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NO. 62439-3-I

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of :

VALERIE ANN PENNINGTON nka VALERIE ANN FOX

Appellant,

v.

JOHN EDWARD PENNINGTON

Respondent.

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REVIEW FROM THE SUPERIOR COURT  
FOR SNOHOMISH COUNTY  
The Honorable Eric Z. Lucas

RESPONDENT'S CORRECTED BRIEF

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN 8 PM 3:42

ORIGINAL

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I. **RESTATEMENT OF THE CASE.**

Respondent John Pennington and Appellant Valerie Fox have one daughter, Grace. Grace is currently 6 years old. This case began almost 6 years ago when the parties separated in January 2005. CP 1108. The parties' dissolution trial began on October 31, 2005, and ended 24 days later on November 23, 2005. CP 1107.

On February 7, 2006, the trial court entered extensive Findings of Fact and Conclusions of Law specifically providing John would be Grace's primary parent based, in part, on Valerie's long term mental health issues that interfered with her performance of parenting functions. CP 1133-34. The trial court further found "[w]ith a proper monitoring program in place [Valerie's] long term emotional condition should not constitute a threat to [Grace]." CP 1134. Therefore, the trial court outlined a "monitoring plan" to allow Valerie to increase her residential time through a system of monitoring and reporting by a Board Certified Psychiatrist. CP 1138-40. These findings are *unchallenged* on appeal.

On February 23, 2006, Valerie, acting pro se, filed a post-trial motion requesting "clarification of trial issues, correction of errors and change of custody." CP 1084-1103. She did not note

the motion for hearing. A dizzying array of letters/motions followed. CP 1054-1083 (March 1, 2006, letter from Valerie with medical records); CP 1011-1054 (March 15, 2006, letter from Valerie with medical records, complaints about house purchase, etc.); CP 1005-1010, (March 21, 2006, declaration from John identifying Valerie's letters as CR 59 motions); CP 993-1004 (March 21, 2006, declarations from John responding to issues in Valerie's March 1 and 15, 2006, letters); CP 749-760 (March 22, 2006, declaration from Valerie). Still no motions were actually noted for hearing.

On March 27, 2006, the trial court characterized Valerie's motions as "a motion for reconsideration or for new trial," and scheduled future hearings. See Respondent's Supplemental Designation of Clerk's Papers (hereinafter referred to as "Resp. Supp. CP") 1236-1237 (3/27/06 Minute Entry). Valerie filed a new set of motions on April 10, 2006, that she has not designated as part of the record on appeal. On April 26, 2006, the trial court entered an order stating Valerie's motion:

for relief of order...per CR 60 and/or a new trial, filed on April 10, 2006, is premature, but will be considered received as of the date of entry of final orders. Respondent does not object to this premature filing. This motion can be considered a motion for reconsideration.

Resp. Supp. CP 1233 (4/26/06 Order).

On May 8, 2006, the parties appeared before the trial court at the time scheduled for the motion for reconsideration. See CP 741-42 (letter from court to parties). On that date, the trial court entered a Final Parenting Plan (hereinafter referred to as “Parenting Plan I”) containing “monitoring provisions” in paragraphs 3.1 and 3.10 that were consistent with the trial court’s February 7, 2006 Findings. The “monitoring provisions” provided for review hearings so the trial court could determine whether to implement a nearly equal residential schedule. CP 727-729, 731-32. Parenting Plan I also contemplated a review of Valerie’s residential time once Grace started school:

### 3.2 SCHOOL SCHEDULE

Upon enrollment in school, *the child shall reside with the father*, except for the following days and times when the child will reside with or be with the other parent:

Reserved. *The schedule in this matter shall be reviewed once the child reaches school age, even if compliance has been achieved in all areas.*

CP 729 (italics added). At the time Parenting Plan I entered, Grace was three (3) years old. CP 727. In the instant appeal, Valerie does not allege any error, nor make any argument, regarding

Parenting Plan I. Further, on May 8, 2006, the trial court denied Valerie's motions for reconsideration. Resp. Supp. CP.1201-1203, (5/8/06 Minute Entry). Valerie did not seek review of Parenting Plan I following the denial of her motions.

On June 5, 2006, John filed a motion to present an order following the May 8, 2006, hearing. He scheduled a hearing for July 17, 2006. CP 725-26. Because of disagreements with the financial award, the trial court sent a letter to both parties on June 26, 2006, requesting further information so it could enter a final Decree. CP 321. On July 5, 2006, new counsel for Valerie entered a notice of appearance, and filed a new CR 60 motion requesting relief from parenting plan order. CP 713-15 (notice of appearance); CP 920-976 (motion). Valerie filed a number of other motions as well<sup>1</sup>. These motions were all scheduled for July 17, 2006. Resp. Supp. CP. 1179-1180 (Calendar Note). All motions were continued to July 27, 2006, to be heard along with John's motion to enter a final decree. CP 683-84; Resp. Supp. CP. \_\_\_\_, (Motion for Presentation, Attached hereto as Appendix A).

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<sup>1</sup> These motions included a motion for scheduled child monitoring, CP 904-919; motion for an order increasing visitation time, CP 878-903; motion to review distribution of assets/liabilities, CP 701-712; objection/motion to vacate order sealing records, CP 875-877.

On July 27, 2006, the parties came before the trial court for hearing. At the time of the hearing, Valerie filed a motion requesting recusal of the trial judge. CP 663-65. The trial denied that motion after hearing argument and testimony. Resp. Supp. CP. \_\_\_ (7/27/06 Minute Entry, Attached hereto as Appendix B)<sup>2</sup>. The trial court did not rule on Valerie's newest July 5<sup>th</sup> motions so the parties entered into a stipulation tolling the time file an appeal for thirty (30) days following the trial court's decisions on the CR 59 and 60 motions pending or to be filed. CP 681. The trial court entered the Decree of Dissolution. CP 666-677.

On August 25, 2006, the trial court entered a final order denying Valerie's CR 60 motions "in their entirety" and denying her CR 59 motions with the exception of attorney's fees. CP 642; see also 8/25/06 RP 3-6 (discussing CR 59 and CR 60 motions before the court), 45, 94 (trial court denies request to vacate monitoring requirement), 60-64, 93 (primary parent designation), 65-67 (transportation issues), 76 (trial court denies all CR 60 motions), 78, 95 (discussing CR 59 motions), 87-89 (court denies CR 59 motions). The trial court continued the hearing to September 29, 2006 to discuss the remaining issue regarding

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<sup>2</sup> Valerie does not provide a report of proceedings for this hearing.

attorney's fees. 8/25/06 RP 116. Valerie did not file a notice of appeal of Parenting Plan I following the trial court's August 25, 2006, order denying her CR 60 and CR 59 motions.

On September 29, 2006, the trial court entered an order ruling on the remaining issues presented to the court on that date, however it took under advisement *John's* pending motion to reconsider the joint residential schedule. CP 639-641.

On November 29, 2006, the parties again appeared for a hearing on a number of remaining issues, including the issue of who would be the "child's monitor." 10/29/06 RP 3-5. At the conclusion of that hearing, the trial court entered an order confirming the parties were still in phase one of Parenting Plan I, but also indicating *John's* motion to reconsider the joint schedule "remains under advisement." CP 627.

On October 26, 2007, over a year after entry of Parenting Plan I, the parties came back before the trial court on *John's* motion for contempt. At that time, Valerie was also apparently seeking to have motions heard on shortened time<sup>3</sup>. 10/26/07 RP 3. During this hearing, the trial court terminated the "monitoring

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<sup>3</sup> These motions were apparently never filed with the Court on or before October 26, 2007, because they do not appear on the Superior Court docket and were not designated for transmittal to this Court.

provisions” of Parenting Plan I. In making this decision, the trial court stated:

I don’t know how carefully you looked at my original decision in this matter. But in Section 8, No. 6, subparagraph J, there was an intent section. I’ll just read it to you for the record. It says:

‘The provisions described in paragraph 6A through 6I are intended to provide a method whereby petitioner may expand her residential time with GP. In order to expand residential time, the requirements described must be strictly adhered to by both parties. If there is a failure to monitor either the parent plan or petitioner’s mental health, then it is the intent of the Court that noncompliance will serve to eliminate any provisions for expansion and restrict residential time to that schedule described in paragraph 6F. *The schedule in this matter shall be reviewed once GP achieves school age even if compliance has been achieved in all areas.*’

*That’s because the schedule of extended weekends would have to change at the time she starts going to school.*

10/26/07 RP 3-4; see also CP 1138-40 (Findings of Fact and Conclusions of Law and Order, paragraphs 6.a – 6.k) (italics added). Later, the trial court reaffirmed that the residential schedule would remain subject to review at the time Grace began school. 10/26/07 RP 24.

