

No. 48462-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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Marriage of:

GRETCHEN RUFF.

Petitioner,

and

WILLIAM WORTHLEY,

Respondent.

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REVIEW FROM THE SUPERIOR COURT  
FOR CLARK COUNTY  
THE HONORABLE JOHN P. FAIRGRIEVE

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REPLY BRIEF OF PETITIONER

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## I. INTRODUCTION

The father agrees that the trial court erred in ordering the parents, who share 50/50 residential time with the child, to participate in an evidentiary hearing to determine which parent is the “primary residential parent” so that it could apply the Child Relocation Act to the father’s request to modify the parenting plan in order to move with the child to Missouri. As the trial court has already concluded (in unchallenged rulings) that the father’s request cannot be considered without first establishing adequate cause to modify the 50/50 parenting plan, which it found the father did not, the father’s concession on appeal mandates reversal, and remand with directions for the trial court to strike the evidentiary hearing and dismiss the father’s actions for modification and relocation.

## II. REPLY ARGUMENT

**A. By failing to file a notice of discretionary review, the respondent/father cannot seek affirmative relief from this Court.**

The parties agree that the trial court’s decision in “setting an evidentiary hearing in this matter to determine the *de facto* primary parent was in error.” (Resp. Br. 19; *see also* Resp. Br. 3) The parties disagree only on the consequence of that error. The mother asks this Court to reverse the trial court’s order setting an evidentiary hearing

and remand with instructions to dismiss the father's relocation and modification actions. The father also asks this Court to reverse, but rather than dismiss his actions, he asks this Court to remand with instructions for the trial court to apply the Child Relocation Act's factors to his request to move the child.

The father cannot pursue this affirmative relief from this Court under RAP 2.4(a), as he did not file his own notice of discretionary review. This Court can only grant the respondent/father affirmative relief "(1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case." RAP 2.4(a); *see also Bearden v. McGill*, 193 Wn. App. 235, 252-53, ¶ 40, 372 P.3d 138, *rev. granted, cause remanded by* No. 93178-0, 2016 WL 5408261 (Wash. Sept. 28, 2016). The father did not file his own notice of discretionary review, and fails to set forth any reason the "necessities of the case" would warrant relieving him of the requirements of RAP 2.4.

If the father believed, as he now asserts on appeal, that the Child Relocation Act should be applied in deciding whether to allow the child to move with him, he should have filed a notice of discretionary review back in September 2014, when the trial court

refused to consider his request to relocate under the Child Relocation Act, and was ordered instead to file a petition for modification of the parenting plan under RCW 26.09.260. (CP 83) Alternatively, the father could have filed his own notice of discretionary review (or notice of cross-discretionary review) in December 2015, when the trial court denied his petition for modification of the parenting plan, and set an evidentiary hearing to determine the actual primary residential parent because it concluded “[t]he Child Relocation Act presumes that one parent is the primary residential parent.” (CP 245) The father cannot now, after failing to pursue those avenues, demand affirmative relief in this Court.

As the parties agree that this Court should reverse the trial court’s decision setting an evidentiary hearing to determine which parent is the *de facto* primary residential parent under the Child Relocation Act, this Court should grant the mother’s request that the trial court be instructed on remand to dismiss the father’s modification and relocation actions. Even if this Court could consider the father’s request that the trial court be directed on remand to apply the Act to the father’s request to move the child, it should be rejected because the Act does not apply to 50/50 parenting plans.

**B. The Child Relocation Act cannot apply to 50/50 parenting plans.**

Although the trial court erred in setting an evidentiary hearing to determine which parent is the primary residential parent, the trial court did properly conclude that the Child Relocation Act presumes there is indeed a primary residential parent. (CP 245) The Act does not apply to parenting plans under which the child resides equally with each parent. The father claims that the Act must apply to 50/50 parenting plans because the parenting plan was entered in 2009 and RCW 26.09.405 provides that the Act applies to “a court order regarding residential time or visitation with a child issued . . . [a]fter June 8, 2000.” (Resp. Br. 4-5) The father asserts that because RCW 26.09.410 defines as a “court order” a “permanent parenting plan,” the Act must apply to the parties’ 50/50 permanent parenting plan. (Resp. Br. 5) But RCW 26.09.410 provides that the definition of court order should apply throughout the Act “unless the context clearly requires otherwise.” Here under the “context” of the Act, a 50/50 permanent parenting plan is not a “court order” to which the Act can apply.

