

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Cause No. 283330

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of

Lance Linderman, Respondent

v.

Heidy Linderman, aka McWain, Appellant,

SUPPLEMENTAL OPENING BRIEF OF APPELLANT

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WSBA # 30613

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I. INTRODUCTION

Heidy McWain filed an objection to relocation of the child relocating from Othello, WA to Cottonwood, Id. When she filed her objection, she lived in Visalia, CA. At the initial hearing, the child was allowed to move to Cottonwood, Id. with her father. During the pendency of the action, after the initial GAL report was filed and before trial, the mother moved to Rochester, WA. The relocation of the child to Cottonwood, Id. was allowed following trial. The court determined to make modifications to the parenting plan because the mother had moved to Rochester and because the father had offered the changes, rather than any statutory factors such as because of the relocation of the father, the factors considered and findings made regarding the relocation, any factors considered for a final parenting plan, or the best interest of the child.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in not allowing the objecting parent's petition to modify the parenting plan, filed concurrently with her objection to relocation, to be heard and determined at the time of the relocation trial, pursuant to RCW 26.09.260(6).
2. The trial judge erred in believing himself restricted in modifying the parenting plan unless harm to the child was proven. And the error was material in reducing or eliminating the modification possibilities in support of the best interests of the child pursuant to relocation.
3. The trial court erred as a matter of law in interpreting the modification provision of RCW 26.09.260(6) too narrowly, to not give the court discretion in modifying a parenting plan pursuant to relocation, unless a change was needed to

effect the relocation and to prevent harm due to geographic changes, rather than to serve the best interest of the child as illuminated by the findings from the relocation factors or final parenting plan factors.

4. The court erred in not using the findings on each statutory factor, to not only analyze if the relocation should be allowed or not, but to analyze how the parenting plan should change, in order to and as necessary to support the best interests of the child.

5. The court abused its discretion, basing its decision on untenable grounds, when, instead of following statutory factors or procedures, the decision on how to modify the parenting plan was based solely on the father's offer due to the mother's move and the court's belief that it would be better to end the litigation between the parties than litigate another minor modification petition due to the mother's move.

III. STATEMENT OF THE CASE

(Part 2) With slight overlap, this statement of the case continues where the Appellant's statement of the case in the first appellant brief filed January 29, 2010, left off. In December 2008, the mother, who lived in Visalia, CA, objected to temporary relocation of the daughter from Othello, Washington to Cottonwood, Idaho. CP 20-33. The motion for temporary restraint of relocation was denied January 23, 2009 (*CP 67-70*) and the decision was upheld on revision April 10, 2009. CP 110-111. As noted in the January 14, 2009 letter decision, the commissioner determined no modification to the parenting plan was *necessary* pursuant to the temporary relocation, i.e. it was still functional. CP 66 at para 3. Since a temporary modification to the parenting plan was not argued at the

first hearing, the mother brought a separate motion for temporary orders in order to review the issue against the best interest of the child standard, See CP 70-72 but the motion was denied. CP 112.

A GAL was appointed to investigate the best interest of the child and report on the child's preferences and make recommendations to the court. *See* CP 112; CP 219; and Order Appointing GAL filed June 5, 2009, CP 521-24. She did this via her report to the court on August 25, 2009, where she raised concerns regarding the child's home in Cottonwood and the father's blocking the GAL from completing her investigation and recommended the child live with her mother in Visalia, CA. *See* CP 219 and 238.

After the child's summer residential time with her mother in CA, the mother brought the child to the father and then began staying with and assisting her grandmother who has Alzheimer's, in the Tri-cities, for over a month. RP 116 ln 3 -21. During that time she was offered a job by an old friend in the Rochester, WA area. RP 118 ln 19 – 119 ln 3. The mother moved to Rochester, WA near the beginning of September, 2009. *Id.*

Following a period of time of settlement negotiations that ended without settlement, the GAL did a supplemental investigation, with a home visit with the mother in Rochester, WA and filed a supplemental report prior to trial. CP 217-218; CP 277-280; The GAL's recommendations to the court, in the best interests of the child, were that the child either reside the majority of her time with the mother, or be allowed a substantially increased amount of time with the mother. RP 456 lns. 16-21; RP 463 lns. 2-8; CP 237-38; CP 279-80.