On March 31, 2008, the parties appeared for presentation of orders following the October 26, 2007, hearing. During this hearing, the only objection raised by Valerie’s counsel related to the trial court’s decision to eliminate the monitoring provision.

3/31/08 RP 2-5, 47-49. No objection was raised regarding the review provision upon Grace's entry into school. The trial court discussed the need to modify Parenting Plan I to reflect the trial court's October 26, 2007 decision. See 3/31/08 RP 10-11, 16 (need to remove provisions regarding monitoring and establish visitation schedule every other week). All parties, and the trial court, continued to contemplate a further review/modification at the time Grace entered school. 3/31/08 RP 4-6, 22, 24. After an extensive discussion, the trial court requested the parties "complete the language and submit" a modified parenting plan. 3/31/08 RP 24. The trial court then entered its Order Re the Hearing of October 26, 2007. That order provides, in relevant part:

3. The Court is terminating jurisdiction of the monitoring provision of the parenting plan.
4. Due to noncompliance[,] the Court invokes paragraph 6f of the original court order.
5. All further hearings will be set before the Court Commissioner.

Resp. Supp. CP 1177-1178 (Order Re: Hearing). By entry of this order, the trial court effectively denied *John's* motion for reconsideration regarding the joint schedule. No further motions under either CR 59 or CR 60 existed at the time of entry of this order, and no further motions were pending. Valerie did not seek

review of this order or of Parenting Plan I within thirty days as required by the parties' earlier stipulation to toll the time for appeal. CP 681.

Almost a year later, on July 11, 2008, Valerie filed a plethora of new motions<sup>4</sup>. Valerie's motions sought to change custody based on June 2008 King County domestic violence and dissolution actions between John and his new wife, Anne Pennington. CP 428-430. Valerie attempted to obtain an ex parte restraining order, without any notice to John, immediately changing custody. However, the court commissioner denied Valerie's request noting "the documents provided [to the court] had insufficient information to support the request." Resp. Supp. CP 1175 (7/11/08 Minute Entry).

On July 14, 2008, John filed a motion for presentation of the modified parenting plan requested by the trial court following the March 31, 2008 hearing. CP 407-412. John noted his motion

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<sup>4</sup> Valerie filed a motion for an ex parte restraining order and an order to show cause, CP 413-417; a motion to change venue to King County, CP 418-20; a motion for DV assessment, CP 421-25; and a motion and separate declaration for temporary restraining orders, CP 426-27 (motion), CP 438-430 (declaration). In her motion for a DV assessment, Valerie references a "supplemental filing" and an audio CD regarding proceedings held in King County. CP 422. According to the superior court docket in this case, this supplemental filing was not actually filed until August 4, 2008. CP 246-281.

before the trial court for August 4, 2008. Resp. Supp. CP 1173-1174 (Note for Calendar). On July 15, 2008, John filed responses to all of Valerie's July 11, 2008, motions. In summary, John objected to Valerie's request to change venue on the basis that RCW 4.12 was not applicable. CP 322-323. He objected to Valerie's request for a "DV/Abuse Assessment" on the basis that the trial court had already considered and rejected Valerie's claims of domestic violence following the 23 day trial and that he completed the anger management counseling the trial court ordered. CP 323-324. Finally, John objected to any change in custody based on Anne Pennington's hearsay statements in the King County pleadings. CP 324-329; CP 330-334 (John's responsive declaration); CP 335-401 (John's responsive materials filed in King County case). John also filed third-party witness declarations regarding Anne Pennington's allegations. CP 402-406. Anne Pennington did not file a declaration in support of Valerie's motions.

On July 17, 2008, the parties appeared before the trial court for a hearing on Valerie's motions. 7/17/08 RP 2-3, 10-11; see also CP 320-322 (objection to motion based on lack of notice). On that date, Valerie's counsel requested the trial court retain jurisdiction

to hear Valerie's pending motions instead of the commissioner's department. 7/17/08 RP 2-3, 20-21. Valerie's counsel requested the trial court strike the August 4 presentation hearing and instead convene an evidentiary hearing regarding Anne Pennington's allegations of domestic violence. 7/17/08 RP 4-7, 14-15, 17. The trial court denied all of Valerie's pending motions without prejudice, and declined to order an evidentiary hearing without a motion. The trial court did not strike the presentation hearing, but indicated Valerie could file her motion so the court could consider it prior to the presentation date. 7/17/08 RP 19-22; CP 311-312; see also CP 1203 (7/18/08 minute entry). On July 23, 2008, Valerie re-filed her July 11 motions<sup>5</sup> along with a new motion and declaration to present oral testimony. CP 295-300. The new motion did not provide the trial court with any legal basis for her request. Instead, the motion only indicated "Anne Pennington's attorney has requested that Anne Pennington be [s]ubpoenaed for hearing testimony rather than submit a Declaration... ." CP 296-97. Valerie did not note her motions for hearing on August 4,

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<sup>5</sup>Valerie re-filed her motion to change venue to King County, CP 306-308; motion for DV assessment, CP 301-305; motion and declaration for temporary restraining orders, CP 309-310 (motion), CP 284-286 (declaration); and proposed parenting plan, CP 287-294.

2008, she simply filed them. John filed an objection on July 28, 2008. CP 282-83.

On August 4, 2008, the parties appeared before the trial court on John's scheduled hearing for presentation of the final parenting plan. At the onset of the hearing, the trial clarified the purpose of the hearing stating:

...the August 4 hearing, which is today, was preset for the presentation of what has been referred to in some of the moving papers as entry of final parenting plan. For shorthand purposes, I think that that is acceptable, but that is not entirely an accurate description of what was being entered. What was actually being entered was an amended final parenting plan. The reason that it was being amended, because there is actually no reason to do that, you could just leave it the way it is, but I made a ruling earlier in the year [on March 31, 2008] that the transition that I had set up in the final parenting plan was no longer being pursued, and so I basically struck it according to the provisions of the plan itself, and I wanted it to reflect that. That's why we requested the change in language.

We could have just left it the same for the record because the actual language itself, maybe I should say it's self-defining, but I thought it made more sense to just go ahead and clarify it. Since it is basically transcription bookkeeping only, there is really no reason for any other deliberation with regard to that.

8/4/08 RP 2-3.

The trial court also noted that Valerie's motions were "arguably on the calendar for today." 8/4/08 RP 3. However, the

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restraining orders, CP 309-310 (motion), CP 284-286 (declaration); and proposed parenting plan, CP 287-294.

trial court again denied Valerie's motions without prejudice because Valerie failed to comply with the trial court's July 17 order. 8/4/08 RP 3-6, 24-26. Thereafter, the trial court indicated it was prepared to sign the modified parenting plan (hereinafter referred to as "Parenting Plan II"). 8/4/08 RP 6, 20. Valerie's counsel objected and argued an *evidentiary* hearing was absolutely necessary prior to the entry of Parenting Plan II because of the domestic violence allegations by Anne Pennington.

As of today, the law says if there is domestic violence, and it's a limitation issue, and it was alleged, and it definitely was alleged in our case...that there is a requirement for an assessment. That's what the law says as we speak. It's a change. So that's the position I have taken.

With regard to why we are here, along the way to the forum, August 4, 2008, along the way to the road to the forum, something happened. Mr. Pennington is getting a divorce. ... He has a domestic violence protection order against him that is not even a debate.

8/4/08 RP 17; see also 8/4/08 RP 5-8, 11-12; CP 301-305. In response, the trial court stated it had reviewed the King County pleadings and did not believe the facts were sufficient to warrant a domestic violence protection order or to conclude John had ongoing domestic violence problems or that Grace was presently in any kind of danger. 8/4/08 RP 14-15, 19-20. Therefore, the trial court entered Parenting Plan II.

