

NO. 48027-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ANGELA K. SCOUTTEN NKA SCHREINER,

Appellant,

v.

MICHAEL J. SCOUTTEN,

Respondent

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DIVISION II
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STATE OF WASHINGTON
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A. Statement of the Issues

1. The trial Court has discretion to deny a relocation if it addresses 10 statutory factors and the evidence supports the decision. This Court made rulings for each factor based off the testimony of 5 witnesses, 29 admitted exhibits, over three days of trial, finding Mike rebutted the presumption that the relocation should be granted. Should this Court affirm the discretionary decision to deny the relocation?
2. Courts have authority to modify a Parenting Plan if it finds a substantial change that is detrimental to the child exists. Prior to the Modification trial, Mike paid the filing fee for his Petition to modify the 2013 Parenting Plan. The Court found a substantial change based off instability, an inability to co-parent, withholding communication, and deceptive behavior, all of which were detrimental to Memphis. Should the Court affirm the modification of the parenting plan?

B. Introduction

This is a case involving two actions, brought on behalf of two parties, with two filing fees: (1) a Relocation Action brought by Angie, and (2) a Petition to Modify the Parenting Plan brought by Mike. The Court was impartial and fair, followed the proper procedure and law for both actions, and made findings that are supported by the record.

This is not the case where after the Court's denial of Angie's relocation, and her subsequent withdrawal of her intent to relocate, the Court acted without authority and arbitrarily entered a modified Parenting Plan. This is a case where Mike filed a Petition to Modify, which gave the Court authority to modify the parenting plan

regardless of whether Angie would later withdraw her relocation. After a relocation and modification trial, and receiving supplement briefing from both Counsel addressing the detrimental effect of Memphis' present environment, The Court found a substantial change occurred since the entry of the 2013 Parenting Plan.

The Court based this decision off Angie's inability to co-parent, her inability to make joint-decisions, her lack of candor for the truth, her deception in concealing where she and Memphis are staying at night, her unilateral cancellations of medical appointments, her instability in employment, and her lack of attachment to Memphis, and vice versa. The Court found that the environment was detrimental to five-year-old Memphis' mental and emotional health. The Court found the modification was in Memphis' best interest.

This Court should affirm the trial Court's (1) denial of the relocation, and (2) the modification of the parenting plan because both decisions are discretionary, the Court followed the proper procedure and law for both decisions, and substantial evidence supports the findings for both decisions.

C. Statement of the Facts

Parties

Angela ["Angie"] Scoutten, Appellant and Michael ["Mike"] Scoutten, Respondent divorced in 2013. Report of Proceedings ("RP") 112. Angie and Mike have a five-year-old named Memphis. Besides Angie and Mike, the other significant people involved in Memphis' life are Angie's mom - Paula, Mike's mom - Karen, and Mike's wife – Monica (fiancé at the time of the trial).

Procedural History

Angie filed an Intended Relocation on January 30, 2015 to move from University Place to Mercer Island. RP 19, Ex 1. Mike filed an Objection to the Relocation on February 19, 2015. Mike had been working on a Petition for Modification ("Modification") before he was notified of the Relocation action. RP 119. For judicial economy, Mike's Modification was included with his Objection; Mike paid the required filing fee.

Angie did not file a new proposed Parenting Plan ("PP") as part of her Relocation Request; Instead, she sought to keep the May 3, 2013 PP in place. RP 274, Ex 5. Mike filed a proposed PP with his Modification, seeking to change the custodial parent from Angie to himself because of changes that had arisen since the 2013 PP that were detrimental to Memphis's well being.

Angie and Mike were both represented by Counsel for the Relocation trial and for the Modification trial. The Court went over the proper procedure for both trials before trial began. The Court offered Counsel an opportunity to object or argue on the posture and how to proceed. Counsel did not object to the trials being heard together. RP 7. The combined trial took place over a period of three days: April 21, 2015, April 23, 2015, and May 4, 2015.

The Court made two rulings with two sets of Findings. The Court made its oral ruling on the Relocation on May 4, 2015. RP 423-440. The Court denied the relocation after going through each factor required by the statute. RP 423-440. The Court found that that Mike rebutted the presumption that allowed the move to Mercer Island by demonstrating that the detrimental effect of the move outweighed the benefit of the change to Memphis and Angie. *Id.*

After the Court ruled against the Relocation, Angie told the Court she would not relocate. RP 441. The Court acknowledged that proceedings normally end without a modification to the PP once a parent informs the Court she will not relocate, but since Mike filed a Modification, the proceedings would continue. RP 403-405. Counsel did not object to having the modification trial, notice was given, Angie testified regarding the modification, she had the

opportunity to cross examine each witness, supplemental briefing was filed on her behalf regarding this issue. Adequate cause was satisfied under the Relocation statute. The Court had more than is required for an adequate cause hearing when after trial, it requested additional briefing by the parties to address the likelihood of the detriment to Memphis under RCW 26.09.260. RP2¹ 2.

Prior to ruling on the Modification, the Court requested additional briefing from Counsel. RP 467-478. After receiving briefing from both sides, the Court made it's oral ruling on June 18, 2015. RP 2-5. The issue before the Judge was:

Whether or not [Mike] [met] his burden of proving, under RCW 26.09.260(c), that 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. RP2 2-5.

The Court found that Mr. Scoutten met his burden of proof and then laid out its reasoning. RP2 3. Final Agreed Orders were entered on July 24, 2015, after minor changes to the PP were made by Counsel. RP3² 13.

Relocation Facts

¹ Record of Proceedings RP2, June 18, 2015.

² Record of Proceedings RP3, July 24, 2015.

Since the divorce, Angie and Memphis lived with Angie's Mother, Paula in University Place. RP 18-19. When Angie does not have Memphis, she typically does not stay at Paula's. RP 31, 39, 41-42, 50, 97-98, 137. Even when Angie has Memphis, she frequently stayed at other locations, with and without Memphis. Id.

Angie testified she paid rent and daycare to her mom, her car, insurance, and Memphis' school. RP 105. Angie's monthly rent on Mercer Island would be \$1,000.00. Angie planned to support herself with monthly income of \$2,200-\$2,700, before taxes, a varying commission, and child support. RP 45-46. Financial documents were admitted into evidence under seal. CP 57,58.

Since the time of the divorce, Angie has held many short term, part time work: Century 21, John L. Scott, Chamber's Bay in Tacoma, Blue Martini in Bellevue, Anthony's Restaurant and Fish Bar at Sea-Tac, and maybe some other jobs. RP 40-42, Ex 24.

Angie wanted to relocate because she obtained full time employment with Pinnacle Property Management as a leasing consultant in Mercer Island on January 12, 2015. RP 19, 22. Angie did not apply for Piece County Pinnacle because her friend, Magdalena referenced her to apply in Mercer Island. RP 34.

Angie's schedule was nine to six, Saturday to Wednesday, with Thursday and Friday off. RP 22. Angie was paid hourly at \$13.50 per hour. RP 23. Angie's employment benefits consisted of health, dental, life insurance, and disability insurance. RP 23. In addition, she received a discount of 20 percent to rent on the property. RP 23. Angie was also eligible to receive commissions. RP 46. Angie would not make the same amount on each paycheck, and as of trial, she made approximately \$2,600.00 per month, before taxes, plus child support. RP 46.