The mother moved the court for permission to file an amended objection to relocation and filed a petition to modify the parenting plan without setting it for adequate cause. CP 287-314 and CP 525-556. These documents acknowledged the move of the mother to Rochester, WA, while updating the pled facts pursuant to discovery and the GAL's investigation. *Id.* Hearing on the motion to amend was postponed for various reasons until the trial court considered the motion before the start of trial, but denied the motion to amend the complaint, ruling that the evidence as it then existed would be allowed. RP 34 lns 1-7 and 54 lns 6-16.

Trial on the Objection to Relocation matter occurred March 29 – 31, 2010. Throughout the action and at trial, all parties acknowledged that since 2003, the mother routinely had been able to spend substantially more time with the child than was ordered in the parenting plan, RP at 515 ln 20-25 (father's counsel); RP 532 ln 22- 533 ln. 3; See GAL Report at RP 236- 238, that her phone contact prior to the objection to relocation with the child had been constant and substantial, *RP 459 Lns. 14-18*, and that with the filing of the objection to relocation, all such additional and healthy contact had ended. RP at 460 ln 20 - 21; 457 lns 4 - 16; CP 238. There was no evidence presented that the additional time would ever be restored while the child resided in Cottonwood. See RP 478 ln 20 – 479 ln. 19; See RP 461 lns 1-6.

Even though the judge believed the child should have as much contact with the mother as possible, *RP 459 lns 6-7*, Judge Antosz found no basis for modifying the parenting plan pursuant to the father's relocation, *See e.g., RP 488 lns 16 – 490 ln 6*, as he explained that no modifications were needed to effect the geographical move of the

father and he believed an objection to relocation is not a modification action. RP 471 ln 1- 473 ln 8; 593 lns 18- 534 ln 2 (judge's discounting of the GAL's report of best interest of child as having little to nothing to do with the relocation); RP at 550 lns. 5-10 and 17-19.

Instead, the trial judge what the father offered regarding a parenting plan modification, not pursuant to the father's relocation, but because of the mother's relocation, *RP 551 ln 9-17*, and the father's offer per his attorney at closing argument. RP 497 ln25 -499 ln 20. His offer was and the trial judge ordered, every other three day weekend and every other spring break with the mother. RP 550 lns 20 – 551 ln 8; 551 lns 18-21. The trial judge found these modifications were driven by the mother's relocation, not the father's, but that the father's offer seemed appropriate due to the distance between the parties, (and such an order would cut off the mother's ability to seek the modification in a separate action¹) and end the litigation which he found to be harmful to the child. RP 551 lns 7-21.

IV. STANDARD OF REVIEW

A court's modification to a parenting plan is generally reviewed for an abuse of discretion. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993)(stating that a trial court's decision will not be reversed on appeal unless the court exercised it's discretion in a manifestly unreasonable or untenable way.). The court's discretion is abused if its decision is manifestly unreasonable

¹ See for example *In re Marriage of Zigler and Sidwell*, 154 Wn.App. 803, 226 P.3d 202 (2010) (allowing adequate cause for changes of circumstances since entry of the last parenting plan entered where facts were known to the court.) In this action, since the parenting plan was modified following the objection to relocation trial, no facts pending before the relocation trial may be used in pursuit of adequate cause to modify the parenting plan.

or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). A decision is based on untenable reasons if the court applies the wrong legal standard. *Id.* Applying the wrong legal standard includes failing to follow the statutory procedures or modifying a parenting plan for reasons other than the statutory criteria. *See In re Marriage of Hoseth*, 115 Wn.App. 563, 569, 63 P.3d 164, *review denied*, 150 Wn.2d 1011, 79 P.3d 445 (2003).

It is based on untenable grounds if the factual findings are unsupported by the record. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The reviewing court must also determine if the trial court made an error of law. *Brandli v. Talley*, 98 Wn.App. 521, 523, 991 P.2d 94 (1999). Issues of law are reviewed de novo. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 556, 852 P.2d 295 (1993).

“A court's choice, interpretation, or application of a statute is a question of law that we review de novo under an error of law standard.” *In re Marriage of Kinnan v. Jordan*, 131 Wash.App. 738, 751, 129 P.3d 807 (2006) (citing *In re Marriage of Hansen*, 81 Wash.App. 494, 499, 914 P.2d 799 (1996); see also *State v. Law*, 110 Wash.App. 36, 39, 38 P.3d 374 (2002); *State v. J.A.*, 105 Wash.App. 879, 884-85, 20 P.3d 487 (2001)).