Valerie did not object to the upcoming school review in section 3.2 of Parenting Plan II. CP 236. Instead, Valerie specifically agreed the trial court could retain jurisdiction over the school-age review along with her other pending motions. 8/4/08 RP 4-6, 24, 29-33; see also CP 244-45 (order). Further, Valerie did not appeal Parenting Plan II within 30 days as required by the parties' earlier stipulation to toll the time for appeal. CP 681.

On August 18, 2008, John filed a motion to for a school-age review of the parenting plan as outlined in paragraph 3.2 of Parenting Plan II. CP 214-232. He scheduled a hearing for September 8, 2008. CP 212-213. In his motion, John specifically outlined his request for Grace to attend a private Christian school in John's school district. John also proposed residential time for Valerie that was consistent with the residential time in Parenting Plan II, with the exception of changing the pick-up from Thursday to Friday to accommodate Grace's school schedule. CP 214-15; see also 9/8/09 RP 19-20 (trial court discusses motion).

Valerie did not file a response to John's motion. 9/8/09 RP 25-27 (trial court discusses failure to submit response to motion despite having opportunity and responsibility to do so). Instead,

Valerie chose to re-file her earlier motions a third time.<sup>6</sup> This time, Valerie “attached” a summons for a parenting plan modification to her motion seeking an evidentiary hearing. CP 208-09. She also filed a “Declaration of Anne Pennington” apparently prepared by Anne’s attorney in her King County case. CP 168-183. John filed responses to each motion<sup>7</sup> as well as a memorandum of law requesting the trial court dismiss the modification action. CP 113-118. The trial court, in a letter ruling dated September 4, 2008, denied Valerie’s motion for an evidentiary hearing after considering all the pleadings, including the new declaration from Anne Pennington. CP 85-87.

On September 8, 2008, the parties appeared for hearing. On that date, the trial court declined to rule on Valerie’s pending motions regarding modification of the parenting plan. 9/8/08 RP 2-3. Instead, the trial court “recused” itself indicating it would no longer retain jurisdiction, and that future modification hearings needed to be heard in the commissioner’s department. 9/8/09 RP

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<sup>6</sup> Valerie filed a motion and declaration for temporary orders, CP 210-211; motion for evidentiary hearing, CP 196-209; motion for CR 35 exam and anger assessment, CP 193-195. Valerie noted these hearings for September 8, 2008.

<sup>7</sup> John filed a response to the motion regarding venue, CP 163-164; declaration in response to the motion for temporary orders, CP 157-162; declaration responding to the motion for CR 35 exam, Anne Pennington’s declaration, and Valerie’s declaration, CP 119-156; and a response to the petition for modification, CP 97-100.

3, 28-29. Therefore, Valerie objected to the trial court hearing John's motion for school-age review under paragraph 3.2 of Parenting Plan II. Valerie gave no reason for objection other it was logical to deal with all motions together. 9/8/09 RP 15. The trial court rejected Valerie's argument because the school review had been contemplated by all parties, without objection, since Parenting Plan I entered in May 2006. 9/8/09 RP 15-17. At the conclusion of this hearing, the trial court entered the "final parenting plan after review for school attendance" (hereinafter referred to as Parenting Plan III). 9/8/09 RP 28; CP 88-96. In section 2.2 of Parenting Plan III, the trial court reiterated its earlier findings regarding limitations under RCW 26.09.191(3). These findings are unchallenged on appeal.

On October 3, 2008, Valerie filed a Petition for Modification, CP 76-83, and yet another motion to change venue. CP 59-75. Three days later, on October 6, 2008, Valerie timely filed a notice of appeal of Parenting Plan III. CP 57-58. On October 24, 2008, Valerie filed a motion/declaration for ex parte restraining orders seeking immediate custody of Grace. In support of her motion, Valerie simply referenced the declarations and pleadings she previously filed. CP 52-56. She did not file a new

declaration in support of her motion. Similarly, in support of her motion to change venue, Valerie re-alleged her previous argument that venue should be changed because John now lived in King County and had a divorce action pending there. CP 62-63.

Valerie also re-alleged her previous arguments about the potential conflict of interest resulting from John's employment with Snohomish County, but, in addition also alleged "the interrelationship of the Everett city council members and the Snohomish County Executive Director [Aaron Reardon] with Judge Eric Lucas, and potentially other judicial officers" raises an appearance of impropriety and potential conflict of interest. CP 62. John again filed responses to Valerie's motions. See CP 16-29 (memorandum regarding adequate cause and request to dismiss petition); CP 30-33 (response regarding venue); CP 36-39 (response regarding ex parte motion).

On November 7, 2008, the parties appeared before the court commissioner for the temporary order/adequate cause hearing. The commissioner's order states:

It is hereby ordered: That the Petitioner's motion to change venue is denied.

That the Petitioner's Petition for Modification is dismissed. Petitioner's request for finding of adequate cause is denied

because the court finds no substantial change of circumstances between the entry of the final parenting plan on 9/8/09 and the filing of this instant proceeding less than one month later on 10/3/08. The court denies the Respondent's request for attorney's fees.

CP 12. Valerie filed a motion for revision. On December 5, 2008, the parties appeared for the revision hearing as scheduled on the Snohomish County civil motions calendar. On that particular day, the trial court (Judge Lucas) was presiding over the civil motions calendar. The trial court denied Valerie's motion for revision. CP

11. Valerie timely filed a Notice of Discretionary Review. CP 1163-1166.

On February 6, 2009, following a hearing on Valerie's Motion for Discretionary Review, Appellate Court Commissioner Neal did not grant discretionary review. Instead, Commissioner Neal entered a notation ruling as follows, in relevant part:

Neither party has cited any authority addressing whether the adequate cause decision is appealable as of right. It is not a final judgment or any other listed appealable order specifically listed under RAP 2.2(a), and I am not persuaded that it is appealable as of right under RAP 2.2(a)(3). On the information presently before me, I am not persuaded that petitioner, Valerie Pennington, has met the strict criteria for discretionary review under RAP 2.3(b).

Notation Ruling, page 1. Therefore, both parties were ordered as follows:

...the parties shall provide the record necessary for review of the final parenting plan and the modification/venue decision, and, in their briefs shall address whether the court should review the modification/venue decision and shall address the issues on the merits; ...

Notation Ruling, page 2. Commissioner Neal also consolidated both matters for review in this Court. See Id.

## II. ARGUMENT

### **A. THIS COURT SHOULD DECLINE TO ACCEPT DISCRETIONARY REVIEW OF THE TRIAL COURT'S DECISION DISMISSING VALERIE'S PETITION FOR MODIFICATION AND DENYING HER MOTION TO CHANGE VENUE.**

As a threshold issue, this Court must determine whether or not to accept discretionary review of the superior court's decision to deny Valerie's motion to change venue and to dismiss Valerie's petition for modification of the parenting plan. See CP 1163-1166 (Notice of Discretionary Review). Contrary to Valerie's brief, this Court has not granted discretionary review at this time. See Appellant's Brief, page 6. It is clear from Commissioner Neal's February 6, 2009, Notation Ruling, this Court will determine whether or not to accept discretionary review. Notation Ruling, page 2.

When this issue initially came before Commissioner Neal, John argued the superior court's decision was reviewable as an appeal under RAP 2.2(a)(3). Further research, however, has proved this argument is incorrect. Although no specific case exists regarding whether or not an adequate cause decision is a final order under RAP 2.2(a)(3), other cases demonstrate the appropriate method of review is by discretionary review. See In re Marriage of Maughan, 113 Wn. App. 301, 304, 53 P.3d 535 (2002) (court grants discretionary review of adequate cause finding); In re Marriage of Mangiola, 46 Wn. App. 574, 732 P.2d 163 (1987) (court grants discretionary review of adequate cause determination); Grieco v. Wilson, 144 Wn. App. 865, 871, 194 P.3d 668 (2008), review granted, 165 Wn.2d 1015, 199 P.3d 411 (2009) (court grants discretionary review of adequate cause in third party custody case).

