a majority of the time" for approximately 2 ½ years prior to the hearing, it is apparent some clarification is required in order to properly determine which parent is entitled to the benefit of the statutory presumption in this case as it appears the court improperly applied the statutory presumption under this particular finding. This is easily done by deferring to case law that is factually similar to the current case being reviewed. This case being the Division II Court of Appeals Fahey case in which the lower court's decision granting relocation to the mother of two daughters to Omak, WA from the area of Edmonds, WA for employment purposes was affirmed;

despite sufficient evidence in the record showing the daughters had been spending more than 50% of the actual residential time with their father for a period of approximately 4 years due prior to the hearing. *In re Marriage of Fahey* 164 Was.App.42 262 P.3d 128 (2011)

Similar to the Fahey case, the parenting plan in this case includes joint decision-making authority for major parenting decisions, no restrictions placed on either parent for their time with the child, and designates the mother as the custodial parent with whom the child is “scheduled to reside the majority of the time with”. Although the Fahey parenting plan included a “miscellaneous provision” which stated the mother “consents to allow [Lawrence] to have access to [the] children up to 50% of the time to the best it can be worked out.” Although the parenting plan in my case does not have that specific provision, I strongly feel I was authorized to enlist the help of Mr. Lail in the care of our child when I felt it was necessary under RCW 26.09.002 which explicitly states, “Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children.”, especially given that our parenting plan included no limitations on joint decision making. In addition, the Fahey parenting plan also had a specific provision giving each parent the right to provide personal care for the children when the other parent was unavailable during his or her residential time.

Although our parenting plan does not include such provision, Mr. Lail indicates in one of his declarations to the court, he feels he should be the primary childcare resource for ML when he is available (SCP 83). Other factual similarities to the Fahey case are apparent in the calculation of residential time Mr. Lail uses in asserting he was the parent whom ML “resided with a majority of the time” for the six months prior to the 2011 hearing. Just as in the Fahey case, Mr. Lail’s calculations included time I was personally unavailable to care for ML due to employment purposes, more specifically, the one hour period ML was in his care due to the lapse in time Mr. Lail’s neighbor was unavailable to provide childcare for ML on Monday and Friday mornings while I commuted to Olympia for work and Wednesday evenings while I commuted home from work; and, like Mr. Fahey, Mr. Lail included time ML was not actually in his care those days, time ML was at school and in childcare after I dropped him off Monday and Friday mornings and before I picked him up on Wednesday evenings, although I was scheduled to have ML those days per the parenting plan and as such was responsible for his care. Further similarity is evident in that a portion of time ML resided with Mr. Lail was due to a “temporary” order giving him primary residential status despite the actual parenting plan on file, although it was only for six months in the Fahey case as opposed to over 2 years in this case.

In summary, despite a couple “differences”, the Fahey case is factually identical and can be appropriately applied to the current case. In doing this, it is clear Mr. Lail’s status as “primary residential parent” of ML prior to the hearing should not have been used as a factor weighing against relocation.

Further clarification regarding which parent is entitled to the benefit of the statutory presumption based on “primary residential parenting status” when that determination is unclear is provided in the RFR case which held “the parenting plan in place at the time of a proposed relocation is used to determine primary residential parenting status.” *In re Parentage of RFR* 122 Wash.App.324, 93 P.3d 951 (2004) Due to the fact that the “temporary” order entered in 2011, designating Mr. Lail as primary residential parent of ML, was later vacated by this court “placing the parties in the same position they were in when Briggs filed her relocation notice”; the original parenting plan designating me as “parent with whom the child resides a majority of the time was in effect at the time the December 10, 2013 relocation hearing took place.

When applying the rationale from these two cases under this finding, it is apparent the statutory presumption weighs in favor of allowing relocation and any contrary application of the statutory presumption is error.

