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71152-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

Jonathan James Arras
&
Laura Grace McCabe
formerly known as Arras

PETITION FOR REVIEW

Laura McCabe
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AUTHORITIES CITED

Washington Cases

Laura McCabe 5260 18th Ave. SE, Seattle WA 98106

A. IDENTITY OF PETITIONER

Laura McCabe was the Respondent in Superior Court proceedings to modify a permanent parenting plan entered by a dissolution court in May, 2010. She was the Appellant in the Court of Appeals.

B. DECISION

Ms. McCabe seeks review of *In re the Marriage of Arras and McCabe*, ___ Wn. App. ___, Slip Op. 71152-1-I, filed August 25, 2014, and the Order Denying Reconsideration, filed September 25, 2014. Attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Appeals Court's affirmation violate the Separation of Powers Doctrine by disregarding statutory prerequisites for judicial authority to modify permanent parenting plans?
2. Does the Court of Appeals' decision conflict with prior decisions of this Court?
3. Did the Court of Appeals apply the wrong standard of review for modifying a parenting plan versus entering a permanent plan?
4. Does the decision endorse untenable findings that do not support the conclusions of law?
5. By adopting the prevailing party's proposed findings three months later, without a presentation hearing, did the trial court violate due process or compromise the mother's ability to challenge the facts on appeal?

D. STATEMENT OF THE CASE [1]

On May 6, 2010, the King County Superior Court dissolved the parties' marriage and established a permanent parenting plan for their two children. The plan was essentially a 50-50 custodial split with shared decision-making.

On August 2, 2012, the father filed a petition to modify the plan, taking custody and decision-making rights from the mother upon accusations that she was mentally ill, on drugs, and abusing and neglecting the children. The ex parte bench, persuaded that the children were in imminent danger, granted the father an emergency ex parte Temporary Restraining Order (TRO) to take custody from the mother. Five days elapsed before the father served notice or removed the children from the mother's allegedly unfit care. He delayed until August 6: the parties' defunct 10th wedding anniversary and the mother's 40th birthday.[2] CP 1-4.

The father's supporters had little, if any, contact, with the mother after she left him in 2009. His declarants were his own parents, his new girlfriend, his best friend (and workplace subordinate)'s wife who gave the children piano lessons only after the parties separated, and the mother's estranged father and stepmother in California. Without any objective

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[1] Please refer to the mother's opening brief for complete citation to the record.

[2] An example of the father's abusive use of conflict.

evidence to support the father's claims, the commissioner found sufficient grounds to proceed, and appointed a Guardian ad Litem (GAL). CP 5-7.

Pending trial, the commissioner ordered a visitation supervisor to be within 10 feet of all the mother's contact with the children, terminated all the mother's overnight visitation and decision-making rights. The court also ordered an independent psychiatric exam, a Domestic Violence (DV) assessment, and blood, skin, and hair-follicle drug tests for the mother.[3] She had to submit her private medical and psychiatric records, allow the GAL to inspect her home, and have her parenting skills assessed by the children's counselors.

Ultimately, every court-ordered report vindicated the mother of the father's accusations. No impartial third-party (e.g. teacher, school administrator, healthcare or childcare provider) ever indicated a concern about her ability to parent. The GAL reported that the children denied their mother ever harmed them. The evaluators deemed the mother to be mentally fit, drug-free, without anger or violence problems; skilled as a parent, and providing a safe, clean, and comfortable home for children.

From the father, the commissioner requested only an anger assessment. The father's evaluator (selected by himself) concluded he needs behavioral therapy to address anger problems and poor emotional

[3] The court, opposing counsel, or GAL selected the mother's examiners. Court-mandated exams and the experts' appearance fees cost the mother over $10,000.

coping skills. The mother's DV examiner reported concerns about the *father*'s abusive use of conflict, foot-dragging, and lack of candor.

The ex parte commissioner requested the children's Child Protective Services' (CPS) files, and found two reports (both by mandatory reporters: a police officer and a school principal) of suspected abuse or neglect *by the father*, not the mother. The GAL reported that the father sat upon the seven-year-old's chest to restrain tantrums, on multiple occasions, and that this scared the child and prevented him from breathing.

The father's claims that the children had severe emotional problems did not withstand scrutiny. Both children were observed by pediatricians, counselors, teachers, and the GAL - no children's care professional reported any concerns. The son had behavior troubles since infancy, but never required special care at school, medication or a psychiatrist. He saw a school psychologist weekly, and was examined by a child psychiatrist. Their daughter, still in kindergarten, wept uncharacteristically frequently for months after her mother's custody was interrupted, so her father sent her to a counselor.

There was a trial without a jury on July 7-10, 2013.

The grandfather flew up from Los Angeles to testify against his daughter. He admitted he had not spoken to her since mid-2011, and that his contact with the grandchildren was solely through his former son-in-

law - whose legal bills he was paying in full. The grandfather believed his daughter delayed his grandson's counseling because his ex-son-in-law told hims so, but he never learned when the counseling actually began.

The grandfather's wife called to testify to the mother's terrible habits and attitudes - as a teenager.[4] She admitted that long-standing conflict with her stepdaughter meant she only saw the grandchildren through their father.

None of Mr. Arras's other personal witnesses (his parents, girlfriend, and best-friend's wife) claimed first-hand knowledge of Ms. McCabe's parenting since 2009, or indeed (in re: his girlfriend) ever.

No expert witness recommended any modification of the original residential schedule, or supported the father's allegations.

The trial court considered the matter for ten days, and on July 19 issued findings and conclusions in open court. The judge acknowledged that the experts unanimously rejected the father's claims,[5] and that the GAL recommended restoring the original residential plan. The court cited no other evidence and found no statutory basis to restrict the mother's custody or parenting rights.

