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DIVISION II

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STATE OF WASHINGTON

BY______
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No. 45235-9-II
Consolidated with
45238-3-II

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

FILED
NOV 2 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

BRIAN LEE MASSINGHAM,

Petitioner,

v.

KAREN NICOLE MASSINGHAM, n.k.a. THIEL,

Respondent.

PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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ORIGINAL

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I. INTRODUCTION

Review in this case should be accepted. First, this case involves a court's modification to the parties' permanent parenting plan undertaken upon a contempt motion without the statutorily prescribed modification procedures having been followed (including not giving notice that a modification was sought), without having first held the required threshold adequate cause hearing, and without having made the findings required under statute. Despite the lack of notice, lack of a threshold hearing, and lack of a trial on the merits, the Court of Appeals merely remanded for the trial court to enter, belatedly, the required findings. This raises constitutional due process issues and conflicts with other decisions of the Court of Appeals. It is additionally a matter of public interest, because the legislature clearly did not intend for parenting plans to be modified upon a contempt motion and without following the procedures and making the findings the legislature has required under statute.

Second, this case involves affidavits of prejudice and motions for a new judge in a contempt proceeding and in a parenting plan modification proceeding. This Court's decisions are clear that these two types of proceedings are examples of "new" proceedings for purposes of the statute allowing change of judge. Division 2, however, held that such proceedings are not "new" proceedings but instead are part of the ongoing marital dissolution case, and that therefore there is no right to a change of judge.

II. PETITIONER'S IDENTITY

Petitioner Brian Massingham is the Appellant at the Court of Appeals and the Petitioner at the trial.

III. CITATION TO APPELLATE DECISION TO BE REVIEWED

Petitioner requests the Washington Supreme Court review the Washington State Court of Appeals Unpublished Opinion in *In re marriage of Massingham*, Cause No. 45235-9-II (which was consolidated with 45238-3-II), 2014 WL 5410642, Washington Court of Appeals, Division Two (October 13, 2014), (the "Opinion," **copy attached hereto**).

IV. ISSUES PRESENTED FOR REVIEW

A. Significant Question of Law under the U.S. Constitution.

1. Whether a trial court may modify a permanent parenting plan in a contempt proceeding without notice that a modification was being sought. The Opinion involves a significant question under the United States Constitution because the trial court modified the parties' permanent parenting plan without any notice that a modification was being sought. Because Brian Massingham lacked notice, the trial court and the Opinion violates constitutional guarantees of procedural due process.

Modification of a parenting plan requires a petition with a proposed new parenting plan and notice that the petitioning parent seeks to modify the

existing parenting plan.[1] Here, there was no such notice, no petition to modify, and no proposed new parenting plan. Because of this basic procedural flaw, the trial court lacked authority to modify the parties' parenting plan. The Opinion's remedy is to remand to the trial court for retroactive entry of the necessary supporting findings. This remedy does not address the procedural flaw of a lack of proper notice to Brian Massingham that a modification was being sought.

B. Conflicts with Decisions of this Court.

1. Whether a contempt proceeding post-dissolution is a new and separate proceeding within the meaning of RCW 4.12.040 and .050 entitling a party to file an affidavit of prejudice against a judge. The Opinion states that a contempt proceeding is not a "new" proceeding for RCW 4.12.050 purposes and that instead, a contempt proceeding becomes part of the same ongoing case in which a court originally dissolved the parties' marriage. The Opinion therefore conflicts with this Court's decision in *State ex rel. Russell v. Superior Court of King County*, 77 Wash. 631, 138 P. 291 (1914), in which this Court held that a proceeding for contempt committed outside the court's presence was a separate proceeding and, therefore, allowed any party or attorney to establish by motion and affidavit the prejudice of a judge and have the action transferred to another department or judge. The Opinion also conflicts with this Court's decision in *Cooper v. Cooper*, 83 Wash. 85, 89-90, 145 P. 66 (1914), in which this

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[1] RCW 26.09.181, .260, .270, and *In re Custody of Halls*, 126 Wn. App. 599, 608, 109 P.3d 15 (2005).

Court held that any proceeding commenced by new and independent process was a "new" proceeding, even if it arose out of and was connected to another action.

2. Whether a petition to modify a parenting plan commences a new proceeding within the meaning of RCW 4.12.040 and .050 entitling a party to file an affidavit of prejudice against a judge. The Opinion states that a petition for modification of a parenting plan is not a "new" proceeding for RCW 4.12.050 purposes and that instead, a modification proceeding becomes part of the same ongoing case in which a court originally dissolved the parties' marriage. The Opinion therefore conflicts with this Court's decision in *State ex rel. Mauerman v. Superior Court*,[2] which 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 a judge. The Opinion also conflicts with this Court's decision in *State ex rel. Foster v. Superior Court*,[3] which 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, because it was *not* a proceeding ancillary to the divorce action.

