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No. 64114-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re Marriage of

KENNETH B. KAPLAN

Appellant/Cross-Respondent,

vs.

SHEILA D. KOHLS

Respondent/Cross-Appellant.

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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON


APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAMES DOERTY

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

This is the father's third appeal since the parties' parenting plan was entered in 2005. The father filed his first appeal immediately after the parties' agreed parenting plan was entered, seeking review of an order denying his motion to vacate the agreed plan based on his claim of a "scrivener's error" during mediation. The father subsequently dismissed his appeal the day before oral argument after agreeing to pay \$5,000 towards the mother's appellate fees and agreeing to modify the parenting plan consistent with the mother's proposal before the agreed parenting plan was entered - a proposal which the father had twice earlier rejected. (See Ex. 1, 5, 23, 51, 56)

Two years later, the father filed his second appeal, seeking review of an order awarding attorney fees to the mother based on the court's finding that the father's "intransigence is well-documented in the record." (CP 580) Only after the father filed his notice of appeal, the mother cross-appealed the trial court's denial of an adequate cause determination on her petition to modify the joint decision-making provision of the parenting plan. (CP 583, 590) This court rejected the father's appeal but reversed and remanded for a hearing on the mother's petition for modification on the

mother's cross-appeal, because she "presented a prima facie case that entitled her to a hearing on her petition." This court also awarded the mother attorney's fees on appeal. ***Marriage of Kaplan***, 144 Wash. 1015 (April 28, 2008) (Appendix A)

The father's third and present appeal arises from the trial court's decision on remand from this court. There, the trial court, consistent with its earlier ruling which this court had reversed, once again dismissed the mother's petition for modification. (CP 875-86) (Appendix B) Expressing some discontent with this court's decision granting the mother an evidentiary hearing on her petition for modification, the trial court found that "but for the Court of Appeals requiring a hearing on [the mother]'s petition for modification," there would be grounds to award the father attorney fees. (CP 882)

Although the father prevailed, and the mother's petition for modification of the parenting plan was ultimately dismissed after a trial, he now brings this third appeal, demanding attorney fees from the mother for having to respond to her petition. The mother cross-appeals, in large part because the basis for the father's demand for attorney fees are adverse findings that are unsupported by the record. Because these unsupported adverse findings are both the basis of the trial court's decision to dismiss the mother's petition for

modification and the basis for the father's demand for attorney fees below and in this court, this court should reverse the trial court's order dismissing the mother's petition for modification and affirm the trial court's denial of attorney fees.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. The trial court erred in entering the portions of the Memorandum Findings And Order On Petition To Modify Parenting Plan underlined in Appendix B. (CP 875-86) The specific assignments of error are addressed in Cross-Appeal § V.A of this brief.

2. The trial court erred in entering its Order Denying Petition for Modification. (CP 889-95)

III. RESTATEMENT OF ISSUES ON FATHER'S APPEAL

1. In light of the broad discretion given to trial courts in its decisions on requests for attorney fees, and this court's decision entitling the mother to a hearing on her petition, should this court affirm the trial court's decision denying the father's request for attorney fees and sanctions for having to respond to the mother's petition?

2. This court affirmed the superior court's earlier attorney fee award based on the father's intransigence in the

superior court and awarded attorney fees on appeal based on both the father's intransigence and the mother's need and the father's ability to pay. In his earlier appeal, the father did not ask this court to have any attorney fee award abide the trial court's decision on remand. Regardless of the trial court's finding on remand that the father was not intransigent in the superior court, is the father barred from requesting recoupment of earlier fee awards based on earlier findings of his intransigence?

IV. STATEMENT OF ISSUE ON CROSS-APPEAL

The trial court's decision to dismiss the mother's petition for modification of the parenting plan is based upon very specific findings of fact about the mother's testimony that have no support in the record of the mother's testimony. Should this court vacate the findings and remand for a new trial on the mother's petition before a new judge to maintain the appearance of fairness?

V. RESTATEMENT OF FACTS

Respondent Sheila Kohls and appellant Kenneth B. Kaplan were divorced in 2005. (Ex. 14) Kaplan is a litigation attorney. (5/06 RP 265) Kohls is a nurse with the Seattle Public Schools. (5/04 RP 79) Their agreed parenting plan for their son, then age 10 (DOB 10/17/1994), and daughter, then age 7 (DOB 11/30/1997),

was entered on March 17, 2005. (Ex. 13) The plan designated the mother as the primary residential parent and provided for joint decision-making on major decisions; if the parties could not agree, they were required to participate in mediation, and if mediation failed, to binding arbitration. (Ex. 13, CP 8-9)

The mother filed a petition for modification on November 22, 2006, nearly two years after the final parenting plan was entered. (CP 28) The mother sought only to modify the decision-making provision of the parenting plan. (CP 31) The mother sought sole decision-making because “joint decision making has proven impossible.” (CP 103) The mother expressed concern that the father was using the “joint decision making power as a way to harass [her]... [and] has created needless conflict between [the parties], and dragged [her] into wasteful, repetitive, and very expensive litigation.” (CP 103)

In support of her petition, the mother asserted that the parties’ inability to jointly make decisions after their divorce had been detrimental to the children, as it delayed appropriate action in the children’s best interests, particularly because the parents were required to engage in costly alternate dispute resolution when they could not reach agreement. (CP 103, 117) This was of particular

concern to the mother as it delayed resolution on issues like the children's mental health and therapy. (CP 103, 117)

The mother's petition for modification was originally dismissed at a threshold hearing. The superior court found that "when the parties continue to demonstrate the same conflict after the parenting plan as before" there was no substantial change in circumstances to warrant a hearing on the petition. (CP 580) In the same order dismissing the mother's petition, the father was ordered to pay the mother for attorney fees because his "intransigence was well documented in the record." (CP 580)

The father appealed the fee award. (CP 583) This court affirmed, holding that "the superior court's conclusion that Kaplan was intransigent rests on tenable grounds. This record more than adequately demonstrates the type of conduct warranting an award of fees on this basis." (Appendix A, *3)

In the same opinion, this court on the mother's cross-appeal reversed the order denying adequate cause, stating: "what is very troubling here is that notwithstanding the agreed mechanism for resolving disputes over parenting by ADR, there is evidence in the record that this mechanism may not be working as intended. Moreover, there is evidence in the record that the delays caused by

the alleged ineffectiveness of the mechanism may have an adverse impact on the children.” (Appendix A, *5) This court held that “to the extent that the agreed ADR mechanism is not working and there is adverse impact on the children, a substantial change of circumstances may exist to modify the plan. That, of course, is a decision for the trial court to make following a hearing on the question.” (Appendix A, *5)

On remand from this court, the parties appeared for trial on the mother’s modification petition before King County Superior Court Judge James Doerty (“the trial court”), whose earlier order of dismissal this court had reversed. The mother had previously been represented by Mary Wechsler in the dissolution action and in the threshold hearing on her petition for modification. (See CP 16, 293) Ms. Wechsler could not represent the mother and she was represented by new counsel at the trial. (See 5/04 RP 10) After a four-day trial, the trial court issued a detailed 12-page ruling dismissing the mother’s petition for modification. (CP 875-86) In its ruling, the trial court made specific findings of fact adverse to the mother’s testimony as recited by the trial court, which the trial court relied upon to conclude both that the mother’s petition was not “supported by the evidence” and that “but for” this court’s decision

requiring a hearing on the mother's petition, "there would be CR 11 grounds for the court to order [the mother] to pay [the father]'s fees for this proceeding." (CP 882, 886)

The father appeals the denial of attorney fees. (CP 969) The mother cross-appeals the trial court's order dismissing her petition. (CP 992)

VI. RESPONSE ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion In Denying The Father's Request For Attorney Fees And Sanctions Under RCW 26.09.260 And CR 11.**

A trial court has broad discretion in its decisions regarding whether to award attorney fees. "The party challenging the award must show that the court used its discretion in an untenable or manifestly unreasonable manner." *Mattson v. Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). This same standard governs review of a

trial court's refusal to award sanctions under CR 11. ***Housing Authority of City of Everett v. Kirby***, __ Wn. App. __, ¶ 15, 226 P.3d 222 (2010).

Here, the trial court did not abuse its discretion in denying the father's request for attorney fees for having to respond to the mother's petition, because pursuant to this court's ruling the mother was entitled to a hearing on her petition. In any event, there was no evidence to support a finding that the mother brought her petition for modification in bad faith to warrant an award of attorney fees under RCW 26.09.260(13).