The court nevertheless granted custodial modification to the father,

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[4] At the time of trial the mother was over 40-years old.

[5] Ex. 16, 22; Ex. 25 at 3, RP 237; RP 310.

on grounds un-alleged in his petition. The court also named the father sole decision-maker, citing conflict between the parties.[6]

The judge found the statutory threshold to modify (a "significant change in circumstances") was met when the mother moved 6.9 miles, within city limits, three years earlier, (six weeks after the dissolution).

According to the court, the mother's intra-city move resulted in an "unacceptable" number of school tardies[7]. No evidence about the move or commute was presented to support this conclusion.[8] Yet on that basis alone, the court eliminated *all the mother's overnight custody on school nights* — reducing the children's overnights with their mother from twelve per month to four. Division I affirmed. Decision at 1, 3.

Three months after the judge's oral ruling, the father submitted proposed written findings which ignored the judge's instructions and reiterated his original allegations. RP 683. The court adopted his proposed findings, without a presentation hearing on October 17, 2013.

E. REASONS THIS COURT SHOULD ACCEPT REVIEW

1. By exceeding statutory limits on judicial authority and ignoring mandatory threshold issues, the decision eviscerates protections

[6] Conflict resulting from allegations by the father which the court ultimately found to be meritless.

[7] The father's opinion was the only evidence that the tardies were remarkable: no teacher, administrator or policy referenced them. The court ignored that in the most recent semester, there had only been *one* tardy.

[8] For example, whether the son was late to school before his mother moved to West Seattle.The daughter did not start kindergarten until more than a year later.

enacted by congress to avoid disrupting children's lives without significant cause.

2. By reviewing an *issue of law* for abuse of discretion, the decision conflicts withWashington law.
3. By endorsing untenable findings of fact, the decision conflicts with prior decisions of this Court and Court of Appeals.
4. By affirming unsupported conclusions of law, the decision conflicts with prior decisions of this Court and Court of Appeals
5. By affirming an erroneous application of CR 15, the decision conflicts with Washington law.

F. ARGUMENT

1. THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW.

The Court erroneously reviewed this major modification of a permanent parenting plan under the broad discretion standard appropriate only to crafting original plans. Decision at 3.

This decision violates RCW 26.09, conflicts with judicial precedent, and violates the Separation of Powers. A court may not disregard a statute unless it first finds the statute unconstitutional. *Robertson v. Robertson*, 113 Wn. App. 711, 715, 54 P.3d 708 (2002).

Whether a petitioner established the mandatory threshold requirements for judicial discretion to modify a permanent parenting plan

is a question of law and subject to de novo review. Here, these threshold requirements were not met, so the modification cannot be upheld.

During dissolution proceedings, courts have virtually unassailable discretion to craft permanent parenting plans. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). By contrast, discretion to modify established plans is strictly limited by statute. RCW 26.09.260(1) and (2); *In re Marriage of Shryock*, 76 Wn. App. 848, 852, 888 P.2d 750 (1995); *In re Marriage of Hoseth*, 115 Wn. App. 563, 569, 63 P.3d 164 (2005).[9] Here, an established permanent plan was in place, so discretion was limited.

Before modifying, the court must comply with the restrictions of RCW 26.09. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 103, 74 P.3d 692 (2003); Dec. at 3. So, whether a trial court properly exercised discretion is an issue of law. Questions of law are reviewed de novo. *State v. Law*, 110 Wn. App. 36, 39, 38 P.3d 374 (2002).

Division I erroneously applies an abuse of discretion standard. *See*, *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001). *Schroeder* cited the abuse of discretion standard but addressed an initial placement plan, not a modification. *Schroeder* at 472. Applying the correct standard of review here, the modification order should be vacated.

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[9] In *Hoseth*, Division III reviewed the statutory threshold for a *minor* modification de novo. Major modifications are governed by RCW 26.09.260(1) & (2), but the same analysis applies.

2. THE DECISION IS A PER SE ABUSE OF DISCRETION.

The legislature has conferred judicial discretion to modify children's residential plans *only* where a substantial change of circumstance has made the environment detrimental, *and* where harm caused by modifying is outweighed by advantages to the children. RCW 26.09.260(1) and 260(2)(c).[10] Here, these requirements were not met, so modification was an abuse of judicial discretion.

It is a per se abuse of discretion to modify a plan unless the facts establish the elements that empower the court to intervene. *Hoseth*, at 569, citing *Shryock* at 852. If a ruling is "based on an incorrect standard or the facts do not meet the requirements of the correct standard," the decision is a per se abuse of discretion. *Littlefield*, 133 Wn.2d at 47.

In contrast to rules governing *dissolution*, the modification statute unambiguously conditions judicial discretion to disturb a child's living arrangements upon a threshold showing of (a) a change of circumstances arising (b) after the initial plan was entered; that is (c) substantial; and (d)

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[10] RCW 26.09.260: (1) Except as otherwise provided in subsection (4), (5), (6), (8), and (10) of this section, the court **shall not modify** a prior custody decree or a parenting plan **unless** it finds, upon the basis of facts that have **arisen since the prior decree** or plan or that were unknown to the court at the time of the prior decree or plan, that a **substantial change** has occurred in the circumstances of the child or the non-moving party **and** that the modification is in the best interest of the child and is **necessary** to serve the best interests of the child.
(2) In applying these standards, the court **shall retain** the residential schedule established by the decree or parenting plan **unless** ...
(c) The child's present environment is **detrimental** to the child's physical, mental, or emotional health **and** the **harm** likely to be caused by a change of environment is **outweighed** by the advantage of a change to the child. (emphasis added).

directly affects the children and (e) diminishes their mental, physical, or emotional health. RCW 26.09.260 (1) and (2); *Hoseth*, at 569.