4. Factor 2.3.4 Findings: “Does not apply.”

Despite the negative treatment Mr. Lail exhibits towards me (12/10/13 VRP 19, 90, 70, 127, 128, 130, 133) which has clearly had a detrimental impact on ML (12/10/13 VRP 69, 70, 98, 99), I have always made an attempt to facilitate “joint decision making” between Mr. Lail and I whenever possible and have been accommodating and cooperative in allowing liberal visitation for Mr. Lail, (12/10/13 VRP 119, 128, 130). Despite my genuine efforts to promote ML’s best interest by communicating cooperating with Mr. Lail (12/10/13 VRP 17, 18, 19, 20, 70, 128, 130), he has succeeded in exploiting these efforts in both 2011 and 2013 with the help of the lower courts in their respective decisions to summarily deny relocation and change primary residential placement of ML to Mr. Lail on the erroneous basis of “integration with consent” (Please refer to Section III(B)(1)). Despite sufficient evidence demonstrating the negative impact these decisions have had on ML, as evidenced by the significant increase in behavioral and emotional issues since the change in his primary residential placement in 2011 (12/10/13 VRP 69, 70, 98, 99), Mr. Lail, through is various pleadings and declarations continues to object to a relocation of ML with me to the Thurston County area. Aside from his unsubstantiated prima facie assertions, he has yet to provide sufficient evidence thus far in this

litigation, demonstrating any actual detriment to ML if relocation were to be granted. Mr. Lail's disregard for ensuring ML's best interest in favor of promoting his stated personal objective of "get[ting] the money and tak[ing] your ass to court for fun just to waste money just so I don't have to give it to your dumbass". (12/10/13 VRP 20; SCP 96) is contrary to promoting the policy outlined in RCW 26.09.002. As such, I feel the court had enough evidence, at the very least, to make an inquiry into this factor if not enter a finding. Especially given that I had previously requested for limitations to be incorporated into our parenting plan in 2009 due to abusive use of conflict by Mr. Lail (SCP 25).

5. Factor 2.3.5 Findings: "The court finds both parties have acted in good faith in requesting and opposing relocation of the child. The mother had legitimate reason, at the time of filing of her relocation request, for pursuing a relocation. The father had legitimate reason for opposing the relocation request. Both parties therefore acted in good faith."

From the time I filed my Notice of Intent to Relocate, I made repeated attempts to make the court aware of the true motivations underlying Mr. Lail's objections to the relocation (12/10/13 VRP 14, 20; SCP 48, 96). In an actual voicemail from Mr. Lail he stated, "So if you want to keep pissing me off I will see you in court cause I will get the money and take your ass to court for fun just to waste money just so I don't have to give it to your dumbass." (12/10/13 VRP 20; SCP 96) is evidence which clearly proves Mr. Lail's bad faith motivations in objecting to relocation

(12/10/13 VRP 14). Furthermore, Mr. Lail's concerns primarily focused on his apparent perception relocation would have resulted in a financial detriment to himself as evidenced by his inability and/or unwillingness to pay additional childcare costs for ML to be enrolled in a licensed childcare program in Olympia (12/10/13 VRP 19, 20, 113; SCP 76) as opposed to the \$150 he was paying his neighbor to provide unlicensed childcare in her home (12/10/13 VRP 113).

There is ample evidence demonstrating Mr. Lail's objections were not done in good faith.

6. Factor 2.3.6: "While it would not be accurate to characterize the child herein as having "special needs", it is fair to say it appears the child has some emotional vulnerability. The child, based on school records and other testimony of the parties, appears to be at an appropriate developmental stage, and performing acceptingly well in school. The possibility of relocation, however, has had possible negative impact on the child, which has been compounded by the mother discussing the relocation, and having "won" her appeal of the initial court decision denying relocation with the child. As the needs of the child are presently being met in Grays Harbor County, and it appears the relocation would at best have no positive impact, on balance the child's needs tip in favor in remaining in Grays Harbor County."

The only incidents of ML's "emotional vulnerabilities:" have occurred after ML's residential placement to Mr. Lail's home (12/10/13 VRP 67, 68, 75, 91, 97, 98, 121). Throughout the record there is evidence of the dysfunctional nature of the relationship between Mr. Lail and I (SCP 25, 96; 12/10/13 VRP 19, 20, 127, 128, 130) which has also had a negative

impact on ML's emotional well-being (12/10/13 VRP 69, 70, 98, 99). Mr. Lail even acknowledged the nightmares/visions ML was experiencing was not an issue when he is at my home (12/10/13 VRP 122) and that they are most likely the result of his exposure to TV and adult conversation at Mr. Lail's home (12/10/13 VRP 121). I made the court aware of my concerns regarding ML's exposure to video games and television back in 2011(SCP 87, 96)

The courts conclusion ML's educational and/or emotional development has or will be negatively impacted, based on my attempt to minimize the detrimental effects already being felt by ML as a direct result of this litigation (12/10/13 VRP 68) is not supported by the record. Both Mr. Lail and I testified ML had been seeing the school counselor for minor behavior issues in school prior to the 2011 relocation action (12/10/13 VRP 66, 67, 98, 99). Mr. Lail also testified, "There's not a particular day he does, you know have the outbreaks. So I can't say they're all-they stem from, you know, just his mom. I think most of his actions stem from, you know, he knows me and his mom don't get along, and I know it hurts him." (12/10/13 VRP 98).