Further, under RAP 2.2(a)(3) an appeal is permitted from “[a]ny written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action.” RAP 2.2(a)(3). The Washington State Supreme Court has determined an appellate court must look at the

effect of an order of dismissal to determine its appealability. Munden v. Hazelrigg, 105 Wn.2d 39, 44; 711 P.2d 295 (1985).

In Munden, the Supreme Court surveyed a number of cases from Washington and other States to conclude the appropriate analysis focuses on the effect of the dismissal order rather than whether the dismissal was “with” or “without” prejudice. Id. at 43-44. Under this analysis, if an order of dismissal does not prevent a litigant from refiling the action, or filing a new action, it is not appealable under RAP 2.2(a)(3). Id. at 44. In the instant case, the trial court’s order dismissing Valerie’s petition for modification did not prevent her from filing a subsequent petition for modification. Therefore, the appropriate method for seeking review is by discretionary review.

An appellate court may grant discretionary review only under the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless; or
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; or
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). In the instant case, Valerie fails to meet her burden to demonstrate the superior court committed either an obvious or probable error or that the superior court departed from the usual course of judicial proceedings. As such, this Court should decline to accept review.

**1. The Trial Court Did Not Commit An Obvious Error When It Appropriately Exercised Its Discretion And Determined Valerie Failed To Establish Adequate Cause To Modify The Parenting Plan.**

Valerie first argues the trial court committed an “obvious” error under RAP 2.3(b)(1) by “failing to convene an evidentiary hearing and failing to make required findings of fact associated with the underlying Petition for Modification.” Appellant’s Brief, page 30. In a modification action, RCW 26.09.270 requires the trial court to first determine whether adequate cause exists to justify a full evidentiary hearing. In re Parentage of Jannot, 149 Wn.2d 123, 124, 65 P.3d 664 (2003).

“Adequate cause” has been defined as “something more than prima facie allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change.” In re Marriage of Mangiola, 46 Wn. App. 574, 577, 732 P.2d 163 (1987) (citing In re the Marriage of Roorda, 25 Wn. App. 849, 851, 611 P.2d 794 (1980)). There are two reasons for requiring a threshold hearing: first, continued litigation is harmful to children, and, second, prior custody arrangements that follow complex litigation should be given great deference. In re Parentage of Jannot, 110 Wn. App. 16, 23, 37 P.3d 1265 (2002), affirmed in part, remanded in part, In re Parentage of Jannot, 149 Wn.2d 123, 65 P.3d 664 (2003) The moving party 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 Wn. App. 185, 191, 972 P.2d 500 (1999).

Under RCW 26.09.260(2)(c), the court shall retain the established residential schedule unless “[t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the

child.” The trial court's adequate cause determination will be overturned only for abuse of discretion. Jannot, 149 Wn.2d at 126.

The abuse of discretion standard is not, of course, unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his or her discretion if the decision is completely unsupported, factually. On the other end of the spectrum, the trial judge abuses his or her discretion if the discretionary decision is contrary to the applicable law.

Jannot, 110 Wn. App. at 22.

In this case, a superior court commission initially concluded Valerie failed to establish adequate cause. CP 12. The trial court affirmed the commissioner's decision. CP 11. On appeal, the appellate court reviews the revision court's decision, not the commissioner's. In re Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003). If the trial court does not make written findings, the appellate court can look to the trial court's oral decision to clarify the theory on which the court decides the case.

Grieco v. Wilson, 144 Wn. App. at 872.

Where . . . the record indicates substantial evidence was presented on the statutory factors thus making them available for consideration by the trial court and for review by an appellate court, specific findings are not required on each factor.

In re the Marriage of Croley, 91 Wn.2d 288, 292, 588 P.2d 738 (1978).

In the instant case, there is no dispute the trial court had substantial evidence on the statutory factors before it. Therefore, the lack of specific written findings on each factor does not preclude appellate review, and the trial court did not commit an “obvious” error by failing to make specific written findings. Further, in its oral ruling affirming the commissioner’s decision to dismiss the petition, the trial court noted “any modification based on criminal charges against Mr. Pennington is premature.” Resp. Supp. CP 1157 (12/5/08 Minute Entry). Finally, “the absence of a finding on an issue is presumptively a negative finding against the person with the burden of proof.” George v. Helliard, 62 Wn. App. 378, 384, 814 P.2d 238 (1991) (quoting Taplett v. Khela, 60 Wn. App. 751, 759, 807 P.2d 885 (1991)). There is no “obvious” error regarding the trial court’s findings.

Thus, the question becomes did the trial court commit an “obvious” error when it exercised its discretion and concluded no adequate cause existed. A careful review of the evidence demonstrates neither an obvious error nor an abuse of discretion. In her petition for modification, and again in this appeal, Valerie

relies exclusively on Anne Pennington's domestic violence allegations to demonstrate adequate cause. CP 82; see also CP 428-430 (declaration referencing Anne Pennington's allegations); CP 284-286 (declaration referencing Anne Pennington's allegations); CP 246-281 (King County dissolution and domestic violence pleadings); CP 196-201 (declaration referencing Anne Pennington's allegations); CP 101-102 (declaration referencing hearsay "expert" opinions based on Anne Pennington's allegations); CP 53-55 (declaration in support of show cause/adequate cause motion referencing all prior declarations).

However, Anne Pennington's declaration fails to provide specific facts to demonstrate Grace's *present* environment (as of October 2008) was detrimental to her physical, mental, or emotional health. At the time the modification action was filed in October 2008, Anne Pennington no longer lived with John and Grace and had not lived with them for five (5) months. In fact, when she finally filed a declaration on August 18, 2008, Anne states "I cannot comment on the current residential placement of Grace with John for the period of time beginning May 11, 2008, when John and I separated." CP 178. By her own admission,

Anne could not provide the court with any information about Grace's present circumstances in October 2008.

Anne's declaration simply lists events occurring *prior* to May 11, 2008, and her speculative statement that John's "downward spiral" likely continued and put Grace at risk. CP 178-183. Notably, Anne's original statement to the police does not contain any allegations that John abused Grace. CP 262-266. John's lengthy responsive declaration addressed all of Anne's allegations, and, not surprisingly, he denied ever being emotionally or physically abusive to Grace. CP 121-132.

The trial court necessarily had to weigh these conflicting declarations. Credibility determinations are solely for the trial court, not the appellate court. See Jannot 149 Wn.2d at 127 (adequate cause determinations are fact intensive and trial judge's day-to-day experience evaluating domestic issues warrants deference upon review); In re Marriage of Farr, 87 Wn. App. 177, 184-85, 940 P.2d 679 (1997), review denied, 134 Wn.2d 1014, 958 P.2d 316 (1998) (trial court best position to judge credibility). The trial court's decision to conclude Valerie failed, at that time, to demonstrate either a substantial change in circumstances or any detriment to Grace based on Anne Pennington's allegations is

supported factually and well within the limits of the trial court's discretion.

**2. This Court Should Decline To Review Valerie's Arguments Regarding A Change Of Venue As They Are Unsupported By Any Legal Analysis.**

In her notice of discretionary review, Valerie seeks review of the trial court's December 5, 2008, decision to deny her motion to change venue. CP 1163. In her brief, Valerie provides absolutely no argument why discretionary review should be accepted on this issue. See Appellant's brief, pages 30-34. Further, she provides no argument on the merits of this issue in the event this Court grants discretionary review. The only reference to this issue consists of the following argument "heading" and statements at page 27 of her brief:

E. The totality of the record below mandates a change of venue and allowance of appellant's Petition for Modification.

Respondent's employment with Snohomish County is well-documented. (CP Vol. 1 59-74). He held said position during the dissolution proceedings. Respondent's high ranking employment with Snohomish County would cause a reasonably prudent and disinterested person to conclude that he would be afforded an advantageous level of credibility in the proceedings below.

Appellant's Brief, 27. The remaining pages devoted to this topic contain a confusing compilation of bare statements regarding the

appearance of fairness doctrine, judicial bias, and claims that the trial court commented on the evidence.<sup>8</sup> However, these bare statements provide neither meaningful analysis nor citation to any relevant authority regarding why a change of venue is required. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); State v. Wood, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977). This Court should decline to reach this issue.