V. ARGUMENT

1. The trial court erred when it would not allow the objecting party's petition for modification to co-exist with the objection to relocation while the proposed relocation of the father was being pursued.

The trial court commissioner dismissed the mother's petition to modify the parenting plan which had been filed simultaneously with her objection to relocation, stating it was inappropriate bootstrapping of a modification action to the objection to relocation. CP at 133 Ins 5-9.

This and a related decision was upheld on revision at CP at 110 -111; CP 148-49 by J. Knodell. These decisions were acknowledged by Judge Antosz at the trial on objection to relocation with J. Antosz also utilizing the label "bootstrap" to reduce even further the ability to modify a parenting plan pursuant to an objection to relocation. RP 542 In 1-3.

The court avoided modification requests that were already dismissed (for lack of adequate cause) and on appeal – the first appeal. RP 501 at 11 - 502 In 10.

RCW 26.09.260 (6) is plain on its face regarding the objecting to relocation parties' right to file and pursue a petition for modification without a showing of adequate cause other than the proposed relocation itself.

"The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued."

RCW 26.09.260(6)

The court is directed to determine whether to permit or restrain the relocation using the standards of RCW 26.09.405 through 26.09.560. “Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.” RCW 26.09.260 (6).

Following standard statutory construction rules, “[a] court must construe a statute according to its plain language, and statutory construction is unnecessary and improper when the wording of a statute is unambiguous.” *State v. Parada*, 75 Wn. App. 224, 230, 877 P.2d 231 (1994)).

The plain and clear language of RCW 26.09.260 (6) allowed the mother to file a petition to modify the parenting plan and a modification to be awarded, without a finding of adequate cause. No case law opposes this interpretation or suggests another. The court erred in not allowing the concurrent modification petition to operate concurrently with the objection to relocation. The error was material.

The materiality of the error became even more apparent when, following trial, Judge Antosz felt he was without legal basis from which to order the changes he ordered – some of which were non-residential provisions. And although he briefly contemplated requiring the mother to pursue yet another petition for modification, he just ordered what had been offered by the father without following any procedure or statute at all. RP 551, Ins. 11-17.

Had the original petition been allowed to stand, the judge would have been more inclined to accept the availability of the panoply of options available to

consider and order in support of the best interest of the child. Then, he would have, for example, appropriately considered additional summer residential time to the mother (like the mother always used to receive and the child desired); ordered changes to the non-residential aspects of the plan including a full alternative dispute resolution provision; provided additional joint decision making for the mother, and order long distance travel expenses to be shared proportionately to income (a statutory requirement at RCW 26.19.080 (3)). See Mother's Proposed Parenting Plan filed February 29, 2009 at CP 73-81.

Instead, the modifications ordered materially prejudice the mother and the child first by ignoring the original modifications requested by the mother that support the child's best interests, and then by curtailing or restricting the mother's ability to seek those modifications in the future because the evidence provided the court at trial and in this action (7+ years worth) precludes a later finding of adequate cause to modify the parenting plan on those same facts, and requires instead a finding of substantial changes occurring since the last parenting plan entered by the court, which now is April, 2010. See RCW 26.09.260 (1) and (5); *In re Marriage of Zigler and Sidwell*, 154 Wn.App. 803, 226 P.3d 202 (2010).

The trial court on remand should be directed to allow, consider, and be able to freely order the proposed modifications to the parenting plan that the mother proposed at CP 73-85, pursuant to relocation and as necessary to serve the best interest of the child. See RCW 26.09.260 (1) and (6).

2. The court erred in constraining himself to a relocation modification unless harm to the child was proven, impermissibly reducing or eliminating the modification possibilities in support of the child’s best interest, pursuant to relocation.

Judge Antosz explained that he was precluded from modifying the parenting plan unless based on harm to the child or detriment to the child. RP 490 lns 1-7, RP 528 lns. 10-25, RP 529 lns 9-13. He found that there’s nothing “detrimental about Cottonwood.” at RP 545 ln. 9-10.

