No. 45235-9-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

KAREN THIEL,

Respondent,

v.

BRIAN MASSINGHAM,

Appellant.

BRIAN MASSINGHAM'S OPENING BRIEF

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I. Introduction

This Court's Commissioner granted review on four issues:

(1) Whether the trial judge erred when denying Appellant's proper and timely request that he recuse himself from a separate, post-decree contempt proceeding;

(2) Whether the trial judge erred when denying Appellant's proper and timely request that he recuse himself from a separate, post-decree parenting plan modification proceeding;

(3) Whether the trial judge erred when denying Appellant's proper and timely request that he recuse himself from a separate, post-decree parenting plan modification proceeding because of an appearance of bias/prejudice in the modification proceeding; and

(4) Whether the trial judge erred in modifying the parenting plan by giving sole decision making to Respondent without a modification action requesting this relief having been filed and without first finding adequate cause as required by RCW 26.09.270.[1]

The Commissioner concluded Appellant demonstrated obvious errors regarding the trial judge's failure to recuse himself in the contempt and parenting plan modification proceedings.[2] If Appellant prevails on the recusal issue in these two proceedings, then no further review is necessary as the trial court would not have had power or authority to proceed further and enter any subsequent orders.[3]

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[1] November 8, 2013 Ruling Granting Review in Part and Denying Review in Part in Consol. Nos. 45205-7-II, 45235-9-II, and 45238-3-II.
[2] Id. at 7 ("Thus, [Appellant] has demonstrated obvious errors render (sic) further proceedings useless in those proceedings...")
[3] *State v. Superior Court of Pac. Cnty.*, 85 Wash. 663, 664, 149 P. 16, 17 (1915).

The trial judge erred when he refused to recuse himself in separate post-decree contempt proceedings and separate post-decree parenting plan modification proceedings. RCW 4.12.050 allows parties to obtain a new judge simply by filing a motion and affidavit of prejudice prior to any discretionary rulings being made in the proceeding. Once a timely application is filed, the trial court's discretion is limited to signing a recusal order and transferring the proceeding to another judge for determination.

Both post-decree and post-judgment contempt proceedings and parenting plan modification proceedings have long been held to be separate proceedings entitling the parties to require a judge recuse herself or himself even if the trial judge previously made discretionary rulings in the underlying action. Here, it is undisputed Appellant timely filed a motion and affidavit for recusal in both the separate contempt and parenting plan modification proceedings. The trial judge, however, ignored the well-settled law and refused to recuse himself from the separate post-decree contempt proceedings and the separate post-decree parenting plan modification proceedings. Reversal is required.

If Appellant does not prevail on the recusal issue in both the contempt and parenting plan modification proceedings, then this Court will have to address the remaining two issues – appearance of bias or prejudice and

authority to modify a parenting plan without following the statutory procedures. Appellant should prevail on both these issues as well.

The trial judge should have recused himself because he appeared to be biased and prejudiced toward Appellant and Appellant's counsel. It is the trial judge's responsibility to recuse himself, even if he is not actually biased or prejudiced against a party, if necessary to avoid the mere suspicion of irregularity, or appearance of bias or prejudice.[4] Here , the trial judge challenged Appellant's credibility, found even the most reasonable request for a guardian ad litem to be in bad faith, accused Appellant's counsel of lying, and stated in open court that he was reporting Appellant's counsel to the Washington State Bar Association. This clearly raises at least the suspicion of irregularity or appearance of bias or prejudice requiring the trial judge to recuse himself. Reversal is required to preserve Appellant's due process rights.

Finally, the trial judge erred when he modified the parenting plan by giving Respondent sole decision making over the children's counseling in perpetuity without Respondent first filing a parenting plan modification petition, without the court first finding adequate cause, and without the

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[4] In re Custody of R., 88 Wn. App. 746, 762, 947 P.2d 745, 753-54 (1997), *citing*, St. Paul and Pac. R.R. Co. v. Washington State Human Rights Comm'n, 87 Wn.2d 802, 557 P.2d 307 (1976) (judiciary should avoid even mere suspicion of irregularity, or appearance of bias or prejudice).

court finding the parenting plan modification was in the children's best interests. Reversal is required.

II. Assignments of Error

A. The trial judge erred when denying Appellant's proper and timely request that he recuse himself from a separate, post-decree contempt proceeding

B. The trial judge erred when denying Appellant's proper and timely request that he recuse himself from a separate, post-decree parenting plan modification proceeding;

C. The trial judge erred when denying Appellant's proper and timely request that he recuse himself from a separate, post-decree parenting plan modification proceeding because the trial judge appeared to be biased and prejudiced against Appellant in the modification proceeding; and

D. The trial judge erred in modifying the parenting plan by giving sole decision making to Respondent without a modification action requesting this relief having been filed and without first finding adequate cause and that the modification was in the children's best interests as required by RCW 26.09.270.

E. Finding of Fact number 1in the July 12, 2013 Order on Petitioner's Motion for New Judge and Affidavit of Prejudice is not supported by substantial evidence.

F. Finding of Fact numbers 2, 3 and 4 in the July 12, 2013 Order on Petitioner's Motion for New Judge and Affidavit of Prejudice are not supported by substantial evidence to the extent they characterize Appellant's objection to relocation as a petition to modify parenting plan.

III. Issues Pertaining to Assignments of Error

1. Whether a trial judge's discretion in a new proceeding is limited to signing a recusal order and transferring the matter to a new judge when a

party timely files a motion and declaration of prejudice before discretionary rulings are made, even when the trial judge made discretionary rulings in other proceedings under the same cause number.