Here, the court found no statutory basis to restrict the mother's custody or parenting rights. Every expert rejected the father's allegations. The GAL urged restoring the original residential plan.[11] Therefore, the modification was a per se abuse of discretion. *See e.g.*, *Hoseth*, at 567.

Findings based on untenable grounds are also a per se abuse of discretion. *In re Marriage of Zigler*, 154 Wn. App. 803, 808-09, 226 P.3d 202 (2010). It is untenable to find that an intra-city move is detrimental to children's physical, mental or emotional health. It is untenable to find a 6.9-mile difference made "a much longer drive," without any evidence about commute routes, traffic, or travel times.[12] Decision at 5. It is untenable to ignore uncontested evidence that the mother had successfully resolved any tardiness issues: the children were tardy only once the previous semester. It is untenable to prioritize punctuality over a kindergardener's need to be tucked in, cuddled, and read-to at bedtime by her mother. It is untenable to remove 2/3 of children's overnights with their mother on the basis of school tardies.

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[11] Ex. 19; Ex. 25.

[12] i.e., whether the move indeed lengthened the commute time, and if so, how much.

3. THE DECISION CONFLICTS WITH STATE LAW.

Absent a substantial change resulting in *demonstrable harm* to the children, the Legislature prohibits modification of established residential plans, so as to protect stability for families. *In re Parentage of C.M.F.*, 179 Wn.2d 411, 419-20, 314 P.3d 1109 (2013). Here, threshold requirements were not met, so modification cannot be reconciled with RCW 26.09.

A petitioner must overcome a strong presumption in favor of custodial continuity and against modification. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993); *In re Custody of Halls*, 126 Wn. App. 599, 607, 109 P.3d 15 (2005); Dec. at 3. The burden is on the movant to come forward with sufficient facts to warrant exercise of discretion in his favor. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013) (quoting *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)). Courts should be "extremely reluctant to disturb child placement dispositions." *In re Marriage of Schneider*, 82 Wn. App. 471, 476, 918 P. 2d 643 (1996) (overruled on other grounds by *Littlefield*, 133 Wn.2d 39).

Here, the plan established at dissolution was in effect for over two years - a long time to children. *See e.g., In re Welfare of Hall*, 99 Wn.2d 842, 850-51,664 P.2d 1245 (1983) (eight months is not in the "foreseeable future" to a four-year-old); *In re Dependency of SMH*, 128 Wn. App. 45, 55, 115 P.3d 990 (2005) (rebuttable presumption that 12 months is not the

"foreseeable future" in the context of RCW 13.34.180(1)(e)). This court was not reluctant to modify, nor did it exercise a strong presumption against modification. Thus, the modification was in error.

Here, the appeals court erroneously held that Finding 2.2 established the statutory prerequisites. Dec. at 4. But the trial court had confused the threshold elements to modify *residential* provisions with those relevant only to *decision-making* provisions. The courts lost sight of mandatory statutory thresholds in RCW 26.09.260(2)(c).

Washington courts require petitioners to show both that (i) the respondent is currently unfit, and (ii) any misconduct has actually affected the children's welfare. *See, e.g., In re Marriage of Woffinden*, 33 Wn. App. 326, 330, 654 P.2d. 1219 (1982)[13].

Children of divorce are not be subjected to repeated re-litigation of custody issues determined in the original action. *Schuster v. Schuster*, 90 Wn.2d 626, 628, 585 P.2d 130 (1978). Extended litigation violates children's strong interest in finality. *In re Parentage of Jannot*, 149 Wn.2d 123, 127-28, 65 P.3d 664 (2003). The court should only modify residential schedules where changes affect the children's welfare. *Schuster*, 90 Wn.2d at 630. Here, the only change was the mother's intra-city move on July 1, 2010 - which happened *two years* before the modification petition and

[13] Division III's holding in *Woffinden* conflicts with the holding here.

three years prior to trial. Alterations to these children's schedule was not a response to a change affecting their welfare as described by *Schuster. Id.* Changes of circumstances are relevant solely to the extent that they "directly and significantly" affect the children's welfare. *Klettke v. Klettke*, 48 Wn.2d 502, 506, 294 P.2d 938 (1956). That is not the case here.

This trial court found two changes of circumstances since the original plan: (1) the parents had difficulty reaching a joint decision about counseling for their son, and (2) the mother moved from the Central District to West Seattle, arguably increasing travel time to the children's school. Modification on these minor bases is contrary to both the letter and the spirit of Washington law.

First, the father did not establish that being late to elementary school eight times was significant compared to preserving the children's bond with their mother. Nor did he claim that the mother's move, only six weeks after the divorce, was unforeseeable to the dissolution court. Loss of a mother's care and companionship is manifestly more detrimental to a child's physical, mental, and emotional health than logistical concerns. *See, e.g. Hoseth* at 574 (increased residential time strengthens parent-child bonds). Here, the children were in kindergarten and second grade - punctuality is trivial when compared to bedtime stories, cuddles, breakfasts, and all other elements of living with their mother.

Ample evidence established that the parties consistently had difficulty reaching agreements at the time of the dissolution. Their inability to immediately agree about their son's counseling was typical. The father did not claim that difficulty reaching an agreement about one issue could not have been anticipated by the original dissolution court when it ordered joint-decision making.