C. Conflicts with Decisions of the Court of Appeals.

1. Whether a trial court has authority to modify a permanent

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[2] 44 Wn.2d 828, 271 P.2d 435 (1954).
[3] 95 Wash. 647, 164 P. 198 (1917).

parenting plan without having followed the mandatory procedures in chapter 26.09 RCW. The Opinion conflicts with other decisions of the Court of Appeals because it remanded to the trial court to retroactively make the findings required under RCW 26.09.260 rather than reversing the order modifying the parenting plan. The trial court modified the parties' permanent parenting plan on a contempt motion without following the procedures in chapter 26.09 RCW. Because these procedures were not followed, the trial court lacked authority to modify the parenting plan, and reversal was required.

The Court of Appeals was clear in *In re Custody of Halls* that modification requires a petition with a proposed new parenting plan, notice that the petitioning parent seeks to modify the existing parenting plan, a finding of adequate cause, a finding of a substantial change in circumstances, and then a finding that the change is in the children's best interests.[4] The Court of Appeals, Division 1, states in *Bower v. Reich*[5] that the statutory procedures are mandatory. None of these procedures were followed here, and *Halls* is clear that without following these procedures, a trial court lacks the authority to modify a parenting plan.[6]

The Opinion agrees that the trial court impermissibly modified the permanent parenting plan by failing to follow RCW 26.09.260 and .270.

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[4] RCW 26.09.181, .260, .270, and *In re Custody of Halls*, 126 Wn. App. 599, 608, 109 P.3d 15 (2005).

[5] 89 Wn. App. 9, 964 P.2d 359 (1997).

[6] *Halls*, 126 Wn. App. at 608.

However, the Opinion's remedy is simply to remand to the trial court for retroactive entry of the necessary supporting findings. This remedy does not address the long list of procedural flaws. The Court of Appeals should have reversed the order modifying the parenting plan, as it did in *Halls*.

D. Substantial Public Interest.

1. The Opinion thwarts legislative intent. This matter substantially affects public interests because the legislature has enacted statutes with rigid procedures that must be followed before a court may modify a permanent parenting plan. The Washington legislature clearly did not intend for parenting plans to be modified upon a contempt motion and without following the required procedures, holding the required hearings, and making the required findings, including a finding of adequate cause and a finding that the modification is in the best interests of the children. The courts should not be able to ignore or circumvent the requirements set down by the legislature.

V. CASE STATEMENT

A. Background facts.

The marriage of Brian L. Massingham ("Brian") and Karen Thiel (f.k.a. Massingham) ("Thiel" or "Karen") was dissolved pursuant to a Dissolution Decree signed by Commissioner Tracy Loiacono Mitchell and entered by the Lewis County Superior Court in May, 2012.[7] The parenting plan for their two children, then ages 13 and 11, was entered at the same

[7] CP 39-46.

time and among its provisions was that the parties were to have joint decision making regarding their children's non-emergency health care, including counseling.[8]

B. Thiel's Contempt Motion and the Parenting Plan Modification

On May 10, 2013, Thiel moved in Lewis County Superior Court for an order to show cause regarding contempt against Brian for his "failure to comply with" the Lewis County Superior Court's February 26, 2013 order allowing her to take the children to counseling.[9] Thiel, without seeking to modify the joint decision-making provisions in the May 2012 parenting plan, sought in her contempt motion to be allowed to take either child to two identified counselors.[10]

The trial court's order on Thiel's motions regarding counseling and contempt was entered July 12, 2013.[11] The trial court did not find Brian in contempt, but gave Thiel sole decision making over selecting a counselor for the children, contrary to the parenting plan's provision giving the parents joint decision making over non-emergency health care.[12]

The Court of Appeals, Division II, granted discretionary review of this order.

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[8] CP 1-12; see in particular CP 5-6.
[9] CP 267-68.
[10] CP 267-68 and CP 250-66.
[11] CP 349-51.
[12] CP 351.

In its Opinion, the Court of Appeals stated that the

> trial court modified the parties' May 2012 permanent parenting plan's original explicit provisions that the parties were to make non-emergency health care decisions jointly... [the order] removed this joint decision making and gave Thiel the unilateral right to choose the children's counselor, a non-emergency health care provider. This ruling reduced Massingham's rights and extended Thiel's rights beyond those in the dissolution's original parenting plan. Thus, it was a parenting plan modification.[13]

The Opinion stated its holding, "[I]n modifying the parenting plan at issue here, the trial court was required to follow RCW 26.09.260 and .270, including finding whether a substantial change in circumstances had occurred; but it did not. We hold that the trial court erred in failing to make the required statutory findings."[14] The Opinion further stated, "With respect to the trial court's modification of the parties' parenting plan provision for decision-making authority over counseling for the children, we remand to the trial court to enter the necessary supporting findings in compliance with chapter 26.09 RCW."[15]

C. The Affidavits of Prejudice

Twice, Massingham filed affidavits of prejudice and motions for a new judge. One week after Thiel had filed a May, 2013 motion for an order to show cause regarding contempt, Brian filed an affidavit of prejudice against Judge Nelson Hunt and moved for a new judge in the contempt

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[13] Opinion at 10.
[14] Opinion at 11.
[15] Opinion at 11-12.

proceeding.[16] A July 12, 2013 order denied Brian's motion for a new judge and dismissed the affidavit of prejudice.[17]