The harm review is required only when looking for adequate cause for a major modification. RCW 26.09.260 (2) (c), not for the exception of section (6) (or sections (4), (5), (8) and (10)). RCW 26.09.260(1). During relocation actions, finding adequate cause is not required – obviously, the move itself is a substantial change of circumstances and a separate finding of harm is not required, some harm to the child is assumed. See RCW 26.09.520 (legislating “that *the detrimental effect of the relocation* outweighs the benefit of the change to the child and the relocating person, based upon the following factors”) and RCW 26.09.260 (6). The judge should not have applied a bar to modify the parenting plan pursuant to relocation on first finding harm to the child, as if the action was subject to the provision of RCW 26.09.260 (2), before modifying any of the provisions pursuant to relocation. No such adequate cause for a major modification was required.

Since modifications pursuant to relocation do not require finding harm before they are modified, modification is then left to the scrutiny of “the best interest of the child.” See RCW 26.09.260 (1) requiring all modifications, unless

otherwise specified, to be “in the best interest of the child and [] necessary to serve the best interests of the child.” Such a modification is similar to a minor modification that must meet their own lower adequate cause standards, but with a presumption that the child will be allowed to move with the primary care relocating parent. See RCW 26.09.260 (1) and the exceptions of (5) allowing a modification following a substantial change of circumstance in the moving party, rather than just the non-moving party of RCW 26.09.260 (1). For example, here, the presumed harm attendant to relocations could have been reduced with appropriate modifications to the parenting plan, such as increasing the ordered time between the child and mother as a result of the father curtailing the extra time the mother used to receive prior to objecting to relocation. If required to rely on the relocation factors in order to modify the parenting plan, such a modification could have been appropriate under such factors as the alternative arrangements factor in conjunction with the relative strength and relationship with each parent.

Such an interpretation is consistent with cases that emphasize that a modification must be in the best interests of a child even if all other criteria under RCW 26.09.260 are met. *In re Custody of Halls*, 126 Wn.App. 599, 607, 109 P.3d 15 (2005) (citing *Thompson v. Thompson*, 56 Wn.2d 244, 250, 352 P.2d 179 (1960)).

Here, the judge identifies that the child’s best interest of the child is and was supported by the parents when the mother received much more time with the child. The court seemed to believe it could not consider in its determination

to modify the parenting plan that the parenting plan was very limited to the mother with some summertime visits at *RP 532 lns. 21 -22*, but that routinely the mother had received more time via “working it out and good communication” at *RP 532 ln 22 – 533 ln 3*, because the bad communication occurring due to the objection to relocation has nothing to do with the relocation. *RP 533 at lns. 4-10*.

With regard to this, he only opines, rather than orders. He apparently thought his hands were tied for one impermissible reason or another. So, rather than actually effecting a change to the parenting plan to protect the child from the curtailment of the additional time she had received for years, and reflect the acknowledgment that the best interest of the child to include much more time with the mother, or to protect the child from future harm when the father arbitrarily curtails all such additional time in the future, the court only opined for a better relationship between the parties. *RP 532 lns 22 – 533 lns 10*.

He did eventually modify the parenting plan, but not because of the best interests of the child as it relates to the objection to relocation, and not even because of a harm to the child, his honor’s earlier position, but in large part as a favor for the father because he was impressed with him. *RP 550 lns. 20-22* (stating, “But the father has impressed me and shown his good faith in offering I think it’s alternating three-day weekends or all three-day weekends.”)

That was an abuse of discretion.

Recalling the law: “The parents' interests are subsidiary to the consideration of the children's best interests. “ *Jacobson v. Jacobson*, 90 Wn.App. 738, 744, 954 P.2d 297 (Div. 2,1998). “Failure by the trial court to make findings that reflect the application of

each relevant factor is error.” *In re Marriage of Shryock*, 76 Wn.App. 848, 852, 888 P.2d 750 (Div. 3 1995).

Undoubtedly, the mother welcomes the additional time ordered with the daughter, but, it is at an unacceptable material cost of curtailing her right to seek a minor modification under RCW 26.09.260 (5)(c) when the amount of time with her daughter is still not adequate, and is at a cost of the court making a full determination that is fully and truly is in the best interest of the child - because the substantial change of circumstances of her move has been spent in the objection to relocation and the filed petition can not move forward. The mother has been ordered to accept, once again, and as has been occurring since prior to the parties’ divorce, only what Mr. Linderman is willing to offer.