**3. The Trial Court Did Not Depart From Accepted Judicial Proceedings By Denying Valerie's Motion For Recusal And Presiding Over The Revision Hearing.**

Valerie's final argument in support of her request for discretionary review under RAP 2.3(b)(2) and RAP 2.3(b)(3) revolves around the trial court's (Judge Lucas') decision to preside over the revision hearing on December 5, 2008. She specifically argues as follows:

...2) that the *Superior Court committed probably error which substantially limited Appellant's freedom to act* when it failed to implement statutorily mandated

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<sup>8</sup> A statement by the court from which the jury can infer the court's attitude toward the merits of the case or the court's evaluation of a disputed issue is a comment on the evidence. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Arguments regarding whether the trial court improperly commented on the evidence are inapplicable in bench trials where the trial court is the finder of fact, not the jury.

assessment protocol prior to entering the final order, by presided [sic] at the Revision hearing over the objection of the Appellant, having previously recused itself from further proceedings, and 3) *that the proceedings below departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court* due to the court's failure to convene an evidentiary hearing and make required findings, its presiding over further hearings after recusal, and its questionable comment upon the validity of the King County Superior Court's Order.

Appellant's brief, pages 30-31.

Valerie's arguments regarding the trial court's "failure to implement statutorily mandated assessment protocol" are properly considered in the context of her appeal of Parenting Plan III. As such, they are addressed in Section II.C.2 herein. Valerie's arguments regarding the trial court's "failure to convene an evidentiary hearing and make required findings" were addressed in Section II.A.1 herein. The only remaining argument, therefore, is whether the trial court's decision to preside over the revision hearing justifies discretionary review under RAP 2.3(b)(3). The answer is no.

Initially, this Court should decline to address this issue because Valerie fails to provide an adequate record as required by RAP 9.6. Valerie claims she objected to Judge Lucas, the trial judge, hearing her revision motion on December 5, 2008. See

Appellant's brief, pages 25-26, 29. However, the record before this Court does not contain any references to a specific request that Judge Lucas recuse himself at the December 5, 2008, hearing.

The Order following the revision hearing is silent as to whether or not Valerie requested Judge Lucas recuse himself. CP 11. The clerk's minute entry does not indicate Valerie made this request. Resp. Supp. CP 1157 (12/5/08 Minute Entry). Although she could have done so, Valerie does not provide this Court with a narrative transcript of the December 5, 2008, revision hearing. See RAP 9.3 (allowing for narrative report of proceedings). There is simply no record for this Court to review regarding this issue.

Valerie's motion for change of venue does not cure this deficiency. In her motion to change venue, Valerie argues, among other things, venue must be changed to King County because of John's connection with Snohomish County and Snohomish County government. CP 59-75. As such, Valerie argued "the dealings between Snohomish County and the respondent in the instant proceeding are the basis for the appearance of impropriety and potential conflict of interest." CP 61. The court commissioner denied the motion to change venue on these grounds. CP 12, 1171. Nowhere in her motion does she specifically request recusal of

Judge Lucas.<sup>9</sup> Absent some type of narrative report of proceedings, the record before this Court is silent regarding what arguments were made before Judge Lucas on December 5, 2008.

It is the responsibility of the party raising an appellate issue to “arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review.” RAP 9.2(b); State v. Tracy, 158 Wn.2d 683, 691, 147 P.3d 559 (2006). Failure to provide this Court with an adequate record precludes further appellate review. In re Detention of Halgren, 156 Wn.2d 795, 804-05, 132 P.3d 714 (2006).

Even if this Court concludes the record is sufficient, Valerie fails to demonstrate discretionary review is warranted under RAP 2.3(b)(3). In her motion, Valerie cites RCW 4.12 as the statutory authority for her request. CP 59. Under this statute:

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

(1) That the county designated in the complaint is not the proper county; or,

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<sup>9</sup> In her motion, Valerie references an earlier July 2006 motion requesting that Judge Lucas recuse himself. CP 60; see CP 663-65 (July motion). However, it appears that motion was never noted for a hearing. Further, on August 8, 2008, Valerie specifically consented to Judge Lucas retaining jurisdiction over the case to enter Parenting Plan III. 8/4/08 RP 4-6, 24, 29-33; see also CP 244-45 (order).

(2) That there is reason to believe that an impartial trial cannot be had therein; or,

(3) That the convenience of witnesses or the ends of justice would be forwarded by the change; or,

(4) That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity, within the third degree; when he has been of counsel for either party in the action or proceeding.

RCW 4.12.030. A trial court's decision regarding venue is reviewed for an abuse of discretion. Hickey v. City of Bellingham, 90 Wn. App. 711, 719; 953 P.2d 822, review denied, 136 Wn.2d 1013, 966 P.2d 1278 (1988); see also State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389 (2007) (absent nondiscretionary reason for recusal, trial court's decision to recuse involves exercise of discretion).

In her motion before the trial court on December 5, 2008, Valerie argued King County was a more convenient forum under RCW 4.12.030(3). CP 62. Valerie has abandoned this argument on appeal. Seattle First-Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 243, 588 P.2d 1308 (1978) (party abandons claim on appeal by failing to brief issue). On appeal, Valerie's sole argument is that Judge Lucas was bias against her and a change of venue/recusal was required.

Valerie argues Judge Lucas had already “recused” himself from further hearings on September 8, 2008 so he was precluded from presiding over the revision motion on December 5, 2008. The September 8, 2008, transcript does not support a conclusion Judge Lucas “recused” himself from all further proceedings. On that date, Judge Lucas simply decided not to retain jurisdiction over Valerie’s pending motions related to the modification action – including her motion to change venue, motion for CR 35 exam, motion for temporary order (changing custody) – and directed these motions be heard in the commissioner’s department in the normal course of a modification action. See 9/8/08 RP 3-5 (motions to be resubmitted in the commissioner’s department); 13 (modification action can be resubmitted in commissioner’s department); 15, 27 (opportunity to litigate issues in front of commissioner’s department), 28-29 (court is no longer retaining jurisdiction).

Given Judge Lucas’ decision on September 8, 2008, was to relinquish jurisdiction, no clear duty to recuse existed under RCW 4.12.030(4). Therefore, Valerie must establish actual or potential bias to demonstrate an abuse of discretion. Chamberlin, 161 Wn.2d at 37; In re Marriage of Meredith, 148 Wn. App. 887, 903,

201 P.3d 1056 (2009). The mere fact Judge Lucas presided over the earlier proceedings is not sufficient to establish actual bias. In Chamberlin, defendant Chamberlin moved to suppress evidence obtained pursuant to a search warrant. The same judge that issued the warrant presided over the suppression hearing after denying Chamberlin's motion for recusal. Id. at 35-36. On appeal, the Washington Supreme Court affirmed the trial court's decision. In doing so, the Supreme Court rejected Chamberlin's argument that bias was "inherent" in the situation simply because the trial court had previously reviewed the evidence. Id. at 37-38.

More importantly, in Chamberlin, the Supreme Court was able to review the record to conclude the trial judge's statements in response to the motion for recusal demonstrated its lack of bias. Id. at 40 (appellate court reviews trial judge's alleged bias in context of motion). In the instant case, Valerie's fails to produce an adequate record for the December 5, 2008, which could have allowed this Court to determine whether her assertion of bias overcomes the "presumption of honesty and integrity accruing to judges." Id. at 38; see also Meredith, 148 Wn. App. at 903 ("trial court is presumed to perform its functions regularly and properly without bias or prejudice").

In the instant case, the nascent record before this Court establishes only, prior to the December 5, 2008, revision hearing, Judge Lucas expressed his disagreement with Valerie's argument that the mere existence of Anne Pennington's allegations, and the resulting King County protection order, required a parenting plan modification. 7/17/08 CP 20 (court states King County proceedings might be relevant but that it does not see direct impact upon Grace); 8/4/08 14-15, 34-35 (court comments on adequacy of evidence in King County proceeding). Disagreement does not establish judicial bias.

The Parenting Act specifically contemplates that the modification court will consider existing protection orders: 'The weight given to the existence of a protection order issued under RCW 26.50 as to domestic violence is within the discretion of the court.'