Earlier, on January 31, 2013, Brian had filed a petition to modify the parties' parenting plan.[18] In this modification proceeding, Brian moved for a change of judge from Judge Nelson Hunt and filed an affidavit of prejudice, but the trial court denied the motion and dismissed the affidavit in an order stating that Brian Massingham's affidavit of prejudice was untimely.[19]

Brian sought discretionary review of both orders denying the motions for new judge and dismissing the affidavits of prejudice. The Court of Appeals, Division 2, stated in its November 8, 2013 Ruling Granting Review in Part and Denying Review in Part,

> Massingham appears to be correct that the Modification Proceeding and the Thiel Contempt Proceedings were new proceedings and that RCW 4.12.050 gave him the right to file affidavits of prejudice in those proceedings.... And because he filed his affidavits before Judge Nelson Hunt made any discretionary rulings in the Modification Proceeding or the Thiel Contempt Proceeding, it appears that the judge was divested of authority to enter orders.... Thus, Massingham has demonstrated obvious errors render further proceedings useless in those proceedings....

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[16] CP 269-72.
[17] CP 351.
[18] CP 190-98. Brian's petition to modify was originally filed in Thurston County Superior Court, the county to which Thiel had relocated with the children, and then transferred to Lewis County Superior Court upon Thiel's request. CP 186; CP 75-77.
[19] CP 55.

The Opinion, however, states that "Massingham is incorrect that these requests for change of judge proceedings were 'new' for RCW 4.12.050 purposes: Instead, the contempt and modification proceedings became part of the same ongoing case in which Judge Hunt [sic] had originally dissolved their marriage."[20] The Opinion held regarding the first motion for change of judge that it was properly denied "because the judge had already made rulings in the parties' original dissolution proceeding, plus two subsequent discretionary rulings in the case, by the time Massingham filed his first motion and affidavit of prejudice," citing a September 14, 2012 ruling on temporary relocation and a November 2, 2012 ruling denying a motion for a guardian ad litem.[21] As for the second motion for change of judge, the Opinion held that the trial judge properly denied it because it was "also filed in the same underlying dissolution action."[22]

VI. ARGUMENT

A. Significant Question of Law under the U.S. Constitution.

The Washington State Constitution guarantees, "No person shall be deprived of life, liberty, or property, without due process of law."[23] Similarly, the Fourteenth Amendment to the U.S. Constitution guarantees,

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[20] Opinion at 6. The Opinion incorrectly states that Judge Hunt dissolved the parties' marriage. The Dissolution Decree is signed instead by Commissioner Tracy Loiacono Mitchell. *See* CP 39-46.
[21] Opinion at 6-7.
[22] Opinion at 7.
[23] Wash. Const. art. I, § 3.

"No State shall... deprive any person of life, liberty, or property, without due process of law."[24] At a bare minimum, procedural due process requires notice and an opportunity to be heard.[25] The notice must be reasonably calculated to inform the affected party of the pending action, the basis of any adverse action, and of the opportunity to object.[26]

To determine whether a procedure violates due process, a court engages in a two-step analysis.[27] First, the court must determine whether a liberty or property interest exists entitling a party to due process protections.[28] Second, if such a constitutionally protected interest exists, courts employ a balancing test to determine the degree of process due.[29] The U.S. Supreme Court set out the balancing test in *Mathews*; to determine whether Brian received all the process that he was due, this Court must weigh (1) Brian's liberty interest, (2) the risk of an erroneous deprivation of such interest through the procedures used, as well as the value of additional safeguards, and (3) the Government's interest in maintaining its procedures, including the burdens of additional procedural

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[24] U.S. Const. amend. 14, § 1.
[25] *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994).
[26] *State v. Dolson*, 138 Wn.2d 773, 776-77, 982 P.2d 100 (1999) (superseded on other grounds by statute as stated in *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 614-16, 70 P.3d 947 (2003)).
[27] *Foss v. Nat'l. Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998), *citing Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).
[28] *Foss*, 161 F.3d at 588.
[29] *Foss*, 161 F.3d at 589.

requirements.[30]

It is well established that parents have a fundamental liberty and privacy interest in the care and custody of their children.[31] The first *Mathews* factor is satisfied.

The second *Mathews* factor addresses the risk of an erroneous deprivation of such interest through the procedures used, the risk was great. Brian received no notice that a modification to the parenting plan was being sought. He had no opportunity to prepare for and argue the issue of adequate cause at a threshold adequate cause hearing. He had no opportunity to prepare for and argue the issues of a substantial change in circumstances and the best interest of the children at a full factual hearing. Instead, the hearings were collapsed into a single hearing nominally of Thiel's contempt motion, not a parenting plan modification. Without these procedures, which are mandatory under statute, the risk of erroneous deprivation of rights was great. Although the Opinion recognizes that the trial court improperly modified the parties' parenting plan, simply remanding for entry of the necessary findings does not address the due process violation.

As to the third Mathews factor, the government's interest in maintaining its

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[30] *Foss*, 161 F.3d at 589, *citing Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976).

[31] *In re Dependency of J.S.*, 128 Wn. App. 108, 116, 114 P.3d 1215 (2005), *citing Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) and *In re Smith*, 137 Wn.2d 1, 27, 969 P.2d 21 (1998).

procedures and the burden of additional procedures, Brian asks simply that the trial court, and Division 2 of the Court of Appeals, recognize and follow the parenting plan modification procedures already required under Washington statute. The Opinion leaves these procedures in doubt if the adequate cause hearing and a full factual hearing can be collapsed into a single hearing with no notice that either is to take place. This uncertainty about whether the mandatory procedures need actually be followed actually fosters additional litigation through appeals and motions for reconsideration.