Furthermore, after the change in residential placement in 2011, ML's negative behaviors substantially increased (12/10/13 VRP 65, 67, 75, 76,

77, 78, 91, 97, 98, 99, 100,) in addition to ML beginning exhibit emotional (VRP 67, 75, 77, 97) issues at both school and at Mr. Lail's home resulting in me seeking counseling outside of school for ML (12/10/13 VRP 67, 69).

The findings under this factor are clearly do not support a finding of detriment to ML regarding relocation. Further error is evident in the courts in its application of the statutory presumption under this finding when it stated "As the needs of the child are presently being met in Grays Harbor County, and it appears the relocation would at nest have no positive impact, on balance the child's needs tip in favor in remaining in Grays Harbor County."

7. Factor 2.3.7: "While it is undeniable that there are more and varied activities and event potentially available to the child in the larger metropolitan area on Thurston County, than in Grays Harbor County, the quality of life, resources, and opportunities available to the child in Grays Harbor County are natural resource related, and the father and child have taken advantage of those opportunities. In addition, the child attends Stevens Elementary School, which the court considers to be on of the better elementary schools in the area. Knowing that the school and many if its educators have won various awards in recent years. No information was presented regarding what school the child might attend if relocation were allowed or the quality of opportunities what would be offered at that school."

My testimony, Mr. Lail's testimony (12/10/13 VRP 109) and the court's own findings, clearly acknowledge a significantly higher availability of recreational opportunities in the Thurston County area. There is evidence

in the record that ML and I have regularly taken advantage of those opportunities, both prior to my relocation in 2011 and after (12/10/13 VRP 22, 28-31, 40-46). In contrast, Mr. Lail's testimony regarding participation in recreational activities in Grays Harbor County was limited to a couple recent occasions of clam digging (12/10/13 VRP 93); an annual visit to the Christmas tree farm to get a tree (12/10/13 VRP 108); going to a couple movies at the local movie theater (12/10/13 VRP 108); taking ML camping at his boss' property up north in Clearwater, which is not actually located in Grays Harbor County (12/10/13 VRP 93); an anniversary party at his neighbor's house and a 4th of July party at a friend's house (12/10/13 VRP 109). The Proposed Parenting Plan I submitted with my Notice of Intended Relocation allowed for ML to be in Grays Harbor with Mr. Lail at least one overnight visitation every weekend which would have enabled Mr. Lail to have more weekend time with ML he testified he needed in order to participate in the recreational activities available in Grays Harbor.

The courts consideration of the educational resources available to ML relies exclusively on its own clearly favorable subjective opinions and observations of the particular elementary school ML attends rather than credible evidence demonstrating the differences between the proposed and current districts. The reports from the Office of Superintendent of Public

Instruction (OSPI)'s website I unsuccessfully attempted to admit into evidence for the court's consideration due to Mr. Micheau's hearsay objection, would have clearly and objectively presented the relevant evidence needed under this finding. In sustaining the objection, the court informed me it determined the document to be hearsay but acknowledged there was a great deal of data in the reports that would need to be interpreted and that it's "not going to admit Exhibit 11 absent someone with the ability to explain what all that means."

The results of the various measurements of academic performance were represented by both percentages and corresponding color coded bar graphs of each districts student body considered to be "meeting standard" as a result of their scores on standardized tests scores, with the demographical data being represented by percentages only.

I am purporting to comprehensively understand the Rules of Evidence governing the admission or suppression of evidence during a hearing, but I did make an attempt to gain a basic understanding by reviewing the Washington State Evidence Rules after trial. ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." and a statement as "an oral or written assertion or nonverbal

conduct of a person, if it is intended by the person as an assertion” Under this definition, it does not appear these reports, which contain only statistical facts, could be construed as “hearsay” as there are no assertions made in the reports based on the objective evidence contained therein.

Instead, the OSPI documents I offered as an exhibit appears to be admissible as a self-authenticating document under ER 902(e) governing this specific evidence type which designates, “Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.” as self-authenticating documents in which “extrinsic evidence of authenticity as a condition precedent to admissibility is not required.”