In sum, the trial court erred in placing an impermissible bar to modifying the parenting plan pursuant to relocation upon a finding of actual harm in the child’s present (relocated) environment. The error was material as it barred the court from considering modifications supportive of the best interest of the child and from making appropriate findings regarding the parenting plan as it related to any statutory factors – at all.

- 3. The court’s belief that he was constrained to what is needed or necessary pursuant to the father’s relocation under RCW 26.09.260 (6) impermissibly constrained the judge’s hands in effecting a parenting plan in the best interest of the child pursuant to relocation.**

From the commissioner’s first written decision in January 2009 (CP 63-66, and specifically at 66) through trial, the term “necessary” became the mantra of the father’s

supporters and the court. In contrast, throughout the action, the mother's requests were focused on achieving modifications to the parenting plan that were in the best interest of the child pursuant to evidence admitted within the relocation factors in support of the best interest of the child. e.g. CP 82-86, and specifically at 82 ln 21-23; RP 468 – 469 ff. The court impermissibly interpreted its authority to be limited to only those changes necessary due to the new geographic location of the child and father. *See e.g.*, RP 488 ln 16 – 490 ln 6; RP 471 ln 1- 473 ln 8; 593 lns 18- 534 ln 2 (judge's discounting of the GAL's report of best interest of child as having little to nothing to do with the relocation); RP at 550 lns. 5-10 and 17-19.

Throughout the court's oral decision, the trial judge demonstrated his belief that modification of the parenting plan pursuant to relocation needed to be constrained to the trickle of "need pursuant to geographical change." *See e.g.* RP at 550 ln 7 and 12 (using the word "necessary") at 550 lns. 11-12. Or only a modification *that has to be made* pursuant to the RCW 26.09.520 factors at RP 497 lns. 1-7. Ms. Black supported this interpretation by equating relocation changes that "should be made, if any" to, "It could be that none is *necessary*." The court agreed, at RP 497 ln 24. He noted that the mother's move may have created a *need* to modify the parenting plan, or make it *necessary* to do so at RP 498 at 17 and 20, and that he was only analyzing the relocation factors as they pertained to geography, not any other matters that might create an issue for the child. *See* RP 501 lns 1- 10; RP 531 lns 3-18.

Although the child was used to and needed more time with her mother,

the court believed that can not be a driving force in the relocation criteria. RP at 533 lns. 11- 534 ln 2. The court believed the best interest of the child did not control. RP 529 ln 9-10.

If anything, the need that should be considered here are the necessary changes in a parenting plan to serve the best interest of the child, not just the limited needs occasioned by a geographic change.

RCW 26.09.260(1) states in part:

“(1) Except as otherwise provided in ... this section, the court shall not modify a prior custody decree or a parenting plan unless it finds ... that the modification is in the best interest of the child and is necessary to serve the best interests of the child.”

Reflecting on basic statutory construction: “A court must construe a statute according to its plain language, and statutory construction is unnecessary and improper when the wording of a statute is unambiguous” *State v. Parada*, 75 Wn.App. 224, 230, 877 P.2d 231 (1994)); and “[w]e give statutes a rational, sensible construction.” *State v. Thomas*, 121 Wn.2d 504, 512, 851 P.2d 673 (1993) – the only applicable “necessary” standard is that modifications must be “necessary to serve the best interest of the child” – not “necessary due to geographic changes”.

The Relocation factors could be used to flesh out proposed living Arrangements, in the best interest of the child, including other relationships and between the two parties. See RCW 26.09.520 factors 1, 8, 9. Although nothing in RCW 26.09.520 specifies that this is the purpose of these factors, it could be presumed that these are the factors to use in determining modifications to the parenting plan via both RCW 26.09.620 (1) and (6) and the tight correlation

between RCW 26.09.520 and RCW 26.09.187. *See CP 462-465 (comparing the tight correlation between the factors of RCW 26.09.520 and RCW 26.09.187.)*

If so, the RCW 26.09.520 factors most relevant to a parenting plan modification must also address as findings parenting plan modification possibilities or issues.

Cases emphasize the need for including evidence, not excluding it, when considering relevant evidence necessary to determine how to support the best interest of the child.