1. Because This Court's Decision Required The Trial Court To Conduct A Hearing On The Mother's Petition, The Trial Court Did Not Abuse Its Discretion In Denying The Father's Request For Attorney Fees For Having To Respond To The Petition.

Under RAP 12.2, the "decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court." This rule codifies the law of the case doctrine, under which "once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." ***State v. Schwab***, 163 Wn.2d 664, 672, ¶ 11, 185 P.3d 1151 (2008); see also ***Harp v.***

American Sur. Co. of N.Y., 50 Wn.2d 365, 368, 311 P.2d 988 (1957) (“mandate . . . is binding on the superior court, and must be strictly followed.”); **Allyn v. Asher**, 132 Wn. App. 371, 378, ¶ 15, 131 P.3d 339 (2006) (“RAP 12.2 is a broad statement of the authority and binding power of the appellate decision.”); **Marriage of McCausland**, 129 Wn. App. 390, 399, ¶ 16, 118 P.3d 944 (2005), *overruled on other grounds*, **Marriage of McCausland**, 159 Wn.2d 607, 152 P.3d 1013 (2007) (appellate court’s mandate was “binding” on the superior court and “must be strictly followed”). Thus, the law of the case would have barred the trial court from dismissing the mother’s petition for modification based on its finding that it was not supported by the evidence without first providing her with the hearing that this court ruled she was entitled. **Eyak River Packing Co. v. Parks**, 148 Wash. 495, 497, 269 P. 807 (1928) (when the appellate court reversed an order of dismissal, the trial court on remand was barred by law of the case from dismissing plaintiff’s case for lack of evidence).

Here, this court held in the father’s second appeal that the mother was entitled to a full hearing on her petition to modify the parenting plan. This court noted that while it “express[ed] no opinion [] as to how the trial court should resolve these questions

at the hearing...[,] a hearing to address these issues is required.” (Appendix A, *5) Thus, while the trial court on remand had discretion to grant or deny the mother’s petition for modification after a full hearing, it had no authority to award attorney fees to the father based on a determination that the mother was never entitled to a hearing in the first place. *Harp*, 50 Wn.2d at 368 (trial court must follow specific direction of the appellate court and only exercise its discretion when directed). Accordingly, the trial court did not abuse its discretion in denying the father’s request for attorney fees for having to defend the mother’s petition for modification.

2. The Trial Court Did Not Abuse Its Discretion In Denying Attorney Fees When There Was No Evidence In The Record Of The Mother’s Bad Faith.

There is no basis to award attorney fees to the father under RCW 26.09.260(13), which provides that “if the court finds that a motion to modify [] a parenting plan has been brought in bad faith, the court shall assess the attorney’s fees and court costs of the nonmoving parent against the moving party.” First, the trial court did not find that the mother filed her petition to modify the parenting plan in bad faith. (See CP 875-86) Second, even if, as the father

urges on appeal, the trial court's findings "taken as a whole" compel the conclusion that the mother's petition was brought in bad faith (App. Br. 28), there would still be no basis for an award of attorney fees because those findings upon which the father relies are not supported by the evidence. (See Cross-Appeal § V.A)

First, the father claims that fees are warranted for the mother's "prelitigation bad faith misconduct" based on the trial court's finding that there was no "emergency" justifying the mother's violation of the joint decision requirement in proceeding with the daughter's counseling with Dr. Engleberg. (App. Br. 30-32, *citing* CP 883) But the mother explained, and the evidence supports, that she acted reasonably in light of the fact that the daughter's school directed the parents to act on the recommendations of the daughter's teachers, including engaging the daughter in therapy, "*as soon as possible.*" (CP 75) The mother also testified that the school described the need to address the daughter's issues as "urgent" and that there was an "immediate need for counseling." (5/04 RP 52) Further, there was no violation of the parenting plan because within a week of the daughter's first appointment, the father agreed to allow the daughter to continue with Dr. Engleberg,

albeit based on his claim that it was only for a four-week period.
(Ex. 22; 5/06 RP 84-85)

Second, the father claims that the mother committed “procedural bad faith” because when the parties finally presented the issue of the daughter’s counseling with Dr. Engleberg to alternate dispute resolution, the mother “initially rejected Ken’s proposal to arbitrate the Engleberg issues, and insisted on mediation, only to make a tardy demand for arbitration/mediation...” (App. Br. 32) But the mother acted consistent with the parenting plan, which requires that the parties participate in mediation first and only proceed to arbitration if no agreement is reached. (CP 9) In fact, the hearing officer chosen by the parties, Larry Besk, had agreed with the mother and ruled that the parenting plan requires the parties to first mediate, and if mediation were unsuccessful, he would arbitrate the dispute. (Ex. 83) Mr. Besk held that the parenting plan did not “contemplate . . . two separate dates to accomplish this.” (Ex. 83; 5/04 RP 134) Thus, the mother’s rejection of arbitration as a first stage for dispute resolution of the issue was not procedural bad faith.

Third, the father claims that the mother committed “substantive bad faith” based on the trial court’s finding that the

mother entered the parenting plan in bad faith since she “testified that her twelve years of marriage to Ken justifies her anticipating that Ken would refuse to adhere to a court ordered parenting plan.” (App. Br. 34, *citing* CP 885) But the mother never testified that she anticipated that the father would not cooperate with the parenting plan based on his behavior during the marriage. Instead, she testified that the parties had cooperated during the marriage and she anticipated that that the father “would cooperate as he had in the past.” (5/04 RP 154)

Finally, the father also relies on the trial court’s adverse credibility findings to also support his claim that the mother acted in “substantive bad faith,” warranting an award of fees under RCW 26.09.260(13) and/or warranting sanctions under CR 11. (App. Br. 35, 41-42) But as set forth in the mother’s cross-appeal, the basis for the trial court’s adverse credibility findings are not supported by the evidence in the record. (Cross-Appeal § V.A) In any event, the fact that the mother was deemed less credible than the father does not in and of itself equate to her bringing her petition for modification in bad faith. See ***Rogerson Hiller Corp. v. Port of Port Angeles***, 96 Wn. App. 918, 930, 982 P.2d 131 (1999), *rev. denied*, 140 Wn.2d 1010 (2000) (rejecting substantive bad faith;

“The trial court did not find the testimony credible. But many if not most trials turn upon which party is the most credible.”).

As there is no evidence to support any finding that the mother brought her petition to modify the joint decision-making provision of the parties’ parenting plan in bad faith, and in light of this court’s earlier decision holding that the mother was entitled to a hearing on her petition, there is no basis to award attorney fees to the father under RCW 26.09.260 or CR 11. This court should affirm the denial of attorney fees.

B. There Is No Authority To Support The Father’s Demand That The Mother Disgorge Attorney Fees Received Under This Court’s Earlier Ruling.

There is no basis for the father’s demand that the mother be required to “disgorge the attorney fees for trial and appellate proceedings previously paid by Ken based on his alleged intransigence.” (App. Br. 37) The father provides no legal authority to support this extraordinary relief, which essentially asks this court to reconsider its earlier decision long after the mandate has issued. The father could have asked this court in his earlier appeal to have any fee award abide the results of the evidentiary hearing on remand. See RAP 18.1(i). His failure to do so, bars the father from seeking the relief that he now requests.

“[Q]uestions determined on appeal, or *which might have been determined had they been presented*, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.” ***Adamson v. Traylor***, 66 Wn.2d 338, 339, 402 P.2d 499 (1965). Here, there was “no substantial change in the evidence” presented at the evidentiary hearing on remand. Instead, the trial court reconsidered its earlier finding after reviewing live testimony. This is not a basis to unwind this court’s previous determination affirming the trial court’s earlier fee award and awarding attorney fees to the mother based on *both* the father’s intransigence and the father’s ability to pay. See ***United States v. Kellington***, 217 F.3d 1084, 1093 (9th Cir. 2000)(“When a case has once been decided by this court on appeal, and remanded to the circuit court, *whatever was before this court, and disposed of by its decree*, is considered finally settled”)(emphasis in original).

It would be particularly inappropriate to require the mother to disgorge the fees paid by the father here, when those fees were incurred by the mother to advocate for what she believed was in the children’s best interests – an efficient manner to make timely decisions for the children – and because the mother’s monthly net

income of \$2,249 (Ex. 283) is likely only a fraction of the income enjoyed by the father, who is an attorney. Even if some form of restitution were warranted under these circumstances, it should be denied because “it would involve substantial hardship or expense” on the mother’s household, which would negatively affect the parties’ children who live primarily in the mother’s home. ***Marriage of Stern***, 68 Wn. App. 922, 931, 846 P.2d 1387 (1993)(a parent otherwise entitled to restitution may be denied restitution if “restitution would involve substantial hardship or expense.”)