If joint decision-making was indeed made impossible by a "significant change in circumstance," resulting in "demonstrable harm," unforeseeable to the dissolution court,[14] that change was *the father's relentless litigation based on false accusations*. If the court needed to modify decision making, it should have vested final word with the mother.

Even if difficulty reaching one important decision justified terminating the mother's decision-making authority, it had no bearing on the residential schedule.

4. THE DECISION IMPROPERLY SHIFTS THE BURDEN TO THE NON-MOVING PARTY

Evidence is insufficient unless a rational trier of fact could find it establishes the essential facts that support the conclusions of law under the statute and burdens of proof. *State v. Brown*, 162 Wn.2d 422, 428, 173 P. 3d 245 (2007). The challenger admits the truth of the evidence and all inferences that reasonably can be drawn from it. *State v. Salinas*, 119 Wn.

[14] per RCW 26.09.260(2)(c)

2d 192, 201, 829 P.2d 1068 (1992). The remedy is to reverse and vacate.

Modification is a two-step process. First, the court reviews the allegations to ensure that the petitioner met his threshold burden to warrant a hearing. *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.d 966 (2004). If the petition is facially sufficient, the court conducts an evidentiary hearing to find the truth. *Zigler*, 154 Wn. App. at 809.

Here, the courts gave undue weight to an initial finding of adequate cause. *Adequate cause* does not mean the petitioner established facts sufficient to justify a modification; merely that the nature of facts he alleged - if substantiated by actual evidence at trial - is such as to empower the court to act. The power of the court to intrude into families' custodial schedules derives solely from the Dissolution of Marriage Act, RCW 26.09. *In re Marriage of Moody*, 137 Wn.2d 979, 987, 976 P.2d 1240 (1999). Accordingly, compliance with the statutory prerequisites for modification is mandatory. *Shryock*, 76 Wn. App. at 852; *In re Marriage of Stern*, 57 Wn. App. 707, 711, 789 P.2d 807 (1990).

Here, the father launched defamatory accusations against the mother with no objective or factual evidence - he offered only his word, child-hearsay, and biased declarations.[15] Throughout the litigation, the court proceeded as if the father had already made his case against the

[15] His declarants / personal witnesses had no first hand knowledge about the mother's parenting, mental state, or actions, since the parties' dissolution.

mother. From day one, the mother was tasked with *proving a negative* - at her own expense. She succeeded in this, insofar as the court ultimately found no statutory basis to restrict her parenting. Despite this, the court slashed her custody by 2/3, gave her false accuser full decision-making power, and left her $70,000 in debt.[16] She broke no law, cooperated fully with the courts, and caused no harm, yet the court removed the bulk of her custody. Her privacy, pride, career, and reputation were all damaged in the process. Because of the custody change, the mother now owes the father monthly child support.

5. THE DECISION ERRONEOUSLY ADOPTS UNTENABLE FINDINGS & AFFIRMS UNSUPPORTED CONCLUSIONS.

Every finding of fact must rest on a tenable basis of substantial evidence and the findings must support the conclusions of law. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *Littlefield*, 133 Wn.2d at 47.

The court may disregard a GAL's recommendation that is not supported by other evidence, or if other evidence is more convincing. *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1389, 133 Wn.2d 1014 (1997). Here, there was no reason to disregard the GAL.

Inexplicably, the court ignored its own findings that the father's

[16] approximately $10,000 in mandated costs (e.g. GAL, medical evaluations and expert fees) plus $60,000 in lawyer bills. The father testified that the litigation cost him nothing.

accusations were meritless, and tolerated his persistent recitals of already-disproven claims. This was untenable. Confusingly, the court deemed the mother's relocation to a more suitable home, six weeks post-divorce, to be un-anticipatable by the dissolution court. This was also untenable.

The court found that a kindergartener and second-grader's best interests were better served by punctuality than by maintaining a stable home with their mother. This was untenable.

The court found that the mother's home was less suitable for children because her domestic partner is an "entertainer" [17] - a bias against performing artists that is baffling and untenable.

The appeals court gives undue deference to untenable finding about the parents' relative credibility. First, the mother did not place her credibility at issue by leveling accusations against the father. Second, finding the father credible cannot be reconciled with the finding that his accusations lacked merit. After all objective evidence (e.g. medical reports, school documents, and expert testimony) established that his claims were false, no reasonable fact-finder could rely on his credibility.

The record shows the father circumvented due process by deliberately misleading the court, manipulating family court procedures (including the ex parte processes designed to protect abuse victims), and

[17] The facts showed that Mr. Miller works full time and also composes music for non-profit theaters, sings close harmonies, and plays guitar in a bluegrass trio.

pretended his petition made it across the court's threshold for substantive reasons. The finding that he was more credible is not supported by a preponderance of the evidence. It is untenable and thus constitutes a per se abuse of discretion.

While the GAL was setting a schedule for supervised visitation, the father proposed 8:00 a.m to 4:00 p.m., while the mother requested 11:00 a.m. to 7:00 p.m. The father claimed his request was "best for the children," while the mother gave the GAL three reasons: (a) so the children could wake up later on the weekends; (b) to allow family dinnertime, and (c) to accommodate the volunteer supervisor, Rick Miller (the mother's domestic partner since 2009). Mr. Miller told the GAL he sometimes performed on Friday nights, and so preferred a later start time. The GAL set the visits at 11:00 a.m. The father presented no evidence that the mother was uncooperative or that the later visit caused any problem,[18] yet the court cited his opinion as basis for its finding that the mother put her boyfriend's needs above her children's, generally. This is untenable.

The trial court found it significant that on a few Sunday mornings the mother allowed the children (seven and ten-years old) to pour cereal and watch cartoons. No evidence showed this self-reliant breakfast ritual was detrimental to the children's welfare; this finding was untenable.