Angie's commute from University Place to Mercer Island is dependent on traffic, and typically ranges from 40 minutes to one hour, or longer. RP 24. Angie typically left for work at eight A.M. and returned at seven P.M. RP 24.

Paula said it was "a miracle that [Angie] got offered [the] job" because she's never had a full-time job with benefits, retirement and healthcare. It's always been these part-time jobs, and it's been real tough." RP 154.

Mike has remained in the family home in Tacoma since the divorce. RP 112. Monica began living with Mike in August 2014. RP 161. Mike is now married to Monica, who was his fiancé at the time of trial. As part of the 2013 PP, Mike paid all the medical bills for

Memphis, child support, his house payment, eighty percent of the tuition for pre-school.

Mike has been in the Military for 12 years. RP 113. Mike works at Joint Base Lewis McChord ("JBLM"). RP 113. Mike chose to remain enlisted, instead of becoming an officer, in part because if he became an officer, he would have to move around every three years. RP 115-116. In his current role, Mike is able to stay at JBLM instead of moving to other bases. Mike was on a non-deployable status. RP 113.

Mike objected to the relocation because Angie had never had a full time job. RP 287. He was concerned of what would happen to Memphis if Angie moved to a place with a higher cost of living, and she lost or quit her job. RP 287. Mike also objected to the relocation because he didn't want Memphis to be taken away from the environment where she is excelling and where her whole support system was close by. Mike was also concerned because of the relationship that Memphis had with her mother and the fact that she had never lived with only Angie. RP 306.

Memphis was five during the trial and attended preschool at Saint Patricks. RP page 25-26. Memphis has seizures. RP 20. Memphis has doctors up North and a doctor in Fircrest, who she has

seen since birth. RP 15-25, 48-49. Memphis would not have to commute as far for any medical appointments to Seattle or Everett, but she would have to commute from Mercer Island to Tacoma to see her father three weekends a month, on Friday and from Tacoma to Mercer Island on Monday morning, sitting in rush hour traffic both ways. RP 47.

For whatever reason, a Doctor noted that Memphis does things to get a response out of Angie and Paula – essentially she mimics behavior that looks like she’s having a seizure. RP 350, Ex 54. Karen testified that “a light switch would turn off on [Memphis]” when there was visitation between Memphis and Angie, “her whole demeanor would change,” “she would get behind a chair,” “it was hard for her to engage with her mother.” RP 234. Karen testified Angie was more interested in learning about Mike, than with engaging with Memphis. RP 235. Karen testified Memphis did not have problems going back to Paula. RP 235.

Mike noticed Memphis’ behavior began to change. RP 119. Mike testified that he had trepidation about the relationship between Angie and Memphis and that Memphis had a stronger bond with Paula than with Angie. RP 121. Mike testified that Angie doesn’t have a warm relationship with her mother, she’s not excited to see

her, she behaves almost fearfully, and she's reluctant to want to return to Angie, and she wants to return to Paula. RP 121.

"She's always glad to see her daddy." Paula. RP 11, page 145. Karen testified that Mike is a parent that sets boundaries, who is consistent, and loving. RP 254. Paula testified that Memphis willingly goes with Mike and "she is always glad to see her daddy." RP 145.

Monica tried to have a relationship with Angie for the sake of Memphis. RP 162-164, Ex 34. Monica testified she had a wonderful relationship with Memphis, that they enjoy going to the grocery, baking, and cooking together. RP 181. Monica testified that they do art projects and crafts together. RP 181. That they threw Memphis a robot birthday party the Saturday after her birthday. RP 181. Monica testified they go to Point Defiance on adventure walks, and she very much enjoyed spending time with Memphis. RP 182.

Karen exercises Mike's residential time with Memphis when Mike is deployed. P 29, 68, 230. Karen testified that she exercises the residential time at Mike's house for consistency, not at her house in Gig Harbor. RP 233. Karen and Memphis have a close relationship, and have many adventures together. RP 231, 232. They like to watch movies. RP 231. They go to the zoo and the

museum. RP 231. They garden together. RP 231. Karen also sees Memphis when Mike is home. RP 232. Karen testified the move to Mercer Island would impact her ability to make spontaneous visits to Memphis' school, like she's enjoyed in the past. RP 255-256.

Karen and Paula have a good relationship, keep an ongoing dialogue, and are very interested in keeping things constant for Memphis (example: potty training). RP 232 – 233. Paula is the primary nanny for Memphis. RP 27. Mike has a contract with Paula, the terms include Paula taking Memphis to and from school so Angie can work full time. RP 28.

From January 2014 to July 2014, a second contract was executed in which Paula took care of Memphis every day, from Sunday to Saturday, from 8:00 A.M. to 6:00 P.M. RP 127, Ex 31. Paula picks up Memphis from school Monday through Friday (or whenever Angie is working). RP 153. If Memphis moved to Mercer Island, Paula would remain the nanny, and would commute from University Place to Mercer Island to watch Memphis. RP 152. Paula would sleep over at Angie's apartment Monday and Tuesday and drive back to University Place to her home and husband Wednesday after she picked Memphis up from school. RP 152. Angie would

take care of Memphis on her days off, which are Thursday and Friday. RP 151.

Angie testified that another reason to relocate was because the schools are better in Mercer Island, but she did not provide evidence of this. RP 36. Angie would want Memphis to attend Saint Monica, which cost \$11,000.00 per year; the cost of which would be split 80/20 by the current Order of Child Support. RP 26. Paula testified that she was concerned how Memphis would adjust to a new school being removed the house she has lived at since 2013. RP 156. Memphis did well at school at St. Patricks. RP 156. Paula also said that the school had recommended that Memphis repeat pre-K because she gets out of control sometimes as part of her condition. RP 156.

According to the May 2013 Parenting Plan, Mike gets Memphis three weekends a month, from Friday at 5:00 P.M. to Monday A.M. RP 28. Mike is responsible for driving Memphis to school on Monday A.M. Angie told the Court that she would provide all the transportation from Tacoma to Mercer Island if she relocated. RP 48. Angie told the Court that she would provide transportation from Tacoma to Memphis' school in Mercer Island on Monday

morning. RP 48. In reality,³ Paula would be providing the transportation. RP 48, 152, 155. Paula testified that she would drive Memphis from Tacoma on Monday morning to school in Mercer Island if she had to, but it would be nice if Mike could help. RP 151, 155.

Modification Facts⁴

Mike hired a private investigator, Mr. Crockett ["PI"] around May 2014 when he was deployed in Afghanistan, while his mother was executing his residential time, partly because of an altercation that occurred at his house. RP 119, 170, 199. Another reason Mike hired the PI was because Angie wanted to change the location for the exchange of Memphis, and Mike wasn't entirely sure where Memphis and/or Angie were living. RP 120, 200, 285. Prior to the Notice of Intended Relocation being served, Karen testified that Angie mentioned "how difficult it was going to be for the picking up and the dropping off type of a situation when [she] moves." Karen

³ Q: ...did you think about Mike dropping Memphis off at school on Monday morning?

A: I told him I would provide transportation.

Q: Are you going to provide it, or is your mother going to provide it?

A: Well, my mom can provide it.

Q: So who is going to provide it?

A: Either me or my mom, Mike if he want to. RP 48.