Furthermore, I’m obviously not any sort of expert in the intricate procedures involved in court proceedings at trial court level, but it seems a little unnecessary to me that such a basic unit of statistical measure would require interpretation by an expert. If I am correct in my thinking, OSPI reports I attempted to admit should have been considered. If they had, the educational benefit to ML as a result of relocation to Thurston County would have been clear.

Under this finding, the court should have addressed the employment related opportunities available in both areas as it is very clear from my notice of relocation, one of the primary reasons for my need to relocate

was employment related (SCP 53) which was still a valid reason for requesting relocation despite the fact I was no longer employed in the Thurston County area (12/2/13 VRP 3, 12/10/13 VRP 25, 26, 27) as I had been unsuccessful in my previous genuine attempts to obtain employment in Grays Harbor (SCP 26, 34). The court minimized credible evidence that clearly indicates more job opportunity in the Thurston County area, and instead substituted its own subjective observations and opinions of the employment related resources and opportunities it feels should be available to me in the Grays Harbor (12/10/13 VRP 148).

The court's finding also ignores other significant opportunities and resources available that would have improved the quality of life for ML and I specific to the Thurston County area such as closer access to the UW campus located in Tacoma for me to pursue my Master's degree (12/10/13 VRP 59); in addition to the availability of more reliable transportation options for employment within Thurston County (12/10/13 VRP 60).

8. Factor 2.3.8: "Both the mother and father admit that they find themselves unable to effectively communicate with each other. In addition, the mother has already relocated to the Lacey, Washington area, which the father testified is approximately a one hour and 15 minute drive one way from the father's present residence. This effectively means that there is no practical way to share custody or make other arrangements for frequent changes of custody which would not interfere with the child's education and social opportunities at either parents' residence."

Despite the fact Mr. Lail and I have issues with communication (12/10/13 VRP 70, 89), I have always been cooperative in accommodating his special requests for visitation with ML even after ML was placed with him primarily (12/10/13 VRP 89). My willingness and ability to foster and continue ML's relationship by allowing access to his father is further demonstrated by the proposed parenting plan I submitted with this court action which allowed weekly overnight visitations between ML and Mr. Lail to maintain the current level of involvement they had with each other before the actions of the court in changing residential placement in 2011. In contrast, the parenting plan proposed by Mr. Lail which was granted by the court after it denied relocation, only allows me alternating weekend visitation with ML (SCP 167). Furthermore, a one hour and 15 minute drive to Olympia to exercise visitation does demonstrate any detrimental effect in the fostering and continuation of ML's relationship with his father. From the time ML's residential placement was changed to Mr. Lail in June 2011, I had been regularly exercising visitation with ML in Aberdeen nearly every Wednesday which I was responsible to provide transportation for, even after my vehicle stopped working. In addition, Mr. Lail and I had been sharing the cost equally for ML's weekly visitation exchanges for that same period of time (12/10/13 VRP 86). There is no

indication Mr. Lail was not capable of continuing this had relocation been granted.

One alternative discussed at the hearing at my suggestion, which Mr. Lail indicated he would be agreeable to had he not been granted residential placement of ML, was allowing relocation at the end of the school year (12/10/13 VRP 122, 123).

In summary, the finding under this factor is not supported by any evidence in the record that relocation would have had any detrimental effect.

9. Factor 2.3.9: “The mother has relocated to the Lacey area approximately July 2011. She stated in her pleadings that she was seeking relocation for employment related purposes, including the time and monetary expense associated with a daily commute. However, the mother lost her employment in March or April 2013, and by her own testimony has not seriously pursued finding other employment. There therefore presently exists no real employment related purpose justifying a relocation of the child. Conversely, the father is a key employee in a business in Grays Harbor County, and has a close personal relationship with the owner of that business, and is in a position to take over and own that business when the current owner retires. The owner of that business and the father have begun negotiations in that regard. It is therefore neither feasible nor desirable for the father to relocate away from Grays Harbor County.”