[18] The court ordered supervision of the mother's visitation in response to accusations by the father which later proved false.

6. THE DECISION DOES NOT ADDRESS THE OMITTED PRESENTATION HEARING.

To ensure due process, CR 52 requires a presentation hearing at which findings submitted by a prevailing party can be challenged. The trial court did not do this. Rule 52 applies to all civil proceedings. CR 1.[19]

> [T]he court shall not sign findings of fact or conclusions of law until the defeated party [has] received 5 days' notice of the time and place of the submission, and [has] been served with copies of the proposed findings and conclusions. CR 52(c).

CR 52 is meaningless unless it gives the defeated party an opportunity to challenge proposed findings and conclusions. King County's Local Rules, however, permit family courts to adopt findings without hearings. Without a presentation hearing, the mother was unable to challenge inconsistencies with the oral verdict. Father's counsel resurrected his client's repudiated allegations as facts. This defeated the just determination of this action and weakened the mother's position on appeal. At minimum, the Court should remand for a presentation hearing.

G. CONCLUSION

The Court should accept review, vacate the modification to the established parenting plan, and restore the mother and children to their previous residential provisions.

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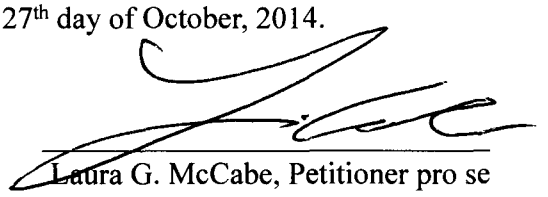
19 CR 1. SCOPE OF RULES: These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity ... They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Respectfully submitted this 27th day of October, 2014.



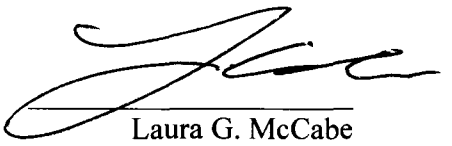
Laura G. McCabe, Petitioner pro se

AFFIDAVIT OF SERVICE

Under penalty of perjury under the Laws of the State of Washington, I, Laura McCabe hereby affirm that I deposited a copy of this Petition for Review in the U.S. mail, First Class postage prepaid, and addressed to opposing counsel at:

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

Signed October 27, 2014,



Laura G. McCabe
in Seattle, Washington

APPENDIX A

COURT OF APPEALS DECISION

In re the Marriage of: JONATHAN ARRAS, Petitioner, and
LAURA ARRAS (nka McCabe), Respondent.
No. 71152-1-I
Court of Appeals of Washington, Division 1
August 25, 2014, UNPUBLISHED

Cox, J.

Laura McCabe challenges a parenting plan modification order. The trial court properly exercised its discretion when it modified the parenting plan. There is substantial evidence to support the trial court's findings. And the findings support the conclusions of law. We affirm.

Laura McCabe and Jonathan Arras were married in 2002. They have two children—a son born in 2003 and a daughter born in 2006. McCabe and Arras separated in 2009.

A dissolution proceeding followed. As part of that proceeding, the court entered a final parenting plan. The final parenting plan designated Arras as the primary parent, and provided McCabe parenting time every Tuesday after school until 7:30 p.m., every Thursday after school until Friday return to school, and alternating weekends from Friday after school until return to school on Monday. The parenting plan provided both parties with decision making authority.

In August 2012, Arras petitioned for modification of that parenting plan. McCabe never provided a response to the petition. Additionally, Arras moved for a temporary restraining order against McCabe, which the court granted.

The court found that there was adequate cause for hearing the modification petition. It entered an order appointing a guardian ad litem (GAL). It also continued the temporary restraining order previously entered with certain amendments. Specifically, the court

ordered that McCabe must undergo a mental health evaluation, that McCabe was permitted supervised visitation twice a week, and that Arras had sole decision making authority.

Shortly before trial, McCabe moved to modify her response (there was none) to include a counter-claim. The court denied this motion.
Arras's petition for modification proceeded to trial. After four days of trial, fifteen witnesses, and other evidence the trial court issued its oral ruling, modifying the parenting plan. Thereafter, the court entered its written findings, conclusions, and order.
McCabe appeals.

MODIFICATION OF PARENTING PLAN

McCabe challenges the trial court's modification of the parenting plan. Specifically, she challenges 21 "findings of fact, " argues that "the findings do not support modification, " and argues that the legal standard and elements for modification were not met. We disagree.

We review a trial court's decision to modify a parenting plan for abuse of discretion.[1] We will not reverse the decision unless the court's reasons are manifestly unreasonable or based on untenable grounds or reasons.[2] We uphold the trial court's findings of fact if supported by substantial evidence.[3] We look at the evidence and reasonable inferences therefrom in the light most favorable to the respondent.[4]

"Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification."[5] "Nonetheless, trial courts are given broad discretion in matters dealing with the welfare of children."[6]

Modification of a parenting plan is statutorily prescribed by RCW 26.09.260.[7] Compliance with the statute is mandatory.[8] RCW26.09.260(1) and (2).

