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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

In re the Marriage of

Jonathan J. Arras
Petitioner Below and Respondent on Appeal

and

Laura G. McCabe (formerly Arras)
Respondent Below and Appellant on Appeal

APPELLANT'S REPLY BRIEF

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B. SUMMARY OF THE CASE

Laura McCabe appeals a modified parenting plan entered on October 16, 2013. Jonathan and Laura were married in 2002, and have two children: Jared (born 7/10/03) and Allegra (born 6/26/06). They separated in June 2009, and Laura moved into an apartment in the Central District with her boyfriend, Rick. The divorce was final in May 2010. Six weeks later, Laura and Rick moved to a house in West Seattle. Under the original plan, custody was approximately 50-50, and decision-making was shared.

In early 2012, the school Principal contacted Child Protective Services (CPS) with concerns that Jonathan might be physically abusing Jared. [1] When Jonathan learned the kids had been interviewed by CPS, he erroneously concluded that *Laura* had reported him. Ex. 120; RP 428, 431, 535. He began compiling allegations against her, and three months later, filed a Petition to Modify. RP 35-338, 40-42, 46.

He accused Laura of physically and emotionally abusing and neglecting the children. CP 1-4; RP 11-12. He also claimed Laura was violent, mentally ill, and addicted to drugs. Id. Laura denied all accusations. Mother's Supp. CP.

The court calendared a bench trial, appointed a Guardian ad Litem (GAL), and entered Temporary Orders requiring supervised visitation and

[1] According to CPS, the school psychologist shared the Principal's concerns. Ex. 120.

eliminating the children's overnight stays with Laura. RP 294. The court ordered Laura to undergo an independent psychological evaluation, drug testing, a GAL investigation, and a domestic violence (DV) assessment. Ex.19. The results all showed that the allegations were false. Ex. 16, 22; Ex. 25 at 3, 237-39; RP 310.

In her interim report, the GAL said the children longed for time with their mother, and recommended reinstatement of the original parenting plan, with some reservations. Ex.19; RP 234. In her final report, she recommended that the original residential schedule be reinstated, unmodified. Ex. 25; RP 235. Jonathan conceded this [RP16], yet still cites the GAL's interim report. Respondent's Brief (BR) 32.

The expensive litigation, accusations, and custody grab escalated conflict. CP 192; RP 245. Jonathan's lawyer described Laura as "combative" for refusing to compromise with her accuser. Persuaded by this, the GAL recommended that Jonathan keep the decision-making rights the court had temporarily assigned him. *See* Ex. 25.

After a bench trial (July 8-11), the court recessed for ten days before announcing a decision on July 19. RP 683-94. It found that Laura loved and was bonded to her children. RP 683. It ruled that Jonathan failed to establish any prerequisite statutory factors for modification. RP 684. Then, the court modified the plan, anyway. RP 691; CP 193-201.

The court reduced Laura's overnight custody by 60% (from ten per month to four), eliminated 70 overnights a year, and named Jonathan sole decision-maker. RP 671; CP 193-201.

When the judge announced her findings and conclusions, she instructed Jonathan's lawyer to write them up. BR 5, RP 694. He delayed for three months, then presented his original, disproven accusations as "findings." Without citation or explanation, he now blames Laura for his delay. BR 6.[2] The judge signed his "findings" on October 16.

Laura filed this timely appeal. CP 202-18. In her opening brief, she presented the following dispositive assignments of error and argument:

1. All expert evidence showed the allegations underpinning the petition were meritless.

2. The court's findings do not establish a substantial, material change of circumstances arising after the original plan.

3. Many findings are unsupported by the record, and no findings are material to the essential elements for modification.

4. The findings do not support a conclusion that modification is warranted, so the order should be vacated.

C. ARGUMENTS IN REPLY

Jonathan does not address Laura's arguments or cite a finding which would permit modification under RCW 26.09.260. He

[2] As he delayed, the Temporary Plan controlled --benefitting him, only. Laura had no summer break with her kids.

mischaracterizes a conclusion of law as a "holding" to claim he met his burden. CP 188 2.2. Without filing a cross-appeal, he asks this Court to vacate a key ruling, conduct an independent evidentiary review, and enter new findings. BR. 20-21.