2. Whether a motion for contempt, which is initiated by serving an order to show cause on the alleged contemnor, is a separate proceedings allowing the alleged contemnor to require recusal by filing a motion and declaration for recusal before any discretionary rulings were made in the contempt proceeding.

3. Whether a petition to modify a parenting plan, which is initiated by serving a summons and petition on the other parent, is a separate proceedings allowing any party to require recusal by filing a motion and declaration for recusal before any discretionary rulings were made in the modification proceeding.

4. Whether the trial judge abused his discretion by refusing to recuse himself from Appellant's parenting plan modification proceeding because the trial judge appeared to be biased or prejudiced against Appellant and Appellant's counsel as evidenced by him calling Appellant's credibility into question, finding bad faith when Appellant requested a guardian ad litem speak to the children, calling Appellant's counsel a liar, and stating in open court that he was reporting Appellant's counsel to the Washington State Bar Association.

5. Whether the trial judge exceeded his authority when he modified the joint decision making provision in the parties' parenting plan as it relates to the children's counseling without either party filing a parenting plan modification petition that sought to modify decision making, without first finding adequate cause, and without finding the change would be in the children's best interests.

6. Whether the trial judge erred in deciding Appellant's appearance of fairness basis for recusal after only addressing and made findings as to subjective actual prejudice and not as to the objective appearance of bias or prejudice

7. Whether an objection to relocation is different from a petition to modify a parenting plan.

IV. Statement of the Case.

The marriage of Brian Massingham and Karen Massingham (n.k.a. Karen Thiel) was dissolved pursuant to a Decree of Dissolution ("Decree") entered in the Lewis County Superior Court on May 9, 2012.[5] The same day, the Lewis County Court approved and entered a permanent parenting plan.[6] It provided, among other things, that the

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[5] CP 39-46.

[6] CP 1-12. In particular, the Parenting Plan provided, "Each parent shall be empowered to obtain emergency health care for the children without the consent of the other parent. Non-emergency health care for the children – Joint." CP 5, ¶ 3.13(B), ln. 9-10. It also provided "Non-emergency health care Joint." CP 6, ¶ 4.2, ln. 22.

parties were to have shared decision making regarding the children's non-emergency health care, including counseling.[7] The parties have two children, then 13 and 11, who have approximately equal residential time with each parent since entry of the Decree and the accompanying Agreed Parenting Plan.[8]

On June 21, 2012, Thiel filed a Notice of Intended Relocation of the parties' children from Lewis County to Thurston County.[9] Appellant filed an objection to the relocation.[10] On September 14, 2012, the trial judge in the relocation proceedings, Judge Nelson Hunt, entered a temporary order allowing Thiel's relocation to Thurston County.[11] In doing so, Judge Hunt, chastised Appellant's and Appellant's counsel credibility by stating:

> THE COURT: Please don't tell me it takes two hours to go from Adna to Olympia because I know that's not the case.
>
> Mr. CADRANELL: No, Your Honor.
>
> THE COURT: Yes, I know. But your client apparently doesn't. And I have to tell you that when I confront pleadings which tell me something that is absolutely not true, and everybody knows it's not true, it throws the entire analysis of what the individual says out the window almost. So don't argue that this is a terrible

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[7] *Id.*
[8] CP 1-12, Agreed Parenting Plan, in particular Residential Schedule at CP 2-4; CP 39-46, Dissolution Decree.
[9] CP 47-50.
[10] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[11] CP 51-53.

commute. There are people that commute to Seattle and manage to do it. So go ahead.

Mr. CADRANELL: Two hours, I believe, Your Honor, is the time for the round trip, not one way.

THE COURT: Even that's ridiculous.[12]

Subsequently Appellant filed a motion for appointment of a guardian ad litem (GAL) that Judge Hunt denied on November 2, 2012.[13] Appellant's motion sought the re-employment of the GAL in the underlying dissolution case to interview the children regarding Respondent's intended relocation from Adna to Olympia, Washington.[14] In denying Appellant's request, Judge Hunt stated on the record he did not read Appellant's reply.[15] Judge Hunt then found Appellant acted in bad faith in trying to have the children's preferences considered in the relocation proceedings.[16]

Later in related proceedings under the same cause number, a matter came before Judge Richard L. Brosey, but Respondent requested Judge Brosey recuse himself, which Judge Brosey did.[17]

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[12] RP 14:11-25 (Aug. 17, 2012).
[13] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[14] *Id.*
[15] RP 5:2-9 (Oct. 12, 2012).
[16] RP 8:15-17.
[17] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.

The relocation proceedings were continued beyond the school year, and Appellant dropped his request the children be restrained from relocation with Respondent to Olympia. The trial on the relocation proceedings was scheduled to occur on December 6, 2012.[18] The judge selected to try this matter, Judge James W. Lawler, unexpectedly recused himself on January 4, 2013.[19] This left only Judge Hunt in Lewis County to try the matter, but it could not be heard until after the full school year, in May, 2013.[20] Because of this, Appellant reluctantly dismissed his objection to relocation and no longer sought to restrain the children's relocation to Olympia.[21]

Instead, Appellant sought to modify the parenting plan now that the children had relocated with Respondent to Olympia. On January 29, 2013, Appellant filed a petition to modify parenting plan in Thurston County, Washington—the place where Respondent and the children then resided—under Thurston County cause number 13-3-00123-4.[22] Upon

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[18] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[19] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[20] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[21] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[22] CP 190-98.