⁴ Even though this brief is broken down by Relocation facts and Modification facts, there is overlap between the facts. In other words, facts under relocation are applicable to the modification, and vice versa.

testified that Angie “backtracked at that point in the game because [Karen] didn’t think she really wanted” anyone to know that she was going to move. RP 256. The PI testified in his opinion as a private investigator that he did not think [Angie] was living in University Place [at her mother’s home] from May 25th of 2014 to the time of the trial. RP 200, 214.

As previously mentioned, Mike filed a Petition to Modify and paid the associated fee. Almost immediately after entry of the 2013 agreed parenting plan, Angie's behavior became concerning to Mike. RP 116. Mike testified part of his reason for seeking modification is that things have changed since the entry of the 2013 Parenting Plan. RP 116. Mike's house is more stable, he planned to wed his fiancé, and he offers a healthier environment for Memphis to grow up in. RP 116-117, 159. Mike testified that in contemplation of the 2013 Parenting Plan, he was ok with Memphis being with Paula, despite her not being the best mother because Paula would oversee the day to day upbringing of Memphis. RP 116-117.

One change is instability and not knowing where Memphis is staying from day to day, night to night, whom she is staying with, who she is around. RP 117. Mike testified Angie tries to hide where she is and where Memphis is on a daily basis. RP 117. Mike testified

Angie's deceit over where Memphis is shows the environment is not healthy. RP 119.

Karen testified that her relationship with Angie had grown difficult, that she's difficult, aloof, cold. RP 261-262, See Ex 38. Karen also described Angie's behavior as being manipulative and untruthful. Karen testified that Angie would not allow flexibility to schedule changes, like when Karen's work schedule... RP 242-251, Ex 38. While Angie had Memphis, Angie sent Karen a text message on Mother's Day, May 11, 2014, "Happy Mother's Day. I hope you rot in hell." RP 247, Ex 41.

Karen testified that Angie would show up while she was exercising residential time without providing the required four-hour notice. RP 243; 244, 245. One of these unannounced visits resulted in an altercation. Monica testified that Memphis was crying and clung to Karen when an altercation occurred at Mike's house [Karen was exercising visitation while Mike was deployed]. RP 170. During the time, Angie did nothing to console Memphis. RP 173. Mike called from Afghanistan during this altercation. RP 172. Angie called the police. RP 172, 242. Mike requested the police escort Angie off the property. RP 173, 292-293. As a result of this altercation, Angie was

not permitted to have her mid-week visitation at Mike's house, while Karen exercised her visitation. RP 173-174.

After the altercation between Monica and Angie, Mike's parents suggested he install a video camera. RP 183, 293. He installed cameras when he returned from his deployment. RP 293. Mike presented a video of an exchange of Memphis at trial. RP 295. The exchange occurred at Mike's house when Mike agreed to alter his residential time so Angie could take Memphis to Disney on Ice. RP 294, 296. There was no objection at trial by Counsel to admitting the video: "no objection." RP 295, Ex 37.

Both Mike and Monica testified regarding the exchange that occurred the night of Disney on Ice. RP 182, 183, 296. Mike testified that he did not see Angie put Memphis' seat belt on, which was how Memphis was able to jump out of the car at the exchange.

Another change that has occurred is Angie's unilateral decision making with regards to scheduling and cancelling medical appointments. RP 118. Mike testified that Angie tries to make it as difficult as possible to be involved in the medical care of Memphis. RP 118. Mike testified this behavior began right after the final Parenting Plan of May 2013. RP 280. For example, Mike and Angie came to an agreement on a date for Memphis' surgery, right before

Mike was to deploy, the doctor's office – not Angie – called and e-mailed him that Angie cancelled the surgery and was going to seek treatment elsewhere. RP 281-282. Mike testified he was frightened that Angie could do something that drastic that he wasn't even aware of, and Mike had to go to Court to get a restraining order preventing Angie from altering medical decisions while Mike was deployed. RP 282, Ex 43, 44.

Despite Mike telling Angie that his insurance, Tricare no longer covered this doctor, Angie continued to take Memphis to this doctor's office and Mike had to pay 100 percent out of pocket costs. RP 49, 52, 288, Ex 45.

Paula does not believe that she has to pick up the phone when Mike calls after 7:00 P.M. RP 142-144. Mike sent a series of e-mails to Paula regarding phone calls with Memphis. RP 143, Ex 32. In response, Paula sent Mike an e-mail that said,

"Mike, you are not allowed to have contact with Memphis while she is in my care so long as it's in accordance in the parenting plan with you and Angie."

"I hope this clarifies that I'm not doing anything to supersede your parenting rights or acting out of bad faith."

Angie sent Mike e-mails explaining he could not contact Memphis when she was in Angie or Paula's care, "You don't have phone calls

in the Parenting Plan, Mike. That is my custodial time.” RP 144, Ex 32.

Angie did not let Mike speak to Memphis on her birthday. RP 144. Angie and Paula were planning on having a birthday for Memphis, but it was Mike’s year to have her, so they told the four-year-old, “your dad [is] going to plan something this year.” RP 55 “we can’t do a birthday this year.” RP 56. At least five days before Memphis’ birthday, Mike told Angie he could not take Memphis because of work. RP 55-56, 61-62, Ex 26. Angie stayed at Cash’s house on Memphis’ birthday because she “had to figure something last minute because [Mike] cancelled her birthday.” RP 57.

Because Mike couldn’t see Memphis on her fifth birthday, Mike asked Angie when he could call to wish her a happy birthday. RP 63. Ex 26. Mike called Angie around 7:00 P.M, which is when Angie told Mike to call. RP 64 - 65. When Mike could not reach Angie, he called Paula. RP 64. Paula’s testimony at trial conflicted with Angie’s testimony on the whereabouts of Memphis and Angie.

A [Paula]: Yeah, it was her birthday. I was really disappointed that Mike cancelled her birthday day because we had to jump through hoops to get things for the party at school and all of that. RP 19-23, page 145.

Q: Did she [Memphis] spend the night with you?

A: Yes.

Q: Memphis did?

A: Yes.

Q: Did Angie?

A: Yes.

Q: Okay. Did Mike try to call that night?
A: He did. It was about 7-ish, 7:30. 7:00 – 7:30.
Q: Okay. Did you answer?
A: Yes.
Q: Did you let him talk to Memphis?
A: Memphis was with her mommy.
Q Did you let Mike talk to Memphis?
A: No. She wasn't there.
Q: Where was she?
A: They said she was with her mommy.
Q: Where?
A: Well, they said that they were going to Baskin Robbins, and they were going to – I didn't tell Mike that they were on the way to pick up a present, but I said that they were at Baskin Robbins.
Q: You're under oath.
A. I know that.
Q: Angie testified that she was in Sammamish with somebody named Cash Raymond.
A: I thought she came back.
Q: And that she brought the car that she purchased up to Sammamish so Cash could put it together.
A: That would have been the – yeah, that would have been the present that she picked up.
Q: She spent the night with Memphis up in Sammamish on the 15th, on Memphis' birthday?
A: If that's what you're saying that she said, then that's what happened. I'm telling you that at 7:00 that's not what I told Mike.
Q: You told Mike that they were out to get ice cream?
Q: But she didn't come back. You testified that she came back and spent the night?
A: I thought she did. I went to bed. Okay? RP 147.

Angie testified that she worked in Mercer Island on Wednesday, April 15th. Memphis went to school in Tacoma on Wednesday, April 15th. After school and work, they went to Toys R Us to pick up her birthday present, drove to Cash's house in Sammamish, and spent the night there. RP 54, 57. Angie testified she drove Memphis to school in Tacoma from Sammamish on Thursday, April 16. RP 57-58. Attendance records show that Memphis did not go to school on Thursday, April 16th. RP 59, Ex 25.