1. HIS STATEMENT OF THE CASE DOES NOT COMPLY WITH TITLE 10.

Respondent does not respond to Appellant's arguments, as required by RAP 10.3(b). He presents a three-page chronology without any cites to the record. BR 1-3. He re-makes allegations the court dismissed as meritless. Ex. 16, 22; Ex. 25 at 3, 237; RP 310, 418, 421.

He cites irrelevant procedural issues and misrepresents the record. BR 3. For example:

- An ex parte commissioner granted an "emergency" restraining order (TRO). Exh. 7, RP 294-96. This only proves he swore the children were endangered -- it does *not* show the court accepted his claims. Tellingly, he waited five days to serve the TRO and take custody. RP 288; Exh. 7 [3].

- He pretends a preliminary ruling of adequate cause for an evidentiary hearing somehow elevated allegations into established facts. BR 3. At trial, every expert refuted his claims. Ex. 16, 22; Ex. 25 at 3, 237; RP 310, 418, 421.

- He recites the GAL's interim report, which predates the experts' reports and evaluations. BR 3-4. Witnesses quoted in the report testified at trial. This testimony, not hearsay from the GAL, must support the court's findings; it does not.

- He ignores the GAL's final recommendation against custody modification. Exh. 25. He does not cite to the Clerk's Papers.

[3] After swearing she was abusive, unstable, on drugs, violent, etc., he left the kids with Laura for five days. He said it was coincidence that he acted on 8/6: Laura's 40th birthday and their defunct 10th anniversary.

- He includes an irrelevant anti-harassment order[4]. He asserts that an appeal is evidence of combativeness and intransigence. BR Exh. 2-7. The court rejected this argument. RP 692.

- He implies that her lawyer withdrew due to the merits of her appeal. BR 5. With$60,000 of trial debt, she can't afford appellate counsel. Mr. Mar told the court that changes of counsel were due to staffing problems at his firm, which Laura had no control over. RP 21[5].

- He misleads the court by claiming one of his witnesses is a DSHS employee. He cites RP 349, which says no such thing. The record says Charlene Harris is a nurse's aide. RP 340.

- The argument section of his brief contains lengthy references to the record with no cites at all. See e.g., BR 8, 17, 23.

2. RESPONDENT MISREPRESENTS STANDARD OF REVIEW.

(a) ***Review of Legal Questions is De Novo***. The standard of review for permanent parenting plans is for abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997); *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Dissolutions are affirmed unless no reasonable judge would have reached the same conclusion. *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985). Respondent incorrectly argues that this is *also* the standard for modification. BR 6. However, RCW 26.09.260 limits judicial discretion to modify an existing plan. *In re Marriage of Hoseth*, 115 Wn. App. 563,

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[4] based on a call Laura made in 2010 to Bellevue City Light, requesting her mom's utility bill, on her mom's behalf.

[5] After two lawyers left the firm, her case was reassigned three times. Mr. Mar took the case just weeks before trial.

569, 63 P.3d 164 (2005).

Questions of law are reviewed de novo. *State v. Law*, 110 Wn. App. 36, 39, 38 P.3d 374 (2002). What was said and done are questions of fact. *State v. Montague*, 73 Wn.2d 381, 389, 438 P.2d 571 (1968). Legal consequences flowing from facts are questions of law. *State v. Lee*, 147 Wn. App. 912, 916, 199 P.3d 445 (2008), *rev. denied*, 166 Wn.2d 1016 (2009).

The court lacks discretion to decide how *much* a change "directly and significantly" affects the children until it has determined that a substantial change happened in the first place. *Klettke v. Klettke*, 48 Wn.2d 502, 506, 294 P.2d 938 (1956). Respondent does not dispute that the he must present "sufficient facts to warrant the exercise of [judicial] discretion" as a condition precedent. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). He concedes that a trial court has discretion to modify a parenting plan only *after* it has "determine[d] the legally relevant factors upon which to make a discretionary decision." BR 6, citing *Littlefield*, 133 Wn2.d at 47.

Determining that a factor is "legally relevant" is a conclusion of law and, as such, is reviewed de novo. *Robel v. Roundup Corp.*, 148 Wn. 2d 35, 43, 59 P.3d 611 (2002). The legally relevant factor here is that the court had no discretion to modify without a mandatory prerequisite finding

of a substantial material change of circumstances. RCW 26.09.260(1). A substantial change is necessary (but not sufficient) to allow modification of a parenting plan.