B. Conflicts with Decisions of this Court.

1. This Court has held that Contempt is a separate proceeding.

This Court has held that contempt is a separate proceeding, and a party may invoke his or her recusal rights under RCW 4.12.050. In *State ex rel. Russell v. Superior Court of King County*, 77 Wash. 631, 138 P. 291 (1914), 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 motion and affidavit the prejudice of a judge and have the action transferred to another department or judge. *Id.* at 633-34.[32] Here, Brian Massingham 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, this 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, Thiel 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.

In contrast, Division 2 held in the Opinion that the contempt

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[32] 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).

proceeding became part of the same ongoing marital dissolution case.[33] This conflicts with other Court of Appeals decisions, and review should therefore be accepted.

2. Modifying a parenting plan is a separate proceeding.

> This Court has held that after a final judgment in a divorce, a subsequent action to modify the dissolution decree was a separate proceeding, and an affidavit for change of judge could be properly filed. In *State ex rel. Mauerman v. Superior Court,*[34] 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.[35] This 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."[36]

In *State ex rel. Foster v. Superior Court,*[37] this 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. This Court concluded in *Foster* 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

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[33] Opinion at 6.
[34] 44 Wn.2d 828, 271 P.2d 435 (1954).
[35] *Mauerman* at 830, 271 P.2d 435.
[36] *Mauerman, supra.*
[37] 95 Wash. 647, 164 P. 198 (1917).

rendering of the decree.[38] The party was therefore entitled to change of judge as a matter of right.[39]

Here, Brian Massingham's petition to modify the parenting plan, post dissolution decree, is a new and separate proceeding within the meaning of RCW 4.12.050, triggering anew this statute permitting affidavit for change of judge. Division 2's holding in the Opinion that the parenting plan modification proceeding became part of the same ongoing marital dissolution case[40] conflicts with decisions of this Court. Review should therefore be accepted.

C. Conflicts with Decisions of Court of Appeals.

The Opinion conflicts with the Court of Appeals decisions in *In re Custody of Halls* and *Bower v. Reich.*[41] In *Halls*, the Court of Appeals reversed two parenting plan modifications because the trial judge failed to follow the procedures required under RCW 26.09.260.[42] The Court of Appeals agreed that the trial judge had entered a series of orders that violated the substantive and procedural rules governing modification of final parenting plans, specifically, that the court had modified a final parenting plan without a pending petition for modification, without an adequate cause hearing, and without adequate

[38] *Foster* at 653.
[39] *Id.*
[40] Opinion at 6.
[41] 89 Wn. App. 9, 964 P.2d 359 (1997).
[42] *Halls,* 126 Wn. App. at 601.

consideration of the statutory criteria.[43]

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.[44] 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.[45] Under RCW 26.09.260, the court may modify a parenting plan only if it finds "a substantial change has occurred in the circumstances of the child or the nonmoving party and ... the modification is in the best interest of the child and is necessary to serve the best interests of the child."[46] Absent a finding that modification is in the best interests of a child, the court may not modify for mere violations of a parenting plan.[47]

RCW 26.09.181 requires a petitioning party to file and serve his motion to modify with a proposed parenting plan.[48] Further, under RCW 26.09.270, a party seeking to modify a parenting plan must submit with his motion "an affidavit setting forth facts supporting the requested ... modification and shall give notice, together with a copy of his affidavit, to other parties to the proceedings, who may file opposing affidavits."[49] And the court *must deny the*

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[43] Id. at 606.
[44] Id. at 606.
[45] Id. at 606.
[46] Id. at 606-07, citing RCW 26.09.260(1).
[47] Id. at 607.
[48] Id. at 607.
[49] Id. at 607.

motion unless it finds adequate cause from the affidavits to hear the motion.[50]

Halls filed only a motion for contempt, and the motion complied with none of the requirements of RCW 26.09.270.[51] It did not ask for a modification of the parenting plan; it provided no basis for an adequate cause finding (and the court did not find adequate cause); and it gave the other parent no notice that Halls sought to modify the parenting plan.[52] Because of these basic procedural flaws, the court lacked authority to modify the parties' parenting plan.[53]

The Massingham case is virtually identical in these respects. Thiel filed only a motion for contempt, and her motion met none of the requirements of RCW 26.09.270: it did not ask for a modification of the parenting plan; it did not include a proposed new parenting plan; it provided no basis for an adequate cause finding (and the court neither held an adequate cause threshold hearing nor found adequate cause); and it gave Brian no notice that Thiel sought to modify the parenting plan. Moreover, in both Halls and the present case, the court never found that a modification was in the children's best interest. Faced with such a situation, the Court of Appeals in *Halls* reversed the order granting the modified parenting plan.[54] Its failure to do so here, instead remanding simply for retroactive entry of the required findings, contradicts the decision in

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[50] Id. at 607-08, citing RCW 26.09.270.
[51] Id. at 608.
[52] Id. at 608.
[53] Id. at 608.
[54] Id. at 609.