Respondent's request, Appellant's modification petition was transferred to Lewis County.[23]

When Appellant voluntarily dismissed his relocation proceedings, there were some unresolved matters pending in the Lewis County relocation matter. On January 9, 2013, Appellant filed a motion to change venue citing the appearance of fairness doctrine.[24] On January 28, 2013, Respondent filed a motion to dismiss Appellant's motion to change venue.[25] Appellant filed a response to Respondent's motion to dismiss that argued the motion to dismiss was moot now that the Lewis County relocation action had been dismissed.[26] Even though the Lewis County matter had been voluntarily dismissed and Appellant's motion was moot, Judge Hunt proceeded to hear Appellant's motion to change venue on Febuary 7, 2013.[27]

On February 26, 2013 Judge Hunt entered an Order on the outstanding issues. Despite Appellant having filed a notice of voluntary dismissal as well as a response to Respondent's motion to dismiss

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[23] CP 186, Motion For Change of Venue and Attorney's Fees; CP 75-77, Order Transferring Venue.
[24] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[25] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[26] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[27] CP 54-56.

Appellant's change of venue motion that specifically stated this matter had been voluntarily dismissed, Judge Hunt found Appellant gave no notice to the court or Respondent's attorney of the dismissal prior to the hearing.[28] The court then determined Appellant's seemingly moot motion to change venue was factually baseless and made after two discretionary rulings had been filed.[29] Even more surprising, Judge Hunt stated in open court that he had taken it upon himself to contact Thurston County about Appellant's Thurston County modification petition.[30] Judge Hunt dismissed Appellant's counsel's declaration that the settlement commissioner told Appellant's counsel that the judges in Lewis County did not like Appellant.[31] During the hearing, Judge Hunt stated in open court that Appellant's counsel was lying.[32] Judge Hunt's Order, however, reflected Appellant's counsel's testimony was not credible.[33] Finally, Judge Hunt dismissed Petitioner's motion to change venue and affidavit as untimely and because there was "a lack of showing any actual prejudice by Judge Nelson Hunt" and because there was not showing that

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[28] CP 55 at ¶ 1.
[29] CP 55 at ¶¶ 3, 4.
[30] CP 55 at ¶ 5 and RP 9:1-2 (Feb. 7, 2013).
[31] CP 55 at ¶ 6 and Declaration of Dennis McGlothin supporting change of venue, supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[32] RP 9:21-22 (Feb. 7, 2013) ("I simply find that claim to be incredible, not believable, and a lie.")
[33] CP 55 at ¶ 6.

Appellant could not "obtain a fair and impartial trial in Lewis County."[34] He also determined that Deb Darnell would be the children's counselor.[35]

There was no further action until Respondent filed a motion and supporting declaration in Lewis County requesting that Court issue a show cause order directed to Appellant that required Appellant to show cause why he should not be held in contempt for his attorney contacting the children's counselor and telling the counselor that it might be an ethical violation for the counselor to continue counseling the children.[36] The Lewis County Superior Court issued the requested show cause order.[37] The show cause order was personally served on Appellant.[38] Without seeking to modify the decision-making provisions in the May 2012 parenting plan, Respondent, in her contempt motion and accompanying declaration, sought to hold Appellant in contempt and allow her to take either child to two identified counselors.[39] On May 17, 2013, Appellant filed a motion and declaration of prejudice pursuant to RCW 4.12.150 requesting Judge Nelson Hunt recuse himself and transfer

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[34] CP 56 at ¶¶ 5 and 6.
[35] CP 56 at ¶ 1.
[36] CP 267-68 and CP 250-66.
[37] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[38] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[39] CP 267-68 and CP 250-66.

this matter to a new judge.[40] The matter was heard on May 22, 2013. The order on Respondent's contempt motion was entered on July 12, 2013.[41] Judge Hunt did not find Appellant in contempt, but gave Respondent sole decision making over counseling for the children, contrary to the parenting plan's provision giving the parents joint decision making over non-emergency health care.[42] Judge Hunt also denied Appellant's motion for a new judge and affidavit of prejudice.[43] Appellant timely appealed this order.[44]

Similarly, Appellant requested Judge Hunt recuse himself from Appellant's new parenting plan modification proceedings that was just transferred from Thurston County to Lewis County. On May 17, 2013, upon transfer of the modification proceeding from Thurston County Superior Court, Appellant filed a Motion for Change of Judge and Affidavit of Prejudice pursuant to CR 40(f) regarding actual prejudice and RCW 4.12.050 regarding recusal as a matter of right.[45] At the hearing on that motion, Judge Hunt, after interrogating Appellant's counsel, found Appellant's counsel was lying as to his motives behind sending a

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[40] CP 269-72.
[41] CP 349-51.
[42] CP 351.
[43] CP 351.
[44] CP 358-63.
[45] CP 273-76.

letter to Ms. Darnell.[46] He then stated in open court that he was going to report Appellant's counsel to the Washington State Bar Association.[47] The Court entered its Order on that motion on July 12, 2013.[48] Appellant timely appealed that Order.[49]

Discretionary review of the recusal orders in the contempt and parenting plan proceedings were consolidated for review.[50] This Court's Commissioner also allowed review of Appellant's appearance of fairness argument for recusal in the parenting plan modification proceedings and Judge Hunt's awarding sole decision making over the parties' children's counseling.[51]

V. Argument

A. Judge Hunt was required to recuse himself in both the contempt and modification proceedings after Appellant timely filed a motion and affidavit of prejudice because they were both separate proceedings for purposes of RCW 4.12.050.

1. The standard of review on a recusal order is abuse of discretion.

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[46] RP 16:5-12 (May 22, 2013); CP 350.
[47] RP 22:17-23:6 (May 22, 2013).
[48] CP 349-51.
[49] CP 358-63. This Court determined the matter was not directly appealable and re-characterized Appellant's notice of appeal as a notice of discretionary review that was ultimately granted by this Court's Commissioner on November 8, 2013.
[50] *See* this Court's Ruling Granting Review in Part and Denying Review in Part at 8 (Nov. 8, 2013).
[51] *See* this Court's Ruling Granting Review in Part and Denying Review in Part at 7 (Nov. 8, 2013).