Angie testified she might have stayed in Sammamish on Thursday, April 16. RP 57. It is unknown where Memphis stayed on Thursday night. Memphis did not go to school on Friday, April 17 “because she had her shots Friday.” RP 58. Memphis’ school lets out at 3:00 P.M. RP 60. Despite being asked what time Memphis got her shots, it is unknown. RP 60. Attendance records show that Memphis did not go to school Friday, April 17. RP 59, Ex 25.

Mike testified his PP allowed Memphis and Angie quality time to work on their relationship: work for “quality, emotional interaction...playing with your child, being involved with her, finding out what she’s interested in doing, not just leaving it to your mother.” RP 307. Mike testified he spoke with Angie about the need to work on the relationship, especially after Paula told Mike that Memphis said, “my mommy doesn’t love me.” RP 308.

The Court Followed the Proper Procedure For the Relocation and the Modification Trials

All parties understood that the Court was hearing a Relocation trial brought by Angie and a Modification trial brought by Mike: “...We

have two actions we're arguing..." RP 5. Counsel did not object to the Court hearing both trials together.⁵ RP 7.

The Court laid out the proper procedure for a Relocation:

Person who is seeking to relocate takes the stand, is sworn in and provides the reason for the intended relocation. Then their testimony stops. That raises the rebuttable presumption, and the responding party then puts on their case. RP 7.

The Court acknowledged the procedure for a Modification trial, within the framework of the Relocation trial was:

Here's what I think the structure is, the way we are postured. There's a Relocation, and Objection to Relocation, and a Petition for Modification of Custody...First, make a decision on the requested relocation and the objection...Then the Court should independently, after the relocation issue, discuss the Petition for Modification...RP 403-404.

If your client had not filed for Modification and simply objected to the relocation, the Court would rule on the relocation and then, if I grant the relocation, then we would have to figure out a parenting plan. *Id.*

If I denied the relocation, the first question would be whether or not the petitioner intended to still relocate even if I had denied the child's ability to relocate. If the answer is, No, I'm not going to relocate, then that's the end of it and we don't go any further. If the answer is Yes, I'm still going to relocate then we would go into the next phase which is, Okay, how do we need to modify the parenting plan and the custody situation to accommodate that circumstance? But we have this additional here where there's a Petition to Modify in addition to that, so it doesn't – first, I should rule on the relocation and then I should consider the Petition for Modification...*Id.*

Okay. Now, if I deny the child's relocation with Mom then the question that goes to Mom as the relocating parent is do you still intend to relocate. If her answer is no, then that's – except for the fact that your

⁵ One example showcasing two separate trials: After Angie testifies regarding relocation [presumption, then burden change], Counsel requests to cease her questions to allow Miller to inquire, then requests additional questions after he puts on his modification testimony. RP 24-25, page 29, RP 1-25, page 30. After Mike's Cross, Mike puts on his case for Modification by calling Angie back to stand [page 50 to page...]

client filed a Petition to Modify, that is the end of the discussion. The Court has no further authority. The parenting plan that is in place would remain in place, and Mom wouldn't move, child wouldn't move, but in this case, your client has also filed a Petition to Modify. So regardless of Mom's answer, regardless of my ruling on the relocation, I think we still go to the Petition to Modify... Id. 404-405.

The Court offered both parties the opportunity to object to procedure and clarifies after Counsel has questions. Neither party objects...id. 404-405. Then again, at the end of the trial, the Court goes back over the procedure before making findings on the 10 factors:

Okay. So I believe we began this trial with me indicating that under the statute for relocation, once the parent with whom the child resides a majority of the time has given the reasons for the relocation, that raises the rebuttable presumption that the child will be able to relocate with the parent, and the burden then shifts to the other parent...to rebut that presumption by going through ten statutory factors which are set forth in 26.09.520...[Mike] has the burden of proof to rebut the presumption... Id. 405-406.

On May 4, 2015, the Court Gave Its Oral Decision on Relocation

I'm prepared to issue my decision on the relocation...I go through each of the ten factors on the record and, as counsel knows, they're not listed in any particular order according to the legislature, and they are not weighted. So the Court has the discretion to assign the weight that it deems appropriate to each of the factors, and while I have to weigh and consider all of the factors, ultimately, the discretion is with the Court to decide whether or not to allow the child to relocate. Id. Page 424.

Factor 1

So the first factor which, interestingly, although not weighted by the legislature in other contexts, is given the greatest amount of weight – for example, if we were establishing an initial parenting plan – and that factor deals with 'the 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. RP 424.

I think it's undisputed that all of Memphis' relationships are with people who live here in Pierce County, and there are no relationships with

anyone in Mercer Island, so the only person who would be there would be Mom. I understand maternal grandma would come and stay for two or three days a week to assist in child care as she has been doing, but she doesn't currently live there and she hasn't had to endure that commute yet, and while she did not say this, I question how long that would, in fact, continue, but suffice it to say that it's sufficient that at this point in time there is no one in Mercer Island with whom the child has a relationship. RP 425.

It is very clear to me based upon the evidence that was presented, that Memphis has a very strong relationship with her father, with her maternal grandmother, with her paternal grandmother and with father's fiancé. The issue is the relationship that she has with her mother.⁶ RP 425....I heard the testimony was that quite frequently Memphis was left with the [Paula], and then [Angie] would go to her friend's home or do whatever. That concerns me...there's a strong relationship between Memphis and [Paula] more so, perhaps than Mother. RP 429. The other part that is concerning to me...is the idea that you would take a four-year-old child and spend the night and you don't know the person's last name.⁷ RP 429. In any event, all of the evidence on this factor is that the bottom line is it weighs against relocation because all of the child's relationships with parents...and other significant persons exist here in Pierce County not in Mercer Island.⁸ RP page 430.

Factor 2

Both parties agree that there are no prior agreements of the parties, and I don't recall anybody testifying whether the parenting plan that was entered in 2013 was done by agreement or done after trial, ordered by the Court, as opposed to by the parties, so that factor on agreement of the parties is that there is none, and it doesn't weigh one way or the other. RP 430.

Factor 3

⁶ Certainly, when she finally got Memphis and put her in the car the first time, I didn't see any evidence that she was strapping her in. RP 428. She closed the door. Memphis quickly re-opened the door and got out of the car. Mom puts her back in the car. I couldn't tell that time if she strapped her in the second time or not. That was very concerning to me. She wasn't doing anything to protect the safety of the child or to show a strong, nurturing relationship... RP 429.

⁷ The Court was fair and impartial, even if it made reference to an analogous situation regarding not knowing someone's last name.

⁸ It's not really before me about how it would be – how to factor in the detriment to disrupting the contact with the extended people. Again, that's part of Factor 1, not Factor 3, but I do think those relationships would be disrupted, and I do think that would be very detrimental to Memphis. RP 431.

It is difficult⁹ for me to reach a conclusion that the disruption of either one of those things would be more detrimental to the child. RP 431. What does this mean – well, it is saying I don't find this factor as a win for mom or as a win for dad, this comes out pretty equal.

Factor 4

...both counsel indicate that there are none, and I didn't see any evidence of that, so that factor does not apply. RP 431- 432.