Halls.

The Court of Appeals, Division 1, states in *Bower* that the procedure relating to modification of a parenting plan is statutorily prescribed, and that compliance with the statutory procedures is *mandatory*.[55] The *Bower* court went on to say that before a petitioner is entitled to a full factual hearing on a petition, he or she must first demonstrate that "adequate cause" exists to modify the permanent parenting plan.[56] This threshold determination requires a petitioner to set forth specific factual allegations, which if proven would permit a court to modify the plan under RCW 26.09.260.[57] Here, the trial court modified the parenting plan without first making the mandatory threshold "adequate cause" determination, and the Opinion merely remands for the finding of adequate cause, along with the other "necessary supporting findings," to be made *after the fact*. These are not the procedures set out in the statutes, which *Bower* plainly and unambiguously states are mandatory procedures. Review should be accepted because the Opinion conflicts with both *Bower* and *Halls*.

D. Substantial Public Interest.

This matter substantially affects public interest because, as outlined above, the legislature in chapter 26.09 RCW enacted statutes with rigid procedures that

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[55] Bower, 89 Wn. App. at 14 (emphasis added).
[56] Id.
[57] Id.

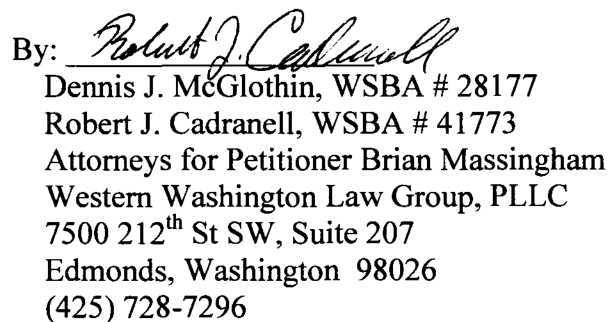
must be followed before a court may modify a permanent parenting plan. The Washington legislature clearly did not intend for parenting plans to be modified upon a contempt motion and without following the required procedures, holding the required hearings, and making the required findings, including a finding of adequate cause and a finding that the modification is in the best interests of the children. The courts should not be able to ignore or circumvent the requirements set down by the legislature by collapsing the threshold adequate cause hearing and the trial on the merits into a single hearing without any notice that a parenting plan modification was being sought.

VII. Conclusion

Because the contempt and parenting plan modifications were new proceedings for purposes of affidavit of prejudice and change of judge, and because no notice was given that Thiel sought a parenting plan modification and the trial court did not follow the mandatory statutory procedures, review should be granted. The modification should be reversed. The motions for change of judge should be granted.

RESPECTFULLY SUBMITTED November 24, 2014.

WESTERN WASHINGTON LAW GROUP, PLLC



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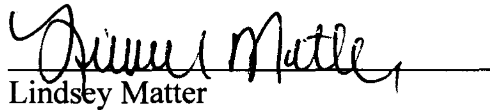
CERTIFICATE OF SERVICE

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.

On the below written date, I caused delivery of a true copy of Petition for Review to the following:

Office of the Clerk State of Washington Court of Appeals, Div. II 950 Broadway Suite 300 Tacoma, WA 98402-4427	[ ] Facsimile [X] Hand Delivery [ ] U.S. Mail [ ] Email
Karen Thiel fka Massingham 99 Newakum Drive Chehalis, WA 98532 kthiel11@hotmail.com	[ ] Facsimile [ ] Hand Delivery [X] U.S. Mail [X] Email

Signed this 24th day of November, 2014 Edmonds, Washington.



Lindsey Matter

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re Marriage of: BRIAN LEE MASSINGHAM, Appellant, v. KAREN NICOLE MASSINGHAM, n.k.a THEIL, Respondent.	No. 45235-9-II Consolidated with 45238-3-II UNPUBLISHED OPINION

HUNT, J.P.T.[†] — We granted Brian Massingham's petition for discretionary review of the superior court's post-dissolution (1) denial of his motions for a change of judge and affidavit of prejudice in a parenting plan modification proceeding and (2) order addressing counseling in a contempt proceeding. Asserting that both the contempt and modification proceedings were separate from the underlying dissolution action, Massingham argues that the superior court erred in failing to grant his motions for a change of judge, in modifying the parenting plan without making the requisite findings under RCW 26.09.260 and .270, and in addressing counseling in a contempt proceeding. Holding that Massingham was not entitled to change the assigned judge, who had previously issued discretionary rulings in the case, we affirm the trial court's denial of

[†] Judge J. Robin Hunt was a member of the Court of Appeals at the time oral argument was heard on this matter. She is now serving as a judge pro tempore of the court pursuant to CAR 21(c).

Massingham's motions. We remand to the superior court to enter statutorily required findings for the parenting plan modification (including any counseling) under RCW 26.09.260.

FACTS

In May 2012, the Lewis County Superior Court dissolved the marriage of Brian Lee Massingham and Karen Nicole Thiel[1], and entered a parenting plan for their two children, then aged 13 and 11. The plan provided that (1) the parents would share decision-making authority over the children's non-emergency health care; and (2) the children would have approximately equal residential time with each parent.

