State Supreme Court no. 96563-3 **(to be assigned)**

(Division III Case No. 354989-III)

SUPREME COURT OF THE STATE OF WASHINGTON

Paul Cardwell, Respondent

v.

Regan Cardwell, Petitioner under RAP 13.4

REGAN CARDWELL'S PETITION for DISCRETIONARY REVIEW

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TABLE OF CONTENTS **Page**

Table of Authorities iii

I. IDENTITY OF THE PETITIONER 1

II. COURT OF APPEALS DECISION TO BE REVIEWED 1

III. ISSUES PRESENTED FOR REVIEW 1

Issue Presented for Review: Is adequate cause for a major modification met when the following have occurred after the final parenting plan was entered: (1) The father (Paul Cardwell) has had multiple criminal charges and convictions (and as family law matters generally turn on a preponderance of evidence standard, even though the charges that did not lead to convictions still have salience in a family law case) and these charges involve detrimental behaviors relevant to parenting; (2) a domestic violence protection order from Sherie Johnson against Paul Cardwell (CP: 59-71), and sworn testimony about Paul Cardwell's abusive and stalking behavior from Tesa Kuhn, as well as Paul Cardwell making threats of self-harm (CP: 136-40); (3) Tesa Kuhn and Scott Dennison (CP: 118-22) both testify that Paul was living in a town over 100 miles away from his girls, and, in corroboration, Scott Dennison saw Paul working in Idaho (CP: 119); (4) Where Paul Cardwell was convicted of threatening people with "two shotguns" (CP: 175, and see 171-191 generally); (5) And where Regan Cardwell has produced more than a prima facie case of harm to the girls under RCW 26.09.260(1)&(2) (e.g, CP: 45-111 and the rest of the record) regarding Paul's harmful and alienating behaviors in support of her Petition, was it an abuse of discretion for the trial and appellate courts to deny adequate cause?
Answer: Yes, the trial court abused its discretion, and the court of appeals applied the wrong legal standard, and construed the facts in an untenable manner, when it upheld the trial court.

TABLE OF CONTENTS, cont. **Page**

IV. STATEMENT OF THE CASE **2**

A. Procedural History **2**

B. Standard of Review: Abuse of Discretion – Errors of Law, Manifestly Unreasonable Decision, or Lack of Tenable Grounds **4**

C. Standard of Review Continued: *Tomsovic* (2004) -- Petitioner's Prima Facie Case and Legal Standard as a Question of Law **5**

D. Standard of Review: De Novo as to Issues of Law **6**

E. Procedural Note: Interlocutory Orders are Revisited, Not Vacated **7**

F. Denial of Revision Means the Commissioner's Decision Is the Decision Reviewed **10**

V. ARGUMENT UNDER RAP 13.4(b) **11**

A. RAP 13.4(b)(1) and (2): The 10/23/18 decision conflicts with all known legal authority. **11**

1. The Primary Issue Appealed is the Denial of Adequate Cause **11**

Issue No. 1 Restated: Do the rest of Regan's facts (even if there was no possibility of Paul going to jail in Idaho) provide adequate cause to modify the parenting plan? Answer: Yes.

2. Note on the GAL Issue **12**

B. RAP 13.4(b)(3) and (4): A Significant Question of Law That is Also of Vital Public Interest -- What Is a "Prima Facie Case?" **14**

VI. CONCLUSION: REVIEW IS REQUESTED **15**

APPENDIX: 10/23/18 Decision of Division III

TABLE OF LEGAL AUTHORITIES **Page**

RULES:

RAP 13.4 **1, 11, 14-18**

STATUTES:

RCW 2.24.050 **10**
RCW 26.09.260 **2, 6, 15-19 en passim**
RCW 26.09.270 **5-6, 15, en passim**

CASES:

Alwood v. Aukeen Dist. Court, 94 Wash. App. 396, 973 P.2d 12 (1999). **8-9**

Chaffee v. Keller Rohrback LLP, 200 Wash. App. 66, 401 P.3d 418 (2017). **9-10**

Council House, Inc. v. Hawk, 136 Wash. App. 153, 147 P.3d 1305 (2006), citing *Estate of Treadwell v. Wright,* 115 Wash.App. 238, 61 P.3d 1214 (2003). **7**

Curhan v. Chelan Cty., 156 Wash. App. 30, 230 P.3d 1083 (2010). **7**

In re Dependency of B.S.S., 56 Wn.App. 169, 782 P.2d 1100 (1989). **10**

In re Jannot, 110 Wash. App. 16, 37 P.3d 1265 (2002), aff'd sub nom. *In re Parentage of Jannot, 149 Wash. 2d 123, 65 P.3d 664 (2003),* as amended *(Apr. 30, 2003).* **3**

In re Marriage of Flynn, 94 Wash. App. 185, 972 P.2d 500 (1999). **4-6**

In re Marriage of Lemke, 120 Wash.App. 536, 85 P.3d 966 (2004). **15**

In re Marriage of Maughan, 113 Wash.App. 301, 53 P.3d 535 (2002). **5**

In re Marriage of Tomsovic, 118 Wash. App. 96, 104, 74 P.3d 692 (2003). **5-7**

TABLE OF LEGAL AUTHORITIES, cont. **Page**

In re Parentage of Jannot, 149 Wash. 2d 123, 65 P.3d 664 (2003), as amended *(Apr. 30, 2003).* **5-6, 14**

In re Parker, 135 Wash. App. 465, 145 P.3d 383 (2006). **13**

Lawrence v. Lawrence, 105 Wash.App. 683, 20 P.3d 972 (2001). **7**

Matter of Marriage of Bralley, 70 Wash. App. 646, 855 P.2d 1174 (1993). **10**

Medcalf v. Dep't of Licensing, 133 Wash.2d 290, 944 P.2d 1014 (1997). **6**

Steel v. Johnson, 9 Wn.2d 347 (1941). **3**

Vandercook v. Reece, 120 Wash.App. 647, 86 P.3d 206 (2004). **3**

Washburn v. Beatt Equip. Co., 120 Wash. 2d 246, 840 P.2d 860 (1992). **7-8**

Williams v. Williams, 156 Wash. App. 22, 232 P.3d 573 (2010). **10**

I. IDENTITY OF THE PETITIONER

Regan Cardwell (mother of the girls in the parenting plan at issue) is the Petitioner seeking discretionary review under RAP 13.4 of a decision terminating review.