Factor 5

...What I really heard the reason for the move was the new employment on Mercer Island... RP 432. To the extent that Mother is now gainfully employed full-time, I think that that is a good reason to seek to relocate; however, I am concerned, based upon her employment history, that she has not had any position, it seems like, for very long, and I would be concerned about a relocation to relocate the child, disrupting the contact with all of the other people in her life and all of her support system except Mom and [Karen] – excuse me, [Paula], and then have [Angie] leave that employment for whatever reason. RP 433-434. So to the extent that the history causes me some concern, I do think that factors in here, although I wouldn't say it goes to – I wouldn't say it rises to the level of bad faith, its just an issue that I would be concerned about... RP 434.

Factor 6

I didn't hear her testify that she would be moving to Mercer Island but for this employment. She wouldn't be moving there just for Memphis' medical care, and I'm not convinced that it, on balance, would be better in that you would take the child off the freeway more by moving her to Mercer Island. Weekly visits with Dad in Pierce County versus three or so medical appointments a month are going to mean more time on the freeway for visits with Dad than medical appointments. So I don't see, on balance, how that is to Memphis' best interest. RP 434.

The sixth factor is the "age, developmental stage and the needs of the child and the likely impact it will have on her physical, educational and emotional development." RP 434. Basically, I can't made a decision based off what was testified to on education... So I wasn't really clear what the plan was with regard to where Memphis would be going to

⁹ ...the legislature is basically recognizing that the disruption in the contact between the child and each parent is going to be detrimental to the child. So recognizing that, we then weight which one is going to have the greater detriment. Would it be more detrimental to disrupt the contact between...Mom...or...Dad... RP 431.

school¹⁰. RP 435. A child's development encompasses more than where a child would go to school. In this case, we have special needs of Memphis. She has a great deal of medical providers. RP 435. ...other than potentially the amount of time that it takes to get to a medical appointment, that there would be any difference in the medical care or treatment of Memphis, whether she lives in Pierce County or she lives in Mercer Island. RP 436. I don't see that that weighs against or in favor of the relocation because its not going to affect her development at all. RP 436. I do think, however, that disrupting her contact with, what I understand now, the extended family and Dad is going to impact her development in other ways; RP 436. So disrupting the contact with Dad – again, going back to that – does impact on No. 6 negatively on Memphis' development, but I didn't hear anything else with respect to the other portions of that No. 6 factor. RP 436-437.

Factor 7

I think the schools, perhaps, really goes to the other issue of No. 6 and No. 7, development of the child and the quality of life and resources and opportunities available... RP 433. So, presumably, having full-time employment will improve the quality of Ms. Schreiner's life and, therefore, Memphis' life because she will be gainfully employed and will be in a better position to help provide for her child... RP 437. Again though, I am concerned that her history has not demonstrated that she has longevity in any job... RP 437. So on the one hand, I do think that the quality of life would be improved and on the other hand, I question how long that's really going to be in place. RP 438.

Factor 8

I would agree with Mr. Miller's statement that I didn't hear [Angie] propose anything except to say we'll keep the current parenting plan in place which, in my mind, isn't really workable to be driving up and down the I-5 corridor to maintain that kind of schedule. So I'm not sure – without any other suggestions, I don't know how else to assess that eight factor in this particular case. RP 438. Certainly, electronics these days, technology these days allow people who are at a distance to have contact with their children or extended family through a variety of different means, some of which are workable when the child is five, but certainly it doesn't take the place of having real time with your child. RP 438-439.

Factor 9

¹⁰ I think the schools, perhaps, really goes to the other issue of No. 6 and No. 7, development of the child and the quality of life and resources and opportunities available... RP 433.

So it seems to me like the alternative, in this particular case, to relocation is that [Angie] continues to commute.¹¹ RP 439. ...I certainly didn't hear anything from Mr. Scoutten that would indicate it would be feasible for him to also relocate. RP 439. Then how one determines that that weighs in favor of or against relocation is really more of a personal choice than something that the Court can analyze and weigh, it seems to me, although I'm always in favor of putting the burden on the parents and not on the children¹², so --

Factor 10

Nobody really presented – even though there is a financial factor here that the Court is supposed to look at, nobody really presented the financials of how that is going to financially impact the parties or – yeah, how a relocation or the lack of a relocation would be dealt with financially, but ... RP 432-433. And what are the logistics of it except to, again, the extent to which the parenting plan of 2013 just seems very, very unworkable to have a Friday at 5 p.m. to Monday at 5 p.m. and three weekends a month and then one Monday a month have 4 p.m. to 7 p.m. with Dad. I don't know how that could possibly work, never mind all the rest of the schedule, just the basic school – children under school age schedule, and then the school schedule is the same. RP 440.

Argument Relocation

I. The Trial Court Properly Denied Angie's Relocation After Making Findings That Corresponded to Each of the 10 Relocation Factors

Appellate Courts review relocation decision for an abuse of discretion. The Trial Court abuses its discretion in the context of a

¹¹ I also find that factor difficult to really thoroughly vet in light of RCW 26.09.530, which specifically says that the Court may not admit evidence on the issue of whether the person seeking to relocate the child will forego her own relocation if the child's relocation is not permitted or whether the person opposing relocation will also relocate if the child's relocation is permitted. RP 439. So in the absence of the ability of – I think we started to go there, and I sort of cut you off because of concern for that statute. RP 439. I always feel a little constrained in trying to analyze any evidence that's been presented with regard to 9. RP 439.

¹² In context, the Court is referencing commuting – putting the burden on parents to commute, instead of on child to commute.

relocation case if it fails to consider the 10 relocation factors required by statute and if substantial evidence does not exist to support the findings. Appellate Courts do not review credibility determinations or reweigh the evidence. A party may object to the relocation by demonstrating that “the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person” based on consideration of 11 child relocation factors.¹³

Angie assigns error to each Finding of Fact without much argument or support from the record. The Court heard testimony from Mike, Angie, Paula, Karen, and Monica regarding each factor, 29 exhibits were entered as evidence on each factor, and the Court

¹³ The 11 child relocation factors are: (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. RCW 26.09.520.

made findings addressing each factor.¹⁴ Even if a reviewing Court finds some error in the articulation of the findings, there is substantial evidence in the record to support the end ruling that the relocation would not be allowed because Mike overcame the presumption of relocation and the Court found “the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person.”

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

Angie incorrectly asserts without argument that the Court improperly applied the most weight to this factor. Angie's brief misleads anyone reading it because she did not include the full statement of the Court. While the Court may have gone on a bit of a tangent in mentioning the fact that in other context this factor is weighted more heavily, taken in context with the rest of the statement, the Court did not say it gave the most weight to this factor:

So the first factor which, interestingly, although not weighted by the legislature in other contexts, is given the greatest amount of weight – for example, if we were establishing an initial parenting plan – and that factor deals with “the strength, nature, quality, extent of involvement and stability

¹⁴ Factor 11 does not apply because there was no temporary order.

of the child's relationship with each parent, siblings and other significant persons in the child's life. RP 424.