The next month, Thiel filed a notice of intended relocation with the children from Adna (Lewis County) to Olympia. Massingham objected.[2] On September 14, the relocation proceedings trial judge, Judge Nelson Hunt,[3] entered a temporary order allowing Thiel's relocation to Olympia.

In January 2013, Massingham moved for change of judge from Judge Hunt and for a change of venue to Thurston County. On February 26, the trial court ruled that (1) Massingham's affidavit of prejudice was untimely because the court had already made two discretionary rulings before Massingham filed his affidavit; and (2) Massingham's motions "for a new judge and change of venue were factually baseless and without authority." Clerk's Papers (CP) at 55. The trial court dismissed Massingham's affidavit of prejudice and denied his motions for a new judge and for

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[1] Formerly known as Karen Nicole Massingham.

[2] On July 30, 2012, the superior court also granted Thiel a six-month anti-harassment protection order against Massingham.

[3] Lewis County Superior County Judge Nelson Hunt is not related to Court of Appeals Division Two Judge J. Robin Hunt.

change of venue. The trial court also entered an order allowing Thiel to take the children to counseling.

While Massingham's Lewis County Superior Court motions for change of judge and change of venue were pending, (1) he withdrew his Lewis County Superior Court objections to Thiel's relocation; and (2) filed a petition to modify the parenting plan under a new cause number in Thurston County Superior Court, citing Thiel's relocation as a "substantial change in circumstance." CP at 193. Thiel moved under RCW 4.12.030(3) to change venue for Massingham's petition's from Thurston County Superior Court to Lewis County Superior Court. On April 19, the Thurston County Superior Court granted Thiel's motion "based upon convenience of witnesses and the ends of justice," transferred venue to Lewis County Superior Court, and awarded Thiel $1,500 in attorney fees. CP at 77.

On May 10, Thiel moved in Lewis County Superior Court for an order to show cause regarding contempt against Massingham based on his "failure to comply with" the Lewis County Superior Court's February 26, 2013 order allowing Thiel to take the children to counseling. CP at 267. One week later, Massingham filed an affidavit of prejudice against Judge Hunt and again moved for a new judge. On July 12, the trial court (1) denied Massingham's motion for a new judge and affidavit of prejudice; and (2) issued findings of fact, conclusions of law, and an order on motions regarding counseling, contempt, affidavit of prejudice, and attorney fees, declining to find Massingham in contempt, giving Thiel sole authority to select a counselor for the children, and awarding Thiel $500 in attorney fees for Massingham's "intransigence." CP at 351.

Massingham sought discretionary review of three orders: (1) the Thurston County Superior Court's order transferring venue to Lewis County for his parenting plan contempt proceeding; (2)

the Lewis County Superior Court's July 12, 2013 order denying his motion for new judge and affidavit of prejudice in his parenting plan modification proceeding; and (3) the Lewis County Superior Court's July 12, 2013 order on motions regarding counseling, contempt, affidavit of prejudice and attorney's fees. We granted review of the two July 12, 2013 Lewis County Superior Court orders; we denied review of the Thurston County Superior Court's transfer of venue to Lewis County.

ANALYSIS

I. RCW 4.12.050 RECUSAL

Massingham argues that the trial judge erred in refusing to recuse himself from the post-dissolution contempt and parenting plan modification proceedings. He contends that these proceedings were "new," thus entitling him to file an affidavit of prejudice *requiring* Judge Nelson Hunt to recuse himself under RCW 4.12.050. Thiel counters that the trial judge properly denied both of Massingham's motion for change of judge accompanied by affidavits of prejudice because neither motion was a "new" proceeding for RCW 4.12.050 purposes and the judge had already ruled in the case before Massingham filed these two motions. We agree with Thiel.

The record supports Thiel's assertion that the trial judge had made rulings in the case before Massingham filed his two motions and affidavits of prejudice under RCW 4.12.050 requesting a different judge. We hold, therefore, that Massingham had no right to seek the trial judge's recusal by filing these motions and affidavits of prejudice.

A. Standard of Review

RCW 4.12.050[4] allows parties to obtain a new judge by filing a motion and affidavit of prejudice only *before* the assigned judge makes any discretionary rulings in the proceeding.[5] We review a judge's refusal to recuse for abuse of discretion. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). "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." *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (internal citations omitted).

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[4] RCW 4.12.050(1) provides, in 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 . . .*
> AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

(Emphasis added).

[5] Only if the challenged judge has not yet made a discretionary ruling in the case, does the judge lack discretion and must recuse and transfer the proceeding to another judge. *In re Marriage of Hennemann*, 69 Wn. App. 345, 346, 848 P.2d 760 (1993).

B. Post-trial Motions Made in Same Case in Which Judge Had Already Ruled

Massingham contends that, because the contempt and parenting plan modifications were new proceedings separate from the original dissolution,[6] he was entitled to file motions for a change of judge, accompanied by statutory affidavits of prejudice, and to request a new judge to hear both post-trial motions. Massingham is correct that the contempt and parenting plan modification proceedings were distinct from the parties' underlying original dissolution trial. But Massingham is incorrect that these requests for change of judge proceedings were "new" for RCW 4.12.050 purposes: Instead, the contempt and modification proceedings became part of the same ongoing case in which Judge Hunt had originally dissolved their marriage. *See State v. Hawkins*, 164 Wn. App. 705, 713, 265 P.3d 185 (2011), *review denied*, 173 Wn.2d 1025 (2012).[7] Thus, these proceedings also were not "new" for RCW 4.12.050 purposes.