A trial court's refusal to recuse in response to an affidavit of prejudice is reviewed for abuse of discretion.[52] Despite the abuse of discretion standard, a seasonable motion for recusal and affidavit of prejudice present no question of fact or discretion.[53]

2. An application under RCW 4.12.050(1) to transfer the proceeding to a new judge limits discretion and the judge to whom it is directed has only the jurisdiction, power and authority to recuse him or herself and transfer the proceedings to a new judge.

RCW 4.12.050 states in relevant part,

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso....

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[52] *In re Marriage of Farr,* 87 Wn.App. 177, 188, 940 P.2d 679 (1997), *review denied,* 134 Wn.2d 1014 (1998).
[53] *Clover Park Sch. Dist. No. 400 v. Washington State Bd. of Educ.,* 131 Wn. App. 1046 (2006).

Prejudice is conclusively established by filing the requisite affidavit or declaration.[54] Here, Judge Hunt had the discretion only to grant Appellant's motion to recuse him from the contempt and the modification proceedings. Having refused to do so, he abused his limited discretion and reversal is required.

3. Respondent's contempt proceeding was a new and separate proceeding that allowed Appellant to invoke his right to require Judge Hunt to recuse himself.

Contempt is a separate proceeding, and a party may invoke his or her recusal rights under RCW 4.12.050. The case *State ex rel. Russell v. Superior Court of King County*, 77 Wash. 631, 138 P. 291 (1914), is dispositive. There, two parties were charged with a contempt of court committed out of the presence of the court. *Id.* at 632. The two parties were required to appear before the superior court to answer the charge of contempt, but before further proceedings were had, the two parties filed a motion requesting a change of judges, supported by an affidavit reciting that the judge before whom the proceeding was then pending was prejudiced against each of them and against their interest in the cause. *Id.* The Washington Supreme Court held that a contempt proceeding for contempt committed outside the court's presence was a separate proceeding and, therefore, allowed any party or attorney to establish by

[54] *State ex rel. Mauerman v. Superior Court for Thurston Cnty.*, 44 Wn. 2d 828, 830, 271 P.2d 435, 437 (1954).

motion and affidavit the prejudice of a judge and have the action transferred to another department or judge. *Id.* at 633-34.[55] Here, Respondent initiated a separate contempt proceeding against Appellant for actions that occurred outside the trial court's presence, and Appellant timely filed a motion and affidavit of prejudice pursuant to RCW 4.12.050. This case is not distinguishable from *Russell*.

The concept in *Russell* was expanded in *Cooper v. Cooper*, 83 Wash. 85, 89-90, 145 P. 66 (1914). There, our state Supreme Court extended the new proceeding analysis to " .... [A]ny proceeding commenced by new and independent process, though arising out of and connected with another action." Here, Respondent commenced the contempt process, as she was required to do, by having the Lewis County Superior Court issue an order to show cause and then personally serving the order to show cause on Appellant. The order to show cause here coupled with personal service was "new and independent process" and gave both parties the right to require judicial recusal pursuant to RCW 4.12.050.

4. Appellant's parenting plan modification proceedings were also separate proceedings that required Judge Hunt to recuse himself.

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[55] Subsequent cases have declined to disturb the holding in *State ex rel. Russell. See, e.g., State v. Superior Court of Spokane County*, 112 Wash. 571, 192 P. 935 (1920) (declining to disturb the holding of *State ex rel. Russell* that there was a right to change of judge in contempt matter).

Similar to the contempt proceedings initiated by Respondent, Appellant's parenting plan modification action was also a separate proceeding entitling both parties to require judicial recusal pursuant to RCW 4.12.050.

After a final judgment in a divorce, a subsequent action to modify the decree was held to be a separate proceeding, and an affidavit for change of judge could be properly filed. In *State ex rel. Mauerman v. Superior Court*,[56] the Washington Supreme Court held that a proceeding to modify the custody provisions of a final divorce decree, upon allegations of changed conditions since the entry of the decree, was a new proceeding within the meaning of RCW 4.12.040 and .050 that entitled a party to file an affidavit of prejudice against the judge who presided over the first proceeding.[57] The Washington Supreme Court reasoned that the modification action was a new proceeding because it "present[ed] new issues arising out of new facts occurring since the entry of the decree."[58] Additionally, the *Mauerman* court confirmed the long standing rule related to judicial recusals as a matter of right:

> If the proceeding is one within the meaning of the cited statutes [RCW 4.12.040 and 4.12.050], a motion for a change of judges presents no question of discretion or policy. It must be granted as a

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[56] 44 Wn.2d 828, 271 P.2d 435 (1954).
[57] *Mauerman* at 830, 271 P.2d 435.
[58] *Mauerman, supra.*

> matter of right. Nor is a question of fact presented by such a motion. Prejudice is established by the filing of the affidavit.[59]

In *State ex rel. Foster v. Superior Court*,[60] the court held that in a suit for modification in the custody of a child the petitioner was entitled to a change of judge on the filing of an affidavit of prejudice. The *Foster* court concluded that the action for modification in custody of a child was not a proceeding ancillary to the divorce action, but was a proceeding to try to determine new rights arising out of new facts occurring since the rendering of the decree.[61] The party was therefore entitled to change of judge as a matter of right.[62]

Here, the petition to modify the parenting plan is a new and separate proceeding within the meaning of RCW 4.12.050, triggering anew this statute permitting affidavit for change of judge. Contrary to the Findings of Fact in the Decision, Judge Hunt's rulings of 9/14/12, 10/12/12, and 2/26/13 were made in a different, earlier relocation proceeding. But that proceeding was voluntarily dismissed. Because Judge Hunt had not made any rulings in the new modification proceeding, Appellant was allowed to require his recusal as a matter of right after complying with RCW 4.12.050's requirements. There is no dispute that Appellant

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[59] *Mauerman* at 830 (internal citations omitted).
[60] 95 Wash. 647, 164 P. 198 (1917).
[61] *Foster* at 653.
[62] *Id.*

complied with RCW 4.12.050's requirements. There is similarly no dispute Appellant filed his motion for recusal and supporting affidavit prior to Judge Hunt making any discretionary rulings in the parenting plan modification matter. To deny Appellant's motion to recuse was error and requires reversal.