The Trial Court heard testimony of Angie, Mike, Paula, Karen, and Monica and found that Memphis has a strong relationship with Mike, Paula, Karen, and Monica. RP 425. The Court specifically found that an issue under this factor was with "the relationship that [Memphis] has with [Angie]." RP 425. The Court found it concerning that Angie does not show a "strong, nurturing relationship with the child...¹⁵" RP 429. ...I heard the testimony was that quite frequently Memphis was left with the maternal grandma, and then [Angie] would go to her friend's home or do whatever. The Court found that there was a stronger relationship with Memphis and Paula than with Memphis and Angie. RP 429. The Court thought it would be very detrimental to Memphis if her bonds with both Karen and Paula were disrupted by a move to Mercer Island. RP 430.

2. Prior agreements of the parties;

¹⁵ Certainly, when she finally got Memphis and put her in the car the first time, I didn't see any evidence that she was strapping her in. RP 428. She closed the door. Memphis quickly re-opened the door and got out of the car. Mom puts her back in the car. I couldn't tell that time if she strapped her in the second time or not. That was very concerning to me. She wasn't doing anything to protect the safety of the child or to show a strong, nurturing relationship with the child...

The 2013 Parenting Plan was developed by agreement, and Mike agreed to the PP because he took comfort in knowing that Paula would oversee Memphis a majority of the time. RP 325. Even if the Order has this does not apply or the Court found there was no prior agreement, there was testimony correcting that, and the Court found this factor was neutral. RP 430.

- 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;**

The Court heard testimony of Angie, Mike, Paula, Karen, and Monica and found that this factor came out fairly split to each parent – meaning it would be detrimental to Memphis equally to disrupt the contact. RP 431.

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

Prior to the Court receiving supplemental briefing on Mike's Modification, it ruled that there were no .191 factors so this did not weigh in favor of or against a relocation. RP 24-25, 431-432.

- 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;**

Angie testified her main reason for moving to Mercer Island was for full time employment with Pinnacle as a leasing consultant. RP 432. Even if the Court didn't explicitly articulate Dad's objection was brought in good faith, this does not mean the record doesn't support the finding. Mike testified that his concern with the relocation [reason for objecting] was that Angie had never held a full time job; if she no longer worked at Pinnacle, he was concerned what would happen to Memphis. RP 287.

The Court found Angie's reason to relocate was brought in good faith, but the Court was concerned with Angie's history of lack of stable employment and what would happen if she lost the job. This finding incorporates one of the reasons Mike objected – his fear of her losing or quitting the job; the logical inference is Mike objected to the move in good faith.

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;

The Trial Court heard testimony of Angie, Mike, Paula, Karen, and Monica. The Court did not find that the move would effect her educational development, but there was testimony from Paula and Mike that they had concerns of how a move to a different school

would impact how she was excelling in her current school. RP 435. The Court found that regardless of where she lived, her medical appointments wouldn't affect her development. RP 436.

The Court found the distance would impact Memphis' development with Karen, Paula, and with Mike. RP 425, 436.

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

The Court acknowledged that having full-time employment would improve the quality of Angie's life, and therefore improve the quality of Memphis' life, but the Court voiced its concerns with Angie's lack of longevity in any job. RP 437-438. The Court also questioned whether Paula would be able to endure the commute to Mercer Island to take care of Memphis in the same way she had been since 2013. RP 425. If Paula could not commute, Memphis would lose contact with the person who arguably had her the most since 2013. The Court did not think that Memphis quality of doctor care would change, since she would be able to maintain the same doctors she had regardless of if she lived in Mercer Island or University Place.

There was no evidence the Judge could rely on to show that schools were better in Mercer Island. There was testimony that the

cost of living is higher in Mercer Island than if Angie were to remain living with her mother. The Court ultimately found that this factor weighed against relocation; while there would be a gain in Angie's employment, Memphis and Angie did not need to move north in order to partake in that opportunity.

8. The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;

This is not the case where one parent was moving out of state or hundreds of miles away; common sense dictates that there should not be much airtime for this factor given the close proximity of the intended move. The court did find that with electronics and technology these days allow people who are at a distance to have contact with their children or extended family through a variety of RP 438 different means, some of which are workable when the child is five, but certainly it doesn't take the place of having real time with your child. RP 438 - 439. However, the Court also heard that both Paula and Angie did not feel they had to allow Mike or his family to speak with Memphis when she was in their care; this testimony would impede Mike and Mike's family to utilize technology to communicate.

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

The Court properly went through its want to tip toe around certain testimony¹⁶ and found that the only alternative to relocating in this context is to have Angie commute to work, like she had been doing. RP 439. Angie wouldn't lose her job if she didn't get to relocate, she would continue to do what she was doing, and the burden wouldn't be put on Memphis to commute for visitation.

After hearing Mike's testimony, the Court found it did not hear any testimony from him "that would indicate it would be feasible for him to also relocate." RP 439. The Court found that this factor weighed against relocation reasoning it is better to put the burden on the parents [to commute] and not on Memphis.

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

The Court considered this factor and there is substantial evidence in the record to support it. The Court received sealed financial documents from both parties that detailed expenses and income. Angie's wages were submitted and testified to. Angie said she paid

¹⁶ I also find that factor difficult to really thoroughly vet in light of RCW 26.09.530, which specifically says that the Court may not admit evidence on the issue of whether the person seeking to relocate the child will forego her own relocation if the child's relocation is not permitted or whether the person opposing relocation will also relocate if the child's relocation is permitted. RP 439. So in the absence of the ability of – I think we started to go there, and I sort of cut you off because of concern for that statute. RP 439. I always feel a little constrained in trying to analyze any evidence that's been presented with regard to 9. RP 439.

her mother rent in University Place and her rent would be \$1,000.00 in Mercer Island.

The logistics of the relocation or prevention of it were minimal for Angie; essentially, Angie would have to commute to work if the relocation were denied, or Memphis would have to commute to Mike's house and both her grandparents house had the relocation been granted. Angie and Paula testified that they would provide all transportation to get Memphis to and from Mercer Island if the relocation were granted.

The Court also heard testimony that Paula would remain Memphis' nanny and would commute and stay on Mercer Island if the relocation were granted. The Court wasn't convinced that Memphis would be in the car less, even though her medical appointments would be closer; the Court compared the drive for three or so medical appointments a month with the weekly visits with Mike in Pierce County, and found it would mean more time on the freeway for visits than for medical appointments. RP 434.

The Court also found that the logistics of the 2013 parenting plan did not seem workable with the move:

just seems very, very unworkable to have a Friday at 5 p.m. to Monday at 5 p.m. and three weekends a month and then one Monday a month have 4 p.m. to 7 p.m. with Dad. I don't

know how that could possibly work, never mind all the rest of the schedule, just the basic school... RP 440.

After going through all the factors in an oral decision, the Court found that on balance, the factors weigh against granting the requested relocation for Memphis, and denied the mother's request to relocate. RP 440.

Oral Ruling on Modification¹⁷

In addition to what I previously ruled [Relocation]... RP2 3. Instability, which I believe is detrimental to the child. RP2 3. Mother testified she's been staying in homes of at least a couple three different people. RP2 3. ...she didn't know the last name of the person that she was staying at RP2 3. She's had numerous jobs in a very short period of time demonstrating, again, instability, and from night to night, it is just unclear where she is and where Memphis is going to be. RP2 3. She's engaged in abusive use of conflict, and I rely, in part, on Ex 41 [From Exhibit Record – Screenshot of 11 messages from Angie, admitted with no objection] which is a text message regarding – which I'm not going to repeat, you all know what it says. RP2 3.

She made untrue allegations against [Mike], yet at trial she testified that she doesn't remember making them and no one else was present who could have made them, so the Court [concludes] that she must have made these untrue allegations. RP2 3.