As the father correctly acknowledges, “[a]t the heart of this dispute are the definition statute, RCW 26.09.4[1]0, the notice statute, RCW 26.09.430, and RCW 26.09.520 that provides

statutory factors for a court to consider to determine if the request to relocate the child should be granted.” (Resp. Br. 7) A plain reading of the Act shows that 50/50 parenting plans do not fall within the context of the statutory provisions cited by the father.

This is no more evident than the father’s strained attempt to create ambiguities in the statute when there are none. If the statutory provisions are read for their “plain meaning,” as is required, it is clear that the Act cannot apply to 50/50 parenting plans. *See Bennett v. Seattle Mental Health*, 150 Wn. App. 455, 460, ¶ 12, 208 P.3d 578 (2009), *rev. granted, cause remanded by* 169 Wn.2d 1029, 241 P.3d 1220 (2010) (“Absent ambiguity, a statute’s meaning is derived from the language of the statute and we must give effect to that plain meaning as an expression of legislative intent.”). Each provision in the Act presumes there is a primary residential parent, and when, as in this case, there is no primary residential parent, the Act cannot apply.

- 1. In a 50/50 parenting plan, the child has no “principal residence” from which to relocate under RCW 26.09.410.**

The mother does not dispute that the Child Relocation Act grants the trial court with “authority to allow or not allow a person to relocate the child” under RCW 26.09.420. But when a child resides

equally with each parent as in a 50/50 parenting plan, the child cannot, by definition, “relocate.” RCW 26.09.410 defines “relocate” to mean “a change in principal residence either permanently or for a protracted period of time.” RCW 26.09.410(2).

The father claims that the definition of relocate is “ambiguous” as it relates to 50/50 parenting plans because it could “mean that the child has no principal place of residence or the child has two principal places of residence.” (Resp. Br. 8) But there is no ambiguity. The statute can only be interpreted one way based on the “plain meaning” of “principal,” which is “[c]hief; primary; most important.” Black’s Law Dictionary 971 (7th ed. abr. 2000). In a 50/50 parenting plan, a child has no “principal residence” because she has two equal residences. Therefore, when there is a 50/50 parenting plan, a child cannot “relocate” as defined by the Child Relocation Act.

The father’s claim that in the case of a 50/50 parenting plan, a child can relocate because she has “two principal places of residence” contradicts the plain language of RCW 26.09.410. The statute defines relocate as a change in a *singular* “principal residence,” not *plural* “principal residences.” RCW 26.09.410(2) (emphasis added). The court cannot rewrite the statute in the guise

of interpreting it. *Custody of Smith*, 137 Wn.2d 1, 12, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (quotations omitted). Therefore, because the child here does not have one “principal residence,” the Child Relocation Act’s grant of authority to “allow or not allow a person to relocate the child” does not apply.

**2. The notice requirement under RCW 26.09.430 does not apply unless the parent is a “person with whom the child resides a majority of the time.”**

The notice requirement under RCW 26.09.430 also does not apply to 50/50 parenting plans because it is only triggered if a “person with whom the child resides a majority of the time” seeks to relocate. Under a 50/50 parenting plan, the child does not reside “a majority of the time” with *either* parent. Thus, as this Court recognized in *Marriage of Fahey*, 164 Wn. App. 42, 262 P.3d 128 (2011), *rev. denied*, 173 Wn.2d 1019 (2012) (*discussed* App. Br. 13-15), by its “plain language,” the Child Relocation Act cannot apply to equally shared parenting plans. 164 Wn. App. at 58, ¶ 32.