Even if abuse of discretion were the correct standard, a modification still fails under RCW 26.09 if it is not based on a fair consideration of the statutory factors. *In re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954 (1996) (spousal maintenance). Respondent admits this Court may reverse a decision involving "an important issue of procedural justice." BR 7 (citing *Capen v. Wester*, 58 Wn.2d 900, 902, 3165 P.2d 326 (1961)). Here, failing to apply a mandatory statutory prerequisite is such an issue.

(b) ***Jurisdiction***: The court's power derives solely from the Dissolution of Marriage Act, so the statute's terms are jurisdictional. *In re Marriage of Moody*, 137 Wn.2d 979, 987, 976 P.2d 1240 (1999). The prerequisites to modification are mandatory. RCW 26.09.260(1); *In re Marriage of Shryock*, 76 Wn. App. 848, 852, 888 P.2d 750 (1995); *In re Marriage of Stern*, 57 Wn. App. 707, 711, 789 P.2d 807, *review denied*, 115 Wn.2d 1013, 797 P.2d 513 (1990). Failure to find each factor is reversible error. *Shryock,* at 852. Here, the court failed to apply the proper legal standard: it modified a permanent plan without evidence of a substantially changed material circumstance.

Respondent attempts to distinguish *Shyrock* by claiming it involved subsection (2)(b) rather than (2)(c) [6]. BR 7-8 (citing *Shryock* at 851-52). This distinction does not detract from *Shyrock*'s dispositive holding that a trial court lacks discretion to modify a parenting plan after having rejected the alleged statutory reasons for doing so. *Id.*

3. RESPONDENT MISREPRESENTS CONTROLLING STATUTE.

The legislature has expressly limited the court's power to modify: it is not discretionary:

> "*The court **shall not** modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or the non-moving party and that the modification is necessary to serve the best interests of the child.*" - RCW 26.09.260(1).

Respondent incorrectly claims RCW 26.09.260(1) is just one of several equivalent statutory bases upon which a court may modify a parenting plan. BR 8, §a.

Even if it finds a substantial change, the court's discretion is still limited: it shall not modify a residential schedule unless:

> "*[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.*" RCW 26.09.260(2)(c).

There is no factual basis for this finding, here.

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[6] RCW 26.09.260(2)(b): The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan.

Respondent asks this Court to vacate the ruling that RCW 26.09.260(4) does not apply. BR 20-22. However, 260(4) *doesn't* apply, because the court found no §.191 factors. Without a cross-appeal (as required by RAP 5.1(d)), he bases his request on RAP 2.5(a), which allows this Court to affirm, but not vacate. BR 21, 23.

He incorrectly argues that RCW 26.09.260(5) also does not apply, because the modification sought was not a minor modification. BR 22-23. However, §260(5)(b) does not support a major custodial modification based without a finding of a substantial change, resulting in detriment to the children - not a move of only a few miles, as he argues.[7] BR 9.

4. WRITTEN FINDINGS DO NOT SUPPORT CONCLUSIONS.

After a bench trial, the judge must enter separate findings of fact and conclusions of law so the reviewing Court can tell which is which. CR 52(a)(1).[8] Findings are based upon evidence, and are independent of legal consequences. *State v. Anderson*, 51 Wn. App. 775, 778, 755 P.2d 191 (1988). Conclusions follow legal reasoning from the facts to their legal consequences. *Id.*, *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 418, 225 P.3d 448 (2010).

Here, the findings do not satisfy CR 52(a)(1), and fail to establish

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[7] the children attend school in the father's school district; the move had no impact on this.

[8] "In all actions tried upon the facts without a jury [...], the court shall find the facts specially and state separately its conclusions of law."

the mandatory prerequisites of RCW 26.09.260.

(a) ***The Findings Section is Inadequate and Unsupported.*** Finding 2.1 concerns jurisdiction over the parties and the subject matter, which was not in dispute. CP 188. Finding 2.2 quotes the statute's conclusions without establishing its threshold factors[9]. CP 188-89. Then comes a two-page narrative, mostly unsupported by the record, and entirely inadequate to support the legal conclusions. CP 189-90.