The court completely disregards credible evidence which clearly indicates there is a higher likelihood of me obtaining gainful employment outside of the Grays Harbor (12/2/13 VRP 3, 12/10/13 VRP 25, 26, 27 148; SCP 46,

24, 26, 34, 53, 145A) area in favor of its own personal observations and opinions of the employment opportunities it feels are present and available to me in Grays Harbor (12/10/13 VRP 148; SCP 166). Had the court actually given me the opportunity to stay in Grays Harbor to retain residential placement of ML, which I clearly intended on doing if I had to (12/2/13 VRP 3, 12/10/13 VRP 6), I would have again been required to spend at least \$600 monthly in commuting costs to Olympia (12/10/13 VRP 27, 61; SCP 53) in order to maintain employment if I had found it necessary to look outside of the Grays Harbor area.

I do not dispute the fact that relocation is neither feasible nor desirable for Mr. Lail as he intends on owning the business he is employed at in the future (12/10/12 VRP 105), however, there is no evidence of a detrimental effect caused as result ML's potential relocation, as Mr. Lail would still be able to maintain the frequent and regular level of residential time with ML as he had been accustomed to historically as outlined in my proposed parenting plan (SCP 55). Therefore, an alternative to relocation was not necessary.

10. Factor 2.3.10: "The financial impact and logistics of relocation or its prevention are minimal and consists primarily of transportation for visitation purposes between Cosmopolis, Washington and Lacey, Washington. Child support presently is not a factor because the mother has contributed little or nothing to the support of the child since late 2011, resulting in the father paying virtually all expenses for the child out of his

own pocket. If the relocation were granted, the father would instead make an actual child support payment to the mother, which would likely be lower than the cost he is currently bearing.”

On the same day the court entered the Order on Objection to Relocation denying relocation (SCP 166), the court entered a parenting plan establishing Mr. Lail as primary residential parent which states the transportation arrangements as “The receiving parent shall provide” with the full knowledge I still reside in Lacey resulting Mr. Lail and I having to commute the same distance as if relocation had been granted (12/10/13 VRP 113, 115; SCP 167). There is no evidence relocation would have caused any financial detriment as our transportation costs are exactly the same as they would be if ML had been allowed to relocate with me.

In addition, Mr. Lail’s childcare costs would have been lower if relocation had been granted. My previous \$400 estimate of Mr. Lail’s proportional share of ML’s full time childcare cost through the Y program would have been reduced to only \$200 (SCP 76) due to the 50% childcare tuition discount I was awarded by the YMCA the day after our first 2011 hearing (12/10/2013 113, 124; SCP 89). This estimate, based on the full-time care ML would only require during summer, would have been even less expensive during the school year when he would only require part time care before and/or after school. Furthermore, these childcare payments

would not have been required until the point I had actually obtained employment.

The only evidence in the record of the detrimental financial impact as a direct result of the courts prevention of ML's relocation in 2011 and the synonymous change in primary residential placement of ML has been experienced by me. In 2011, I had made the court aware its actions ended the support payments I was receiving on behalf of ML, required me to pay \$50 in support to Mr. Lail, increased my housing (12/10/13 VRP 55; SCP 89) and commuting costs; all of which ultimately resulted in me having to file bankruptcy (SCP 89). Further evidence of the detrimental financial impact is implicit in the fact that I am currently unable to pursue the Master's Degree in social work necessary in enabling me to secure gainful employment in my field of study without forgoing my weekend visitations so I can attend classes in Tacoma (12/10/13 VRP 51; SCP 89).

Again, under this factor, the court seems to disregard the \$600 monthly commuting cost I would be responsible for (12/10/13 VRP 27, 61; SCP 53) had I been given the opportunity to retain residential placement of ML by residing in Gray Harbor, due to the high likelihood of me needing to do pursue employment in the Olympia area (12/2/13 VRP 3, 12/10/13 VRP 25, 26, 27 148; SCP 46, 24, 26, 34, 53, 145A).

Summary: A thorough review of the record clearly shows the evidence therein does not support a finding that the “detrimental effect of relocation outweighs the benefit of the change to the child and the relocating party.” which is requirement under RCW 260.09.520 to properly rebut the presumption in favor of allowing relocation. Absent a successful rebuttal, denying the relocation of ML to Thurston County was an abuse of discretion. Further error is evident when considering the court relied solely on its own subjective opinions and perceptions of potential employment opportunities available in Grays Harbor as well as the quality of educational resources available to ML in Grays Harbor rather than deferring to the credible evidence that was in the record which included subjective information on both geographical areas. Since the evidence in the record does not support the court’s findings and the court based some of its findings on its own subjective opinion, this resulted in a decision based on untenable grounds which is an abuse of discretion.

B. The trial court erred in modifying the Parenting Plan when substantial evidence in the record does not support a finding that a substantial change has occurred in the child’s environment.