II. COURT OF APPEALS DECISION TO BE REVIEWED

The court of appeals denied the appeal of the denial of adequate cause on 10/23/18. A copy of the decision is attached.

III. ISSUES PRESENTED FOR REVIEW

Issue Presented for Review: Is adequate cause for a major modification met when the following have occurred after the final parenting plan was entered: (1) The father (Paul Cardwell) has had multiple criminal charges and convictions (and as family law matters generally turn on a preponderance of evidence standard, even though the charges that did not lead to convictions still have salience in a family law case) and these charges involve detrimental behaviors relevant to parenting; (2) a domestic violence protection order from Sherie Johnson against Paul Cardwell (CP: 59-71), and sworn testimony about Paul Cardwell's abusive and stalking behavior from Tesa Kuhn, as well as Paul Cardwell making threats of self-harm (CP: 136-40); (3) Tesa Kuhn and Scott Dennison (CP: 118-22) both testify that Paul was living in a town over 100 miles away from his girls, and, in corroboration, Scott Dennison saw Paul working in

Idaho (CP: 119); (4) Where Paul Cardwell was convicted of threatening people with "two shotguns" (CP: 175, and see 171-191 generally); (5) And where Regan Cardwell has produced more than a prima facie case of harm to the girls under RCW 26.09.260(1)&(2) (e.g, CP: 45-111 and the rest of the record) regarding Paul's harmful and alienating behaviors in support of her Petition, was it an abuse of discretion for the trial and appellate courts to deny adequate cause? **Answer:** Yes, the trial court abused its discretion, and the court of appeals applied the wrong legal standard, and construed the facts in an untenable manner, when it upheld the trial court. NOTE: After the adequate cause hearing, Paul's appeal of his conviction for threatening other non-parties that he would come back "with two shotguns" was denied, and that conviction stood, and was filed in this case. See CP: 494-500 for the denial of the appeal, and see CP: 171-91 for summary of those threats by Paul Cardwell.

IV. STATEMENT OF THE CASE

A. Procedural History

The Opening Brief of the Appellant to Division III is incorporated herein.

In short, the mother petitioned for a major change of the parenting plan based upon the allegations, summarized above. The trial court commissioner properly found adequate cause to modify the parenting plan

on 2/3/17, based upon the mother's petition which showed a substantial change of circumstances in the father's home, and which showed detriment to the children in the father's home. The Order of 2/3/17 was based upon the filings in the court file, and was issued after a telephonic hearing that was held, without an oral record being made, on 12/7/16. This finding of adequate cause was not revised or appealed.

The Order of 2/3/17 found adequate cause (CP: 461) and states, in relevant part, in "other findings" (CP: 461-62) (emphasis added):

> (a) The mother conceded at hearing, prior to decision, that any temporary modification of the parenting plan should be reserved.
>
> (b) The father's judgment and sentence from Idaho was properly before the court under ER 201(f) which allows judicial notice to be taken at any time in a proceeding, and under cited case law, e.g., *Steel v. Johnson*, 9 Wn.2d 347 (1941) and *Vandercook v. Reece,* 120 Wash.App. 647, 651, 86 P.3d 206, 209 (2004).
>
> (c) That the father is susceptible to re-incarceration for up to 180 days at the discretion of the Idaho probation officer was <u>one</u> of the decisive factors in finding adequate cause.
>
> (d) Any conflicts between mother and the paternal grandparents are not relevant.
>
> (e) <u>All facts not known to the court when then the final parenting plan was entered on 3/15/2013 were considered</u>.
>
> (f) Both parties agreed that the *Jannot* case presented the applicable legal standard. See *In re Jannot, 110 Wash. App. 16, 24–25, 37 P.3d 1265, 1269 (2002),* aff'd sub nom. *In re Parentage of Jannot, 149 Wash. 2d 123, 65 P.3d 664 (2003),* as amended *(Apr. 30, 2003).*
>
> (g) Based upon the foregoing, <u>there has been a substantial change of circumstances in the home of the non-moving party, and there is sufficient concern for detriment to the children, and sufficient evidence regarding the best interests of the children, such that</u>

adequate cause should be granted, and mediation ordered, with a trial date to be determined.

(h) Both parties waived a court record on this [12/7/16] hearing, as recording equipment was not available for the telephonic hearing necessitated by the father's counsel having been unable to attend the special set in the regular courtroom on the date of 12/7/16.
(i) These findings are sufficient to provide good cause to enter this order.

After spectacular irregularities, the commissioner "vacated" the finding of adequate cause on 9/15/17, and that denial of adequate cause was upheld on revision, and then appeal was taken by Regan Cardwell.

Despite the precise wording of the foregoing order, that Paul Cardwell's possible incarceration was "one" of the reasons for granting adequate cause, the commissioner "vacated" adequate cause on 9/15/17 because Paul Cardwell was not going to be jailed in Idaho after all, after Paul's probation was transferred to Washington State.

B. Standard of Review: Abuse of Discretion – Errors of Law, Manifestly Unreasonable Decision, or Lack of Tenable Grounds

The standard of review on an adequate cause decision is abuse of discretion. For example, on that basis, the court reversed the trial court's denial of adequate cause in *In re Marriage of Flynn,*:

> After a careful examination of the transcript of the commissioner's oral ruling, and the implementing order of March 28, 1997, we conclude the commissioner did not state tenable reasons or grounds justifying denial of adequate cause under these circumstances. Because the decision was manifestly

> unreasonable and lacked tenable grounds, we hold the commissioner abused his discretion by not granting an evidentiary hearing to Ms. Manis.

In re Marriage of Flynn, 94 Wash. App. 185, 195, 972 P.2d 500, 504 (1999).