Addressing these findings:

(i) Did the move to West Seattle mean a "much longer drive"? The record does not establish this, nor is it self-evident (given factors like traffic and freeway access). Laura moved only seven miles, only six weeks after the original plan was entered, three years before the trial.

(ii) Were there were "many" tardies? No school employee ever expressed concern about the number of tardies. The record shows the children's tardies declined each semester, from 4 to 3 to 1. *See* RP 605-06.

(iii) Is the father's schedule is "more predictable"? The record is silent about Jonathan's routine or lifestyle. The record does *not* show that any teachers, pediatricians, or counselors were ever concerned about the children's sleeping or eating habits. The court found that the children's schedules were *not* irregular at their mother's home. RP 684.

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[9] a substantial change of circumstances; children's best interests; present environment is detrimental; harm caused by a change is outweighed by advantages. 260(1), 260(2)(c).

(iv) Did Laura put her boyfriend's needs above the kids'? Nothing in the record shows Laura's domestic relationship impacted the kids' schedules.[10] Laura asked the GAL to consider Rick's job when she set a supervised visitation schedule, because Rick was the court-appointed supervisor. RP 690.

(v) Does Laura live with an "entertainer?" Yes. No one disputed that Rick works a regular day job and also performs with a local bluegrass band. Does Judge Inveen find that parents who live with (or are) performing artists presumptively cannot provide as stable a home for children as non-artists? The finding is irrelevant and confusing.

(vi) Did the children keep an irregular schedule at Laura's house? No. The court found no "contrary evidence" to disprove Jonathan's claim that the children were up "late" at their mother's, but found no evidence that their schedule was irregular. RP 683, 690.

(vii) Did the children's behavior[11] improve due to removal from the mother's custody? No.

- No expert linked any improvements in behavior with the custody change.[12] Jonathan alleged this, and his non-expert witnesses repeated it. RP 128. The court ruled that this testimony was improper. RP 173, 391.

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[10] Laura and Rick have lived together since 2009. According to the GAL , Jared really likes Rick, "because he is one of the nicest guys I know." RP 267.

[11] Only one sibling, Jared, ever had behavior problems.

[12] The court's suggestion that a custody court battle could have a good effect on young children is so preposterous that some expert corroboration is called for.

- The record contradicts this finding: the school's psychologist reported that Jared's behavior began to improve in 2011. RP 223. The GAL testified he significantly improved in 2011. RP 223.

- Arguments that a custody change (rather than a critical year of maturation), caused improvements are a logical fallacy: *Post hoc ergo propter hoc* ("after this, therefore because of this"). Causality cannot be inferred from temporal sequence.

- Jared's mental health counselor testified that "***a lot of his anger was actually toward his dad and his perception that his dad was keeping him from his mom and doing it to try to hurt her.***" RP 94. When the court lifted supervised visitation requirements, Jared relaxed and was less angry. RP 93-94.

(viii) Did Jared suffer from "extreme mental health issues?" No. The record contradicts this finding: Jared never presented a danger to himself or required "a school safety plan." CP 190, RP 220.[13] Jared's counselors testified that his treatment consisted solely of periodic office visits to a non-medical counselor. RP 88-99, 109. A court-ordered psychiatric exam concluded Jared is perfectly normal. The only evidence that Jared's mental health ever required intervention was Jonathan's testimony (either first-hand or repeated second-hand by his declarants).[14] There was no non-testimonial evidence to support Jonathan's claim that Laura prevented Jared from receiving counseling. At trial, Laura submitted every e-mail the parties exchanged about counseling, as all their

[13] This description of Jared appears in the written findings, but was not in the judge's oral ruling. RP 687.

[14] Three months after the modification trial, Jonathan stopped taking Jared to counseling, indicating that he fabricated (or grossly exaggerated) the"crisis" to manipulate the court and garner family support.

communications were in writing. RP 541

(ix) Is the mother angrier or louder than the father? The record does not support this finding. CP 189.[15] Anger management treatment was recommended for *Jonathan*, not Laura. RP 253-54, 637. Two mandatory reporters contacted CPS with concerns about Jonathan's actions, including some related to anger. Ex.120; RP 428, 431, 535. Laura's independent psychiatric evaluation concluded she is healthy and normal for a woman involved in custody litigation. RP 637. An extensive DV evaluation showed her to have no anger problems. RP 638. The doctor who has treated her for five years has no concerns about her anger. None of Jonathan's witnesses had first-hand knowledge of Laura: Her father admitted he hadn't spoken to her in years; her stepmother could only recount her temperament as a teenager[16], and Jonathan's parents had not seen her since 2009.