On January 6, 2014, after taking this case under advisement pursuant the evidentiary hearing held on December 10, 2013 in which he orally denied

relocation of ML (12/10/13 VRP 158), the Honorable Judge Edwards granted Mr. Lail's Petition to Modify Custody in a written decision (CP 68-70) which was later incorporated into a formal order (CP 83-87). There are several "factual findings" the court relied upon in justifying its decision in doing so. I had provided the court with a detailed written objection to these findings on January 17, 2014 (CP 71-82), prior to the entry of orders on January 21, 2014. I will address each finding that is not supported by evidence in order to show the decision of the court to grant the modification is erroneous and should be vacated.

Standard of Review

In re Marriage of Cabalquinto, 100 Wn.2d 325, 327, 669 P.2d 886 (1983). A trial court manifestly abuses its discretion when a review of the record shows that its decision is based on untenable grounds or untenable reasons. *In re Marriage of Littlefield* 133 Wash. 2d 46, 47, 940 P.2d 1362 (1997); A court's decision is based on untenable grounds if the factual findings are unsupported by the record. *Littlefield*, 133 Wash. 2d. 39, 47, 941 P.2d 1362 (1997); A trial court's factual findings are reviewed for substantial evidence. *In re Marriage of McDole*, 122 Wash. 2d 604, 610 859 P.2d 1239 (1993).

1. Section 2.2

“The parties followed the terms of that Parenting Plan until approximately April 2009, when Ms. Briggs moved to Spokane. The minor child then resided full time with Mr. Lail for approximately two months while Ms. Briggs remained in Spokane, even after her 2009 relocation request had been denied. Ms. Briggs eventually returned to Grays Harbor County and began residing with her father.”

Since the establishment of the parenting plan in 2006, I have always allowed Mr. Lail overnight visitation every weekend rather than every other weekend (12/10/13 VRP 117). From April 27th through May 22, 2009, I had to leave ML in Mr. Lail’s care due to the temporary restraining order filed by Mr. Lail requiring me to do so. After relocation was denied, I returned from Spokane (SCP 53; 12/10/13 VRP 17, 35, 48). I did not move to my father’s residence until December 2010 (12/10/13 VRP 85).

“Even when Ms. Briggs returned to Grays Harbor County, the minor child continued to reside primarily with Mr. Lail. The evidence supports that the minor child resided with Mr. Lail up to approximately 16 to 20 days every four week cycle from approximately June 2009 to March 2013. In March 2013 Ms Briggs voluntarily reduced her overnight visits with the child even further, to an average of one night per week.”

It wasn't until December of 2010, Garrett and I came to the agreement of him exchanging his Saturday overnight visitation for a Monday and Tuesday night overnight visitation in order to accommodate my new work schedule (12/10/13 VRP 84, 85). This schedule did not change again until I had actually relocated per Judge Godfrey's order on July 16, 2011 (12/10/13 VRP 38,39). In March of 2013, at my request due to a change in my availability, Garrett voluntarily agreed to allow me to have ML at my home both nights every weekend instead of only one I had been granted by the 2011 "temporary" order (12/10/13 VRP 24, 38, 87). This increased visitation arrangement continued up until at least the December 10, 2013 hearing (12/10/13 VRP 88).

"The father has frequent communication with the school and teachers. The father and child enjoy many outdoor activities together, including, camping, hiking, and clam digging. The minor child has friends at his current school and in the neighborhood where he resides. There are no maternal or paternal relatives of the child who reside in Thurston County."

Despite the fact "In determining whether a substantial change in circumstances has occurred to warrant modification, the trial court must look only at the circumstances of the child or the custodial parent and not those of the noncustodial parent." *In re Marriage of Mangiola*, 46 Wn.

App. 574, 578, 732 P.2d 163 (1987), there is also substantial evidence I have always maintained contact with ML's teachers first when I worked at his daycare at Evergreen (12/10/15 VRP 131; SCP 96); through my participation at his conferences (12/10/13/ VRP 66; CP 16-57) and through volunteering in ML's classroom (12/10/13 VRP 39, 47, 65-67, 71, 131; CP 16-57); I participate in various recreational activities with ML, including outdoor activities (12/10/13 VRP 22, 28-31, 40-46); ML has friends in the neighborhood I live in(12/10/13 VRP 22, 23, 24, 30, 41, 43, 44,45,60, 64, 96, 101; SCP 96); there are maternal relatives in Thurston County (12/10/13 VRP 91, 92); and evidence of one paternal relative whom resides in Porter (12/10/13 VRP 92) which the same distance from the Olympia area as it is from the Aberdeen area.