In re Marriage of Stewart, 133 Wn. App. 545, 555, 137 P.3d 25 (2006), review denied, 160 Wn.2d 1011, 161 P.3d 1027 (2007) (citing RCW 26.09.191(2)(n)).

Thus, Valerie fails to present any facts to conclude Judge Lucas was biased against her on December 5, 2008 simply because he was familiar with the evidence. Therefore, it was not a abuse of discretion for Judge Lucas to deny Valerie's motion to change venue/recuse and proceed to deny her motion for revision. As

such, this court should decline to accept review of the December 5, 2008, order denying Valerie's motion to change venue.

Finally, even if this Court were to conclude Judge Lucas should have recused himself, the proper remedy is a remand for a new revision hearing before a different Snohomish County jurist. Valerie provides no argument on appeal for this Court to conclude she cannot receive an impartial hearing before any court in Snohomish County.

**B. THIS COURT SHOULD DECLINE TO REVIEW THE TRIAL COURT'S DECISION PRIOR TO ENTERING PARENTING PLAN II BECAUSE THE ISSUES VALERIE RAISES ARE EITHER TIME-BARRED OR MOOT.**

In her appeal, Valerie requests the following specific relief:

[a]ppellant respectfully prays this Court to reverse the decision(s) of the Snohomish County Superior Court *denying appellant's modification action [and] motion for change of venue* and remand for further proceedings below consistent with the requested prayer for relief herein.

Appellant's brief, page 35. Valerie requests no specific relief from this Court regarding the following claimed errors: (1) that the trial court abused its discretion by "failing to uphold the monitoring provisions" in Parenting Plan I, or, (2) that the trial court abused its discretion by failing to "implement RCW 26.09.191 assessment

protocol.” See Appellant’s brief, pages 6-10 (monitoring provision argument); 10-15 (assessment protocol argument).

Arguably, Valerie’s request for a remand of the trial court’s adequate cause decision could provide relief regarding these claimed errors. Whatever decision this Court reaches, however, Valerie’s arguments regarding the trial court’s decision to remove the “monitoring provisions” and its failure to “implement assessment protocol” prior to entering Parenting Plan II must be rejected as either untimely and/or moot.

**1. Valerie Has Failed To Timely Appeal Either Parenting Plan I or Parenting Plan II.**

The procedural history of this case is important to determine what is properly before this Court. The parties’ “stipulated” to toll the time for filing an appeal until 30 days after the trial court ruled on the motions pending before the court on July 26, 2006. CP 681. That “stipulation” terminated on March 31, 2008, when the trial court entered its “Order Re Hearing of October 26, 2007.” Resp. Supp. CP 1177-78 (Order re: Hearing). Upon entry of that order, the trial court finished ruling on all motions that were before the Court on July 26, 2007 (or related thereto). Therefore, under RAP 5.2(a) Valerie had to file a notice

of appeal of Parenting Plan I by April 30, 2008. She did not. The trial court entered Parenting Plan II (striking the “monitoring provisions”) on August 4, 2008. Again, under RAP 5.2(a), Valerie had to file her notice of appeal of Parenting Plan II by September 4, 2008. She did not.

Valerie’s failure to timely file a notice of appeal precludes appellate review of either Parenting Plan I or Parenting Plan II. A necessary prerequisite to appellate jurisdiction is the timely filing of the notice of appeal. Buckner Inc. v. Berkey Irr. Supply, 98 Wn. App. 906, 911, 951 P.2d 338 (1998). Valerie cannot bring Parenting Plan I or Parenting Plan II within this court’s jurisdiction through her timely appeal of Parenting Plan III. See In re Marriage of Osborn, 24 Wn. App. 862, 865, 604 P.2d 954 (1997) (appeal of denial to modify custody provision in decree does not allow review of underlying decree). As such, Valerie’s claimed errors surrounding the entry of Parenting Plan II are time barred.

**2. Even If Valerie’s Appeal of Parenting Plan II is Timely, The Issue She Raises Regarding The Trial Court’s Failure to “Uphold the Monitoring Provisions” Is Moot.**

Even if this Court concludes Valerie’s appeal of Parenting Plan I and Parenting Plan II is timely, Valerie does not argue,

anywhere in this appeal, that the trial court abused its discretion in naming John as Grace's primary residential parent in all three parenting plans. CP 727-736 (Parenting Plan I); CP 234-241 (Parenting Plan II); CP 88-96 (Parenting Plan III)<sup>10</sup>.

More importantly, Valerie has failed to assign error to the trial court's extensive findings regarding her "long term emotional impairment," and the subsequent limitations as outlined in section 2.2 of Parenting Plan I, Parenting Plan II, and Parenting Plan III. CP 1133-1134, 1137-1140 (Findings of Fact); CP 728 (Parenting Plan I); CP 735 (Parenting Plan II); CP 89 (Parenting Plan III). These unchallenged findings are verities on appeal. Marriage of Brewer, 137 Wn.2d 756, 266, 976 P.2d 102 (1999). Even if Valerie wanted to challenge the evidence to support these findings, she cannot. It is the responsibility of the party raising an appellate issue to "arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." RAP 9.2(b) see also Morris v. Woodside, 101 Wn.2d 812, 815, 682 P.2d 905 (1984) (failure to provide

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<sup>10</sup> Under the Rules of Appellate Procedure and clearly established caselaw, Valerie cannot raise this argument for the first time in her reply brief. RAP 10.3(c); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

transcript precludes appellate review of the record for substantial evidence so trial court's factual findings are verities on appeal).

Clearly, these findings supported the trial court's decision to name John as Grace's primary parent. As such, any error regarding the trial court's failure to "uphold the monitoring provisions" (Appellant's brief, pages 6-10) is moot. "A case is moot if a court can no longer provide effective relief." Harbor Lands, LP v. City of Blaine, 146 Wn. App. 589, 592, 191 P.3d 1282 (2008) (citing Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)). Because the issue of mootness is jurisdictional, it can be raised at any time. Harbor Lands, 146 Wn. App. at 593.

Here, Parenting Plan I specifically provided John would be Grace's primary parent once school began "even if compliance has been achieved" in all areas the monitoring provisions were designed to address. CP 729. The trial court clearly outlined its intent regarding the residential provisions during the hearing on August 4, 2008. 8/4/08 RP 2-6, 21-22. Given the mandate of Parenting Plan I, the "monitoring provisions" had no impact on John's designation as Grace's primary parent once she entered school. Absent a challenge to this original decision, Valerie's

argument regarding the trial's court's decision to remove the monitoring provision is moot.

**C. THE TRIAL COURT APPROPRIATELY EXERCISED ITS DISCRETION AND ENTERED PARENTING PLAN III.**

The only issue properly before this Court for review is whether the trial court abused its discretion when it entered Parenting Plan III. Appellate courts generally are reluctant to disturb a child custody decision because of the trial court's unique opportunity to personally observe the parties. In re Custody of Stell, 56 Wn. App. 356, 366, 783. P.2d 615 (1989).

The motives of the parties, their history of previous litigation, particularly litigation involving the children, and the trial judge's considerable experience in applying this body of law, all distinguish custody disputes...

In re Parentage of Jannot, 110 Wn. App. at 22. For this reason, a trial court's custody determination will not be disturbed on appeal absent a manifest abuse of discretion. Stell, 56 Wn. App at 366; see also In re Interest of Mahaney, 146 Wn.2d 878, 895, 51 P.3d 776 (2002) (in child custody proceedings, trial court is accorded broad discretion and is entitled to great deference on review).

Valerie alleges two separate errors regarding the trial court's entry of Parenting Plan III. First, that the trial court abused

its discretion by refusing to “recuse” itself, and, second, that the trial court erred in failing to conduct an evidentiary hearing under RCW 26.09.191(4). Appellant’s brief, pages 10-16 and 22-25. Again, Valerie does not assign any error to the actual residential schedule contained in Parenting Plan III. Her arguments solely surround the trial court’s discretionary procedural decisions.