In *In re Marriage of Clark*, the court notes the absurdity in limiting the court's eyes and options regarding anything relevant to the child. "It would be absurd to not permit the court to compare living circumstances in order to also flesh out the new parenting plan provisions when the parties stipulated to a substantial change." *In re Marriage of Clark*, 112 Wn.App. 805, 51 P.3d 135 (2002)(analyzing whether or not to exclude comparative evidence between the homes in a modification action based on integration into the other parties' home).

Another trial court decision reversed by this appellate court for impermissibly constraining itself from considering evidence as it relates to determining the child's best interests is *In in re Marriage of Combs*. This appellate court reversed the trial court for concluding it was constrained from considering a planned relocation by the mother in an original dissolution, noting that "the child's residence will have an important effect on his or her best interests and directly related to a factor to be considered. *In re Marriage of Combs*, 105 Wn.App. 168, 175-76 19 P.3d 469, 473 (Div. 3, 2001). When the court concluded

it was not permitted to consider evidence regarding a planned relocation, but that evidence did effect the child and could be included within the required statutory analysis, the decision was based on an untenable reason. *Id.* at 76.

Similarly, court's are not reversed for implementing broad changes to a parenting plan when done in the best interest of the child, even with an objection to relocation action. Division 3's case of *In re Marriage of Chua and Root* demonstrates one trial court's broad authority, which was upheld on appeal, regarding changes to a parenting plan "pursuant to relocation" and based on statutory criteria, to include restraints and supervised telephone and physical contact, depending on the evidence at trial, not just the impact of the geographic location to the move. *In re Marriage of Chua and Root*, 149 Wn.App. 147, 153, 155-56, 202 P.3d 367 (Div. 3, 2009).

Here, the court all but threw out the GAL's recommendations and report, finding, in essence, her work and report was not relevant and neither was most of the evidence having to do with anything but geography. *See* RP 458 ln 16 – 459 ln 25; RP 531 ln. 3-18; RP 533 ln 4 - RP 535 ln 22. The court declined to consider the surrounding circumstances of the relocation as relevant, including the personalities and conflicts, as well as ignoring or dismissing the specific needs of the child, classifying them as not relevant and interpreting the relocation factors as meant to address the geographical move exclusively. RP 531 lns 3-18.

In sum, the court based its decision to not modify the parenting plan pursuant to relocation on untenable grounds when the trial judge constrained himself in modifying the parenting plan pursuant to the father's relocation to only

a modification as needed to support the father's geographical change, rather than to modify the parenting plan as necessary to support the best interests of the child.

4. The trial court erred in rejecting the lawyers' proposed statutory criteria to determine appropriate provisions for a modified parenting plan that would direct the court to modify the plan to effect the best interest of the child, pursuant to relocation, but then failed to modify the parenting plan pursuant to any statutory criteria at all.

No case has examined this issue directly.

Other than to authorize changes "pursuant to relocation" at RCW 26.09.260 (6) and in "the best interest of the child" at RCW 26.09.260(1) the RCW 26.09 statutes are otherwise silent on what specific factors or criteria should be used or the scope for modifying a parenting plan pursuant to relocation.

The statutorily authorized outer limits to modifying a parenting plan pursuant to relocation seemed clear to the mother at the outset of the action. According to RCW 26.09.260 (6), the mother could seek a "change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself." *Id.* Then, following that decision, the court was authorized to modify the plan "pursuant to relocation," *Id.* and the best interest of the child at RCW 26.09.260(1).

The mother thus sought a change in the residence in which the child resides the majority of the time in one proposed parenting plan and suggested appropriate alterations to the parenting plan, for the child's benefit, after the relocation was allowed at the other hearing. See CP 53-61; CP 73-81.

During the temporary orders stage (s), the mother's theories pursuant to RCW 26.09.260(6) were all dismissed.

Several tenants of statutory construction should be applied here. "In interpreting statutory language, the statute must be construed in the manner that best fulfills the legislative purpose and intent." *In re Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993). "Statutes should not be construed so as to render any portion meaningless or superfluous." *In re Marriage of C.M.C.*, 87 Wn.App. 84, 88, 940 P.2d 669 (1997). And applicable to family law in particular: "The parents' interests are subsidiary to the consideration of the children's best interests." *Jacobson v. Jacobson*, 90 Wn.App. 738, 744, 954 P.2d 297 (Div. 2, 1998). "Failure by the trial court to make findings that reflect the application of each relevant factor is error." *In re Marriage of Shryock*, 76 Wn.App. 848, 852, 888 P.2d 750 (Div. 3 1995).