Despite an adequate cause hearing being akin to summary judgment, the State Supreme Court, in *In re Parentage of Jannot,* established that abuse of discretion, not a de novo review as in a summary judgment motion, was the applicable standard of review in adequate cause decisions. In rejecting de novo review, the *Jannot* court stated:

> Instead, we recognize that a trial judge does stand in a better position than an appellate judge to decide whether submitted affidavits establish adequate cause for a full hearing on a petition to modify a parenting plan. We adopt the reasoning of Division Three of the Court of Appeals in this case and Division One of the Court of Appeals in *In re Marriage of Maughan,* 113 Wash.App. 301, 53 P.3d 535 (2002), and hold that an appellate court may overturn a trial court's RCW 26.09.270 adequate cause determination only if the trial court has abused its discretion.

In re Parentage of Jannot, 149 Wash. 2d 123, 126, 65 P.3d 664, 666 (2003), *as amended* (Apr. 30, 2003).

C. Standard of Review Continued: *Tomsovic* (2004) – Petitioner's Prima Facie Case and Legal Standard as Question of Law

A seminal application of the *Jannot* case came down the next year in Division Three, in the *Tomsovic* case, which showed that a petitioner

for a modification need only make out a prima facie case to meet adequate cause:

> Along with the motion to modify, the petitioner must submit affidavits with specific relevant factual allegations that, if proved, would permit a court to modify the parenting plan under RCW 26.09.260. RCW 26.09.270; *In re Marriage of Flynn,* 94 Wash.App. 185, 191, 972 P.2d 500 (1999); *Bower,* 89 Wash.App. at 14, 964 P.2d 359. If the trial court finds that the affidavits establish a prima facie case, it sets a hearing date on an order to show cause why the requested modification should not be granted. RCW 26.09.270; *Flynn,* 94 Wash.App. at 189–90, 972 P.2d 500. The trial court's adequate cause determination may be overturned only for abuse of discretion. *In re Parentage of Jannot,* 149 Wash.2d 123, 126, 65 P.3d 664 (2003).

In re Marriage of Tomsovic, 118 Wash. App. 96, 104, 74 P.3d 692, 695–96 (2003).

D. Standard of Review: De Novo as to Issues of Law

As the *Tomsovic* court was clear to state, applying the wrong legal standard is an error of law, subject to de novo review (emphasis added):

> In the present case, the trial court concluded adequate cause had not been demonstrated to authorize a full hearing on the motion to modify the residential schedule. The court based this decision on a finding that Mr. Tomsovic had not established a substantial change in the circumstances of the parties. Mr. Tomsovic challenges this conclusion on two fronts, arguing that the court improperly construed the terms "substantial change in circumstances," and erred in finding no substantial change in circumstances. The <u>first of these arguments involves statutory interpretation and is therefore a question of law reviewed de novo.</u> *Medcalf v. Dep't of Licensing,* 133 Wash.2d 290, 297, 944 P.2d 1014 (1997). The second argument is a question of fact and subject to review for abuse of discretion. *Jannot,* 149 Wash.2d at

126–27, 65 P.3d 664.

In re Marriage of Tomsovic, 118 Wash. App. 96, 104–05, 74 P.3d 692, 696 (2003).

Another way to state the standard of review regarding legal issues is that errors of law are an abuse of discretion. "Untenable reasons include errors of law." *Council House, Inc. v. Hawk*, 136 Wash. App. 153, 159, 147 P.3d 1305, 1307 (2006), citing *Estate of Treadwell v. Wright,* 115 Wash.App. 238, 251, 61 P.3d 1214 (2003); *Lawrence v. Lawrence,* 105 Wash.App. 683, 686, 20 P.3d 972 (2001). And all errors of law are reviewed de novo. *Curhan v. Chelan Cty.,* 156 Wash. App. 30, 35, 230 P.3d 1083, 1085 (2010).

E. Procedural Note: Interlocutory Orders are Revisited, Not Vacated

As the trial court used the language of "vacating" the order of adequate cause, that misuse of legal terminology confuses issues, in the manner of the *Washburn v. Beatt Equipment* case, in which a defendant, previously dismissed on partial summary judgment, was reinstated.

In upholding the reinstatement, the Washington State Supreme Court said (emphasis added):

> Absent a proper certification, an order which adjudicates fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties. CR 54(b); *see Fox,* 115 Wash.2d at 504, 798 P.2d 808.

> The partial summary judgment order was not properly certified and it was not a final judgment; the trial court had the authority to modify the order at any time prior to final judgment.
>
> Further, plaintiffs' attempt to use, and the trial court's consideration of, CR 60(b) does not change the result. As defendant acknowledges, CR 60(b) is not the proper vehicle to use where interlocutory orders are concerned. Brief of Appellant, at 24 n. 8. *See* CR 60(b) (pertaining to "*final* judgment, order, or proceeding" (italics ours)); *see generally* 11 C. Wright & A. Miller, *Federal Practice* § 2852, at 145 & 145 nn. 27–28 (1973) (Fed.R.Civ.P. 60 (relief from judgment) is not applicable in the case of an interlocutory judgment or order; instead at any time before entry of final judgment trial court has plenary authority to afford such relief as justice requires); *accord, O'Neill v. Southern Nat'l Bank,* 40 N.C.App. 227, 252 S.E.2d 231 (1979); *Thompson v. Goetz,* 455 N.W.2d 580 (N.D.1990). Plaintiffs' erroneous reliance on the rule and the trial court's consideration of the matter as a CR 60(b) motion did not adversely affect the trial court's power to modify the order. *See Zimzores v. Veterans Admin.,* 778 F.2d 264 (5th Cir.1985). Nor does the error as to the legal propriety of use of CR 60(b) bind this court to an erroneous view of the law. *See State v. Knighten,* 109 Wash.2d 896, 902, 748 P.2d 1118 (1988) (plurality) (erroneous concession as to point of law not binding on court); *In re Estate of Dunn,* 31 Wash.2d 512, 528, 197 P.2d 606 (1948) (same).
>
> In conclusion, the partial summary judgment was not a final judgment and the trial court had authority under CR 54(b) to modify it regardless of CR 60(b). We uphold the trial court's reinstatement of defendant as a party to this action.