> 5. Because Judge Hunt was required to recuse himself, the order he entered on the merits of the contempt proceeding were void and constituted reversible error.

Because his discretion was limited when Appellant seasonably filed his motion to recuse and affidavit of prejudice, Judge Hunt did not have the jurisdiction, power, or authority to rule on the merits of Respondent's contempt motion. The application for change of judge and affidavit divests the judge to whom it is directed from jurisdiction to hear the proceeding on the merits.[63] The only thing the judge can do is recuse her or himself and transfer the matter to a new judge.[64] Here, Judge Hunt exceeded his jurisdiction, power, or authority by not recusing himself and deciding the merits of Respondent's contempt motion. This Court must, therefore, also reverse the contempt order.

B. The trial court abused its discretion when it modified the May 2012 permanent parenting plan by giving Respondent sole decision making over the children's counseling without following the required procedures in RCW 26.09.260 and .270.

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[63] *McDaniel v. McDaniel*, 64 Wn.2d 273, 275, 391 P.2d 191, 192 (1964).
[64] *Skagit Cnty. v. Waldal*, 163 Wn. App. 284, 288, 261 P.3d 164, 166 (2011).

1. The standard of review to determine parenting plan provisions is abuse of discretion.

Parenting plan provisions are reviewed for abuse of discretion.[65] Here, Appellant seeks review of a provision re-allocating decision making over the children's counseling. It is, therefore, a parenting plan provision and should be reviewed under the abuse of discretion standard.

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.[66] A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices.[67]

Despite using an abuse of discretion standard, a trial court's discretion has been expressly limited by the legislature.[68] The legislature allows a court to modify a parenting plan or custody decree pursuant only to RCW 26.09.260 and .270. RCW 26.09.260(1).[69] RCW 26.09.260 sets forth the procedures and criteria to modify a parenting plan. These procedures and criteria limit a court's range of discretion.[70] Accordingly,

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[65] *In re Custody of Halls*, 126 Wn. App. 599, 606, 109 P.3d 15, 19 (2005).
[66] *Halls*, 126 Wn. App. at 606
[67] Id.
[68] Id.
[69] *In re C.M.F.*, 314 P.3d 1109, 1112 (Wash. 2013)
[70] Halls, 126 Wn. App. at 606, citing, *In re Marriage of Hoseth,* 115 Wn.App. 563, 569, 63 P.3d 164 (2003)(citing *In re Marriage of Shryock,* 76 Wn.App. 848, 852, 888 P.2d 750 (1995), *review denied,* 150 Wn.2d 1011, 79 P.3d 445 (2003)).

a court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria.[71]

2. The trial court did not follow the requirements set forth in RCW 26.09.260 and .270.

The trial court did not follow the statutory requirements to modify the parties' May 2012 agreed permanent parenting plan's non-emergency health care provisions. A permanent parenting plan may be changed in three ways: by agreement, by petition to modify, and by temporary order.[72] Here, it not disputed the parties never agreed to a change in the decision making provisions of the May 2012 permanent parenting plan. Moreover, it is similarly not disputed the May 2012 permanent parenting plan was not a temporary order.

a. The July 2013 Order modified the May 2012 parenting plan

The trial court modified the May 2012 agreed permanent parenting plan's decision making provisions. A modification to a parenting plan occurs "when a party's rights are either extended beyond or reduced from those originally intended in the decree."[73] In *In re Marriage of Christel & Blanchard*,[74] the appellate court held that re-writing a dispute resolution provision so it dealt with how to determine the child's

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[71] *Halls*, 126 Wash. App. at 606 *citing Hoseth,* 115 Wn.App. at 569, 63 P.3d 164
[72] *In re Marriage of Christel and Blanchard*, 101 Wn. App. 13, 23, 1 P.3d 600 (2000).
[73] *In re Marriage of Christel & Blanchard*, 101 Wn. App. 13, 22, 1 P.3d 600, 605-06 (2000), *citing, Rivard v. Rivard,* 75 Wn.2d 415, 418, 451 P.2d 677 (1969).
[74] 101 Wn. App. 13

enrollment in school in the future was a modification because it went "beyond explaining the provisions of the existing parenting plan. The language goes beyond filling in procedural details. The order on its face imposes new limits on the rights of the parents."[75]

Here, Judge Hunt also modified the parties' May 2012 agreed permanent parenting plan's decision making provisions that explicitly provides in two separate and places (¶¶ 3.13, and 4.2) non-emergency health care decisions should be made jointly. Judge Hunt's July 12, 2003 Order modifies the parenting plan's non-emergency health care provisions by allowing Respondent "to take either or both children to a counselor or counselors selected by the respondent."[76] This was a modification for four reasons. First, it limited Appellant's rights under the May 2012 parenting plan because he no longer had any decision making authority over who the children's non-emergency health care provider would be or whether they should participate in counseling. Second, it expanded Respondent's rights to make non-emergency health care decisions regarding counseling for the children. Third, it was also a forward looking provision because it dealt with counseling that had yet to occur. Finally, Judge Hunt's July 12, 2013 Order regarding counseling is properly characterized as a permanent order, as opposed to a temporary