“According to evidence provided by Mr. Lail, and unrefuted by Ms. Briggs, for at least six months prior to the relocation request being filed, the minor child was residing with Mr. Lail a minimum of four days of every seven, if not more frequently. Ms. Briggs was then commuting from Grays Harbor County to Thurston County for employment, and had voluntarily increased the minor child's residential time with the father for her own convenience and for the well-being of the child. Thus the minor child had been integrated in to the residence and care of his father, with

the consent of Ms. Briggs, for the period of time between April 2009 through June 2011.”

At the hearing on December 10th hearing I had, in fact, refuted Mr. Lail’s assertion of having residential placement of ML four out of every seven days at trial during cross examination referencing the argument from my first appellate brief (12/10/13 VRP 34, 36; Please refer to Section III(A)(3) of this brief for a detailed case law discussion) which would clearly have shown Mr. Lail’s calculations of residential time did not equate to him having ML four of every seven days and did not negate my designation as primary residential parent. In addition, my stated purpose for this was to allow me to have ML on both my days off so that I could spend more quality time with him while maintaining Mr. Lail’s same level of *actual* residential time ML was accustomed to spending with Mr. Lail. It was clear this change was only meant to be temporary as I had begun communicating my intent to relocate with ML to Olympia at the end of ML’s school year (12/10/13 VRP 19; SCP 76). As such, this temporary arrangement does not qualify as an “integration with consent” based on the Washington Supreme Court definition of “consent” as “a voluntary acquiescence to surrender of legal custody.” in which consent may be shown “by evidence of the relinquishing parent’s intent, or by the creation of an expectation in the other parent and in the children that a change in

physical custody would be permanent.” *In re marriage of Taddeo-Smith and Smith* 127 Wash.App 400, 110 P.3d 1192 (2005). There was no such evidence presented. Furthermore, the contention this integration started in April 2009 is not supported by the record. Mr. Lail testified, the agreement due to my changed work schedule did not actually start until December 2010 (12/10/13 VRP 85).

“Sometime after the mother filed her 2011 relocation petition, she did relocate from Grays Harbor County to Thurston County. The mother has since been terminated from her employment in Thurston County, as of at least April 2013, and has without any valid reason, refused to seek new employment since that time.”

I have not “refused” to seek employment. At the hearing, Mr Lail testified, I had actually attempted to obtain employment in a town closer to the Cosmopolis area after the 2011 hearing (12/10/13 VRP112). Furthermore, I had actually been job searching and making job contacts with potential employers in anticipation of obtaining employment after court had concluded (12/10/13 VRP 49, 50, 51).

“Arguably, the mother withdrew her consent to the integration upon filing of her relocation petition in 2011. Since 2011 the minor child has continued to reside with the father pursuant to various court orders.”

As discussed previously, there is no evidence in the record to support I “consented” to an integration of ML into Mr. Lail’s household, therefore it is not possible for me to withdraw my “consent”. The “temporary” parenting plan from 2011 giving Mr. Lail primary residential placement of ML was reversed by this Court. The Ex Parte Restraining Order, granted by Judge Edwards prior to the day the Mandate was issued reversing the 2011 order, essentially continued the 2011 order (SCP 144). There was never a proper “Show Cause” hearing held to address the Ex Parte restraining order.

“She unilaterally terminated the child’s mental health counseling because she thought the child’s behavioral issues were caused by conflict between the mother and the father. Said conflict continues to this day.”

After attending several sessions with ML, all parties, including Mr. Lail and ML’s counselor, concluded the nature of the relationship between Mr. Lail and I was the cause of ML’s behavioral and emotional issues and that ML’s participation in counseling would not be effective until Mr. Lail and I dealt with our relational issues (12/10/13 VRP 99)

“The mother discussed the status and details of the pending modification/relocation litigation with the child, who is now only 9 years of age.”

Please refer to Section 3(A)(6) for a detailed discussion regarding this.

“The mother voluntarily recently reduced her contact with the child to one overnight visit per week beginning as March 2013. The mother previously voluntarily reduces her contact with the child as of 2009, contrary to the terms and provisions of the then existing Parenting Plan.”