This Court’s conclusion in *Fahey* that the Child Relocation Act does not apply to 50/50 parenting plans is not dicta, as alleged by the father. (Resp. Br. 4) Dicta are “statements in a case that do not relate to an issue before the court and are unnecessary to decide the case.”

*Pierson v. Hernandez*, 149 Wn. App. 297, 305, ¶ 23, 202 P.3d 1014 (2009) (See App. Br. 14, fn. 1). But whether the Act can apply to 50/50 parenting plan was necessary to resolve the father’s argument in *Fahey* that the mother had to prove a basis under RCW 26.09.260, the modification statute, and not the Act, before she could relocate the children. The father’s argument was premised on his claim that the Act did not apply because either (1) he was the primary residential parent as a matter of fact because of the parties’ agreed deviation from the parenting plan or (2) neither was the primary residential parent because the parenting plan “intended that he and [the mother] share residential time equally.” *Fahey*, 164 Wn. App. at 54-55, 58, ¶¶ 25, 32.

While this Court ultimately rejected the father’s arguments, holding that it was bound by the plan’s designation of the mother as the primary residential parent regardless of the “actual residential circumstances” or that the parenting plan “envisioned approximately equal residential time,” this does not make this Court’s conclusions dicta. *Fahey*, 164 Wn. App. at 58, 59, ¶¶ 31, 33-34 (emphasis removed); see *Pierson*, 149 Wn. App. at 305, ¶ 23 (court’s rejection of a party’s argument is not dicta) (citing *Satterlee v. Snohomish*

*County*, 115 Wn. App. 229, 235-36, 62 P.3d 896 (2002), *rev. denied*, 150 Wn.2d 1008 (2003)).

Even if this Court's holding that "when residential time is split 50/50 . . . neither parent can invoke the child relocation statute," *Fahey*, 164 Wn. App. at 58, ¶ 32, *was dicta*, this Court must still reject the father's argument that the Child Relocation Act applies to 50/50 parenting plans because it is premised on an impermissible "strained or absurd interpretation" of the statute. *Bennett*, 150 Wn. App. at 460, ¶ 12. By definition, majority means "[a] number that is more than half of a total; a group of more than 50 percent." *Black's Law Dictionary* 774 (7th ed. abr. 2000). Therefore, the father's claim that in a 50/50 parenting plan "*both* parents have a majority of parenting time" (Resp. Br. 8) simply cannot stand. Instead, as this Court recognized in *Fahey* (*dicta* or not), when each parent has 50 percent residential time neither parent has the child a majority of time, and the Act does not apply. 164 Wn. App. at 58, ¶ 32.

The father argues that "[e]ven in a pure 50/50 parenting plan . . . one parent will have the child the majority of the overnights in any given year." (Resp. Br. 9) But as this Court has acknowledged, "actual residential circumstances" cannot "negate the express intent of a primary residential parent designation in a permanent parenting

plan.” *Fahey*, 164 Wn. App. at 59, ¶ 34; *see also Marriage of Kimpel*, 122 Wn. App. 729, 734, 94 P.3d 1022 (2004) (even though the children resided with the father slightly more than the mother, the parties were bound by the mother’s designation in the parenting plan as the children’s custodian and primary residential parent). In other words, in a case like this, where the parties have a “true 50/50 parenting plan where both parties are designated the joint custodial parents of the parties’ minor child” (CP 221), the actual number of overnights “cannot negate the express intent” of the parenting plan that neither is the primary residential parent with whom the child resides a majority of time.

**3. Absent this Court rewriting RCW 26.09.520, the factors governing the court’s determination of whether to allow the child to relocate cannot apply to a 50/50 parenting plan.**

The father acknowledges that RCW 26.09.520 as written cannot apply to 50/50 parenting plans because it would grant the parent seeking to move the child away from the other parent with whom the child resides equally a rebuttable presumption that the intended relocation of the child will be permitted. (Resp. Br. 15-16) Nevertheless, the father urges this Court to conclude that neither parent has the rebuttal presumption in 50/50 parenting plans, relying on comments made by a legislative representative. (Resp. Br.