Washburn v. Beatt Equip. Co., 120 Wash. 2d 246, 300–01, 840 P.2d 860, 890 (1992). And see, *Alwood v. Aukeen Dist. Court:*

> And because interlocutory orders are not automatically appealable, permitting a trial court to correct any mistakes prior to entry of final judgment serves the interests of judicial economy.

Alwood v. Aukeen Dist. Court, 94 Wash. App. 396, 400–01, 973 P.2d 12, 14 (1999).

This issue was addressed again in *Chaffee v. Keller Rohrback LLP*, in which the court explained that a "motion to revisit" an interlocutory order regarding a stay on discovery did not necessitate meeting the requirements of CR 59:

> Here, Defendants' renewed motion was not subject to the requirements of a CR 59 motion for reconsideration. The trial court's order denying Defendants' first motion was not a final order terminating the dispute, so as to fall within CR 59, but, rather, was merely an interlocutory order subject to review and revision by the court as appropriate.
>
> An interlocutory order is " 'one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.' " *Alwood v. Aukeen Dist. Court Comm'r Harper*, 94 Wash.App. 396, 400, 973 P.2d 12 (1999) (quoting Black's Law Dictionary 815 (6th ed. 1990)). Interlocutory orders are not appealable, as "permitting a trial court to correct any mistakes prior to entry of final judgment serves the interests of judicial economy." *Alwood,* 94 Wash.App. at 400-01, 973 P.2d 12. Indeed, the authority of trial courts to revisit interlocutory orders "allows them to correct not only simple mistakes, but also decisions based on shifting precedent, rather than waiting for the time-consuming, costly process of appeal." *United States v. Martin*, 226 F.3d 1042, 1049 (9th Cir. 2000).
>
> CR 59 is not applicable to such interlocutory orders. *Williams*, 147 Wash.2d at 491, 55 P.3d 597. Rather, such orders—not being final orders—are subject to discretionary review. *King v. Olympic Pipeline Co.*, 104 Wash.App. 338, 347-48, 16 P.3d 45 (2000).
>
> Defendants' renewed motion was not a CR 59 motion for reconsideration but, rather, a renewed motion for a stay.

Chaffee v. Keller Rohrback LLP, 200 Wash. App. 66, 76–77, 401 P.3d 418, 423–24 (2017).

Note of Procedural Correction: Therefore, it is clear that the commissioner simply "re-visited" his order granting adequate cause when he "vacated" the order, and so the issue on review remains: ***Did Regan Cardwell's affidavits and submitted records establish adequate cause on her Petition to Modify?*** The answer is: ***Yes.***

F. Denial of Revision Means the Commissioner's Decision is Reviewed

A superior court's denial of a revision motion leaves the commissioner's action unchanged and the commissioner's findings and order become the findings and order of the superior court. RCW 2.24.050. The superior court's adoption of a court commissioner's orders and judgment may be either by express or implied rationale. *In re Dependency of B.S.S.*, 56 Wn.App. 169, 170, 782 P.2d 1100 (1989). See *Matter of Marriage of Bralley* for the same point:

> In the present case, the court merely chose not to revise the commissioner's order. Under RCW 2.24.050, the findings and orders of a court commissioner not successfully revised become the orders and findings of the superior court.

Matter of Marriage of Bralley, 70 Wash. App. 646, 658, 855 P.2d 1174, 1180 (1993). And see, *Williams v. Williams*, 156 Wash. App. 22, 27–28, 232 P.3d 573, 575 (2010) ("A revision denial constitutes an adoption of

the commissioner's decision and the court is not required to enter separate findings and conclusions.").

V. ARGUMENT UNDER RAP 13.4(b)

A. RAP 13.4(b)(1) and (2): The 10/23/18 decision conflicts with all known legal authority.

If the submitted and sworn facts of the father's crimes, father's violence, father's acts of alienation, father's absence, and father's tactical use of his parents to keep the girls from their mother do not justify adequate cause, then it is impossible for parents to have clarity as to their rights to protect the safety of their children, or to protect their relationships with their children.

1. The Primary Issue Appealed is the Denial of Adequate Cause

The Division III ruling of 10/23/18 completely fails to address Regan Cardwell's statement of the issue on page 19 of her Opening Brief:

> **(2) Issue No. 1 Restated:** Do the rest of Regan's facts (even if there was no possibility of Paul going to jail in Idaho) provide adequate cause to modify the parenting plan? Answer: Yes.

Division III simply failed to address the facts in support of adequate cause. Acceptance of review and correction is requested.

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2. Note on the GAL Issue

Although Ms. Cardwell would welcome the court addressing this issue, her request for discretionary review is focused upon the clear error of the courts below as to adequate cause. Appointment of a GAL is one thing, and adequate cause is another.

Paul Cardwell's attorney drafted findings on the denial of a GAL appointment which reads: "There is no evidence …[of detriment] …that would provide a basis for appointment of a Guardian Ad Litem." (CP: 540, with the entire Order denying the GAL appointment at CP: 539-42.)

Division III cites to this finding on page 9 of the Decision of 10/23/18, as if the court commissioner had ruled that there was not sufficient evidence of detriment to support adequate cause. However, adequate cause was not at issue on 5/5/17, the GAL appointment was, and Division III egregiously erred to conflate the GAL-relevant finding with adequate cause issues.

In fact, in denying the Guardian Ad Litem, the commissioner stated, on 5/5/17, at Clerk's Papers page 614 (emphasis added):

> The appointment of a guardian ad litem is not just a rubber stamp to this Court. There generally must be some extraordinary issues, which I, frankly, don't see in this case.

In short, in stating that this case had no "extraordinary issues," the commissioner was denying a GAL, but the commissioner was not denying

detriment in the father's home sufficient to justify the adequate cause order of 2/3/17. That finding in support of the adequate cause order was not at issue on 5/5/17.

Under the cited authority, Regan Cardwell needed only to make out a "prima facie case" to be granted adequate cause, which she did.

The commissioner went on to say:

> I don't need a guardian ad litem to tell me how I should think. So I'm not going to appoint a guardian ad litem.