Using these tenants of statutory construction, the "modification pursuant to relocation" language of RCW 26.09.260 (6) could be interpreted to mean, "pursuant to the relocation factors regarding relocation" -- the RCW 26.09.520 factors. This interpretation gives the relocation factors and the evidence presented a secondary function in both determining if the relocation should be allowed and in determining appropriate modification to the parenting plan.

The father's counsel approved this interpretation. RP 495 ln 4 – 497 ln. 5.

The mother's attorney advocated for this interpretation. CP 462-465; *see also* RP 481 ln. 15 - 482 ln 2; and also explained that the policy section of RCW 26.09 and RCW 26.09.187 should guide the court in determining appropriate parenting plan provisions pursuant to relocation. RP 469 ln 11 - RP 470 ln 5; CP 422-429.

When the court did not seem to use any statutory criteria at all to guide its decision, on reconsideration, the mother's attorney attempted to clarify for the court that the relocation factors of RCW 26.09.520 identify, approximately, the same factors of RCW 26.09.187 to elucidate the best interest of the child and fashion a parenting plan from the findings pursuant to relocation. CP 462-465. Her motion for reconsideration was dismissed without comment. CP 520.

RCW 26.09.184 and RCW 26.09.187 are the only two statutes that provide the court criteria that are specifically designated as criteria from which to fashion permanent parenting plans in the best interest of the child.

“Criteria for establishing permanent parenting plan.” (3)
Residential provisions. (a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors.:

RCW 26.09.187. Heading and (3)(a).

Neither RCW 26.09.184, nor RCW 26.09.187 state in their text that the statutes can not be used to establish a final parenting plan pursuant to a modification action. On the other hand, RCW 26.09.520 is silent as to a final parenting plan established or modification after an objection to relocation trial.

Yet, the court rejected utilization of these statutes to determine provisions of the parenting plan following relocation, claiming RCW 26.09.187 could only be utilized to establish the first or original permanent parenting plan, not

subsequent permanent parenting plans. See RP 489 In. 23 – 490 In 7; CP 510 §

2.3.5.

In using the factors to formulate appropriate parenting plans, the most substantial difference between the permanent parenting factors and the relocation factors of RCW 26.09.520 is that the original permanent parenting factors are not to include a presumption in favor of the temporary residential parent, see *In re Marriage of Kovacs*, 121 Wn.2d 795, 809, 854 P.2d 629 (1993), where as the relocation statute specifically includes a presumption in favor of the primary residential parent. See RCW 26.09.520. See also CP 462-465.

Although case law may support the judge's conclusion regarding the use of RCW 26.09.187 to provide direction on initial permanent parenting plans, the absolute bar is not the most sensible, obvious, or appropriate construction and interpretation when it then leaves a trial judge without specific criteria to use in determining the best interest of the child during modifications. The original parenting plan criteria should permissively guide the court in determining what is in the best interest of the child during a modification action so long as the factors do not curtail modification requirements, such as application of the presumption of primary residential parent continuity. The mother offered these criteria, of RCW 26.09.187, as the operative statutory criteria because they are the only criteria within RCW 26.09 that state they specifically apply to fashioning a parenting plan and RCW 26.09.184 also references 26.09.187 at (6).

In contrast, no where in the objection to relocation section of RCW 26.09.520 does the statute state that these 11 statutory criteria should be utilized

as a guide to modify the parenting plan, even though the criteria of RCW 26.09.187 and the relocation factors of RCW 26.09.520 are so similar in kind and quality, it is reasonable to believe that the legislature expected the relocation factors to be functional to both determine if the relocation is allowed, and guide what change to the parenting plan should be made to promote the best interest of the child pursuant to RCW 26.09.260(1) and (6). Yet, if that is true, then the RCW 26.09.520 need to be utilized as findings in consideration of the modification, and not just allowing or disallowing the modification.

Counsel for the father argued for using the RCW 26.09.520 factors for modification of the parenting plan during closing argument. RP 495 ln 4 – 497 ln.5. If it is, case law needs to establish that connection, because the statute itself does not provide that directive. Further and even if it was to be utilized, the requirement to analyze it as related to parenting plan modification factors then should also be also required. An appellate interpretation is needed to direct the clear use of RCW 26.09.520, RCW 26.09.184 and or RCW 26.09.187 as statutory factors to determine parenting plan provisions following a trial on relocation.