15-16) First, “the answer of a single legislator” cannot create an intent different from that in the enacted statute. *See North Coast Air Servs., Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 326, 759 P.2d 405 (1988) (App. Br. 14-15).

Second, as our Supreme Court has held, “we will not read qualifications into the statute which are not there. A court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.” *Smith*, 137 Wn.2d at 12 (quotations omitted). Under the father’s interpretation of the Act, this Court would have to add in qualifying language to RCW 26.09.520 to effect the father’s interpretation. (*See App. Br. 15-16*).

Further, the father fails to address the factors under RCW 26.09.520, which are ill-suited for deciding whether to allow a child to move away from a parent with whom she lives an equal amount of time as the relocating parent. (*App. Br. 18-20*) The Child Relocation Act “shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child and the relocating person.” *Marriage of Horner*, 151 Wn.2d 884, 887, 93 P.3d 124 (2004). Rather than only the child’s best interests, RCW 26.09.520

gives import to the “interests and circumstances of the relocating person.” *Horner*, 151 Wn.2d at 894.

But when the child resides equally with each parent under a 50/50 parenting plan, the analysis cannot be focused on only the “interests and circumstances of the relocating person” as required by the Child Relocation Act. Instead, the “interests and circumstances” of the non-relocating person must also be considered and the best interests of the child must be the focus.

The Child Relocation Act thus cannot be applied to 50/50 parenting plans. Instead, the standard for modifying parenting plans, which focuses on the best interests of the child alone, is the standard that must be used to decide whether to allow a parent to become the primary residential parent as a result of his decision to move away from the other parent.

**C. The statute governing modification of parenting plans applies when a parent wishes to modify a 50/50 parenting plan to move the child away from the other parent.**

If one parent wishes to move with the child to a location that would effectively make it impossible for the parents to comply with the 50/50 parenting plan, he must prove a basis to modify the parenting plan under RCW 26.09.260(1), (2). This is consistent with the legislative policy of protecting the best interests of the child by

ensuring that “the existing pattern of interaction between a parent and child” is altered as minimally as possible. RCW 26.09.002; *see Custody of Halls*, 126 Wn. App. 599, 607, 109 P.3d 15 (2005) (“We employ a strong presumption against modification because changes in residences are highly disruptive to children.”). As our Supreme Court has recognized, the modification procedures of RCW 26.09.260 were specifically set up to “protect stability by making it more difficult to challenge the status quo.” *Parentage of C.M.F.*, 179 Wn.2d 411, 419-20, ¶ 13, 314 P.3d 1109 (2013). The status quo in this case is an equally shared parenting plan, with neither parent as the primary residential parent.

The father claims that “Petitioner does not explain how any statute in RCW 26.09 requires a court to impose an adequate cause burden to modify a parenting plan on a relocating party, even if the relocating parent is not the majority parent and a subsequent change would qualify as a major modification pursuant to RCW 26.09.260.” (Resp. Br. 12)<sup>1</sup> But there is nothing to “explain” – this is exactly what the statute requires.

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<sup>1</sup> RCW 26.09.260(6), which places the burden on the non-relocating parent to file a petition to modify, does not apply because it presumes application of the Child Relocation Act, which is irrelevant for 50/50 parenting plans.