**1. The Trial Court Did Not Abuse Its Discretion When It Relinquished Jurisdiction Over Further Post-Trial Motions, Denied Valerie’s Belated Motion For Recusal, And Thereafter Entered Parenting Plan III.**

As stated in Section II.A.3 herein, Valerie’s argument that the trial court (Judge Lucas) “recused” itself on September 8, 2008, is incorrect. The trial court merely concluded it was going to relinquish jurisdiction over Valerie’s then pending motions to modify the parenting plan and direct those motions be heard in the commissioner’s department. 9/8/08 RP 3-5, 13, 15, 27.

Valerie argues, however, once the trial court declined jurisdiction over her modification issues, it was required to decline to hear John’s then pending motion for a final school age residential schedule. Valerie argues that the trial judge’s comments on August 4, 2008, regarding the weight of the King County protection order provide “competent” evidence to

demonstrate the trial court violated the appearance of fairness doctrine and was biased against her. Appellant's brief, pages 22-24. As such, she claims the trial court abused its discretion by entering Parenting Plan III instead of recusing itself.

Valerie did not raise these arguments before Judge Lucas on September 8, 2008. Her sole argument was it was "logical" to hear all the issues together. 9/8/08 RP 15. Absent any indication an argument is advanced in a substantive fashion at trial, it cannot be raised for the first time on appeal. In re Marriage of Studebaker, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); see also RAP 2.5(a); Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (issue, claim, or theory not presented at trial court level not considered on appeal). The purpose of this rule is to afford the trial court an opportunity to correct alleged errors and avoid needless appeals and retrials. State v. Thompson, 55 Wn. App. 888, 892, 781 P.2d 501 (1989).

Further, Valerie's argument ignores the fact that she agreed to allow the trial court to determine the school age residential schedule at the conclusion of the hearing on August 4, 2008. 8/4/08 RP 4-6, 24-29-33. At the time she agreed allow the trial court to proceed, Valerie was aware of the very comments she now

complains demonstrate bias. 8/4/08 14-15, 19-20. Thus, under the doctrine of invited error, Valerie cannot raise this issue on appeal. See In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (party cannot set up an error at trial and then complain of it on appeal).

Finally, the trial court's comments on August 4, 2008, do not demonstrate bias. Again, the trial court was simply commenting on the weight it would give to the King County orders. "The weight given to the existence of a protection order issued under chapter 26.50 RCW as to domestic violence is within the discretion of the court." RCW 26.09.191(2)(n). The trial court did not abuse its discretion when it denied Valerie's belated motion for recusal on September 8, 2008.

**2. The Trial Court Did Not Abuse Its Discretion By Denying Valerie's Request For An "Evidentiary Hearing" Prior To Entry Of Parenting Plan III.**

Valerie's argues the trial court abused its discretion because it "was statutorily mandated" to conduct an evidentiary hearing in light of Anne Pennington's new domestic violence allegations. This argument is incorrect and not supported by a plain reading of RCW 26.09.191(4). This statute provides:

[i]n cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties *shall be screened to determine the appropriateness of a comprehensive assessment* regarding the impact of the limiting factor on the child and the parties.

RCW 26.09.191(4) (emphasis added).

RCW 26.09.191(4) was amended/enacted by the legislature in 2007. The legislature’s policy statement states:

[t]he legislature reaffirms the intent of the current law as expressed in RCW 26.09.002. However, after review, the legislature finds that there are certain components of the existing law which do not support the original legislative intent. ... Furthermore, the legislature finds that the identification of domestic violence as defined in RCW 26.50.010 and the treatment needs of the parties to dissolutions are necessary to improve outcomes for children. When judicial officers have the discretion to tailor individualized resolutions, the legislative intent expressed in RCW 26.09.002 can more readily be achieved. *Judicial officers should have the discretion and flexibility to assess each case based on the merits of the individual cases before them.*

RCW 26.09.003 (italics added). Thus, although RCW 26.09.191(4) requires a trial court to “screen” parties when allegations of domestic violence are raised, the trial court retains the discretion to determine the method of the screening, and whether further assessments are required. Therefore, there is no mandatory requirement for an “evidentiary hearing” as Valerie claims.

In the instant case, it is clear the trial court “screened” Valerie’s claims new domestic violence claims before it entered either Parenting Plan II or Parenting Plan III. On August 4, 2008, the trial court’s statements demonstrate it considered and weighed the hearsay evidence contained in Anne Pennington’s King County petition for order of protection and did not find it persuasive. 8/4/08 RP 14-15, 19-20. After reviewing the evidence, the trial court entered Parenting Plan II.

Thereafter, Valerie presented additional evidence in an attempt to convince the trial court an “evidentiary hearing” was necessary. Notably, Valerie filed a lengthy declaration from Anne Pennington. CP 168-183. John presented rebuttal evidence. CP 119-156. The trial court’s written decision on September 4, 2008, indicates the trial court considered this evidence before making its decision an evidentiary hearing was unnecessary. CP 85. Thus, the record demonstrates the trial court again screened the new domestic violence allegations as required by RCW 26.09.191(4) before entering Parenting Plan III on September 8, 2008.

Valerie does not argue the trial court’s decision to screen the information in written form was in any way inadequate. She simply argues the mandatory screening method is an evidentiary

hearing. This argument is plainly incorrect. The trial court's decision to screen the new allegations by reviewing the written documents rather than conducting an evidentiary hearing was reasonable. As such, the trial court did not abuse its discretion.

**D. JOHN SHOULD BE AWARDED HIS ATTORNEY FEES FOR HAVING TO RESPOND TO THIS APPEAL.**

This Court should award attorney fees to John for having to respond to this appeal. Valerie's issues have no merit, and her brief contains the same confusing and overbroad arguments, lacking in meaningful legal analysis, that she presented to the trial court on multiple occasions. Under RAP 18.9, an award of attorney fees is appropriate. No debatable issues exist that could reasonably result in a reversal of the trial court.

Further, at the outset of this case, Valerie designated over 1000 pages of record to this court, yet failed to provide any detailed citation to the record in support of her arguments as required by RAP 10.3(a)(5) or 10.3(a)(6). John was forced to file a motion in this Court requesting Valerie submit a proper brief with proper citations to the record. See Motion to Strike, filed on July 22, 2009. Valerie's resubmitted brief still fails to provide detailed

citations, increasing the amount of time necessary to track her arguments and provide a cogent response.

“Intransigence is a basis for awarding fees on appeal separate from RCW 26.09.140 (financial need) or RAP 18.9 (frivolous appeals).” In re Marriage of Mattson, 95 Wn. App. 592, 605-606, 976 P.2d 157 (1999). Given the gross deficiencies in Valerie’s brief and the lack of merit in her arguments, this court should award John his attorney fees. In re Marriage of Healy, 35 Wn. App. 402, 406, 667 P.3d 114, review denied, 10 Wn.2d 1023 (1983).

### **III. CONCLUSION.**

This Court should decline to accept review of Valerie’s claimed errors regarding the trial court’s order denying her request for a change of venue and dismissing her petition for modification.

This Court should also affirm the parenting plan the trial court thoughtfully designed with Grace’s best interests in mind

following a 23 day trial, and award John his attorney fees for having to respond to this appeal.

Respectfully submitted this 7<sup>th</sup> day of January, 2010.

**BREWE LAYMAN**  
Attorneys at Law  
A Professional Service Corporation

By   
\_\_\_\_\_  
Karen D. Moore, WSBA 21328  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 7<sup>th</sup> day of January, 2010, I caused a true and correct original along with one copy of the Respondent's Corrected foregoing document to be delivered by US mail to the following:

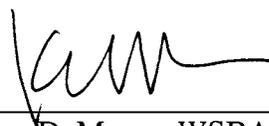
Richard D. Johnson  
Court Administrator  
The Court of Appeals of the State of Washington  
Division I  
One Union Square  
600 University Street  
Seattle, Washington 98101-4170

I also caused a true and correct copy of the foregoing document to be delivered via US mail to the following:

Attorney for Appellant

Louis B. Byrd, Jr.  
100 East 13<sup>th</sup> St Suite 108  
Vancouver WA 98660

Dated this 7th day of January, 2010 at Everett, Washington.