1. First motion for change of judge

We hold that the trial judge properly denied Massingham's first motion for change of judge, filed on January 9, 2013, because the judge had already made rulings in the parties' original

[6] Massingham also contends that his objection to Thiel's relocation was a different proceeding than his petition to modify the existing parenting plan; but he fails to show support this contention.

[7] Similarly, a retrial following reversal on appeal is "a continuation of the original action and, therefore, is the same case for purposes of RCW 4.12.050," even though it might present new issues arising from new facts that have occurred since the entry of final judgment. *See State v. Hawkins*, in which Division One of our court

> refused to treat a retrial after a mistrial as a new case, noting that "'case' . . . involves pretrial, trial, *posttrial* and appellate *proceedings*[,]" [because Hawkins' postrial] hearing was not based on new issues arising from new facts but was simply the most recent in a chain of posttrial proceedings that were all part of the original action.

164 Wn. App. at 713-14 (emphasis added) (quoting *State v. Clemons*, 56 Wn. App. 57, 59, 782 P.2d 219 (1989)).

dissolution proceeding, plus two subsequent discretionary rulings in the case, by the time Massingham filed his first motion and affidavit of prejudice: a September 14, 2012 ruling "allowing the respondent to temporarily relocate to Olympia" and a November 2, 2012 ruling "denying the petitioner's motion for a guardian ad litem." CP at 347. RCW 4.12.050(1) entitles a party to a judge's recusal only if the party files its motion and affidavit of prejudice "*before* [the trial judge] shall have made any ruling whatsoever in the case." (emphasis added). Because Judge Hunt had already made discretionary rulings in this same case, RCW 4.12.050 did not entitle Massingham to the trial judge's recusal.

2. Second motion for change of judge

We further hold that the trial judge properly denied Massingham's May 17, 2013 motion for change of judge because RCW 4.12.050 also precludes a party from making "more than one such [recusal] application in any *action* or proceeding under this section." RCW 4.12.050(1) (emphasis added). As with Massingham's first motion for change of judge, this second motion for change of judge, and its accompanying affidavit of prejudice, were also filed in the same underlying dissolution action. Therefore, Massingham was not entitled to file this second motion for change of judge under the statute.

We affirm the trial court's denials of Massingham's two motions for change of judge.

II. JURISDICTION TO HEAR CONTEMPT MOTION

Massingham also argues that (1) the trial judge "exceeded his jurisdiction, power, or authority by not recusing himself and deciding the merits of [Thiel's] contempt motion"; and (2) therefore, we must reverse the contempt order. Br. of Appellant at 20. Massingham contends that his motions for change of judge and affidavits of prejudice immediately divested the trial judge of

jurisdiction to hear further proceedings and, consequently, the trial judge lacked authority to enter an order on Thiel's contempt motion. We have already held that the trial judge did not exceed his authority in denying Massingham's motions to recuse; thus, this argument about divestment of the trial court's authority to hear the contempt motion also fails.

III. APPEARANCE OF FAIRNESS

Massingham next argues that the trial court erred in denying his motions for a new judge based on the appearance of bias or prejudice. Thiel counters that the trial judge showed "no actual or apparent bias." Br. of Resp't at 11. The record supports Thiel's assertion.

Massingham asserts that the trial judge's "'*impartiality may be reasonably questioned*'" because the trial court's July 12, 2013 order denying his motion for new judge and affidavit of prejudice purported to require him to show "actual prejudice" to obtain the judge's recusal under RCW 4.12.050. Br. of Appellant at 29 (quoting *Meredith*, 148 Wn. App. at 903).

Massingham further contends that the trial judge's July 12 order used an improper legal standard in ruling that he (Massingham) "'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.'" Br. of Appellant at 29 (emphasis added) (quoting finding of fact 11 at CP at 347-48). Massingham (1) asserts that this quoted language is evidence that the trial judge applied an incorrect "actual prejudice"[8] standard to his motions; and (2) argues that the trial judge should have evaluated his (Massingham's) affidavit of prejudice using the legal standard asking

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[8] Br. of Appellant at 29.

whether the trial judge's "'*impartiality may reasonably be questioned*'" and then recused himself. Br. of Appellant at 29 (quoting *Meredith*, 148 Wn. App. at 903). Massingham's argument fails.

First, Massingham fails to show that the trial court applied an incorrect "actual prejudice"[9] legal standard. Rather, the trial judge's order rejected Massingham's motion for a new judge on the grounds that he (the trial judge) had already made discretionary rulings before Massingham moved for a change of judge, not on Massingham's failure to show prejudice.