CP: 614, lines 20-23.

The Division III decision of 10/23/18 treats the GAL hearing findings as definitive of the adequate cause finding. See pages 11-12 of the 10/23/18 decision. This conflation of the GAL appointment standard and the adequate cause standard is a clear error of law, and the facts are conflated between the two issues by Division III.

The issue of no sufficient detriment to merit a GAL, is different from no sufficient detriment to support adequate cause.

Division III's decision of 10/23/18, as to adequate cause, contradicts appellate and supreme court authority.

There is simply no tenable basis for the Division III construction of the case, nor for the trial court's decision denying adequate cause. *In re Parker*, 135 Wash. App. 465, 471–72, 145 P.3d 383, 385–86 (2006).

Acceptance of review, and reversal, is requested.

B. RAP 13.4(b)(3) and (4): A Significant Question of Law That is Also of Vital Public Interest – What Is a "Prima Facie Case?"

It is now fifteen years since the *Jannot* case. While the State Supreme Court has established deference to the trial court's fact-finding in parenting plan modifications, legal errors are still subject to de novo review and are, by definition, abuses of discretion (see citations, above).

In this case (Cardwell), the legal standard was either egregiously misapplied, or the standard needs clarification by the court because it has become unclear or difficult to apply.

If the Division III deference shown to the trial court in this case now logically follows from *Jannot*, then it has gone too far, and the standard needs clarification.

Upon application of any reasonable standard that respects the best interests of the children, and by any reasonable standard that respects a parent's right to protect her children, and to protect her relationship with her children, Regan Cardwell established adequate cause.

The best interests of the children require that the door to the courthouse can be opened on the facts of this case.

If the current legal standards allow any other decision, as a matter of significant public interest, the law should be revisited and clarified.

VI. CONCLUSION: REVIEW IS REQUESTED

As the court said in *Lemke,* the primary purpose of the threshold adequate cause requirement is to prevent a useless hearing. *In re Marriage of Lemke,* 120 Wash.App. 536, 540, 85 P.3d 966 (2004).

Regan Cardwell's Opening Brief and Reply Brief are incorporated herein, but this summary of her initial filings in her Petition to Modify and in her request for Adequate Cause bears repeating from her appellate brief:

> Regan Cardwell filed a summons and petition to modify the parenting plan on 10/28/16, requesting a major modification of the plan (CP: 9-16). Regan's petition (also supplemented by declarations and exhibits) included the following recitation of the substantial change in circumstances under RCW 26.09.270 and .260(1)&(2):
>
> > There is a substantial change in circumstances since the final order was entered, under RCW 26.09.260(1), and there is detriment to the children in the father's home, under RCW 26.09.260(2)(b). It would be in the children's best interests to change the parenting/custody order.
> >
> > Paul Cardwell, the children's father, is absent the majority of the time and regularly engages in criminal activity, often during his custodial time with the children (see criminal history as submitted, and as summarized below). In addition, his parents are left to act as primary physical custodians for the children in his absence, and this is causing harm to the relationship between the children and me, as Paul's parents disparage me to the children, and the children's interests would be best served in my care.
> >
> > Paul is not physically or personally providing daily care for the children; his parents provide for all of their daily primary physical care. Paul is rarely present at home, yet he does not transfer them to me for visitation;

also, he does not attend most of the children's school and extracurricular events.

I am suffering a constitutional detriment in that I am a fit parent, but the children's paternal grandparents are receiving priority of visitation and primary care of the children over me, and I ask that my right to parent be respected, and that Paul's criminal activity and indifference to his parental duties provide the basis of a major modification and a change of placement

The Final Parenting Plan was entered on 3/15/13. Since then Mr. Cardwell has accumulated a significant criminal history, detailed below:

Unbeknownst to the court at the time of entry of final orders, Mr. Cardwell had an existing Protection Order on file against him involving a minor child, filed on 12/28/2012, **Benton County Case #12-2-03141-7.**

On 3/13/13 he was charged with Harassment and Obstruction of Justice (during his custodial time), **Grant County Case # G130319CC**. This conviction is currently on a stay sentence pending appeal under the stipulation that he is not to commit any further criminal law violations, **Grant County Case #14-1-00714-3.** Paul has committed further criminal law violations (see below) and additional incarceration is expected.

Further Charges Occurred as Follows:

4/17/14 - Fishing Without a License and Lying to an Officer (a criminal law violation that occurred during his custodial time), **Grant County Case # 100065979/ C00065831.**

10/20/14, Driving While Intoxicated (a criminal law violation that occurred during his custodial time), **Grant County Case # 4Z1073292**.

4/27/16 - Possession of a Controlled Substance, in Canyon County Idaho, (a **Felony Charge** that occurred during his custodial time with the children), **Idaho Case # CR-2016-0007652-C**. Sentencing in this matter is coming up on 11/7/16 for a Felony count of Possession of Greater Than 3 Ounces. Mr. Cardwell has Pled Guilty to this charge in return for an agreement to drop the paraphernalia charge against him.

5/24/16 - Despite his recent arrest and upcoming sentencing in Idaho, Paul committed yet another criminal violation of Fishing with a Treble Hook and Failure to Submit Gear (during his custodial time with the children) **Grant County Case # 100982181/C00086835.**

Greater Unavailability of Paul Cardwell: While Paul is already absent on all but a few occasions, Paul is very likely to be completely unavailable to care for the children while serving his sentences in Idaho and Washington. His criminal and negligent behavior is a detriment to the children, and his attempts to hide his failings behind his parents should not be allowed to continue.

Developmental Needs of the Girls: As the girls develop, they need more time with their mother. Their desire and need to have more time with me is obvious to any reasonable observer during our visitation. It is detrimental to their long term emotional health and overall development to deny that time with me to them. The girls deserve to have their mother's guidance and influence during these critical years in their growth, and development into young women.