[75] *Christel*, 101 Wn. App. at 23
[76] CP 351 at ¶ 1.

order. There is no duration in the counseling provision. Because it was forward looking and permanent, expanded Respondent's decision making rights, and limited Appellant's decision making rights, Judge Hunt's July 12, 2013 Order modified the parties' May 2012 agreed permanent parenting plan.

b. Requirements to properly modify a parenting plan

To modify a parenting plan, a court must follow the provisions in RCW 26.09.260 and .270. RCW 26.09.260 and .270 govern parenting plan modifications.[77] Modification requires a petition, proper service, a finding of adequate cause, and then a finding that the change is in the children's best interests.[78] RCW 26.09.260 states:

> Except as otherwise provided in subsections (4) ... and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds ... that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.
> RCW 26.09.260(1).

RCW 26.09.270 states:

> A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his or her motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his or her affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause

[77] *Halls*, 126 Wn. App. At 606
[78] *Id.*

> for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

Christel & Blanchard also held that because the trial court modified the dispute resolution provision in the parenting plan, the trial court was required to comply with RCW 26.09.260 and .270 (e.g. a petition, an adequate cause finding, and a finding that the change was in the children's best interests) when entering the order and that failure to follow these procedures was an abuse of discretion.[79]

c. Judge Hunt did not follow the requirements to modify a parenting plan

Judge Hunt did not follow the requirements to modify a parenting plan. He did not preliminarily address adequate cause, did not set a subsequent hearing for the modification, and because he did not make a finding the modification would be in the children's best interests.

(i) Failure to preliminarily address adequate cause

Judge Hunt abused his discretion because he never preliminarily addressed or decided whether adequate cause existed for the proposed change prior to setting the matter for hearing on the merits as required by RCW 26.09.270. A "court is required to deny a motion that seeks to modify a parenting plan provision unless the court finds that adequate cause for hearing the motion is established by the affidavits, in which

[79] *Christel*, 101 Wn. App. at 23-24.

case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted."[80] While a trial court's adequate cause determination is reviewed for abuse of discretion,[81] Judge Hunt never addressed adequate cause or made an adequate cause finding in his July 2013 Order.

(ii) Modifying the parenting plan without a subsequent hearing

Judge Hunt abused his discretion when he modified the parties' May 2012 agreed permanent parenting plan at the first hearing where that relief was requested. "Under RCW 26.09.270, the trial court does not have the unfettered discretion to decide what kind of hearing to hold and when to hold it."[82] RCW 26.09.270 expressly requires courts to first determine whether adequate cause exists for the proposed modification and then, and only then, can it "set a date for hearing on an order to show cause why the requested order or modification should not be granted." Here, the trial court not only did not first find adequate cause, but it also modified the parties' May 2012 agreed permanent parenting plan at the first hearing after Respondent filed her contempt motion wherein she requested the trial court modify the decision making provisions in the

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[80] *Id.*, citing RCW 26.09.270.
[81] *In re Marriage of Kinnan*, 131 Wn738, 750, 129 P.3d 807 (2006), citing *In re Marriage of Flynn*, 94 Wn. App. 185, 189–91, 972 P.2d 500 (1999).
[82] *Kinnan*,131 Wn. App. at 751.

parties' May 2012 agreed permanent parenting plan to give her sole decision making over the children's counseling. This too was reversible error.

(iii) Failure to find modification was in the children's best interests

Judge Hunt abused his discretion when he entered the July 2013 Order and modified the non-emergency health care decision making provisions in the May 2012 agreed permanent parenting plan when he made the modification without finding the change was in the children's best interests. "Absent a finding that modification is in the best interests of a child, the court may not modify for mere violations of the parenting plan."[83] Failure to make a required finding must be treated as though a finding of fact against the party with the burden of proof was made. Here, Respondent bore the burden to prove her proposed change to the decision making provisions was in the children's best interests.[84]

Here, Judge Hunt made no finding that Respondent's requested change to the non-emergency health care decision making provisions in the parties' May 2012 agreed permanent parenting plan was in the children's best interests. Having not made this essential finding upon which Respondent bore the burden of proof, requires this Court to

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[83] *Halls*, 126 Wash. App. at 607, citing, *See e.g., Thompson v. Thompson,* 56 Wn.2d 244, 250, 352 P.2d 179 (1960); *Schroeder,* 106 Wn.App. 343, 351, 22 P.3d 1280 (2001).
[84] *Halls*, 126 Wash. App. at 607

conclude such a finding against Respondent. Having found against Respondent, Judge Hunt erred when he modified the parties' May 2012 agreed permanent parenting plan's decision making provisions regarding non-emergency health care. Reversal is required.

C. Judge Hunt violated Appellant's due process rights and abused his discretion when he denied Appellant's motions to recuse Judge Hunt from the contempt and modification proceedings based on the appearance of fairness.

1. The standard of review

The standard of review when a judge refuses to recuse himself is an abuse of discretion.[85] "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.[86] Here, Judge Hunt abused his discretion when he applied an erroneous view of the appearance of fairness doctrine.

2. Judge Hunt used the wrong standard when analyzing appearance of fairness.

"Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) require that a judge disqualify from hearing a case if that judge is biased against a party ***or*** *if his or her*

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[85] *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056, 1064 (2009).
[86] *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054, 1075-76 (1993).

impartiality may be reasonably questioned."[87] (Emphasis added). "The test to determine whether a judge's impartiality might reasonably be questioned is an objective one that assumes that a reasonable person knows and understands all the relevant facts."[88] "[I]n deciding recusal matters, *actual prejudice is not the standard.*"[89] [Emphasis added].