In this case, the trial court found that the parenting plan should be modified pursuant to RCW 26.09.260(1) and (2). This statute provides in pertinent part:

(1) Except as otherwise provided in subsection (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, 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.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:
(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child;[9]

The court's written Finding 2.2 reflects the necessary statutory elements to support modification and adjustment under these subsections. It states:

The Parenting Plan should be modified because a substantial change of circumstances has occurred in the circumstances of the children or the non-moving party (Respondent) and the modification is in the best interest of the children and is necessary to serve the children's best interests. The children's environment under the current Parenting Plan is detrimental to their physical, mental, or emotional health, and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children.[10]

The trial court then set out several paragraphs of facts to support the requested modification.[11] It noted that these facts "arose since the prior plan or were unknown to the court at the time of the

prior plan."[12]

In one finding, the court discussed a substantial change in circumstances—McCabe's move to West Seattle:

[McCabe] has moved to West Seattle, creating a much longer drive to transport the children to each parent's home and to school in Bellevue. The children's attendance at school has been significantly affected on days [McCabe] was supposed to bring them to school, with evidence at trial showing that the children had many school tardies on days [McCabe] was to do the transportation to school. This affected their performance at school as well. [Arras] is also better able to maintain a more predictable and appropriate schedule for the children than [McCabe]. [McCabe] is self employed and not keeping traditional work and sleep hours. Her partner is in the entertainment business, and testimony from her and others showed that it is very important to her to accommodate his schedule, including late hours. This has affected the children. These are young children who have had behavioral problems who need consistency. When they have stayed over at [McCabe's] house on school nights, the late schedule and greater distance between homes/school has negatively impacted their school attendance and performance.[13]

This finding is supported by substantial evidence.

For example, the son's report card shows four absences and eight tardies during his third grade year. Arras testified that the children had unexcused tardies 20 percent of the time McCabe brought them to school. McCabe testified that the tardies were the result of the bridge not running on schedule. She testified that it was not an issue when she lived in the Central District, and it had not been an issue since she moved again. She conceded that the children are not tardy when they stay with Arras because they take the school bus.

Additionally, the GAL testified that McCabe insisted on supervised visitation not starting until 11 a.m. McCabe testified that her

boyfriend is a musician and an earlier time would not work because he works late. She also testified that at times she sleeps beyond 11 a.m.

Further, Arras testified that the children were up past their bed time when they stayed overnight at McCabe's. He also testified that he volunteered in the children's classrooms, and after an overnight at McCabe's, the children were "completely exhausted," "unable to focus," and that their schooling started to suffer. For example, he testified that their grades were down and that the daughter was struggling with reading.

Several witnesses testified about the children's improvement in school after the new temporary parenting plan was implemented.

McCabe argues that the record does not support a finding that the children had many tardies, that no evidence attributed fluctuation in the son's report cards to McCabe's conduct, that the record is silent as to whether her live-in partner's musician lifestyle affected the children, and that there is no evidence that the children's eating or sleeping schedule was not perfectly regular. But the evidence just discussed supports this finding. Further, Arras's mother testified that the son told her that sometimes he and his sister have to "make cereal" for themselves because McCabe is still asleep.

In another finding, the court discussed another substantial change in circumstances—the parties' inability to get along and the son's worsening behavior:

The parents have been completely unable to get along to provide appropriate joint decision making. The parties' son [ ] was suffering from such extreme mental health and behavioral issues that by 2011-2012 he was a safety risk to himself and others, requiring a school safety plan, school suspensions, and school bus suspensions. Timely and necessary treatment was needed, but the evidence was overwhelming that the failure to get [the son] treatment for over 18 months was due to [McCabe] instigating conflicts and putting up roadblocks to getting [the son] the care he

needed. [McCabe] repeatedly came up with excuses and delays to sabotage attempts to get treatment for both children. Neutral witnesses, including [McCabe's] own father, testified in this regard. The evidence at trial was also clear that [Arras] was much more receptive than [McCabe] to input from professionals regarding parenting strategies and counseling for the children, and that [McCabe] didn't engage in or follow through with the professionals. [McCabe's] testimony regarding these issues was not credible. In sum, the evidence on these issues was clear and compelling to the point that if this had been a criminal case the Court would have found beyond a reasonable doubt.[14]

This finding is also supported by substantial evidence in the record.

For example, as the court points out, McCabe's father testified that they had concerns about McCabe's son, wanted to get him into counseling, and that McCabe was resistant and would cancel appointments. He also testified that the son was expelled from the school bus and hit other children. McCabe's stepmother testified that the son began to mirror McCabe's anger, and it took nine months to get the son into therapy because McCabe would not agree. Arras's mother testified that she saw "roadblock after roadblock after roadblock" with respect to setting up counseling. She said that the son's behavior worsened between 2010 and 2012, that he began "screaming and cussing, "and that his behavior became more like McCabe.

Additionally, the GAL's reports and testimony reflected similar concerns about the son's escalating behavior. Her initial report stated that the parties could not agree on decisions, that the son had behavioral issues, and that he "suffered needlessly" because he needed counseling. Her testimony revealed incidents where the son had harmed himself and threatened to harm others. The GAL's final report stated that McCabe seems to have instigated confusion and conflict and that the children will be harmed by the parents' inability to make decisions.

McCabe argues that there is no evidence that [the son] suffered from "extreme mental health issues," or has ever been "a safety risk to himself and others," or that [the son] ever required a "school safety plan." But Arras and the GAL provided evidence of this in their testimony. For example, Arras testified that the son had multiple suspensions "both on the bus and at school for being physically aggressive" and "had a safety behavior plan issued by the school." Moreover, McCabe does not challenge the other facts within this finding, such as the fact that the son needed treatment and that she blocked this treatment. These facts also show a change of circumstances that was detrimental.

In a third finding, the court found that "[w]hile there were allegations of anger and yelling by both parents, the evidence at trial was clear that [McCabe's] improper parenting in this regard was far in excess of [Arras's]." It also found that McCabe inappropriately manages relationships and issues. Despite McCabe's arguments to the contrary, this finding is supported by substantial evidence.