This court should deny the father’s demand that the mother disgorge attorney fees received under this court’s earlier ruling.

C. This Court Should Deny The Father’s Request For Fees On Appeal And Award Attorney Fees To The Mother Based On Her Need And The Father’s Ability To Pay.

This court should deny the father’s request for attorney fees on appeal. The mother’s petition for modification was brought in good faith to resolve the fact that the parties could not reach mutual decisions for the children. Out of concern that the parties’ inability to make joint decisions quickly resulted in delays for the parents to take any action for the children in their best interests, the mother filed her petition. (See CP 103-18) This court agreed that this was

a sufficient basis to warrant a hearing on the petition. There was no basis for an award of attorney fees to the father in the trial court. Likewise, there is no basis for an award of attorney fees to the father in this court.

Instead, the mother asks this court to award her attorney fees and costs for both the fees incurred in her cross-appeal, argued below, and the fees incurred in responding to the father's appeal, pursuant to RCW 26.09.140 (on the basis of the mother's need and the father's ability to pay attorney fees), and RAP 18.1 (on the basis of the father's continued intransigence). This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; **Leslie v. Verhey**, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). The father's intransigence in pursuing his *third* appeal since the parenting plan was entered in 2005, necessitating the mother's cross-appeal to challenge the trial court's adverse findings against her, warrants an award of fees to the mother. See **Marriage of Mattson**, 95 Wn. App. 592, 606, 976 P.2d 157 (1999).

The mother should not be required to impoverish herself by paying for defense of the father's appeal, which necessitated her

cross-appeal, out of the resources awarded to her by the property division when the father's tactics have made litigation unnecessarily difficult. ***Marriage of Dalthorp***, 23 Wn. App. 904, 912-13, 598 P.2d 788 (1979). This court should award the mother her attorney fees, and deny the father's request for fees.

VII. CROSS-APPEAL ARGUMENT

A. The Trial Court's Adverse Findings Against The Mother Are Not Supported By The Evidence.

"This court reviews a court decision on a petition to modify a parenting plan for an abuse of discretion." ***Kinnan v. Jordan***, 131 Wn. App. 738, 746, ¶ 18, 129 P.3d 807 (2006). Here, the trial court's decision dismissing the mother's petition for modification was an abuse of discretion because it was based entirely on adverse findings against the mother that are not supported by the evidence. While the mother recognizes the deference that this court grants to the trial court in making factual determinations, "if a trial court's findings of fact are clearly unsupported by the record, then an appellate court will find that the trial court abused its discretion." ***Magana v. Hyundai Motor America***, 167 Wn.2d 570, 583, ¶ 21, 220 P.3d 191 (2009). Here, the trial court made specific findings of fact that were adverse to what the trial court found was

the mother's testimony. But in many instances, the mother's testimony simply was not as the trial court recited. The mother therefore challenges the following eighteen findings of fact especially, and the trial court's conclusion that the mother "lied," as it is based on a faulty recollection of the testimony:

1. *The mother "testified that her twelve years of marriage to [the father] justifies her anticipating that [the father] would refuse to adhere to a court ordered parenting plan. This is bad faith."* (CP 885) In fact, the mother testified to the opposite. The mother testified that the parties had "full cooperation" up until spring 2005, shortly after the parenting plan was entered. (5/04 RP 71) The mother testified that joint decision-making had not been an issue prior to entry of the parenting plan, and she assumed in entering their parenting plan that the father "would cooperate as he had in the past." (5/04 RP 71, 154) For example, during the marriage, the parties were able to agree on the son's diagnosis of ADD and his subsequent treatment. (CP 200-01; 5/04 RP 71, 5/05 RP 193, 253-54)

2. *The mother "mischaracterizes" the issue raised by the father in his motion to set aside the parties' agreed parenting plan and for a trial, which was the subject of his first appeal, as*

“demanding that the summer Wednesday mid-week visits be all overnights.” (CP 877-78) In fact, this was an accurate characterization of the issues raised by the father. The parties had agreed that during the school year, the children would reside with the father, among other times, every Wednesday evening. (Ex. 1; 5/04 RP 197-99) However, for the summer, the father sought every Wednesday *overnight* with the children. (Ex. 1; 5/04 RP 197-99) The mother objected to overnights but did not oppose continuing the weekly Wednesday evening visits through the summer. (Ex. 1; 5/04 RP 197-99) To resolve the dispute, a compromise was reached where the children would reside with their father overnight on Wednesdays “alternate weeks” during the summer, but eliminated the every Wednesday evening visits that the father had during the school year. (See CP 3; 5/04 RP 197-98)

After the parenting plan was entered, the father claimed that the parenting plan contained a “scrivener’s error” or “mutual mistake” because the term “alternate weeks” with the children was inaccurate, and he should have *every* Wednesday overnight during the summer; the father sought a trial to resolve his challenge. (Ex. 4; 5/04 RP 198) The issue presented by the father when he sought to set aside the agreed parenting plan was specifically about his

“Wednesday overnights.” (Ex. 4 at 3: “Should a one day trial be scheduled to approve or amend the Final Parenting Plan in regard to the issue of his Wednesday overnights and the children’s best interests.”) The father alleged that “through inadvertence and mutual mistake, the Father’s Wednesday night visits during the summer were reduced from every Wednesday night... to every other Wednesday night.” (Ex. 4 at 1)

3. *Retired Judge Rosselle Pekelis, who presided over the parties’ mediation, agreed with the father’s position that the “parenting plan reduced Wednesdays to alternate weeks” and it was her “reasonable understanding that Wednesdays were included.”* (CP 878, *citing* Ex. 1) Exhibit 1 was an excerpt from the mother’s mediation letter proposing that the father have every Wednesday *evening* during the summer, but specifically rejecting that the father have every Wednesday *overnight*. In fact, Judge Pekelis rejected the father’s request to change the provision of the parenting plan to state that he was entitled to “every Wednesday night.” (Ex. 7 at 2) Judge Pekelis found no scrivener’s error, and that the parties’ agreed parenting plan providing the father with alternating Wednesday overnights was consistent with the parties’ agreement at mediation:

There was no evidence of mutual mistake or a scrivener's error. In fact, prior drafts of the CR2A agreement were all consistent with the final agreement. Moreover, Mr. Kaplan, who is an attorney, had carefully reviewed all drafts and both parties and their attorneys had signed the agreement.

(Ex. 7 at 2) Likewise, a superior court judge agreed that there was no "scrivener's error" and awarded attorney to the mother for the father's intransigence in forcing the mother to bring a motion to enforce the parties' CR 2A agreement. (Exhibit 10, 11, 16)

4. *The father's appeal of the order denying his motion for a new trial "was settled in negotiation in [the father]'s favor. [The father]'s pursuit of this relief was not abuse of the court process...It does not show he was out to ruin her financially."* (CP 878) In fact, the appeal was not settled in the father's favor. The parties settled on the exact terms the mother offered at the parties' mediation - before the agreed parenting plan was entered - and on July 8, 2005, some eight months before the father dismissed his appeal. (Ex. 1, 23, 51, 56; 5/04 RP 197-99) As a result of the father's refusal to accept this offer on July 8, 2005, the mother was forced to incur unnecessary fees to prepare her respondent's brief, which was filed one month later, in August 2005. (See Ex. 23, 26) Only after all of the briefing was completed, and one day before

oral argument in this court, the father dismissed his appeal, agreeing to pay \$5,000 towards the attorney fees incurred by the mother in defending his first appeal. (Ex. 56)

5. *“There was no emergency justifying [the mother] violating the joint decision requirement for healthcare in unilaterally selecting Engleberg” as counselor for the parties’ daughter.* (CP 883) In fact, the head of the school urged the parents to follow the recommendations of the staff, including engaging the daughter in therapy, *“as soon as possible,”* so that the daughter *“will have the greatest opportunity for success as she begins 2nd grade.”* (CP 75) Furthermore, there was no violation because the father subsequently agreed, approximately one week after the daughter’s first appointment, to allow the daughter to continue counseling with Dr. Engleberg. (Ex. 22: *“Mr. Kaplan will allow Suzanne Engleberg to be a therapist concerning issues mentioned by Idalia’s teachers over the course of the next four weeks...”*; *see also* 5/06 RP 84-85)