(x) Was Jonathan's testimony more "credible"? This credibility determination was improper, as Judge Inveen based her assessment on Laura's courtroom demeanor. RP 689. Behavior on the witness stand is not a valid ground for modifying residential arrangements. *Andersen v. Andersen*, 75 Wn.2d 779, 782, 453 P.2d 856 (1969). Her finding was subjective, but objectively, it has no basis in the factual record:

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[15] As with scheduling issue, there was no evidence about the father to reasonably substantiate a comparison.

[16] At trial, Laura was 41 years old, and had not lived within 1,000 miles of her stepmother for 20+ years.

- *Every* expert discredited Jonathan's sworn testimony. At the outset, Jonathan swore by affidavit Laura was abusive, neglectful, violent, insane, and on drugs. No experts found any merit to any of these claims. RP 689. He repeats these disproven claims again here-- even the one he conceded.[17]

- The finding that Laura loves and is bonded to her children directly contradicts the bulk of Jonathan's testimony. RP 683. It also contradicts his corroborating witnesses' testimony. See, e.g., C. Arras at RP 158, 185; J. Arras at RP 197.

- The court found Jonathan's claim that Laura delayed Jared's counseling "credible," despite uncontested email exhibits evidencing the opposite. RP 258.

- Laura was cross-examined after days of hurtful, insulting, false accusations. Frustration with opposing counsel's tactics is not relevant to parenting abilities. *Andersen*, 75 Wn.2d at 782.

- The judge and GAL said they did *not* believe Jonathan's denials that he sat on Jared's chest. RP 685. Jared's counselor, Jan Harter, testified Jared said his father sat on his chest, and that he felt safer with his mom. RP 92, 97.

- There were no "neutral corroborating witnesses." The piano teacher is married to Jonathan's closest friend and former employee. Laura was estranged from her father for years; Mr. McCabe admitted he accepts anything Jonathan says as gospel. RP 133-34.

(b) ***Written Findings Do Not Reflect the Court's Oral Ruling.***

The court expressly stated that the evidence did not support any instance of abuse or neglect. RP 684. However, Finding 2.3 says the mother committed abuse and neglect as the result of mental health issues

[17] [any alleged mental incapacity appears] "at this time to be adequately treated and managed." CP 190.

that were "untreated or erratically managed." CP 190. There was no evidence of untreated mental health issues. RP 426. All expert testimony established the opposite. See e.g. Ex. 16, 22; RP 689.

The court did not find evidence of poor hygiene or soiled clothing, only that the father's testimony "raised concerns." That is a review of testimony, *not* a finding. The court actually found that hygiene concerns did not rise to the level of neglect and that Laura's depression was not currently a factor. RP 684.

Judge Inveen did *not* find that Laura's depression was "poorly managed;" she only said, "evidence suggests [it] may have been." RP 684. This is a review of testimony, not a finding.

(c) ***No Findings Establish a Change of Circumstances Sufficient to Modify***. Even if this Court finds that the written findings accurately reflects the court's oral decision *and* finds support for those findings the record, the statute is still not satisfied. Even if this Court accepts that Appellant's 2010 seven-mile move constituted a "substantial change," there is no actual support for a finding that the children's environment was detrimental to their physical, mental, or emotional health, as mandated by RCW 26.09.260(2)(c). *See* Section 3, supra.

5. THE OPERATIVE FINDINGS ARE THOSE THE JUDGE INSTRUCTED COUNSEL TO WRITE UP.

Respondent asks this Court to ignore the bench findings and decide

the appeal based on written findings. BR 10. The Court should do the opposite, for the following reasons:

(a) ***Judge Deemed Oral Findings Dispositive***. On July 19, Judge Inveen announced her findings in open court. She instructed counsel to write them up: "*At this time I am prepared to provide the decision and rationale for that, and then I would expect counsel to put this into final papers.*" RP 683. Instead, over three months later, counsel submitted findings that did not reflect the court's ruling or rationale.