For example, a family therapist testified that both the son and daughter reported that McCabe had slapped the son in the face and that she hits him and grabs his hair "really hard." Arras's mother testified that the son told her that McCabe spit a whole mouthful of food at him. Arras testified that his son told him that McCabe slapped a plate of food out of his hands, and it shattered at his feet and sprayed food all over him.

In another finding, the court found that "[s]ince being in counseling and under the temporary parenting schedule[e]... (a schedule wherein [McCabe] has had much less time with the children than is provided for in the parties' 2010 parenting plan), the children's behavior has substantially improved, as has their attendance at school and their grades." The court found that this was especially true for the son, whose improvement was "extraordinary." This finding is not challenged on appeal and, moreover, is supported by substantial evidence in the record.

Finally, the court expressly found Arras to be more credible than McCabe.

In sum, there is substantial evidence to support the court's finding that a substantial change of circumstances has occurred in the circumstances of the children or the non-moving party, that the modification is in the best interest of the children and is necessary to serve the children's best interests, and that the children's environment under the current parenting plan is detrimental to their physical, mental, or emotional health. The trial court did not abuse its discretion when it determined that the parenting plan should be modified.

RCW 26.09.260(10)

The court also found that the nonresidential aspects of the parenting plan should be adjusted in the areas of dispute resolution and decision making, pursuant to RCW 26.09.260(10). This subsection also requires a showing of a "substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child." [15] To support adjustment of the parenting plan under this provision, the court relied on the same findings previously discussed. For the same reasons, we conclude that the court did not abuse its discretion when it determined that the parenting plan should be adjusted.

McCabe alleges a number of errors. None are persuasive.

First, McCabe argues that the record does not show the essential elements for a modification. She contends the record does not show a substantial change of circumstances and argues that the court claimed discretion to modify "on the basis of a 6.9 mile move" from the Central District to West Seattle. But this overlooks the other substantial changes that the court identified, such as the parties' inability to get along and the son's worsening behavioral problems.

McCabe also contends that these changes did not arise subsequent to the existing parenting plan as required by statute,

because her move to West Seattle could have been anticipated, and Arras's allegations of abuse were based on incidents prior to dissolution. But nothing in the record or parenting plan supports her assertion that the move to West Seattle and the subsequent resulting problems could have been anticipated. Additionally, the trial court did not rely on the abuse allegations to support modification. In fact, it expressly rejected that as a basis for modification.[16] Thus, these arguments are not persuasive.

Second, McCabe argues that an "unremarkable number of tardies" does not show that the child's present environment is detrimental as required by RCW 26.09.260(2)(c). She argues that the court limited her rights "on the sole ground that it takes 15-20 minutes longer to reach the children's school." But this misrepresents the court's findings and fails to acknowledge the other findings that showed that the children's present environment was detrimental.

Third, McCabe argues that the written findings do not correspond to the court's announced findings and "are less authoritative than the bench findings." This claim is contrary to the record. In any event, the court's written findings, conclusions, and order reflect the final ruling of the court. The contention that these are less authoritative is simply untrue.

Fourth, McCabe argues that the court abused its discretion by "disregarding the GAL's recommendation." But McCabe fails to show that the court disregarded the GAL's recommendation. While the GAL's final report recommended that the previous parenting plan be reinstated, the GAL later clarified this recommendation at trial. At trial, the GAL testified that her recommendation was based on the fact that she expected the court to have a review in six months and that a GAL would "stay on board."

Further, even if the court disregarded the GAL's recommendation in the final report, a court is "free to ignore the guardian ad litem's recommendations if they are not supported by other evidence or [if] it finds other testimony more convincing."[17] A court's

decision to disregard a GAL report is reviewed for abuse of discretion.[18] As previously discussed, there was substantial evidence that the parties' inability to get along has been harmful to the children, especially the son, and that the mother's move to West Seattle and home environment was detrimental to the children. This evidence provided tenable grounds to disregard the recommendation in the final report.

Fifth, McCabe argues that the court "erroneously deemed courtroom demeanor as evidence of parental fitness." She is mistaken.

In one instance, the trial court cited to McCabe's demeanor when it evaluated her credibility. But "[i]t is the trial court's job to weigh all the evidence and to determine credibility of the witnesses when there is disputed evidence."[19] A witness's demeanor is one factor to consider when assessing credibility.[20] Thus, the court's observation was proper.

In another instance, the trial court said McCabe's demeanor "demonstrated that [McCabe] needs to get her own way." McCabe does not appear to challenge this reference to her demeanor. But even if the court improperly considered her demeanor as evidence, it would constitute reversible error only if the appellant shows that the trial outcome was materially affected by the error.[21] In support of this point, the trial court also cited testimony by other witnesses. Given McCabe's lack of argument and the cumulative evidence to support this point, she fails to show that the outcome was materially affected.

Sixth, McCabe argues that the court's hearsay rulings "do not conform to the rules of evidence." She briefly recites general principles of law about hearsay and expert opinion and cites to 17 different pages in the record, claiming that "the court allowed [Arras's] witness to testify to inadmissible hearsay and inadmissible opinion testimony based on the inadmissible hearsay." This shotgun approach to argument is insufficient to warrant further review.[22]

CR 15 MOTION

McCabe argues that that the court erroneously denied her motion to amend her response. We hold that the court properly exercised its discretion.