6. *“[The mother] testified on cross examination that both she and [the father] knew about the school conference about [the daughter]’s behavior three weeks before but that neither of them came with counselor names. This is inconsistent with her assertion that there was an ‘emergency.’”* (CP 883) In fact, while the mother

was concerned about the daughter and understood that the school was also concerned, the “urgency” about the daughter’s issues was not expressed until their first meeting on June 20, 2005, at the conclusion of the daughter’s first grade school year – a meeting that had previously been delayed by three weeks due to the father’s schedule. (5/04 RP 50-54) It was at this meeting that the parents were formally advised that their daughter’s academic, emotional, and social progress at school had deteriorated and that the school recommended the daughter be evaluated for ADHD until this meeting. (See CP 74-75; 5/04RP 50-54) Because there had already been a delay in the parents receiving the recommendations from the school and in light of the fact that the school recommended the parents act “as soon as possible,” the mother acted reasonably so that the daughter receive “immediate attention.” (See Ex. 18; 5/04 RP 52-54; CP 75)

7. *“The mother’s “unwillingness to delay the start of [the daughter]’s counseling a week because [the father] didn’t ask in writing as she told him to do was unreasonable.”* (CP 884) In fact, the mother did not refuse to delay the daughter’s appointment because the father’s objection was not in writing, but because his objection was made right before the appointment, and the mother’s

understanding from the school that the need for counseling for the daughter was “urgent.” (5/04 RP 57-58)

8. *“The factual issue for which the testimony [for arbitration] was sought was the nature of [the daughter]’s medical diagnosis and the appropriateness of treatment by stimulant medication. This is a very contentious and controversial subject in general and especially so in parental disagreements. In this instance [the father]’s concerns were well taken.”* (CP 879) While there may be support in the record for this finding, it ignores the undisputed fact that this issue was long drawn out due to the parties’ disagreement, and as a result the daughter remained untreated. For example, even though the daughter was evaluated as early as October 2005 when it was recommended that the parents follow up with the doctors to determine whether the daughter “presents with an attention deficit disorder (and medical management for such if deemed appropriate)” (Ex. 29), the parties were still seeking assistance to reach a decision on how to proceed on this issue as late as May 2007. (See Ex. 177)

9. *After the mother’s petition for modification of the joint decision-making provision of the parenting plan was dismissed, “[the mother] appeal[ed] the denial of adequate cause; [the father]*

appeal[ed] attorney fee award.” (CP 879; *see also* CP 875) In fact, it was the father who appealed the order awarding the mother her attorney fees. The father filed his notice of appeal on February 21, 2007- the 27th day after the order was entered. (CP 583) Only *after* the father filed his notice of appeal, and after the time to file her own appeal had otherwise passed, RAP 5.2(f), did the mother file her notice of cross-appeal on March 1, 2007, challenging the trial court’s denial of her motion for adequate cause. (CP 590) Had the father not appealed, the mother would not have.

10. *“[The mother] lied to the court about communication methods. She testified that the first time that she heard that sending personal dispute related FAX’s to [the father]’s law office was an issue or caused problems for him at work, was during this trial.”* (CP 876) The father testified that “on every single fax” he sent to the mother he stated that it was a “very big problem” for her to fax him at work. (5/06 RP 67-68) But nowhere in the over 300 exhibits presented to the court, including the father’s faxes to the mother, is there any evidence that the father ever told the mother that sending faxes to his office “caused problems for him at work.” Instead, the reason presented by the father for asking that the mother be required to use email to communicate with him was

because *he* did not want to want to fax the mother, because it was “unduly burdensome and time consuming. It literally takes hours and makes it impossible for [the father] to communicate with her in a timely fashion.” (Ex. 254 at 8)

11. *The mother “testified that she refuses to use email as ordered by the mediator because she can’t type and is not good with computers. This is contradicted by other evidence such as EXs 228, 254, 257 & 257 [sic].”* (CP 876) The mother never testified that she cannot type. Instead, she testified that she types “slowly” and is “faster at hand writing.” (5/05 RP 300) While the mother testified that she is not “comfortable” using a computer (5/05 RP 301), this was not the reason that she declined to communicate with the father by email. Instead, she testified that email was the “least efficient way” of communicating with her because she typically does not use the computer and there were times when she did not even turn on the computer for a week. (5/05 RP 301)

The mother testified that fax was the best way for the father to communicate with her and guarantee that she will review the communication fairly quickly:

I’m old fashioned, I prefer to talk to a person or you know fax and I just, I don’t like feeling like I’m a slave to a computer. Oh I have to check my e-mail two

times a week and I think that I have noted that in correspondence to Ken. Please if it is something urgent or time sensitive it is much better to call me and then fax me because if it's an email I may not check it.

(5/05 RP 302) The exhibits cited by the trial court do not contradict the mother's testimony. Exhibit 228 is a typed fax from the mother to the father – presumably one that she typed “slowly.” Exhibit 254 is a letter from the father to the arbitrator objecting to having to communicate with the mother by fax because it is “unduly burdensome and time consuming.” Exhibit 257 is an email from the mother to the father where she explains that she will be discontinuing her email and asks that any communication be by fax.

12. *“[The mother]’s testimony was often histrionic and exaggerated for example when she testified ‘not a single month has gone by without some ADR dispute.’”* (CP 876) This finding again mischaracterizes the mother's testimony. The mother testified that it was not just ADR, but that every month there was some type of dispute between the parents causing her to incur attorney fees. (5/12 RP 228-29; see also CP 114) Her allegation was proved by a spreadsheet admitted into evidence showing that the mother incurred attorney fees related to the dissolution every month during

the 63 months since the final parenting plan was entered on March 17, 2005, except for June 2006. (Ex. 282)

13. *The mother “involved the children in parental disagreements more than [the father].”* (CP 877) In making this finding, the trial court relied on Exhibit 64, a fax from the mother forwarding a letter from their son to the father. But this is consistent with the parenting plan, which provides that “each parent shall encourage [the children] to discuss his or her grievance against a parent directly with the parent in question. It is the intent of both parents to encourage a direct parent-child bond and communication.” (Ex. 13, §3.14(d)) By forwarding the son’s letter to the father regarding a camp/scouting trip, the mother was acting within the spirit of the parenting plan to “encourage” these communications, and with the children’s counselors’ recommendations that the children learn “self-advocacy.” (5/06 RP 194-97, 199-200) It was not, as the trial court found, evidence of the mother’s abusive use of conflict. (CP 877)

14. *The mother engaged in the abusive use of conflict due to her “intentional and inappropriate involvement of others,” finding that the mother asserted that “Ken is not an involved father to many individuals (Keyes, Engleberg, Fong, Zipperman, some*

people involved in school applications).” (CP 877) In fact, the father only testified that the mother told Dr. Fong, who performed the language and learning evaluation of their daughter, that he was “not involved.” (See 5/06 RP 133; 5/12 RP 234) There was no evidence that the mother made a similar statement to Drs. Keyes, Engleberg, Zipperman, or school officials.

15. *“[The mother]’s testimony did not always address facts; she testified about her feelings of [the father] being consistent in co-parenting with the way he was during 12 years of marriage.”* (CP 876, citing Ex. 260) In fact, the mother never testified as to the father’s ability to co-parent during the parties’ marriage, other than to testify that they had cooperated. (See 5/04 RP 71, 154) Furthermore, Exhibit 260 cited by the trial court does not support the trial court’s finding, as it is a mediation letter from the father’s counsel, and could provide no “testimony” on the mother’s “feelings” on the father’s co-parenting ability. (Ex. 260)

16. *The mother has trouble “letting go of control over the children.”* (CP 884) This finding is based on a 2005 report from Dr. Weider, the parenting evaluator from the dissolution action, despite the fact that the trial court told the parties that it would not consider “Dr. Weider’s parenting evaluation unless the whole document is

before me.” (5/04 RP 283) The entire document was never presented. The trial court also improperly relied on the Weider report to find that “making the change from *de facto* decision maker to co-parenting was difficult for Sheila.” (CP 885)

17. *“The trial was the first time in the long sad history of this case that [the mother] asserts domestic violence.”* (CP 878) In fact, the mother never testified that the father was domestically violent. Instead, the mother asserted that she believed the father was exerting “economic coercion” on her by forcing her to incur attorney fees, and that this was a form of “behavioral domestic abuse.” (5/12 RP 230) Many people agree with this conclusion. See King County Domestic and Dating Violence, An Information Resource and Handbook (2008) (<http://www.kingcounty.gov/courts/Clerk/-DomesticViolence.aspx>).

18. *The mother’s “need to cling to the conflict is further evidenced by her response to [the father]’s CR 68 offer of judgment.”* (CP 882) Before trial, the father offered to settle with the mother, proposing that she have sole decision-making on the children’s healthcare issues and he would pay \$5,000 towards the mother’s attorney fees. (Ex. 266) The mother rejected this offer because the “strings attached” to the offer made it unworkable.