There was the issue with respect to Memphis' birthday where Dad contacted her [Angie], said he was unable to be there, requested a time to call to speak to his daughter. RP2 4. He calls and – I believe he got voice mail, but he was also told [by Angie's mother] that Memphis and Mom were out for ice cream, or she testified to the fact, which was also

¹⁷ RP2 is the Oral Ruling on Modification, versus RP, which encompasses everything up to May 4, 2015.

not true, and it deprived Father of his opportunity to speak to his child on her birthday. RP2 4.

She has also repeatedly interfered or either failed to communicate or communicated inconsistently and interfered with the ability for the parties to engage in co-parenting or decision-making. RP2 4. Some of this responsibility certainly is at the feet of Mr. Scoutten as well, but to the extent that medical appointments were made by agreement of the parties, cancelled by Mother, rescheduled at a time that Dad was unable to attend indicate a failure to communicate and engage in joint decision making and co-parenting. RP2 4.

I have serious concerns regarding the child's attachment to her mother. RP2 4. The evidence was overwhelming that the child does not want to return to her mother, does want to return to her maternal grandmother and that would be consistent with Mother's own testimony about putting the child to bed at maternal grandmother's home and then leaving for the evening and staying somewhere else. RP2 4.

In addition, what was most compelling, quite frankly, was Ex 37, I believe, which was the video. RP2 5. Mother stood beside the car, Dad demonstrated very appropriate behavior in the transition of the child to Mother. RP2 5. When Mother does put the child in the car, Mother does not secure the child in the seat. She doesn't strap her in or anything, apparently isn't using any kind of child safety locks on the back door because she barely had the door closed when the child was able to get out of her car seat and open the door to the car and get out of the car. RP2 5.

For all of these reasons, and the reasons I previously expressed as well as those stated in the brief submitted on behalf of [Mike]¹⁸, I am finding that he has met the burden under the statute, and I am going to adopt his parenting plan. RP2 5. Angie's Counsel requests some minor alterations to Mike's Proposed Parenting Plan.

¹⁸ Mike's Brief re: application of RCW 26.09.260(2)(c), Angie's Response, Mike's Reply. CP 87-99, filed June 8, 100-103.

I. The Trial Court Had Authority to Modify the Parenting Plan Because Mike Filed a Petition to Modify, Established a Substantial Change Occurred, and Modification was in Memphis' Best Interest

Even though the Court ruled against the Relocation and Angie stated she would not relocate, the Modification was proper because Mike filed a Petition to Modify, paid a filing fee for the separate action, there was a Modification trial with no objections, and the Court requested additional briefing prior to ruling.

The Court of Appeals "may refuse to review any claim of error which was not raised in the trial Court." RAP 2.5(a). There were no objections at trial to moving forward with Mike's petition to Modify the Parenting Plan after the Relocation trial. Every right was afforded to Angie to respond, call witnesses, cross examine witnesses, and put forward additional briefing at trial. Angie should not be permitted to raise this issue for the first time on appeal.

This case is controlled first by the Relocation statute and second by the Modification statute, and does not fall squarely under *Grigsby* because Mike filed a petition to Modify the 2013 Parenting Plan. There does not appear to be any case law directly on point with the procedural posture of this case where a modification outside of

the relocation was filed at the same time of the relocation.¹⁹ Even so, there were two issues, no objections, two trials, supplemental briefing, and two rulings.

RCW 26.09.260(6) governs a request for modification made as part of an objection to a petition for relocation. In a relocation case, it is not necessary for the court to consider whether there is a substantial change in circumstances other than the relocation itself, to consider the factors contained in RCW 26.09.260(2). Under the relocation statute, the objecting party can petition to change the residence the child resides a majority of the time without a showing of adequate cause. This statute does not control the outcome of the case once the relocation is off the table because Mike filed a petition to modify and paid the filing fee.

Instead, RCW 26.09.260(1) governs Mike's petition to modify. In order for the Court to have authority to modify the parenting plan after Angie withdrew her intended relocation, the Court had to find

¹⁹ Dicta in a footnote from a Division three case, *In Re Marriage of McDevitt*, 181 Wn. App. 765, 772, 326 P.3d 865 (2014) touches on the less than clear statutory restrictions on the proper procedure for what happens after a relocation is denied, a parent withdraws their relocation request, and modification under the best interests of the child has been explored. That FN though is not directly on point either as this Court went through a best interest of Memphis analysis because Mike filed for a Modification.

(1) based off facts that have arisen since the 2013 parenting plan was entered that (2) a substantial change has occurred in regards to Memphis or Angie, and that (3) modification it is in the best interest of Memphis, and necessary to serve her best interests. RCW 26.09.260(1).

In determining whether modification is in the best interest of Memphis, the Court could not change the PP unless it found (1) Memphis' present environment is detrimental to the her physical, mental, or emotional health and (2) the harm likely to be caused by a change of environment is outweighed by the advantage of the change to the her. RCW 26.09.260(1)(c). The Court did exactly what it was required to do under the law. The Court found modification was in Memphis' best interest based on the instability that was apparent and harming Memphis since the entry of the 2013 PP.

In *In re Marriage of Grigsby*, 112 Wn. App 1, 57 P.3d 1166 (2002), the Trial Court denied the Relocation after finding that the detrimental effect of the relocation outweighed any benefit. The mother withdrew her request to relocate, but the Trial Court modified the Parenting Plan to make the father the primary parent. The COA affirmed the Relocation because the FF were supported by substantial evidence, but reversed the modification fo the PP

because the Court did not have authority to modify the PP to make the father the primary parent once the mother withdrew the request to relocate. *Id.* 1. The Court found that once the mother was no longer pursuing the relocation, there was no substantial change in circumstances and none of the factors contained in RCW 26.09.260(2) were present. *Id.*

Our case is distinguishable from *Grigsby* factually and procedurally. First, Mike filed a Petition to Modify the PP and paid the fee, whereas the father in *Grigsby* did not. Second, in our case, there was a Modification trial and a Relocation trial; there was only a Relocation trial in *Grigsby*. Third, because there was a Modification trial, the Court made its decision to modify the PP because there were RCW 26.09:260(2) factors present. Fourth, after the Court ruled denying the relocation, the mother withdrew her relocation, and the Court did not alter the PP, leaving it to the parties to bring another Motion if it wanted to modify the PP.

In *Grisby*, two months after the relocation ruling, the parties came before the Court for a hearing (unknown who initiated, FN 3) and the Court modified the PP. *Id.* 5. The Court made the father the primary parent, but kept everything else the same, reasoning that it was protecting the children from any proposed relocation in the

future. Our case is different because there was a modification trial, not just a relocation trial, the Court made findings for each trial, supported by substantial evidence, and the Court did not just change the primary parent to protect Memphis from a proposed relocation in the future, like the Court did in *Grigsby*; it made Mike the primary parent because Memphis was being harmed by actions that arose since the 2013 PP was entered and it was in her best interest to live with Mike, not Angie.

After Reversing the Modification of the PP, the *Grigsby* Court addressed the procedural difference from that case and ours by noting the father was free to seek modification of the PP under RCW 26.09.260(2), should he be able to establish that there was a substantial change in circumstances and that the modification was necessary to serve the best interests of the child. *Id.* 26-27.