"The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party."[23] Factors to consider in determining prejudice include undue delay, unfair surprise, and jury confusion.[24]We review the denial of a motion to amend for abuse of discretion.[25]

Here, the trial court stated in its order:

On July 3, 2013 [McCabe] filed a "Motion to Amend Response to Include Counterclaim", a counterclaim that requested that the parties' Parenting Plan be modified to make her the primary parent. The motion was procedurally inappropriate in that the Respondent had not actually filed a Response prior to that date, and the motion was filed only two court days before trial, well after the August 27, 2012 Adequate Cause Hearing, the November 26, 2012 Confirmation of Issues, the December 21, 2012 Status Conference, the June 3, 2013 discovery cutoff, and the May 21, 2013 Pretrial Conference.[26]

We adopt the reasoning of the trial court. Denial of this motion was proper.

ATTORNEY FEES

McCabe argues that the court abused its discretion in denying her attorney fees. She also seeks an award of reasonable costs and fees for this appeal. Arras also asks for fees and costs on appeal. We conclude that the court did not abuse its discretion, and we deny fees to both parties on appeal.

RCW 26.09.140 provides, in part:

The court from time to time after considering the financial

resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

Fees at Trial

An award of attorney fees under RCW 26.09.140 is discretionary and is reviewed for abuse of discretion.[27] In making a determination as to attorney fees, the needs of the requesting party must be balanced against the other party's ability to pay.[28]

Here, as Arras points out, McCabe failed to provide any of the required financial documentation to support a request for fees, as required by King County Local Family Law Rule 10.[29] McCabe does not dispute this in her reply brief. We find nothing in the record to show that she provided the required documentation. Accordingly, we conclude that the court did not abuse its discretion when it ordered both parties to pay their own attorney fees and costs.

Fees on Appeal

Both parties ask for fees on appeal pursuant to the same statute identified previously. We decline to award fees to either party.

RAP 18.1 authorizes attorney fees on appeal if provided by applicable law. RCW 26.09.140 provides that after considering the financial resources of both parties, we have discretion to award attorney fees. But to receive attorney fees under this statute, the requesting party must show need and the other's ability to pay fees.

[30] A party relying on a financial need theory for recovery of attorney fees must submit an affidavit of need "no later than 10 days prior to the date the case is set for oral argument or consideration on the merits."[31]

Because neither party has submitted such an affidavit, we deny both requests for fees on appeal.

McCabe also asks for fees on an equitable ground, alleging that Arras's attorney "conceded that he had extended the trial an entire day" by presenting witnesses with duplicative testimony. But this does not accurately reflect the record. While Arras's attorney commented that the trial went longer than expected, he did not make this concession. This argument is not persuasive.

Costs

Costs are awarded to the prevailing party in an appeal. Arras prevails in this appeal. Thus, he is entitled to the award of costs, subject to compliance with RAP 14.1 et. seq.

MOTION TO MODIFY COMMISSIONER'S RULING

Following the filing of her notice of appeal, McCabe moved to stay the order granting modification of the parenting plan, pending review of her appeal. Arras opposed her motion. A commissioner of this court denied McCabe's motion.

Subsequently, McCabe moved to modify the commissioner's ruling, asking this court to exercise its discretion to "restore the status quo" under the May 6, 2010 parenting plan "while the modification proceedings are reviewed." Because the modification proceedings have now been affirmed, this motion to modify the commissioner's ruling is moot.

We affirm the modification order.

Notes:

[1] *In re Marriage of Zigler and Sidwell*, 154 Wn. App. 803, 808, 226 P.3d 202 (2010).
[2] *See id.* at 808-09.
[3] *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993).
[4] *Zigler*, 154 Wn.App. at 812.
[5] *McDole*, 122 Wn.2d at 610.
[6] *Id.*
[7] *In re Marriage of Tomsovic*, 118 Wn.App. 96, 103, 74 P.3d 692 (2003).
[8] *Id.*
[9] RCW 26.09.260.
[10] Clerk's Papers at 188-89.
[11] *Id.*, at 189-90.
[12] *Id*, at 189.
[13] *Id.*
[14] Clerk's Papers at 190.
[15] RCW 26.09.260(10).
[16] See Clerk's Papers at 190 ("While evidence at trial raised concerns about [McCabe's] parenting, specifically as it related to hygiene, clothing, sleeping and eating schedules, much of this may have been due to [McCabe's] mental health issues that were being untreated or erratically managed, which at this time appear to be adequately treated and managed. There was no evidence of drug use. The evidence does not support imposition of RCW 26.09.191 restrictions against [McCabe] at this time.").
[17] *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997).
[18] *See id.* at 107-08.
[19] *See In re Estate of Bussler*, 160 Wn. App. 449, 469, 247 P.3d 821 (2011).
[20] *State v. Barry*, 179 Wn. App. 175, 179, 317 P.3d 528, *review granted.* 328 P.3d 903 (2014); *In re Sego*. 82 Wn.2d 736, 740, 513 P.2d 831 (1973).
[21] *See Barry*, 179 Wn.App. at 181 -82.
[22] *See Cowiche Canyon Conservancy v. Boslev*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).
[23] *Wilson v. Horslev*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

[24] *Id.* at 505-06.
[25] *Prosser Hill Coalition v. County of Spokane*, 176 Wn. App. 280, 286, 309 P.3d 1202 (2013).
[26] Clerk's Papers at 191.
[27] *In re Marriage of Steadman*, 63 Wn. App. 523, 529, 821 P.2d 59 (1991).
[28] *Id.* at 529.
[29] See King County Local Family Law Rule 10.
[30] *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985).
[31] RAP 18.1(c).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of JONATHAN ARRAS, Petitioner, and LAURA ARRAS (nka McCabe), Respondent	No. 71152-1- ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Laura McCabe, has moved for reconsideration of the opinion filed in this case on August 25, 2014. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 25th day of September 2014.

For the Court

Cox, J.

Judge

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