(b) ***Contrary Authorities Are Distinguishable***. Various decisions hold that oral rulings and comments have no legal effect until incorporated in written findings. *See State v. Bryant*, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995); *St. v. Dailey*, 93 Wn.2d 454, 458, 610 P.2d 357 (1980); *St. v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966); *Ferree v. Doric Co.*, 62 Wn.2d 561, 383 P.2d 900 (1963). Those cases are distinguishable.

In *Bryant*, the trial court made an oral ruling, then based its written decision on different reasoning. *Bryant*, 78 Wn. App. at 812. The reviewing court disregarded the oral ruling, citing *Mallory*, 69 Wn.2d at 532, 533-44 (an oral finding at the close of trial was subject to "further study and consideration"). In *Dailey*, an oral ruling during the one-day trial could not be reconciled with the written decision. *Dailey*, 93 Wn.2d at 456, 458. Some courts have announced decisions immediately following

trials, then altered them upon hearing additional arguments as the written findings were presented -- these altered, post-trial findings were accepted as the court's. *See Earl v. Geftax*, 43 Wn.2d 529, 530-31, 262 P.2d 183 (1953), and *Fosbre v. State*, 70 Wn.2d 578, 584, 424 P.2d 901 (1967).

Distinguishably from all these cases, Judge Inveen did not issue an off-the-cuff ruling on the last day of trial: she reflected for *ten days*, then convened a formal hearing for the sole purpose of delivering her findings. She clearly instructed counsel to turn her bench rulings into a set of Findings and Conclusions. RP 683. Her oral pronouncement was substantively different and more formal than the written version she signed three months later.

(c) ***No Opportunity to Challenge Written Findings***. The King County Superior Court does not conduct presentation hearings in family matters, so the prevailing party's written findings go unchallenged. Demonstrably, prevailing counsel can write virtually anything, so long as it is generally consistent with the decision.

(d) ***Jurisdiction***. Only the decision and findings announced on July 19, 2013, are within the trial court's jurisdiction.[18] When the judge signed the written findings, more than 90 days had elapsed between when the case was submitted for decision (July 10), and the entry of the

[18] Trial court jurisdiction may be challenged at any time. RAP 2.5(a)(1).

purported findings (Oct. 16). This delay is prohibited by RCW 2.08.240[19]:

> *Every case submitted to a judge of a superior court for his or her decision shall be decided by him or her within ninety days from the submission thereof: [...] and upon willful failure of any such judge so to do, he or she shall be deemed to have forfeited his or her office.*

This case was submitted for decision on July 11, 2013, so 90-days elapsed on October 9, 2013. The delay does not void the judgment, nor does the court lose jurisdiction to enter judgment. *Moylan v. Moylan*, 49 Wash. 341, 344, 95 P. 271 (1908). Rather, Appellant raises this issue of first impression in reply to Respondent's defense of the inaccurate "findings" signed by the judge on October 16. The delay precludes this later version from displacing the timely findings announced in open court on July 19.

(e) ***Adherence to the Superior Court's Decision.*** Three-months later, Respondent presented written findings that did not represent the judge's oral ruling. CP 188-90. He included his entire catalog of discredited allegations (abuse, neglect, domestic violence, etc.) *See also* BR 1-2, etc. Erroneously, the judge signed it -- perhaps because after three months, she forgot the contrary findings she announced in court:

- Both parents love and are bonded to their children. RP 683.
- There is insufficient evidence of abuse, neglect or mental health issues, illicit drug use or alcohol abuse. RP 684.

[19] Codifying Const. art. 4, §20: "[e]very cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof[.]"

- The children's eating and sleeping schedules were not irregular at Laura's home. RP 684.

- Allegations of poor hygiene and inadequate clothing did not rise to the level of 26.09.191, and were no longer a factor. RP 684.

- Laura's treatment for depression was not a factor. RP 684.

Because the written findings contradict the court's oral ruling, this Court should regard instead only the findings as announced on July 19.