If RCW 26.09.520 provides the court a dual purpose in requiring analysis of the evidence within the factors pursuant to relocation and also to modify the parenting plan, then findings for each function are necessary.

But no findings, regarding these factors were ever made by the court as to how RCW 26.09.520 relates to modifying the parenting plan. They could have been. When an opportunity to modify the parenting plan pursuant to the relocation factors appeared, the court did not seem to recognize it as an

opportunity. While making findings regarding the relocation factor of “other arrangements to foster and continue the relationship and access to the other parent”, the court considered the best arrangement to be one where the parties were communicating and the father was providing more time to the mother voluntarily, outside the provision of the parenting plan – that this would be the best – but did nothing to implement that in the ordered parenting plan or consider how it related to a modification of the parenting plan in order to effect “the best” situation for the child. RP at 547 Ins. 7-15.

The court did not use either RCW 26.09.187 or RCW 26.09.520 factors in its parenting plan assessment. The court did not seem to utilize any of the evidence from the trial that might relate to RCW 26.09.520 factors, to determine what changes were necessary to serve the best interest of the child. It used “necessary pursuant to the relocating parties’ geographic changes” and denied all changes pursuant to relocation.

But then, the trial judge ordered what the father had offered because of the mother’s move and because the court was “impressed by the father”. RP at 550 In 11- 20; 551 In 9-17. The court simply ordered an offer, without legal basis.

When the court's findings do not relate specifically to any factors identified by the Legislature as relevant to the determination, it is impossible to determine on what basis the court ultimately made its decision. “The result is that the court's decision was not based on tenable reasons and was an abuse of discretion.” *In re Marriage of Combs*, 105 wn.App. 168, 176-77, 19 P.3d 469 (Div., 3, 2001)

Given the lack of statutory clarity on what, if any specific factors should guide the permanent parenting plan following relocation, confusion on this issue and the breadth of the court's authority "pursuant to relocation" is not surprising and will yield inconsistent results from one court room and county to another. In 2004, to avoid further inconsistent results regarding the relocation factors, concerning the relocations themselves, the Supreme court in *In re Marriage of Horner* accepted review even though the issue was moot. The court noted the unique and important opportunity to address the case relocation case because of the infrequent appeal of relocation cases. *In Re Marriage of Horner*, 151 Wn.2d 884, 892-893, 93 P.3d 124 (2004).

In sum, the mother seeks the appellate court's directive to the superior court of Grant County, on remand, describing the appropriate boundaries and criteria for the court to consider in modifying a parenting plan "pursuant to relocation," and requests that as a matter of law the boundaries *must be greater than need or necessary due to the geographic change*, and should be broad enough to encompass necessary modifications to a parenting plan to serve the best interests of the child as demonstrated by the evidence at the relocation trial or hearing regarding the 11 relocation factors of RCW 26.09.520, or their equivalent in RCW 26.09.181 and with consideration for RCW 26.09.184 pursuant to a final parenting plan.

VI ATTORNEY FEES ON APPEAL PER RAP 18.1

The Appellant seeks attorney fees on appeal in the event that the economic condition of the father improves, where an ability to pay might become a reality and allow for recovery from the father to the mother under RCW 26.09.40.

VII CONCLUSION

Through a multitude of legal errors that reduced the scope of viable options for a parenting plan modification following relocation, including the original dismissal of the Dec. 2008 Petition for Modification in July 2009, the court abused its discretion. The court abused its discretion when it did not provide findings, related to any given statute (including RCW 26.09.520), on the parenting plan changes it did order, but seemed to only order what it ordered because it was offered by the father. The court erred in not allowing consideration of RCW 26.09.187 and .184 as statutes relevant in fashioning a final parenting plan post objection to relocation. The errors were material because, in the end, the court did not make an independent determination on how to modify the parenting plan to serve the best interest of the child, and instead, ordered an offer and terminated the mother's standing to receive a minor modification of substantially more time under RCW 26.09.260 (5) which would have served the child's best interest, following the mother's substantial change in residence.

Respectfully Submitted this 4th day of October, 2010,

A handwritten signature in cursive script, appearing to read "Amy Rimov".

AMY RIMOV, WSBA 30613
Attorney for Appellant