Beginning in March 2013 and continuing up to the December 10, 2013 hearing, I had actually been exercising more visitation with ML than what was designated in the “temporary” parenting plan from 2011 per Mr. Lail’s testimony (12/10/13 VRP 88, 95). Furthermore, I had always consented to a deviation from the 2006 parenting plan in allowing Mr. Lail overnight residential time with ML every weekend since its original entry (12/10/13 VRP 117). However, this only resulted in Mr. Lail having residential time with ML two of every seven days. The only deviation from the parenting plan in 2009 was for less than one month due to the provisions of a temporary restraining order.

“When the minor child is in the mother’s care, she does not require the child to exercise appropriate safety procedures, including permitting him to ride a skate board without a wearing a protective helmet, and allowing him to be transported in the bed of a pickup truck.”

Although it is apparently a personal preference of Mr. Lail as well as the court, there is no legal mandate in any of the jurisdictions I reside requiring helmet usage while riding skateboards. (12/10/13 VRP 64). There is no evidence ML has ever sustained any significant injuries while in my care; not during the seven plus years I had primary residential placement or thereafter. Although I agree in hindsight it may have not been the best judgment on my part to allow ML to ride in the back of a truck, as it is not legal to transport a child without proper restraints, there is not substantial evidence demonstrating any detriment to ML's physical health as we literally drove less than a mile "right down the street" on a remote country road (VRP 58; CP 71-82). Furthermore, my witness, Linda Bouffard, testified at trial to being present at a visit exchange she had driven me to where she witnessed Mr. Lail, after yelling at me and calling me curse words in the presence of ML and her 4-year old daughter, driving away erratically with Mason in the back seat of his vehicle, not properly restrained and actually falling across the back seat (12/10/13 VRP 135, 136).

"During the pendency of this action, since 2011, the mother has twice been cited for either texting while driving or using a cell phone while driving, which activity, when transporting the child is not only illegal but fails to exercised due care and caution for the safety of the child."

ML was not in the car when I was cited for either infraction (12/10/13 VRP 58). Furthermore, due to my “present circumstances” at the time of the hearing of not having an operating vehicle, there is no possibility of ML being at any risk due to this.

2. Section 2.4

This section should say does not apply as this wasn't a minor modification of the parenting plan.

3. Section 2.7

Based on the previous discussion regarding “facts supporting the requested modification” relied upon in Section 2.2 of the “Order re Modification of Parenting Plan” entered on January 21, 2013 justifying ML’s change in primary residential placement to Mr. Lail; A finding of substantial change of circumstances under the RCW 26.09.260 basis’ (2)(b)ML has been integrated into the home of the Mr. Lail with my consent and; (2)(c)ML’s present environment is detrimental to his 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 is not supported by substantial evidence in the record resulting in a decision based on untenable reasons which is an abuse of discretion.

IV. Conclusion

Since it is clear there is not substantial evidence in the record to rebut the presumption in favor of allowing relocation and the court's decision was an abuse of discretion, I am asking this Court to vacate the Order restraining the relocation of ML (SCP 166). Furthermore, since there is sufficient evidence in the record under each relevant factor, if it is a requirement of this Court to remand back to the trial court, I am asking it does so with specific instruction to enter an order in favor of allowing relocation rather ordering another evidentiary hearing on this matter. This will best serve the ends of justice in promoting finality; this works in protecting the best interests of ML, as well as myself, due to the negative impacts we have experienced on our lives due to this continued litigation and continue to experience. In addition, since the court's decision to modify the parenting plan and change ML's residential placement to Mr. Lail was an abuse of discretion as well, I am asking that order be vacated with specific instruction to the trial court to adopt the proposed parenting plan I submitted in 2011 (SCP 55). Since the Child Support Order is prejudicially affected by the Modification Order, I am asking that be vacated and appropriately determined by the trial court as well. Furthermore, since there is evidence the Court will have substantial difficulty overlooking its previously stated views and findings due to its

clear bias in favor of Grays Harbor over Thurston County and that reassignment would preserve the appearance of justice *Ellis v. US Dis. Court*, 356 F. 3d 1198, 1211 (9th Cir. 2004), I am asking this court to remand this case to a different Judge.

September 17, 2015

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Kim Briggs", written over a horizontal line.

Kimberly Briggs
Appellant
Pro Se

Certificate of Service

A copy of this motion is being mailed via USPS to the Office of Jack Micheau, attorney for the other party.