Alienation Tactics of Paul and His Agents – His Parents: The children's schedules are kept very full and are arranged and manipulated by Paul and his parents so as to erode their visitation time with me. The children's paternal Grandmother calls and texts the children repeatedly during their visitation time with me, then threatens to punish the girls later if they do not respond and stay in constant, daily communication with her. Paul's parents also disparage me in front of the children, and his mother throws erratic fits of rage which frighten the children so that they beg me not to confront her or say anything for fear of reprisal when they return to her care.

Conclusion: In closing, I am a fit parent with constitutional rights superior to those of the paternal grandparents, and it is in the best interests of the children to be placed in my care and custody. I believe a change of placement is appropriate in this case.

(CP: 12-14) (Ms. Cardwell also submitted many other supporting documents, discussed, infra, that further stated her evidence in support of the elements of RCW 26.09.260/.270.)

Regan Cardwell submitted a proposed parenting plan (CP: 17-25) and the informational form in support of her plan (CP: 26-30). Because the father had pending sentencing in Idaho (CP: 33-35), the mother brought a motion seeking temporary change of placement (CP: 31-32), along with her motion for adequate cause (CP: 38-42), accompanied by a supporting memorandum (CP: 41-44), originally noted to be heard on 11/4/16 (CP: 36).

If the current legal standard prevents a finding of adequate cause on these facts, then that standard needs re-definition by this court under RAP 13.4(b)(3),(4).

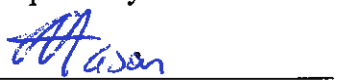
If Division III simply mis-applied existing law, then review is requested under RAP 13.4(b)(1),(2).

As Division III noted, on page 13 of its decision, "The commissioner's reversal of his finding of adequate cause was an unusual development." Indeed, it was a clear sign that something is very wrong, requiring correction by this court. (Alternative relief would be to remand to Division III to address adequate cause, as the issue was elided and never dealt with in the Decision of 10/23/18.)

Division III somehow overlooked the fundamental question: Did Regan Cardwell establish adequate cause sufficient to open the courthouse door to a full evidentiary hearing on her Petition to Modify the parenting plan? And the answer is: Yes.

Discretionary review is respectfully requested to allow Ms. Cardwell to pursue the best interests of her daughters at a trial, and to vindicate her rights to parent her children, and to protect their interests, under RCW 26.09.260 and .270, and the case law of this State.

Respectfully submitted on 11/26/18,



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APPENDIX: 10/23/18 Decision of Division III

FILED
OCTOBER 25, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Marriage of PAUL A. CARDWELL, Respondent, and REGAN R. CARDWELL, Appellant.	)	No. 35498-9-III (consolidated with No. 35508-0-III) UNPUBLISHED OPINION

SIDDOWAY, J. — Regan Cardwell persuaded a Grant County court commissioner that adequate cause existed for a hearing on her motion to modify a parenting plan, only to have the commissioner later vacate his finding of adequate cause based on more accurate information. Her motion for revision of the vacation order was denied. She appeals that denial as well as the superior court's order refusing to revise a commissioner ruling denying her request for appointment of a guardian ad litem (GAL). We find no error or abuse of discretion, affirm, and deny both parties' requests for an award of attorney fees.

FACTS AND PROCEDURAL BACKGROUND

When Regan and Paul Cardwell's marriage was dissolved in March 2013, the permanent parenting plan entered for their two daughters provided that the girls would reside with Paul[1] the majority of the time. They stay with Regan every other weekend. Provisions of the parenting plan allocate the girls' residential time during winter vacation, summer vacation, and other school breaks. All major decisions are made jointly.

Three and a half years later, in late October 2016, Regan moved the trial court for emergency temporary relief placing the girls with her full time, stating that Paul was about to be sentenced in Idaho on a plea of guilty to a felony charge of possessing marijuana and a misdemeanor paraphernalia charge. Regan simultaneously petitioned to modify the parenting plan and residential schedule, alleging that there had been a substantial change in circumstances in that Paul was "absent the majority of the time," "regularly engages in criminal activity," and that Paul's parents, who "are left to act as primary physical custodians . . . disparage me to the children." Clerk's Papers (CP) at 12-13. She recounted information on prior orders, charges, and in two cases, convictions, that she characterized as Paul's "significant criminal history." CP at 13.

Regan's proposed modification provided that the girls would live with her most of the time, with visitation every other weekend with Paul and shared holidays. Because she

[1] Given the common last name, we use the couple's first names for ease of reading. We intend no disrespect.

alleged that Paul's problems "may harm the children's best interests," her proposed plan required that he be evaluated for drug and alcohol abuse. CP at 17-18. The plan gave Regan the sole authority to make parenting decisions. Her petition was supported by her own declaration and eight others.

Paul opposed the motion with his own 17-page declaration that cast a very different light on most of the events identified by Regan's recount of his "significant criminal history"—a history in which she had included even violations of fishing regulations. He was particularly contrite about a 2014 DUI[2] arrest and conviction but pointed out that the children were not with him at the time of the offense conduct, he was fully compliant with the conditions of his sentence, and the conviction had been the basis for an earlier motion by Regan to modify the parenting plan that was denied. In addition to his own declaration, his opposition was supported by seven declarations of others.

An adequate cause hearing was held before the Grant County court commissioner on December 7, 2016. On February 3, 2017, the commissioner entered an order finding adequate cause to hold a full hearing on Regan's petition. Among other findings, the commissioner stated he was taking judicial notice of the Idaho judgment and sentence entered for Paul's conviction of marijuana and paraphernalia possession, under which "the father is susceptible to re-incarceration for up to 180 days at the discretion of the

[2] Driving while under the influence of intoxicants.

Idaho probation officer" and this fact "was one of the decisive factors in finding adequate cause." CP at 462.

The commissioner also found that "[a]ny conflicts between mother and the paternal grandparents are not relevant." *Id.* While making clear that "[a]ll facts not known to the court when the final parenting plan was entered on 3/15/2013 were considered," he did not identify any other facts as bearing on his finding of adequate cause. *Id.* The commissioner denied Regan's request that he appoint a GAL.