(CP 926) For example, the father's offer would have required four weeks notice for any "non-emergency and non-routine" decision, to allow him the opportunity to object on the family law motions calendar. (Ex. 266) The mother realized that this provision in effect did not provide her with sole decision-making and would not cure the underlying problem with joint decision-making that the father almost never agrees with the mother's decision and attorney fees will necessarily be incurred to resolve the dispute. (CP 926) Furthermore, the \$5,000 offer towards the mother's attorney fees came nowhere near the fees that she actually incurred. (CP 926)

Because the trial court's findings are not supported by the record and these findings formed the basis for the trial court's decision to dismiss the mother's modification action, this court should remand to the trial court for reconsideration.

B. This Court Should Remand To A Different Judge For A New Hearing On The Mother's Petition For Modification.

The trial court's findings are tainted by its apparent bias against the mother, including adverse credibility findings that are not supported by substantial evidence. See *Cham v. Attorney General of U.S.*, 445 F.3d 683, 691 (3rd Cir. 2006) (due process requires neutral decision-maker who can fairly evaluate evidence).

This is particularly surprising as the judge who presided over the trial is a well-respected jurist with many years of experience. But underlying the trial court's findings is an apparent irritation or impatience with a mother who, as the trial court found, was a "loving, attentive parent[] (CP 885), but who may have been too emotional for the trial court's liking.

The trial court complained that the mother "testified about her feelings" instead of facts. (CP 876) The trial court complained that the mother was "histrionic" when she described the parties' litigation history. (CP 876) The trial court commented on the fact that a 2004 "vocational assessment recommended that [the mother] receive another two years of once-weekly psychotherapy." (CP 884) The trial court minimized the mother's testimony that she at times suffers from "extreme stress" by noting that "this is a Sheila problem not a parenting plan problem." (CP 884) These findings, irrelevant to the issue before the court, reflect a bias that should not be repeated on remand.

The trial court's findings that the mother was not credible and acted in bad faith must be reversed. The trial court's apparent dislike for the mother requires that this matter be remanded to a different fact-finder with no bias against the mother. In order to

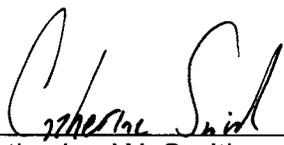
safeguard the appearance of fairness, this court should remand this matter to a new Superior Court judge because the trial court cannot reasonably be expected to set aside its previously expressed hostility towards the mother. **Marriage of Muhammad**, 153 Wn.2d 795, 807, ¶ 19, 108 P.3d 779 (2005); **Custody of R.**, 88 Wn. App. 746, 762-63, 947 P.2d 745 (1997).

VIII. CONCLUSION

This court should affirm the trial court's denial of attorney fees to the father, reverse the trial court order dismissing the mother's petition to modify the parenting plan and remand for a new trial on the mother's request for sole decision-making before a new judge, and award attorney fees to the mother on appeal.

Dated this 30th day of April, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 
Catherine W. Smith
WSBA No. 9542
Valerie Villacin
WSBA No. 34515

Attorneys for Respondent/Cross-Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 30, 2010, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Charles Wiggins Wiggins & Masters, P.L.L.C. 241 Madison Avenue N Bainbridge Island, WA 98110-1811	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 30th day of April, 2010.



Carrie O'Brien

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:)	No. 59612-8-1
KENNETH B. KAPLAN,)	DIVISION ONE
Appellant,)	
and)	
SHEILA KOHLS-KAPLAN,)	UNPUBLISHED
Respondent.)	FILED: <u>April 28, 2008</u>

Cox, J. — Kenneth B. Kaplan appeals the trial court's award of attorney fees to Sheila Kohls arising from their disputes relating to the parenting plan regarding their children. Sheila Kohls cross-appeals the trial court's decision that she failed to show adequate cause for a hearing to modify the decision-making provision of their parenting plan.¹

The trial court was well within its discretion to award to Kohls attorney fees for intransigence. However, it committed legal error in exercising its discretion on

¹ A party seeking to modify a parenting plan shall submit, together with his or her motion, an affidavit setting forth facts supporting the modification and shall give notice, together with a copy of his or her affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested modification should not be granted. RCW 26.09.270.

whether Kohls established adequate cause for a hearing. We affirm in part, vacate in part, and remand for further proceedings.²

The court dissolved the marriage of Sheila Kohls and Kenneth Kaplan in 2005. Their agreed parenting plan gave Kaplan and Kohls joint decision-making power on major decisions for their son, Z.K., and their daughter, I.K. The parties acknowledged in this plan that their children needed mental health counseling and that I.K., age nine, needed to be evaluated for ADHD. In case of decision-making disputes, the parenting plan requires “mediation, and if no agreement is reached, arbitration by Larry Besk, or another agreed individual.”

Several months after the entry of the order approving the parenting plan, Kaplan and Kohls disagreed over counseling and ADHD treatment for their daughter, I.K. Her teachers advised the parents that I.K. should be evaluated for ADHD and recommended several therapists. Kohls proceeded to set up an appointment with one of the recommended professionals, Dr. Suzanne Engelberg.

Kaplan objected and involved the parties' attorneys in the dispute. Eventually, he acquiesced and allowed I.K. to see Dr. Engelberg and agreed to pay his part for her therapy. Several months later, Kaplan stopped paying Dr. Engelberg's fees. He contended the treatment had continued too long, he had received no feedback from Dr. Engelberg, and believed her to be “antagonistic” toward him. Kaplan and Kohls also disagreed about whether I.K. should take medication for ADHD.

² We grant Kenneth B. Kaplan's motion to supplement record dated March 24, 2008.

Kohls invoked the parenting plan's dispute resolution process. Kaplan refused to arbitrate issues and then cancelled the mediation and/or arbitration session the day before it was scheduled to occur. Kohls' attorney rescheduled an appointment for two weeks later. Kaplan agreed to the date, set forth new issues to be addressed, and informed Kohls he no longer wanted to mediate or arbitrate his objections to Dr. Engelberg. He also said that he would pay her past fees as set out in court orders. He did not pay.

Kohls moved for an order holding Kaplan in contempt of the order of child support. In response to her motion, Kaplan paid what was due. Accordingly, Kohls cancelled the contempt hearing, and the court entered an agreed order to reserve the issue of attorney fees for later determination.

Based on Kaplan's resistance to medicating I.K. for ADHD and his resistance to J.K.'s therapy, Kohls petitioned to modify the decision-making provision of the parenting plan. In her petition, she alleged that Kaplan used the joint decision-making power as a weapon that delayed necessary and important decisions for the children, especially regarding their healthcare. Kohls also put the reserved issue of attorney fees before the court.

A commissioner denied Kohls' motion for modification, concluding that she failed to show adequate cause for a hearing. She ordered Kaplan to pay Kohls \$5,785.90 in attorney fees, subject to Kohls' counsel providing redacted copies of bills to Kaplan's counsel.

Both parties moved to revise the commissioner's order. The superior court denied both motions in one order. The order stated that a substantial change of circumstances is not established "when the parties continue to

demonstrate the same conflict after the parenting plan as before.” It further specified that “[Kaplan’s] intransigence is well documented in the record.”

Kaplan appeals the award of attorney fees to Kohls. Kohls cross-appeals the denial of a hearing on adequate cause to modify the parenting plan.

ATTORNEY FEE AWARD

Kaplan argues the court abused its discretion by awarding attorney fees to Kohls. Specifically, he challenges the basis of the award—intransigence. We hold that Kaplan’s intransigence is well documented in this record and the amount of the award is proper.

A court may award attorney fees on the basis that one party’s intransigence caused the other party to incur additional legal fees.³ Attorney fees based on intransigence have been awarded where a party engaged in obstruction and foot dragging or made the proceeding unduly difficult and costly.⁴ When awarding attorney fees on the basis of intransigence, a trial court must make findings sufficient to allow appellate review.⁵ We review the trial court’s award of attorney fees for an abuse of discretion.⁶

Here, the court commissioner awarded \$5,785.90 in attorney fees to Kohls based on events leading up to the twice scheduled ADR proceeding to resolve

³ In re Marriage of Bobbitt, 135 Wn. App. 8, 30, 144 P.3d 306 (2006).

⁴ Id.

⁵ Id.; In re Marriage of Greenlee, 65 Wn. App. 703, 708-09, 829 P.2d 1120 (1992).