Despite this, Judge Hunt seemingly applied an actual prejudice standard to Appellant's request that Judge Hunt recuse himself based on the appearance of fairness doctrine. In his July 12, 2013 Order on Petitioner's Motion for New Judge and Affidavit of Prejudice, Judge Hunt found:

> The [Appellant] did not present any evidence or file an affidavit as required by RCW 4.12.050, that would substantiate that Judge Hunt *is prejudiced* against the petitioner or his counsel, so that petitioner or his attorney cannot or believes that he cannot, have a fair and impartial trial by Judge Hunt.[90]

This underscores the fact Judge Hunt required Appellant show that Judge Hunt was actually prejudiced against Appellant, but the correct standard is either the judge being actually prejudiced ***or*** *that the judge's impartiality may be reasonably questioned.* Judge Hunt's July 12 Order did not address or make any findings as to the second, objective

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[87] *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056, 1064 (2009).
[88] *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 340, 54 P.3d 665, 683 (2002).
[89] *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355, 378 (1995) amended, 61645-1, 1996 WL 137107 (Wash. Jan. 31, 1996).
[90] CP 347-48, Finding 11.

component of the appearance of fairness doctrine. Having failed to apply the correct law to Appellant's motion, Judge Hunt necessarily abused his discretion and his July 12 Order on Petitioner's Motion for New Judge must be reversed.

3. Had Judge Hunt used the proper standard, then the result should have been different.

When reversing Judge Hunt's July 12 Order on Petitioner's Motion for New Judge, this Court should remand with instructions for Judge Hunt to grant Appellant's motion for a new judge because had Judge Hunt applied the correct legal standard, then he should have recused himself.

The hearings before Judge Hunt in the prior Lewis County relocation matter show an escalating series of exchanges between Judge Hunt and three different attorneys that, when taken together, show the appearance of bias or prejudice. First, on August 17, 2012, in the prior Lewis County relocation proceedings, Judge Hunt chastised Appellant's attorney Robert Cadranell and expressed doubt as to Appellant's credibility ("it throws the entire analysis of what the individual says out the window almost.")[91]

Judge Hunt ratcheted up his comments against Appellant at the next hearing. Appellant filed a motion to appoint a guardian ad litem for the limited purpose of interviewing the then 14 and 11 year old children on

[91] *See* August 17, 2012, RP 14:18-20.

their wishes regarding their relocating to Olympia with Respondent after having spent their entire lives in Adna and having their school and all their extracurricular activities in Adna.[92] The hearing on Appellant's motion was October 12, 2012, and Robert Cadranell again represented Appellant at the hearing. At that hearing, Judge Hunt did not read Appellant's reply, although it was timely filed.[93] He also found that the motion was brought in bad faith and assessed $1,000 in terms against Appellant.[94]

Judge Hunt continued to escalate his attacks on Appellant and now Appellant's counsel. The next hearing was the hearing on Appellant's moot motion to change venue, which was mooted by Appellant voluntarily dismissing his objection to relocation, and Respondent's motion to dismiss Appellant's motion to change venue. The hearing occurred on February 7, 2013, and Appellant was represented by Dennis McGlothin, a different attorney in the same law firm as Mr. Cadranell. At that hearing, Judge Hunt called Mr. McGlothin a liar. Judge Hunt said that Mr. McGlothin's claim that the settlement commissioner told him

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[92] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[93] RP 5:2-9 (Oct. 12, 2012).
[94] RP 8:15-17 (Oct. 12, 2012); and Order, supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available

that the judges in Lewis County did not like Appellant was "a lie."[95] He also stated that he had taken it upon himself to contact Thurston County about Appellant's pending modification action in that county, which arguably contravened the Code of Judicial Conduct.[96]

As though that were not enough, Judge Hunt's attacks increased in severity against Appellant's counsel. The next hearing was on Respondent's motion for contempt. The hearing was held as set forth on the show cause order on May 22, 2013.[97] Appellant was again represented by Mr. McGlothin at that hearing. This time, Judge Hunt said to Mr. McGlothin in open court that Judge Hunt believed Mr. McGlothin had set about to "torpedo" his order, that he did not believe Mr. McGlothin's stated motive for writing a letter to a therapeutic

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[95] RP 9:17-22 (Feb. 7, 2013).

[96] RP 9:1-2 (Feb. 7, 2013). The purpose of CJC Rule 2.9 relating to *ex parte* communication is obvious from its context. Judges are precluded from initiating, permitting, or considering ex parte communications outside the presence of the parties and their counsel about a pending or impending matter. The Rule makes a special effort to preclude expert advice on the law without providing a reasonable opportunity to respond. In addition, a limited right to confer with other judges or court staff is coupled with an obligation not to consider things outside the record. Comment [6] expressly provides that a judge is not to investigate facts in other mediums outside the record. Certainly the spirit, and probably the letter, of Rule 2.9 was violated when *sua sponte* Judge Hunt contacted Thurston County about the matter filed by Mr. Massingham. Judge Hunt stated on the record he had contacted Thurston County, although to whom he spoke and what he said is unknown. Obviously, a conclusion can be drawn from the context of his comments that by doing so he expressly wanted to poison the well against Mr. Massingham in Thurston County. Judge Hunt's conduct clearly implicates Rule 2.10(A) which prohibits a judge from making "any nonpublic statement that would reasonably be expected to substantially interfere with a fair trial or hearing."