Second, as the proponent on appeal that the trial judge should have recused for bias, Massingham has the burden to provide evidence of the trial judge's actual or potential bias. *State v. Lundy*, 176 Wn. App. 96, 109, 308 P.3d 755 (2013). Massingham fails to fulfill this burden: He fails to show any actual or potential bias by the trial judge at any point in the proceedings below, including, as he contends, in finding of fact 11 of the trial court's order on petitioner's motion for new judge and affidavit of prejudice. And despite Massingham's assertion that the trial court's criticisms of his counsel in finding of fact 11 evinced the "appearance of bias or prejudice,"[10] we hold that the trial judge did not make any improper statements warranting recusal. Massingham's argument fails.

IV. Counseling Order

Last, Massingham argues that the trial court abused its discretion when it modified the May 2012 permanent parenting plan by giving Thiel sole decision making authority over the children's counseling without following the required procedures in RCW 26.09.260 and .270. Thiel counters

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[9] Br. of Appellant at 29.

[10] Br. of Appellant at 3.

that the trial court did not improperly modify the parenting plan because (1) the trial court's order was merely temporary, and (2) the trial court acted in the children's best interests by giving Thiel only temporary power to choose a counselor. To the extent that the trial court failed to comply with RCW 26.09.260, we agree with Massingham.

"A [parenting plan] modification . . . occurs when a party's rights are either extended beyond or reduced from those originally intended in the decree." *In re Marriage of Christel & Blanchard*, 101 Wn. App. 13, 22, 1 P.3d 600 (2000). Modification is different from a "'clarification,'" which is "'merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.'" *In re Marriage of Holmes*, 128 Wn. App. 727, 734-35, 117 P.3d 370 (2005) (quoting *Christel*, 101 Wn. App. at 22). Here, the trial court modified the parties' May 2012 permanent parenting plan's original explicit provisions that the parties were to make non-emergency health care decisions jointly: The court's July 12, 2013 order on motions regarding counseling, contempt, affidavit of prejudice, and attorney's fees removed this joint decision-making and gave Thiel the unilateral right to choose the children's counselor, a non-emergency health care provider. This ruling reduced Massingham's rights and extended Thiel's rights beyond those in the dissolution's original parenting plan. Thus, it was a parenting plan modification.

When modifying a parenting plan or custody decree, the trial court must follow the

procedures in RCW 26.09.260 and .270.[11] RCW 26.09.260(1); *In re Parentage of C.M.F.*, 179 Wn.2d 411, 419, 314 P.3d 1109 (2013). For example, the trial court must find a "'substantial change in circumstances'" in order to modify a parenting plan or decree, even if the proposed modification is minor. *In re Marriage of Kirshenbaum*, 84 Wn. App. 798, 807, 929 P.2d 1204 (1997) (quoting RCW 26.09.260(1)). Thus, in modifying the parenting plan at issue here, the trial court was required to follow RCW 26.09.260 and .270, including finding whether a substantial change in circumstances had occurred; but it did not. We hold that the trial court erred in failing to make the required statutory findings.[12]

We affirm the trial court's denial of Massingham's two motions to change judge, with their accompanying affidavits of prejudice.[13] With respect to the trial court's modification of the parties' parenting plan provision for decision-making authority over counseling for the children,

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[11] RCW 26.09.260(1) sets forth the statutory requirements for modifying a parenting plan, which include, in part, that

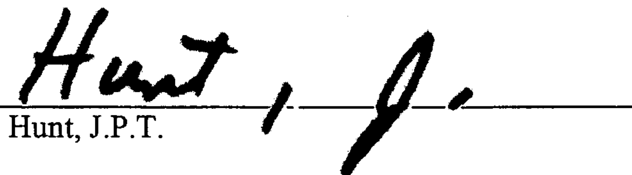
> the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the 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.

[12] Thiel contends that RCW 26.09.260 and .270 did not apply because the July 12 parenting plan counseling modification was merely temporary. But the record before us on appeal does not show that the trial court specified that this parenting plan modification was temporary; nor did it set a date when this modification would expire. We agree with Massingham that the plain meaning of the trial court's order made Thiel's right to choose a counselor permanent. Thus, the trial court was required to comply with RCW 26.09.260 before making such permanent change to the parenting plan.

[13] Because Massingham is not the substantially prevailing party, we decline to award him attorney's fees. RAP 18.1.

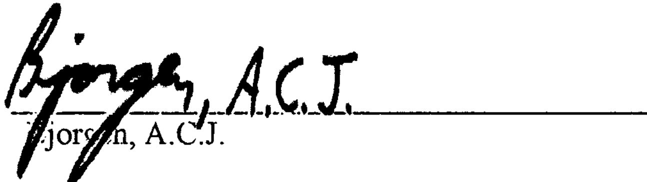
we remand to the trial court to enter the necessary supporting findings in compliance with chapter 26.09 RCW.[14]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

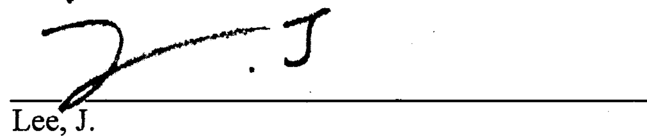


Hunt, J.P.T.

We concur:



Bjorgen, A.C.J.



Lee, J.

[14] If on remand the trial court does not enter the requisite findings, then it shall vacate its order modifying the parenting plan to give Thiel sole decision-making authority over the children's counseling.