⁶ In re Marriage of Mattson, 95 Wn. App. 592, 604, 976 P.2d 157 (1999).

disputes regarding the parenting plan. On revision, the superior court denied Kaplan's challenge to the award, stating in its order:

Although a contempt finding was avoided by the Petitioner's last minute compliance with the order ***his intransigence is well documented in the record.***^[7]

The record contains substantial evidence to support this determination. In Kohls' declaration in support of her motion alleging intransigence, she alleged that Kaplan stopped paying his share of I.K.'s counseling costs, in violation of the child support order requiring him to pay 72 percent of the children's counseling expenses.⁸ After several attempts to get Kaplan to pay, she tried mediation and/or arbitration as required by the parenting plan.⁹ Kohls' attorney prepared materials, including responses to Kaplan's additional unrelated issues, and submitted them in advance of the session, as requested.¹⁰ Kaplan submitted no materials.¹¹ Kaplan cancelled both scheduled mediation/arbitration sessions shortly before each session.¹² Kaplan then withdrew his objection to I.K.'s counselor and agreed to pay his portion of treatment costs.¹³ Nearly a month

⁷ Clerk's Papers at 585 (emphasis added).

⁸ Clerk's Papers at 702.

⁹ Clerk's Papers at 702-03.

¹⁰ Clerk's Papers at 702.

¹¹ Id.

¹² Clerk's Papers at 703.

¹³ Id.

later, Kaplan still had not paid what he owed, which compelled Kohls to move for contempt sanctions against him.¹⁴

Kohls' counsel also submitted a declaration in support of the motion. She alleged that Kaplan's behavior made the mediation and/or arbitration process and efforts to get him to comply with his obligation to pay for I.K.'s therapy difficult and expensive.¹⁵ Specifically, Kaplan argued over whether mediation and arbitration could take place on the same day, added issues unrelated to I.K.'s counseling to the agenda requiring additional preparation, and cancelled mediation and/or arbitration sessions after preparation was complete.¹⁶ The commissioner based the \$5,785.90 attorney fees award on evidence provided by Kohls' counsel in her declaration and in argument before the court.¹⁷

The superior court's conclusion that Kaplan was intransigent rests on tenable grounds. This record more than adequately demonstrates the type of conduct warranting an award of fees on this basis.

Kaplan argues that In re Marriage of Bobbitt¹⁸ requires the trial court to make specific findings of fact identifying the particular conduct that constituted intransigence. Kaplan misreads Bobbitt.

¹⁴ Id.

¹⁵ Clerk's Papers at 599-600.

¹⁶ Clerk's Papers at 599, 622.

¹⁷ See Report of Proceedings (Jan. 8, 2007) at 14-16.

¹⁸ 135 Wn. App. 8, 30, 144 P.3d 306 (2006).

There, the court did not make a finding of intransigence, but awarded \$10,000 in attorney fees “for the necessity of having to pursue this action.”¹⁹ Division Two of this court remanded, holding that a “trial court must provide sufficient findings of fact and conclusions of law” to provide an adequate record for appellate review.²⁰ Our case satisfies the rule in Bobbitt because the trial court articulated its conclusion that Kaplan was intransigent in its order. A conclusion of intransigence, supported by the record, is all that is required.

In a related argument, Kaplan contends that the court’s “finding” that he avoided contempt by last minute compliance is insufficient to support the court’s conclusion of intransigence. This argument is inapposite to the award of fees based on intransigence, and we need not discuss it further.

Without citing authority, Kaplan next argues that awarding attorney fees on the basis of his intransigence is inappropriate after his “successful fight” in defending the joint decision-making provision in the parenting plan. This argument, too, is inapposite to the basis of the award of fees. We need not discuss it further.

Finally, Kaplan contends that the award should be reversed because Kohls’ counsel failed to produce redacted copies of billing records as required by the commissioner’s order. But it is difficult to understand why counsel for Kohls would have made this information a part of the court file below. In view of this observation, it is likewise difficult to understand why such information would or

¹⁹ Bobbitt, 135 Wn. App. at 30.

²⁰ Id.

could have been part of the record on appeal that is now before us. Thus, Kaplan's assertion is unpersuasive.

In any event, Kohls' counsel on appeal represented to this court at oral argument that this condition was met. We accept that representation from counsel, an officer of the court. We have granted Kaplan's motion to supplement the record, showing the billing records were provided to counsel on January 26, 2007.

ADEQUATE CAUSE FOR HEARING

Kohls argues the trial court abused its discretion in denying a hearing on her petition to modify the joint decision-making provision in the parenting plan. We hold that Kohls presented a prima facie case that entitled her to a hearing on her petition.

"The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child."²¹

The party seeking modification of a parenting plan must submit with his or her motion an affidavit alleging facts to support the requested modification.²² Notice and a copy of affidavits must be provided to other parties.²³ "The court

²¹ RCW 26.09.260(10).

²² RCW 26.09.270.

²³ Id.

shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing”²⁴

Adequate cause is shown where the court finds, “upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred” in the circumstances of either parent or of a child.²⁵

We review the trial court’s adequate cause determination for an abuse of discretion.²⁶ A court abuses its discretion when its decision, based on the facts and applicable law, is outside the range of acceptable choices.²⁷

Here, Kohls alleged in her supporting affidavit that since entering into the parenting plan, Kaplan has made joint decision-making unworkable and detrimental to her and their children. She alleged Kaplan abused his joint decision-making power by refusing to agree, involving their attorneys in every matter that comes up, and refusing to participate in mediation and/or arbitration as required by the parenting plan when agreement cannot be otherwise achieved. She claims this behavior harms their children by preventing them from receiving therapy and treatment, which they need.

The superior court denied Kohls’ motion for revision, stating:

The substantial change of circumstances required is not established when the parties continue to demonstrate the same conflict after the parenting plan as before. Difficulties in proceeding

²⁴ Id.

²⁵ RCW 26.09.260, 270.

²⁶ In re Parentage of Jannot, 149 Wn.2d 123, 128, 65 P.3d 664 (2003).

²⁷ In re Custody of Halls, 126 Wn. App. 599, 606, 109 P.3d 15 (2005).

with the ADR provisions of the parenting plan should be addressed in a motion to enforce or in a motion for contempt.^[28]

In Selivanoff v. Selivanoff,²⁹ the parenting plan at issue there included a provision that “upon agreement by plaintiff and defendant, the visitation rights can be extended without court approval.”³⁰ The court found that communication had broken down between the parents to the point of rendering the provision meaningless. It concluded that “[a] material change in condition can be deemed to occur where a provision in the original plan anticipates cooperation and that cooperation is not forthcoming.”³¹

We agree that the record shows that the parties had a history of conflict. Presumably, that is one of the reasons why the parenting plan includes a provision for ADR with a specific person in the event of post-dissolution disputes. We cannot agree that the conflict evidenced here is “the same conflict after the parenting plan as before.” What is very troubling here is that notwithstanding the agreed mechanism for resolving disputes over parenting by ADR, there is evidence in the record that this mechanism may not be working as intended. Moreover, there is evidence in the record that the delays caused by the alleged ineffectiveness of the mechanism may have an adverse impact on the children.

For example, we need only point to the events leading up to the twice scheduled then cancelled ADR proceedings that served as a basis for the trial

²⁸ Clerk's Papers at 580; see also Report of Proceedings (Jan. 8, 2007) at 14 (Commissioner's Oral Ruling); Clerk's Papers at 292 (Commissioner's Order).

²⁹ 12 Wn. App. 263, 265, 529 P.2d 486 (1974).

³⁰ Id.

³¹ Id.

court's award of attorney fees for intransigence to illustrate the point. A general history of conflict between the parties, arguably, does not adequately address the more narrow question of whether the alleged inability to effectively use the ADR process constitutes a substantial change of circumstances warranting modification of the parenting plan.

To the extent that the agreed ADR mechanism is not working and there is adverse impact on the children, a substantial change of circumstances may exist to modify the plan. That, of course, is a decision for the trial court to make following a hearing on the question. This record also suggests there may be a fundamental change in the ability of the parties to cooperate from that anticipated in their agreed parenting plan. If so, the provisions of RCW 26.09.187 may also support modification of the agreed plan.

We express no opinion by our above comments as to how the trial court should resolve these questions at the hearing. But a hearing to address these issues is required.

Accordingly, we vacate the order to the extent it denies a hearing on the petition to modify and remand for further proceedings.

ATTORNEY FEES ON APPEAL

Kohls seeks attorney fees and costs for her cross appeal and for responding to Kaplan's appeal under RCW 26.09.140 and RAP 18.1 and 18.9. We award her fees, subject to her full compliance with the requirements of the RAPs.