[97] CP 350.

counselor, and that he was going to be sending "an official complaint" to the Washington State Bar Association.[98]

The presentation hearing for the orders on Appellant's motion for new judge occurred on June 14, 2013. Appellant was represented by Anthony Gipe who was also an attorney with the same law firm as both Messrs. McGlothin and Cadranell. Judge Hunt engaged in a bitter exchange with Appellant's third attorney as well. His comments made clear that he had a vendetta against Mr. McGlothin and evidence the appearance of bias or prejudice.[99]

Taken together, Judge Hunt's statements that Appellant's credibility and analysis was "out the window," finding Appellant's motion to appoint guardian ad litem for the limited purpose of having the 14 and 11 year old children's wishes and desires considered by the Court was filed in bad faith without even reading Appellant's

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[98] RP 16:5-12; 22:17-23:6 (May 22, 2013).

[99] RP 20:1-19 (June 14, 2013):

THE COURT: Yes, and let me say that I know that you weren't involved in it, and Mr. McGlothin noted this matter. How could he note it with such issues as are brought here and then send you down here to argue these motions? He's not available to argue a motion that he set?

Mr. GIPE: He had another motion already set on an emergency basis that he had to deal with. That's my understanding. He could not be here. I was only – and I'm not here to explain why that happened, Your Honor.

THE COURT: Well, I would like to know why, because I have some things I wanted to say to Mr. McGlothin.

Mr. GIPE: I will let counsel know that, Your Honor, and if there's some proceeding in which you would like to address that with Mr. McGlothin --

THE COURT: No, the proceeding that I wanted to address it was in this hearing.

Mr. GIPE: I --

THE COURT: He set it, and I prepared for that, not for you.

timely filed reply where he explained his motivations in filing the motion, finding Mr. McGlothin was a liar when he reported what the settlement conference commissioner had told him, finding that he did not believe Mr. McGlothin's stated motive in sending a letter to Ms. Darnell, and stating in open court that he planned to bring a bar complaint against Mr. McGlothin certainly constitute an objective appearance of bias and prejudice sufficient to require Judge Hunt to recuse himself.

D. Appellant's objection to relocation is different from his petition to modify the existing parenting plan

Judge Hunt erred when he found Appellant's July 2012 objection to relocation was a petition for modification because objections to relocation are different than petitions to modify a parenting plan. First, a party objecting to relocation objects to *the children* relocating with a primary residential parent.[100] A parent also has a right to modify a parenting plan based on a change in circumstances that have occurred since the last parenting plan was entered.[101] "Ordinarily, in a relocation case, it will not be necessary for the court to consider whether there is a substantial change in circumstances, or to consider the factors contained

[100] RCW 26.09.480(1).
[101] RCW 26.09.260(1).

in RCW 26.09.260(2)."[102] Instead, the trial court must consider 10 equally weighted factors set forth in RCW 26.09.520.[103]

Moreover, in relocation cases courts do not even consider whether to modify the parenting plan until after they determine whether to restrain the children's relocation. To be sure, RCW 26.09.530 does not even allow a court to consider whether the parent seeking relocation will relocate if the children are restrained from relocating. If a parent no longer seeks relocation, either before or after the trial court determines whether the children are allowed to relocate, then a parent seeking to modify the parenting plan must establish adequate cause and must establish one or more grounds to modify the parenting plan under RCW 26.09.260.[104]

Here, the difference is stark. In the Lewis County relocation case the trial judge never determined the preliminary issue on whether the children would be restrained from relocating. That trial was supposed to occur in December 2012, but did not because no trial judge was available. After the relocation trial was re-set for May 2013 – more than 5 months after the initial trial and 10 months after Respondent served her notice of intended relocation – Appellant decided he no longer wished to object to

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[102] *In re Marriage of Grigsby*, 112 Wn. App. 1, 15, 57 P.3d 1166, 1173 (2002).
[103] *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124, 130 (2004).
[104] *Grigsby*, 112 Wn. App. at 16.

the children's relocation and dismissed his objection to relocation. At that time Respondent was no longer pursuing relocation because Appellant had consented to it. Accordingly, Appellant was required to pursue a separate parenting plan modification action, establish adequate cause, and prove the requirements set forth in RCW 26.09.260 to adjust or modify the parties' May 2012 agreed permanent parenting plan provisions to accommodate the children's best interests now that they have been allowed to relocate to Olympia.

Because objections to relocation are fundamentally different from petitions to modify a parenting plan, Appellant's July 2012 objection to relocation cannot be found to have been a petition to modify a parenting plan, and Judge Hunt's finding to the contrary is not supported by sufficient evidence.

VI. Conclusion

For the above reasons, the trial court should be reversed and remanded with instructions that the trial court recuse Judge Hunt from hearing either Respondent's contempt motion or Appellant's parenting plan modification petition. In addition, the July 12, 2013 order entered in Respondent's contempt proceeding should be vacated because Judge Hunt did not have the jurisdiction, power, or authority to enter that order.

If this Court determines Judge Hunt should have recused himself and vacates the July 12, 2013 contempt order that impermissibly modified the healthcare decision making provision in the parties' May 2012 agreed permanent parenting plan, then this Court need not address Appellant's arguments regarding impermissible parenting plan modifications in contempt proceedings. If, however, this Court does not determine that Judge Hunt should have recused himself, then this Court should reverse Judge Hunt's July 12, 2013 Order on Motions Re: Counseling, Contempt, Affidavit of Prejudice and Attorney Fees because the trial court failed to follow the mandatory procedures in RCW 26.09.260 and .270.

Appellant should be determined to be the prevailing party and awarded his costs for bringing this appeal.

DATED this 27th day of February, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

I will cause delivery of a true copy of Brian Massingham's Opening Brief to the following individuals on **February 28, 2014:**

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Signed this 28th day of February, 2014 Seattle, Washington.

Lindsey Matter
Paralegal