6. RES JUDICATA, STABILITY, AND THE PRESUMPTION AGAINST MODIFICATION.

A parenting plan is *res judicata* for all issues determined on conditions then existing, unless and until circumstances materially change, "*subsequent* to the entry of the last custody order." *Sweeny v. Sweeny*, 48 Wn.2d 872, 876, 297 P.2d 610 (1956) (custody order); *Brim v. Struthers*, 44 Wn.2d 833, 835, 271 P.2d 441 (1954); RCW 26.09.260(1). "It can be assumed that all of the circumstances existing at that time [when the plan was entered] were made known to the court and a sound discretion was exercised." *In re Rankin*, 76 Wn.2d 533, 537, 458 P.2d 176 (1969). Here, Laura moved only six weeks after the dissolution, to a home better suited for her family. Relocation immediately following divorce settlements must be so routine as to be within the foresight of the dissolution court.

Here, the court erroneously conducted a *de novo* review of all the circumstances, old and new, and tried to devise its own parenting plan according to its notions of children's best interests. It thus undermined the

common law doctrine of finality generally, and also ignored the finality protections built specifically into RCW 26.09.260.

There should be a strong presumption against modification. *In re Custody of Halls*, 126 Wn. App. 599, 607, 109 P.3d 15 (2005). Here, the court has undermined the Legislature's protections for children's stability: a substantial change must be proved before the court considers modification. RCW 26.09.260(1). Here, neither the oral finding nor the written version establish any such change. RP 684, 686; CP 189-90.

7. ANY CHANGE WAS INSUBSTANTIAL, IMMATERIAL, OR PRE-EXISTING.

As a threshold to modification, a changed circumstance must be substantial, material, and postdate the decree. RCW 26.09.260(1).

(a) ***Insubstantial***. Respondent fails to cite a single finding to support the conclusion that RCW 26.09.260 was satisfied. BR 11-19, 21-23, 27-30, 32, 34. If the 2010 move was a substantial change (RP 687) the record does not show it. The judge merely speculated that Bellevue is "much further" from West Seattle than the Central District. RP 689. No evidence showed the move affected the children's school performance.

(b) ***Immaterial***. A custody court will not concern itself with allegations which, even if proven, are insufficient to prove the party's case. *In re Marriage of Wicklund*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996) (affection shown toward same-sex partner immaterial for custody).

Whether or not Jonathan has a more predictable schedule[20] is immaterial, as the court *also* found the schedule at Laura's house is *fine.* RP 690. Therefore, the comparative schedules cannot be "detrimental" under RCW 26.09.260(2)(c). This also contradicts the court's unsupported finding that Laura accommodated her boyfriend's schedule "to the detriment of the children." RP 690.

A finding that Laura displays greater anger than Jonathan requires the court to reject independent expert evaluations in favor of self-serving and biased hearsay. Either way, this finding does not provide a reason to eliminate overnight visits on school nights.

"Inappropriately manages relationships and issues" is not supported by expert testimony, and does not support any conclusion about Laura's parenting.[21] Dr. Ishiki testified that "She has good relationships." RP 426.[22] Laura's witnesses testified to decades of friendship and trust. It was uncontested that Laura and Rick have been a couple for five years.

The finding that Laura is self-employed and lives with a musician (RP 690) is irrelevant, unless the court holds that living with a musician is *itself* detrimental to children's physical, mental, or emotional health.

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[20] This finding was unsupported; the record contains no mention of Jonathan's schedule.

[21] The GAL garbled an expert suggestion of *optional* counseling for *both* parents to improve their relationship. RP 247-48; RP 331; Ex. 102.

[22] Before this matter, Laura "appropriately managed" her relationships with Jonathan's declarants for years. See RP 154 (last contact with stepmother was 2 years prior); RP 130 (no contact with father since 2011); RP 195 (Cyndy Arras admits no contact after 2010); RP 195 (Jim Arras admits no contact after 2009).

(c) ***Pre-Existing.*** The primary change cited by Judge Inveen is the parents' inability to get along, which she speculated was not contemplated by the dissolution court. RP 687. This conclusion is not based on any finding, and is unsupported by the record. Perhaps the *only* thing the parties agree about is the "high conflict" since their breakup in 2009. It makes no sense to transfer decision-making to the party who increased conflict by mounting litigation based on false accusations.