On April 27,[3] Regan filed a second motion for the court to appoint a GAL, in which she detailed additional events that she characterized as "a few of the many displays of Mr. Cardwell's bad behavior toward me, and abusive behavior, as well as signs of instability." CP at 470. The commissioner again denied the motion, finding no evidence of a risk or detrimental environment for the couple's children that would warrant appointing a GAL. The commissioner's order also denied Regan's motion that Paul be required to obtain a psychological evaluation. This time, Regan moved the superior court to revise the commissioner's denial of her motion for appointment of a GAL.

Regan's motion for revision was heard and denied by the superior court on June 2. In denying the motion, the court explained that the reason a court appoints a GAL is to

[3] This and all other procedural developments discussed in the balance of the opinion occurred in 2017.

serve as "the eyes and ears of the Court" when information is needed that the court cannot otherwise obtain. Report of Proceedings (RP) at 21. The court stated that it appointed GALs when their assistance was needed, identifying, as a "typical situation . . . where we have pro se litigants, and they are not getting the evidence out to the Court." RP at 22. The court characterized the Cardwells' case as "frankly . . . not the kind of case where I feel I need to have a guardian ad litem. . . . [T]his is the kind of case where there's been a lot of information already provided to the Court. And the nature of the information isn't so much of the kind that we really want to have a guardian ad litem. . . . [W]e're getting a lot of good information here through attorneys themselves and through the discovery process." RP at 23-24. In its written order denying the revision motion the court explicitly adopted the commissioner's findings. Among them was the commissioner's finding that "[t]here is no evidence before the court that raises concern that the children are in any danger or that the environment in the father's home is detrimental to the children that would provide a basis for appointment of a Guardian Ad Litem." CP at 540.

Regan filed an eight-page motion for reconsideration, once again laying out "[k]ey facts" about Paul's problems that she claimed "were not known for months or even years." CP at 623. The motion for reconsideration was denied.

In the meantime, after Regan had served discovery, Paul filed a motion for a protective order. On July 21, the commissioner heard the motion. By then, materials had

been filed that made clear that Paul's Idaho sentence had been transferred and deferred or supplanted by a probationary program in Washington State, and that no jail time was imposed.

During the course of the hearing on the protective order motion, when Regan's lawyer attributed the commissioner's earlier finding of adequate cause to Paul's many problems, the commissioner disagreed, stating that he found adequate cause only because "it looked imminent that Mr. Cardwell was going to spend six months in jail." RP at 35. When Regan's lawyer disagreed, the commissioner was insistent, stating, "That's why I made the decision. Believe me. . . . It was the only consideration . . . . I'm saying I made a finding that adequate cause, based on my understanding at that time that Mr. Cardwell was going to be imminently incarcerated for six months." RP at 35-36. In his letter ruling on the motion, the commissioner commented that adequate cause for a hearing on Regan's modification petition may no longer exist.

On August 11, Paul filed a motion under CR 60(b)(11) to vacate the commissioner's earlier finding of adequate cause, arguing that it was now clear that the basis for the finding did not exist. The commissioner heard argument of the motion on August 25 and granted it. His letter ruling stated that he was "now . . . persuaded that the father will not be incarcerated since his DOC[4] supervision has been transferred to the

[4] Department of Corrections.

State of Washington." CP at 793. Speaking to the application of CR 60(b)(11), the commissioner stated, "the Court found adequate cause based on its mistaken belief that incarceration was imminent. The Court so found based upon its reading of the Judgment and Sentence from the State of Idaho. It is obvious that the Court's interpretation was incorrect. This Court finds that CR 60(b)(11) can be used in this case as a basis to vacate the finding of adequate cause," adding that "[m]odifications to Parenting Plans are disfavored[and t]here is a strong policy in favor of custodial continuity." CP at 794.

Regan moved the superior court to revise the commissioner's decision. The superior court heard argument of the motion on September 15 and denied it. It observed that Regan never sought revision of the order finding adequate cause and that the meaning of the order was a question of law for the court. It found that the commissioner's only basis for finding adequate cause was the potential imminent incarceration of Paul, a belief that proved to be mistaken. Given that the sole basis for the order was a mistake, the superior court found that the commissioner properly vacated the finding.

On September 25, Regan moved the superior court for reconsideration. On October 2, the superior court denied the motion without further argument or proceedings.

Regan appeals (1) the superior court's orders on her motions for revision and reconsideration of the commissioner's order denying her request for appointment of a guardian, and (2) the superior court's orders on her motion for revision and

reconsideration of the commissioner's order granting the motion to vacate the adequate cause finding.

ANALYSIS

Acts and proceedings of court commissioners are subject to revision by the superior court upon demand made by written motion, filed with the clerk of the superior court within 10 days. RCW 2.24.050. When an appeal is taken from an order denying revision of a court commissioner's decision, we review the superior court's decision, not the commissioner's. *Williams v. Williams*, 156 Wn. App. 22, 27, 232 P.3d 573 (2010). If the superior court simply denies the motion to revise the commissioner's findings or conclusions, we treat the court as having adopted the commissioner's findings, conclusions, and rulings as its own. *Grieco v. Wilson*, 144 Wn. App. 865, 877, 184 P.3d 668 (2008), *aff'd sub nom. In re Custody of E.A.T.W.*, 168 Wn.2d 335, 227 P.3d 1284 (2010).

Whether to grant a motion for reconsideration is a matter within the sound discretion of the trial court; this court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Denial of request for appointment of GAL

RCW 26.09.220(1)(a) provides that a court "may" appoint a GAL to perform an investigation and report concerning parenting arrangements for a child. We review a trial

court's determination on whether a GAL is necessary for an abuse of discretion. *Wildermuth v. Wildermuth*, 14 Wn. App. 442, 446, 542 P.2d 463 (1975). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion." *State v. Johnson*, 125 Wn. App. 443, 460, 105 P.3d 85 (2005). As the superior court in this case explained in denying Regan's motion for revision, when the parties have developed and presented evidence on the factors relevant to the parenting decision, an investigation will not be needed. *See Wildermuth*, 14 Wn. App. at 446 (GAL can be needed where parties fail in their proof to adequately develop relevant evidence).