Here, the trial Court did not modify the Parenting Plan under 26.09.520(6), it modified the Parenting Plan under RCW 26.09.260(1),(2)(c). Had the Court modified the PP under the relocation statute after Angie withdrew her relocation request, the Court *may* have erred, but the Court had authority under 260 to modify after it found, based on facts that had arisen since 2013, which involved the inability to co-parent, unilateral decision making,

deceptive behavior, withholding communication – all of which were detrimental to Memphis' well being.

While Angie is correct that there was not a technical adequate cause hearing,²⁰ this is only a result of the unique procedural posture of the case and should not constitute a reversible error.²¹ In addition, this issue was not addressed at trial and should be barred for review by RAP 2.5(a). Before a modification can be set for a hearing, adequate cause must be established; this requires an affidavit setting forth facts that arose since the entry of the last PP. *Zigler* at 809. In addressing the modification statute after the Relocation trial, the Court requested supplemental briefing before it made its ruling. The supplemental briefing goes beyond what is required to be found to pass the adequate cause hurdle required outside of the relocation statute. It could not have been the legislature's intent in this scenario where a Modification was filed and a Modification trial was in full

²⁰ No facts outside of the record should be considered on this appeal. Any argument or reference to anything occurring before the trial that was not testified to or after July 24, 2015, when the Final Agreed Orders were entered should be stricken and not considered, including inaccurate designation of Clerk's Papers, and any subsequent history of this case. If this Court finds an issue that was not addressed in Angie's brief, but that has merit, it should allow the parties to provide supplement briefing.

²¹ If this case were solely based off just the modification statute, a hearing for adequate cause would be required before the case was set for trial. RCW 26.09.270, *Zigler* at 809. These parties were already in trial. A ruling had already been made on the relocation.

swing to have the Court end proceedings as soon as Angie notified the Court she would not relocate without first having an adequate cause hearing. At the least, judicial economy required the case to continue and there was no harm or prejudice in continuing.

A Modification is upheld outside an abuse of discretion, which occurs if the findings are not supported by the records. *In re Marriage of g*, 154 Wn. App. 803, 812, 806, P.3d 202 (2010). Even if there is no direct evidence of detriment to a child, inferences showing a child is likely affected by dysfunction supports a finding of detriment. *Id.* At 815. In our case, there was testimony that Memphis' has stronger attachments to every person in her life, except for her mother and that her lack of attachment to her mother was very concerning to the Court. The Court found that it was not in Memphis' best interest to shuffle amongst a variety of Angie's friend's houses to sleep. Angie and Paula also believed that they did not have to let Mike speak with Memphis when Memphis was in their custody. The Court found that this behavior was an example of Angie's inability to co-parent. Any behavior that was detrimental to Memphis' health was Angie's unilateral decisions to cancel agreed doctor appointments without telling Mike, which also effects Mike's ability to be involved in decision making.

The Court found the change making Mike the primary parent was in Memphis' best interest because the instability that has become apparent since 2013 is detrimental to Memphis. The Court based its decision in part on the number of jobs Angie has held, her inability to co-parent, her unilateral decision making in cancelling and rescheduling Memphis' medical appointments to times when Mike could not attend and not even informing Mike of the change, withholding communication, and that no one really knew on a daily basis where Angie and/or Memphis would be sleeping.

The Court relied on the testimony of Angie and Paula that Angie regularly sleeps at residences other than Paula's, the testimony and opinion of the PI that Angie did not live at Paula's. The Court also heard direct conflicting testimony during trial for where Memphis and Angie slept the night of Memphis' fifth birthday. Mike tried to call Memphis on her birthday, but Angie did not answer. Angie testified that they slept at Cash's in Sammamish and Paula testified that Memphis and Angie slept at her house in University Place. Angie testified that she and Memphis spent the night at Cash's in Sammamish on the Wednesday before trial. Angie testified that she took Memphis to school the next day on Thursday and then again on

Friday. The attendance records from the school show that Memphis did not attend school on Thursday or Friday.

The Court's decision that a substantial change had occurred since 2013 is supported by substantial evidence in the record. Angie objects for the first time to the admissibility of the video (Ex. 37) that shows the exchange between Angie and Mike. The Court of Appeals "may refuse to review any claim of error which was not raised in the trial Court." RAP 2.5(a). There were no objections at trial to the admissibility of the video and this Court should not consider it now. Even if the Court were to find the video of the exchange of Memphis was inadmissible, there was testimony at trial from Monica and Mike about the exchange that is shown in the video, and there is substantial evidence outside of the video to support the finding that a modification was in the best interest of Memphis.

The Court did not abuse its discretion in modifying the parenting plan, it had authority to modify the PP, it made appropriate findings based off substantial evidence, and this Court should affirm the modification.

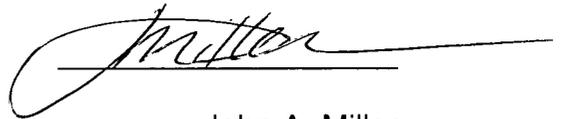
E. Conclusion

The trial Court properly considered all relevant factors in making its decision to deny Angie's relocation, which is supported by substantial evidence in the record. Any reviewing Court does not reweigh the evidence or make credibility determinations. Even without the video, there was ample evidence to support the trial Court's decisions. Further, this Court should find that even if the trial Court didn't explicitly detail every possible reason it relied on it making its decision, there is substantial evidence in the record to support the court's relocation findings.

This Court had authority to modify the parenting plan even after Angie withdrew her intent to relocation because Mike filed a petition to modify, there was a modification trial, and supplemental briefing. The Court appropriately made a discretionary decision after finding a substantial change in circumstances had arisen since the May 2013 Parenting Plan and properly considered the factors under the Modification statute – 26.09.260(2). The Court found that the modification was in five-year-old Memphis' best interest because her environment was detrimental to her wellbeing. Mike requests this Court affirm the denial of the Relocation and affirm the Modification

of the Parenting Plan, which keeps Memphis where she has been since July 2015, living with Mike and Monica.

Respectfully Submitted
this 15th Day of March, 2016

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

John A. Miller
Attorney for Respondent
WSBA 5741

DECLARATION OF SERVICE

I, Lennette Natucci, make the following declaration:

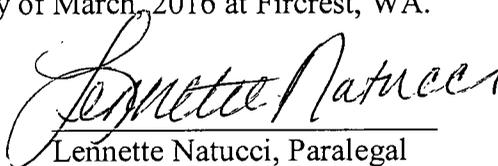
I am over the age of 18, a resident of Pierce County, and not a party to the above action. On March 18, 2016 and again on March 22, 2016, caused to be filed/served a true and correct copy of the foregoing COA No. 48027-1-II Respondent Michael J. Scoutten's Response Brief as follows:

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| <p><u>Original filed with:</u> Court of Appeals, Division II Clerk's Office 950 Broadway, Suite 300 Tacoma, WA. 98402</p> | <p><u>Copy Mailed via U.S. Post Priority Mail on March 18, 2016:</u> Angela Schreiner 5420 60th Ave. Ct. W. University Place, WA 98467</p> |
| <p><u>Copy e-served:</u></p> | <p><u>Copy Mailed via U.S. Post first Class Mail on March 22, 2016 to:</u> Angela Schreiner 5420 60th Ave. Ct. W. University Place, WA 98467</p> |

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22 day of March, 2016 at Fircrest, WA.


 Lennette Natucci, Paralegal