Conflict specifically regarding Jared's behavior was not a change: the record shows Jared had behavioral and emotional difficulties long before the divorce. According to his preschool teacher, his behavioral problems were "legendary." RP 378. Even Laura's step-mother testified that Jared's problems dated back to his sister's arrival [in 2006]. RP 152.

The court's non-specific finding of "relationship issues" can only relate to Laura's relationships with Jonathan and his declarants. These "relationship issues" were established long before the dissolution, and so were presumptively contemplated by the prior court. Laura was estranged from her father and stepmother for decades. RP 129. Not atypically, she never got along with her former in-laws.

None of these considerations are "overriding and clearly compelling" such that the children's environment was detrimental to their health, nor was the harm caused by the change outweighed by advantages

to the children, as required by RCW 26.09.260(2)(c).

8. ATTORNEY FEES.

At the time of trial, Laura had spent nearly $70,000 in mandated expert assessments (and the experts' appearance fees), GAL and court costs, and attorney fees. RP 21, 246, 497, 609.

The accusations at the core of Jonathan's modification petition were rejected by the experts, denied by the children (in their GAL interviews), and unsupported by any objective evidence. Yet, along the way, no court has awarded her fees for what she has paid defending herself and her children -- or what she has borrowed to pay.

The court may award attorney fees after considering the financial resources of both parties. RCW 26.09.140. Laura should have received attorney fees at trial based on her need and the father's ability to pay. Jonathan (who earns a six-figure salary and owns a 7-bedroom home) paid nothing for the trial: Laura's estranged father paid all his legal costs. RP 133-34. Laura's actual income is so low that for purposes of child support, the courts have imputed her income at the statutory minimum.

Laura was also entitled to fees because of Respondent's unnecessary protraction of the trial. The judge reprimanded Mr. Goddard several times. "We've heard some of this testimony four or six times." RP 376. "Speed it up." RP 209-10. "Cut the repetition and duplication, and

move on to new issues." RP 210.

Respondent implies that this appeal is frivolous. BR 39. An appeal is frivolous solely if it presents no debatable issues and there is no possibility of reversal. *In re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (1997). Any doubts should be resolved in favor of the appellant. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). This is a meritorious appeal.

Fees can not repay the lost months with her kids, the year without bedtimes and breakfasts, two summers of vacations, holidays, school breaks, damage to her personal reputation (especially in the school community), or her professional standing (who hires a lawyer who lost her own children in court?). Again, this has cost Jonathan nothing. [23] Laura should be awarded the fees she reported at trial ($70,000), or the issue should be remanded for further fact-finding.

D. CONCLUSION

Without evidence or expert support, Jonathan's false allegations have been validated and rewarded by the courts since he filed an ex parte motion in August, 2012. His actions confuse logical minds: *why would he put his children through this ordeal unless he was telling the truth?* [24] He

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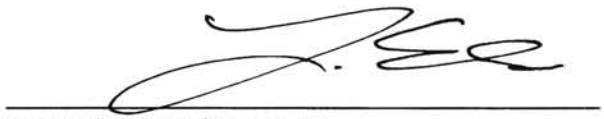
[23] Believing his grandkids were in danger, Michael McCabe paid all of Jonathan's trial costs. RP 133-34

[24] Perhaps simply because Laura left him for Rick. Or maybe he thought she filed a false CPS report, and by the time he learned otherwise, he had lied to the court, rallied family support, and paid a lawyer.

has manipulated the system and used the courts as a weapon. Reasonable people conclude that Laura *must have done something* wrong, in order to make sense of the distress Jonathan has caused his children. This is wrong.

The Court should reinstate the permanent parenting plan from 2010. If decision-making can no longer be shared, the mother, not the father, should have the final word.

Respectfully submitted this ~~2nd day~~ 5th day of June, 2014.



Laura G. McCabe, Pro Se

AFFIDAVIT OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I deposited this day a copy of this reply brief in the U.S. Mail, first class postage prepaid, addressed to:

Goddard Wetherall Wonder, PSC
155 – 108th Avenue N.E., Suite 700
Bellevue, WA 98004
Attention: Brook Goddard

~~Signed on June 2, 2014, in Seattle Washington~~.

Signed on June 5, 2014, in Seattle Washington,

Laura G. McCabe