A court, after considering the financial resources of both parties, may order one party to pay the other party's reasonable attorney fees associated with

maintaining or defending a proceeding under Chapter 26.09 RCW.³² “An important consideration apart from the relative abilities of the two spouses to pay is the extent to which one spouse’s intransigence caused the spouse seeking the award to require additional legal services.”³³

Here, both parties have submitted declarations on this issue. Having fully considered both, we conclude that an award of fees to Kohls, both for the appeal and cross appeal, is proper under the circumstances.

In conclusion, we affirm the superior court’s order denying revision of the \$5,785.90 in attorney fees to Kohls based on Kaplan’s intransigence. We vacate the order to the extent it denied revision of the denial of Kohls’ motion for a hearing. We remand for a hearing on her petition to modify the joint-decision making provision of the parenting plan. We order Kaplan to pay Kohls’ attorney fees and costs associated with both his appeal and her cross-appeal.

Cox, J.

WE CONCUR:

Edmonton, J.

Leach, J.

³² RCW 26.09.140.

³³ In re Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989).

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

In re the marriage of	
KENNETH KAPLAN	No 04-3-01252-3 sea
Petitioner	MEMORANDUM FINDINGS AND ORDER
And	ON PETITION TO MODIFY PARENTING
SHEILA KOHLS (fka KAPLAN)	PLAN
Respondent	Clerk's action required

This matter came before the court for trial on Sheila Kohls' Petition to Modify the 2005 Parenting Plan. The court heard testimony from the parties and witnesses May 4, 5, 6 and 12, 2009. Closing arguments were heard on May 13th. The court has considered some 300 exhibits and taken notice of the legal record prior to the filing of the modification petition.

The court dissolved the marriage of Sheila Kohls and Kenneth Kaplan in 2005. Their agreed parenting plan gave them joint decision-making power on major decisions for their son, Zachary and their daughter, Idalia. The parenting plan requires "mediation, and if no agreement is reached, arbitration by Larry Besk, or another agreed individual."

Sheila subsequently petitioned the court to modify the parenting plan. A commissioner on the family law motions calendar found lack of adequate cause. On revision this court also found lack of adequate cause and sustained the commissioner's order for Ken to pay Sheila \$5,785.90 in attorney fees. Both parties appealed. On April 28, 2008 the Court of Appeals reversed and remanded for a hearing on the modification petition, COA No. 59612-8-1. The appellate court found that "notwithstanding the agreed mechanism for resolving disputes over parenting by ADR, there is evidence in the record that this mechanism may not be working as intended. Moreover, there is evidence in the record that the delays caused by the alleged ineffectiveness of the mechanism may have an adverse impact on the children."

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A.E. 9
BRIEF 26-27

1 The appellate court also found that "there may be a fundamental change in the ability of the
2 parties to cooperate from that anticipated in their agreed parenting plan. If so, the provisions of RCW
3 26.09.187 may also support modification of the agreed plan"

4 Neither party has proposed any change in the residential provisions of the parenting plan.
5 Therefore the applicable standard is substantial change of circumstances and whether any resulting
6 adjustments to the plan are in the children's best interests. RCW 26.19.206 (10)

7 **Findings regarding credibility:**

8 This court judges credibility based on the witness's memory, responsiveness, whether the
9 answers are reticent or forthcoming, demeanor, consistency within the testimony, motive or interest in
10 the outcome, and contradiction (impeachment). Based on these factors Sheila is less credible than Ken.

11 Some of the evidence the court relies on to reach this finding include the following.

12 Sheila's testimony did not always address facts; she testified about her feelings of Ken being
13 consistent in co-parenting with the way he was during 12 years of marriage (EX 260) and the stress and
14 frustration of co-parenting. Sheila lied to the court about communication methods. She testified that the
15 first time she heard that sending personal dispute related FAXs to Ken's law office was an issue or
16 caused problems for him at work, was during this trial. She testified that she refuses to use email as
17 ordered by the mediator because she can't type and is not good with computers. This is contradicted by
18 other evidence such as EX s 228, 254, 257 & 257. Sheila's testimony was often histrionic and
19 exaggerated for example when she testified "not a single month has gone by without some ADR
20 dispute" or Ken's objections to Dr.Dassel was "last minute sabotage". Her assertion that Ken
21 fabricated an issue under the CR.2A is not supported by the facts as discussed below.

22
23 Certainly in a trial such as this it is to be expected that neither party's recollection is perfect, or
24 that their testimony is entirely free from a self-serving viewpoint. Some issues with Ken's credibility
25 were pointed out in trial. However, Sheila's case for modifying the parenting plan turns in large part on
26 her insistence that Ken uses the ADR and court process as part of an intentional plan to destroy her
financially. She testified that Ken told her he would do this. Ken testified that early on he told her he

A.E. 15
BRIEF 31

A.E. 10
BRIEF 27

A.E. 11
BRIEF 28

A.E.12
BRIEF 29

1 was concerned that their disagreements and cost of lawyers would send them both into poverty. On this
2 key assertion Sheila is not believable.

3 **Abusive use of conflict:**

4 Sheila asserts in various ways that Ken generates conflict and abuses the conflict resolution
5 mechanism. This court understands "abusive use of conflict" to mean the involvement of the children
6 in the parents' conflicts, such as attempting to turn a child into an ally, involve the child in a parental
7 decision, having the child be an oral messenger or badmouthing the other parent as specifically
8 prohibited in this parenting plan (EX. 13, sec. 3.14 (h) & (i)). This court's understanding is based on the
9 inclusion of "abusive use of conflict" in discretionary restrictions sections of the parenting statute,
10 RCW 26.09.191 (3) (e) which requires that the abusive use of conflict "creates a danger of serious
11 damage to the child's psychological development". The standard is high because some conflict
12 between even married parents is inevitable. Although Sheila has involved the children in parental
13 disagreements more than Ken (EX 64), there is no evidence of serious damage to these children's
14 psychological development in this case.

15 Other forms of related conflict issues not directly involving the children are asserted by Sheila
16 to be abusive use of process. She complains of intransigence or frivolous litigation and abuse of
17 financial matters, both discussed below.

18 Another form of abusive use of conflict could be the intentional and inappropriate involvement
19 of others. Sheila has not specifically asserted this but Ken asserted in about her in his testimony. On
20 many occasions Sheila has sought to involve others in her disagreements with Ken: the FAXs to the
21 mail room at his law office and her assertion that "Ken is not an involved father" to many individuals
22 (Keyes, Engelberg, Fong, Zipperman, some people involved in school applications), and inflammatory
23 messages to Ken's family and friends (EX 69) are examples.

24 Allegations of abuse of the court process include Sheila's assertion that "the ink had barely
25 dried on the parenting plan" when Ken was in court over a nonexistent scrivener's error. In testimony
26

A.E. 2
BRIEF 20

1 May 4th and earlier declarations in the record Sheila mischaracterizes his issue as demanding that the
2 summer Wednesday mid-week visits all be overnights. The issue Ken raised (ECR doc. No. 81) was
3 that the parenting plan reduced Wednesdays to alternate weeks contrary to what the parties' settlement

A.E. 3
BRIEF 22

4 letters had proposed (ECR doc. No. 90), contrary to what Judge Pekelis wrote would be included
5 (Wednesday evenings, EX 1) and contrary to what the children were used to (ECR doc. No. 22).

6 Further Ken complained that the parenting plan as drafted injected regular ten day intervals when he
7 would not see his children. Ken asserted that this was contrary to their best interests as identified by Dr.
8 Wieder. The issue was not about more overnights, it was about a reoccurring ten day gap in seeing the
9 children. (ECR doc. Nos. 79, 81). The trial court's order denying Ken's motion to set a trial on this
10 parenting plan issue does not include factual findings on this dispute. In view of the substantial

A.E. 3
BRIEF 22

11 reduction in Ken's residential time between Ken's proposed parenting plan (ECR doc. No. 5) and the
12 final parenting plan, a reasonable understanding from Judge Pekelis that Wednesdays were included,

A.E. 4
BRIEF 23

13 Dr. Wieder's recommendations, RCW 26.09.070(3) and that ultimately this issue was settled in

14 negotiation in Ken's favor (EX 56) Ken's pursuit of this relief was not abuse of the court process. It
15 does not support Sheila's case to modify. It does not show he was out to ruin her financially. It does not
16 support Sheila's contention that he frustrates the ADR provisions.