If a non-majority parent chooses to relocate and wishes to have the child move with him, thus requiring a major modification of the parenting plan, he must prove adequate cause under RCW 26.09.260(1) and (2). *Marriage of Tomsovic*, 118 Wn. App. 96, 103, 74 P.3d 692 (2003) (the court is required to retain the residential schedule established in the parenting plan unless it finds a substantial change in circumstance of the nonmoving party or child under RCW 26.09.260(1) and if specific enumerated circumstances support modification under RCW 26.09.260(2)). Placing the burden on the parent seeking to disrupt the child's residential schedule by asking that the child be allowed to move is wholly consistent with 26.09.060. *George v. Helliard*, 62 Wn. App. 378, 384, 814 P.2d 238 (1991) (the burden of proof in modification proceedings is on the parent seeking to change the child's "custodial environment") If the non-majority parent cannot prove a basis under RCW 26.09.260(1), (2) to warrant an order allowing the child to move away from the other parent, he has two choices: 1) he can stay and maintain the existing parenting plan or 2) he can choose to relocate without the

child and ask that the parenting plan be modified under RCW 26.09.260(5)(b).<sup>2</sup>

To claim that a non-relocating parent would have more protection under the Child Relocation Act than under the modification statute, the father sets up an exaggerated hypothetical situation. In it, he claims that a parent could move with the child unilaterally “without consideration of the financial burden of the other parent’s transportation costs,” force the child to “attend school in two districts” without filing a petition under RCW 26.09.260 simply by maintaining the 50/50 residential schedule. (Resp. Br. 13) In the wholly unlikely event that such a situation would ever arise, the non-relocating parent would have similar avenues of relief under either the Act or modification statute.

Under the Child Relocation Act, the non-relocating parent can pursue sanctions or contempt against the other parenting for failing to give notice of the parent’s relocation. RCW 26.09.470. Similarly, presuming parents governed by a 50/50 residential schedule also have joint decision-making for education, the non-relocating parent

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<sup>2</sup> Under RCW 26.09.260(5)(b), the relocating parent need only prove a “substantial change in circumstances of either parent or the child.” The parent’s decision to relocate is certainly a “substantial change in circumstances.”

can pursue sanctions or contempt for the relocating parent's decision to unilaterally enroll the child in another school district. RCW 26.09.160(1).

Under either the Child Relocation Act or the modification statute, the non-relocating parent can object to the relocating parent's decision by filing a petition for modification. RCW 26.09.480; RCW 26.09.260. While it is true that under this unique circumstance, the burden would fall on the non-relocating parent to meet adequate cause under RCW 26.09.260(1), (2), it is one that would be easily met since the other parent's unilateral relocation would be a "substantial change . . . in the circumstances of the . . . nonmoving party" under RCW 26.09.260(1), and the fact that a child would be going to school in two separate school districts could certainly meet the requirement that "[t]he 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" under RCW 26.09.260(2).

Finally, under either the Child Relocation Act or the modification statute, the non-relocating parent can pursue relief under a temporary order requiring the child to return. RCW

26.09.510(1); RCW 26.09.270. Nevertheless, the father relies on the fact that the mother sought to temporarily restrain the child's move to Missouri under RCW 26.09.510 as a concession from the mother that the Act applies. (Resp Br. 14) But in her accompanying motion to dismiss, she specifically stated that she had purposely avoided filing an objection to relocation under RCW 26.09.480 to avoid the adverse collateral effect of triggering the Act. (CP 30) The motion to temporarily restrain the relocation would not have been necessary had the father properly filed a petition for modification under RCW 26.09.260. In that instance, the burden would have been on him under RCW 26.09.270 to move for any temporary orders that would change the parenting plan pending a final determination.

Here, the trial court correctly ruled that the father was required to establish adequate cause under RCW 26.09.260(1), (2) before his request to move the child with him to Missouri could be considered. However, the trial court erred in not dismissing the action once it found that father failed to meet his burden.

### **III. CONCLUSION**

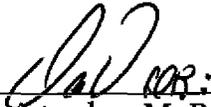
This Court should reverse the trial court's order setting an evidentiary hearing and remand it with directions to dismiss the father's relocation and modification actions.

DATED this 14 day of October, 2016.

SMITH GOODFRIEND, P.S.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 14, 2016, I arranged for service of the foregoing Reply Brief of Petitioner, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 14<sup>th</sup> day of October, 2016.

  
Jenna L. Sanders

**SMITH GOODFRIEND PS**

**October 14, 2016 - 12:02 PM**

**Transmittal Letter**

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