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Karen D. Moore, WSBA 21328

Filed in Open Court

7-27 20 06



CL11686681

SUPERIOR COURT OF  
WASHINGTON  
FOR SNOHOMISH COUNTY

PAM L. DANIELS  
COUNTY CLERK

By *Pam Gordon*  
Deputy Clerk

VALERIE ANN PENNINGTON  
(PETITIONER)  
AND  
JOHN EDWARD PENNINGTON  
(RESPONDENT)

CAUSE NO.: 05-3-00244-3  
JUDGE: ERIC Z. LUCAS  
REPORTER: DENNIS ERICKSON  
CLERK: PAM GORDON  
DATE: 7-27-06 @ 9:00 A.M.

THIS MATTER CAME ON FOR: PRESENTATION; MOTION HEARINGS  
CONTINUED/HEARING DATE SET AND CONTINUANCE CODE:

ACTION:

HEARING STRICKEN/CODE:

PETITIONER APPEARED: YES

COUNSEL: LOUIS B. BYRD, JR.

RESPONDENT APPEARED: YES

COUNSEL: RUTH SPALTER

GUARDIAN AD LITEM APPEARED: NO

DOCUMENTS FILED: PETITIONER'S MOTION/DECLARATION FOR CHANGE OF VENUE AND RECUSAL  
OF JUDGE

ORDERS ENTERED: DECREE OF DISSOLUTION; ORDER ON MOTION FOR RECONSIDERATION AND  
OTHER RELIEF FROM MAY 8, 2006 HEARING; ORDER ALLOCATING TAX EXEMPTION FOR TAX  
YEAR 2005; AND ORDER, TO BE FILED BY COUNSEL

PROCEEDINGS/COURT'S FINDINGS:

PETITIONER'S MOTION FOR CHANGE OF VENUE AND RECUSAL OF JUDGE: DENIED.  
RESPONDENT'S MOTION FOR SPECTATORS TO REMAIN OUTSIDE OF THE COURTROOM  
DURING PETITIONER'S MOTION FOR CHANGE OF VENUE AND RECUSAL OF JUDGE:  
GRANTED.

9:50 JOHN EDWARD PENNINGTON, JR., CALLED BY THE RESPONDENT, SWORN AND  
TESTIFIED.

9:52 CROSS EXAMINATION OF JOHN EDWARD PENNINGTON, JR. BY THE PETITIONER.

10:13 THE COURT INQUIRES OF THE WITNESS.

10:14 PETITIONER OPENS CLOSING ARGUMENTS.

10:19 RESPONDENT MAKES CLOSING ARGUMENT.

1

DOMESTIC MINUTE ENTRY

APPENDIX A

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347

VALERIE ANN PENNINGTON VS. JOHN EDWARD PENNINGTON 05-3-00244-3

10:28 PETITIONER MAKES FINAL ARGUMENT.

10:32 COURT'S DECISION: DENIED. THIS MOTION IS POST TRIAL AND THE COURT FINDS NO AUTHORITY TO GRANT THIS MOTION. THE RESPONDENT IS NOT A LONG TERM SNOHOMISH COUNTY EMPLOYEE AND THE COURT FINDS THERE IS NO BIAS OR PREJUDICE WITH THE RESPONDENT BEING EMPLOYED BY SNOHOMISH COUNTY.

THE COURT WILL ENTER THE CHANGES AS SUBMITTED.

RESPONDENT'S MOTION FOR ATTORNEY'S FEES ACCUMULATED FROM TODAY'S MOTION FOR CHANGE OF VENUE AND RECUSAL OF JUDGE: RESERVED.



CL11824737

FILED

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SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

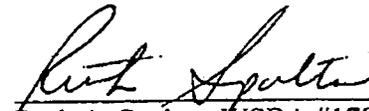
In Re the Marriage of: )  
 )  
 VALERIE ANN PENNINGTON, )  
 )  
 ) Petitioner, )  
 )  
 ) and )  
 )  
 JOHN EDWARD PENNINGTON, JR., )  
 )  
 ) Respondent. )

No. 05-3-00244-3

MOTION AND DECLARATION FOR  
PRESENTATION OF FINAL  
DECREE OF DISSOLUTION

COMES NOW the respondent by and through his attorney, Ruth A. Spalter,  
and requests this court to enter the Decree of Dissolution in this matter. This motion is  
based upon the declaration of Ruth A. Spalter and the files and the records herein.

DATED this 17th day of July, 2006.

  
 \_\_\_\_\_  
 Ruth A. Spalter, WSBA #17897  
 Attorney for Respondent

MOTION AND DECLARATION FOR PRESENTATION  
OF FINAL DECREE OF DISSOLUTION - 1 -

File No. 05-9000  
jc

**RUTH A. SPALTER**  
**ROCKEFELLER LAW OFFICE, LLP**  
 3116 Rockefeller Avenue  
 P.O. Box 12057  
 EVERETT, WA 98206-2057  
 (425) 258-3511 • FAX (425) 339-2122

  
 339

ORIGINAL  
APPENDIX B

1 RUTH A. SPALTER declares under penalty of perjury of the laws of the  
2 state of Washington that the following is true and correct:

3 1. I am the attorney for the respondent John Pennington.

4 2. At the most recent court hearing, I presented the court with a Final  
5 Parenting Plan, Final Order of Child Support, and Final Decree of Dissolution. Ms.  
6 Pennington objection to entry of the Decree of Dissolution as she wished this court to  
7 consider an offset of \$4,000.00 which was left in the savings account and which Mr.  
8 Pennington used to pay community bills. She also wanted the court to reconsider the issue  
9 of making her responsible for the TSP loan. She also asked the court to consider awarding  
10 her one-half of the increase in the equity on the condominium from the date of trial to the  
11 date of sale.  
12  
13

14 3. The court took entry of the final decree under advisement and, I  
15 believe, with the intention of entering the Decree prior to my hearing on motion for  
16 reconsideration or at the same hearing. My believe was further confirmed by this court's  
17 letter of June 22nd that requested that I provide an original Decree and the exhibits and  
18 documentation showing how I arrived at my judgment figure. I did respond to the court's  
19 letter and did send a copy of all documents to Mr. Byrd.  
20

21 4. On the date of my motion for reconsideration, Monday, July 17, 2006,  
22 I was made aware that Mr. Bryant had failed to place my motion on the calendar. Thus, this  
23 court did not hear my motion or any of the other scheduled for that time.  
24

25 MOTION AND DECLARATION FOR PRESENTATION  
26 OF FINAL DECREE OF DISSOLUTION - 2 -

27 File No. 05-9000

28 jc

**RUTH A. SPALTER**  
**ROCKEFELLER LAW OFFICE, LLP**  
3116 Rockefeller Avenue  
P.O. Box 12057  
EVERETT, WA 98206-2057  
(425) 258-3511 • FAX (425) 339-2122

1                   5.    In a discussion with Mr. Byrd, it became clear that he did not believe it  
2 was appropriate for this court to enter a Decree of Dissolution as I had not prepared a  
3 calendar note and motion for entry of the same. I told him that I believed it had been  
4 continued based upon this court's decision to take it under advisement at the most recent  
5 hearing. Mr. Byrd was not present and was undoubtedly unaware that the court had done  
6 that.  
7

8                   6.    In order to avoid confusion, and a potential separate hearing, I am  
9 making this motion to enter the Decree of Dissolution to make certain that if the court has  
10 not issued its ruling based upon taking this matter under advisement, that it do so at the  
11 hearing on Thursday, July 27th, at 9:00 a.m. Hopefully, all issues can be dealt with at that  
12 hearing, rather than having to have a follow-up or supplemental hearing to enter the final  
13 decree.  
14

15                   7.    I am providing along with this motion a copy of the documents I had  
16 previously sent to the court and opposing counsel, to-wit: Decree of Dissolution, Exhibits  
17 A, B, and C.  
18

19                   EXECUTED this 17th day of July, 2006, at Everett, Washington.  
20

21                     
22                   \_\_\_\_\_  
23                   Ruth A. Spalter  
24

25                   MOTION AND DECLARATION FOR PRESENTATION  
26                   OF FINAL DECREE OF DISSOLUTION - 3 -

27                   File No. 05-9000  
28                   jc

**RUTH A. SPALTER**  
                  **ROCKEFELLER LAW OFFICE, LLP**  
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                  EVERETT, WA 98206-2057  
                  (425) 258-3511 • FAX (425) 339-2122