Regan does not assign error to the superior court's adopted finding that "[t]here is no evidence before the court that raises concern that the children are in any danger or that the environment in the father's home is detrimental to the children that would provide a basis for appointment of a Guardian Ad Litem." CP at 540. It is therefore a verity on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

Instead, Regan argues that it was an abuse of discretion not to appoint a GAL because "the father had been extremely secretive, and he is assisted by his parents in keeping information from the mother." Opening Br. of Appellant at 2-3. The mere allegation in a family law case that the opposing spouse is withholding information does

not require the court to appoint a GAL. It is for the trial court to assess the need for the GAL, and where a party appears to ask for a GAL as an aid to discovering facts, legitimate considerations for the court include whether the party requesting the GAL is represented by a lawyer, has already investigated matters herself or himself, and has been permitted to engage in discovery. All of those were the case here. Because the superior court's belief that no further investigation was needed was reasonable, no abuse of discretion is shown in its denial of the motions for revision and reconsideration.

Order vacating adequate cause finding

The procedural significance of the adequate cause finding where modification of a parenting plan is requested has been described by this court as follows:

> Parenting plan modifications require a two-step process set out in RCW 26.09.260 and .270. First, a party moving to modify a parenting plan must produce an affidavit showing adequate cause for modification before the court will permit a full hearing on the matter. RCW 26.09.270. "[T]he information considered in deciding whether a hearing is warranted should be something that was not considered in the original parenting plan." *In re Parentage of Jannot*, 110 Wn. App. 16, 25, 37 P.3d 1265 (2002), *aff'd*, 149 Wn.2d 123, 65 P.3d 664 (2003).
>
> If the moving party establishes adequate cause and the court holds a full hearing, the court may then modify the existing parenting plan if it finds that (1) a substantial change occurred in circumstances as they were previously known to the court, (2) the present arrangement is detrimental to the child's health, (3) modification is in the child's best interest, and (4) the change will be more helpful than harmful to the child. RCW 26.09.260(1), (2)(c).

In re Marriage of Zigler & Sidwell, 154 Wn. App. 803, 809, 226 P.3d 202 (2010) (alteration in original). "Custodial changes are viewed as highly disruptive to children,

and there is 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).

"The primary purpose of the threshold adequate cause requirement is to prevent a useless hearing." *Grieco*, 144 Wn. App. at 875. For that reason, it was appropriate for the commissioner to vacate the finding of adequate cause when he learned he was mistaken as to the only basis for his finding. That was the obvious remedy by which to prevent a useless hearing.[5]

Regan nonetheless argues that the wrong procedure was followed in the revision proceeding because the superior court should have considered *all* the evidence she originally offered in support of adequate cause, not just her contention that Paul was subject to imminent incarceration. She fails to consider two things, the first being that all of her other evidence offered to demonstrate that Paul presented a risk and detriment to the children had already been found unpersuasive by the superior court. It was rejected in connection with her motion for appointment of a GAL when the commissioner made and

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[5] CR 60(b) and (c) were relied on by Paul in requesting that the finding of adequate cause be vacated, and were relied on by the court in vacating the finding. Regan does not challenge the application of the rules. While the commissioner's order making the finding of adequate cause was no longer subject to a motion for revision (the 10-day time frame for bringing such motions under RCW 2.24.050 had passed), that does not make it a final order within the meaning of CR 60(b). The finding seems more interlocutory than final. Either way, relief from the mistaken finding was available. A trial court's interlocutory order or ruling is subject to revision at any time before final judgment. *See State v. Kinard*, 39 Wn. App. 871, 873, 696 P.2d 603 (1985); *Alwood v. Aukeen Dist. Ct. Comm'r*, 94 Wn. App. 396, 400 & n.9, 973 P.2d 12 (1999).

the superior court adopted the finding, unchallenged on appeal, that there was no evidence raising concern that the couple's daughters were in any danger or that the environment in the father's home was detrimental to them.

She also fails to consider that in denying her motion for revision, the superior court construed the commissioner's February 3 order as finding adequate cause solely on the basis of Paul's imminent incarceration. If Regan thought the commissioner's finding should not be so narrowly based, she needed to move for revision in February. In August, when the sole basis for the adequate cause finding was determined not to exist, it was too late to complain to the superior court about the narrow basis for a finding made six months earlier. No error or abuse of discretion is shown in the superior court's denial of the revision and reconsideration motions.

Attorney fees

Both parties request an award of reasonable attorney fees under RAP 18.1. Paul argues that Regan's intransigence and the frivolous nature of her appeal support an award of his fees on appeal. RAP 18.9 authorizes this court to award sanctions against a party who uses the Rules of Appellate Procedure for the purposes of delay, files a frivolous appeal, or fails to comply with the rules.

An appeal is frivolous if we are convinced that it presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *In re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (1997). A

civil appellant has a right to appeal under RAP 2.2, and all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *See Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980). The commissioner's reversal of his finding of adequate cause was an unusual development. Under the circumstances, we do not find Regan's appeal to have been frivolous.

Regan also requests attorney fees on appeal but does not identify applicable law giving her the right to a fee award. Her request is also denied.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

Division Three Case No. 35498-9-III
(Consolidated with No. 35508-0-III)

SUPREME COURT
FOR THE STATE OF WASHINGTON

PAUL A. CARDWELL, Respondent, and REGAN R. CARDWELL, Petitioner.	)	DECLARATION OF SERVICE RE: Petition for Discretionary Review RAP 13.4

I certify that on the 26th day of November, 2018, I caused a true and correct copy of Ms. Cardwell's Petition for Discretionary Review to be served on the following in the manner indicated below:

Barbara J. Black
PO Box 1118
Moses Lake, WA 98837-0169

Emailed to: bjblack@gcpower.net;dcannon@gcpower.net
VIA Washington State Appellate Court Portal

Signed and Sworn on the date above.

Lori Mason, paralegal for Craig Mason

CERTIFICATE OF SERVICE

MASON LAW

November 26, 2018 - 10:54 AM

Transmittal Information

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Appellate Court Case Title:	In re the Marriage of Paul A. Cardwell and Regan R. Cardwell
Superior Court Case Number:	10-3-00479-3

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