A.E. 17
BRIEF 32

17 Sheila filed for contempt on the Engelberg fees claiming "Ken is trying to wreck me
18 financially". The first time Sheila asserts this theory in the record appears to be her April 26, 2005
19 letter to mediator Pekelis (EX 292). This court finds based upon Sheila's overall lack of credibility
20 that Ken never told her "he will make sure that all her settlement money is spent on legal issues". The
21 facts do not support this theory of abuse. The contempt motion was withdrawn when Ken paid the fees.

A.E. 17
BRIEF 32

22 This court further rejects Sheila's related testimony on rebuttal that the expenses of ADR and post
23 parenting plan litigation are part of a pattern of Ken's economic coercion as a form of domestic
24 violence. The trial was the first time in the long sad history of this case that Sheila asserts domestic
25 violence.. Domestic violence through economic coercion is entirely unsupported by the facts. That it
26 comes up now is evidence in support of Ken's view that Sheila clings to the conflict unable to move

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A.E. 18
BRIEF 32

1 on. Sheila's need to cling to the conflict is further evidenced by her response to Ken's CR 68 offer of
2 judgment discussed below.

3 Sheila filed her Petition to Modify November 22, 2006. At this point there had been *one* ADR,
4 delayed initially by Sheila's lawyer's actions although later Besk chastises Ken for not pursuing the
5 issue pro-actively. In the modification petition Sheila raises the ADHD medication issue which had
6 never been to ADR.

7 Sheila appeals denial of adequate cause; Ken appeals attorney fee award.

8 Ken files for trial *de novo* of the May 15, 2007 arbitration decision. This court dismissed the
9 trial *de novo* on procedural grounds and awarded Sheila attorney fees. This court then denied a motion
10 for reconsideration, awarding Sheila attorney fees. In both the motion to dismiss and response to the
11 motion for reconsideration Sheila repeated her theory that this was part of Ken's alleged scheme to ruin
12 her financially. The implication in her pleadings was that this was established fact. It was never
13 established. Until now it has never been specifically addressed by a mediator or the court. It was not a
14 basis for this court's award of attorney fees on the trial *de novo* segment. Now that it has finally been
15 the subject of a trial this court rejects the theory as a fabrication by Sheila often repeated by her
16 lawyers with no evidence, merely her assertion. The evidence at this trial establishes that during the
17 marriage Sheila intentionally did not participate in business matters. This court did not find
18 intransigence or bad faith regarding the trial *de novo*. The procedural issues were not frivolous. The
19 factual issue for which testimony was sought was the nature of Idalia's medical diagnosis and the
20 appropriateness of treatment by stimulant medication. This is a very contentious and controversial
21 subject in general and especially so in parental disagreements. In this instance Ken's concerns were
22 well taken.

23 The next court "event" is February 1, 2008 when Ken files a motion to enforce regarding the
24 provision for the children's passports. There had been previous difficulties with travel plans. The time
25 remaining before Ken's trip to Mexico with the children ran up against the notice requirement on the
26 family law motions calendar. Sheila could have provided the documents earlier and chose not to do so.

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5

A.E. 8
BRIEF 26

APPENDIX

1 The "court event history" as this decision identifies it consists of three court actions initiated by
2 Ken and two initiated by Sheila. All of the attorney fee awards favored Sheila and none of the issues
3 were frivolous or made in bad faith. This record does not support abuse of the court process. Ken's
4 intransigence as noted in the record was thoroughly reviewed by the Court of Appeals. It has been
5 previously resolved by court orders and is insufficient basis to deprive him of decision making.
6

7 The modification petitioner (Sheila) has not proved that that the agreed mechanism for
8 resolving parenting disputes by ADR is not working as intended .

9 The parenting plan requires that the purpose of the ADR mechanism is "to resolve
10 disagreements about carrying out this parenting plan, (EX 13 p.9). Both Ken and Sheila have invoked
11 the ADR process. Sheila testified that Ken's "disputes" are not really "disputes", that they are
12 "frivolous" (ECR doc. 145). Examples include Sheila's refusal to discuss alternatives to Engelberg for
13 Zach ("it is not a parenting plan issue") or Sheila's insistence that middle school applications (resolved
14 by Besk) are a "non-issue under the parenting plan". The court admits bafflement by this argument.
15 How can one parent deny that the other is in disagreement? Sheila is frustrated that Ken injects a
16 "laundry list" of disagreements into the dispute process she apparently believes that only certain
17 parenting disagreements are subject to the ADR provision. Ken is frustrated by the inability for him
18 and Sheila to "have a conversation", as demonstrated by her refusal to use e-mail, sending personal
19 FAXs to his work place or have joint discussions about Idalia with her counselor because she doesn't
20 want to talk to Ken directly (EX 23).

21 In fact some of the issues Ken submitted to ADR were rejected as not needing a mediator's
22 decision; some were resolved in Ken's favor, some were resolved in Sheila's favor; some were
23 identified as enforcement issues. This underscores that the histrionic exaggeration of Sheila's
24 assertions that Ken has "absolutely refused to participate in the mediation/arbitration process in any
25 way that allows it to work (ECR doc. 165) and that "he manufactures conflicts" are is not supported by
26 the evidence.

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6

APPENDIX

1 Sheila complains that Ken won't participate in ADR but also complains that he abuses ADR in
2 order to ruin her financially. She complains that Ken always involves lawyers in their disagreements
3 while not hesitating herself to involve her own lawyers (EX 36). The evidence does establish that
4 Sheila refuses to follow the resolutions and directives of the ADR provider: substituting her version of
5 Zach's middle school application after Besk picked Ken's or refusal to use email as directed by Slusher
6 (EX 261) are examples

7
8 When Sheila raised the issue of Engelberg counseling Zach Ken responded within a week (EX
9 35 - 39). Sheila requested ADR on the issue (EX 37). This issue was mediated promptly. Ken
10 prevailed. Issues about school applications, summer camps and tutoring were addressed. Sheila
11 prevailed on summer camp. A procedure for school applications was designed by Besk. Tutoring was
12 not decided.

13 In the spring of 2006 Sheila initiated ADR on Idalia continuing with Engelberg and payment of
14 her fees. There has been considerable controversy and finger pointing about the delays in this particular
15 ADR but a great deal of it was because of the lawyers, not the parties. Sheila's lawyer added two
16 school district employees as witnesses with minimal notice during the summer break rightly
17 necessitating a postponement. Sheila's lawyer then rescheduled that postponed ADR without
18 consulting with Ken's lawyer about the new date. Both lawyers had vacations. Ultimately this issue
19 and others were resolved in March of 2007 (EX 148). Ironically while a significant part of this trial is
20 about Sheila's assertions that Ken from the beginning set out to ruin her financially by overuse of
21 ADR, in the March 2007 decision Ken was chastised for not bringing issues to the mediator sooner.

22 In January 2006 the parties made an effort to have a short mediation with Besk without
23 involving their lawyers. Sheila's lawyer cancelled this ADR (EX49).

24 On May 17, 2007 was an ADR decision about extracurricular activities, school changes,
25 counseling and make-up time (EX 171, EX 168).

26 In August 2007 ADR addressed continuing with Engelberg for Idalia and obtaining an updated
evaluation for Zach.

1 In September of 2007 Ken wanted Besk to decide some remaining issues still pending from
2 March, 2007 on the documents without oral argument (EX 148) to expedite the resolution and save
3 money. Sheila denied there were any pending decisions and disqualified Besk for the future (EX 212).
4 There were in fact pending issues and on the most significant, (changing therapists without a complete
5 evaluation), Ken prevailed. This is another example of Sheila claiming there are no disputes when there
6 are in fact disputes. This has delayed ADR and made it more expensive.

7 In November 2008 Sheila refused ADR on the modification petition because it would have cost
8 each of them 50% rather than proportional shares. (EX 253, 254). Ken prevailed on other issues (EX
9 261 p.3).

10 The court is mindful of RCW 5.60.070. Since effective use of ADR is a central issue in this
11 proceeding counsel and the court agreed at an earlier pretrial hearing that there would be disclosure and
12 consideration of the pretrial mediation pursuant to subsection its (1) (a). EX 266 establishes that on
13 January 14, 2009 Ken made a CR 68 offer of judgment yielding sole health care decision making to
14 Sheila. This offer was rejected. Sheila insisted on this trial. But for the Court of Appeals requiring a
15 hearing on Sheila's modification petition, the absence of any real current issues, and Ken's offer of
16 judgment there would be CR 11 grounds for the court to order Sheila to pay Ken's attorney fees for this
17 proceeding.

18 This history does not establish that ADR is not working as intended. The statutory intent is that
19 parties will not address parenting disagreements in court but in a less formal decision making
20 environment, less constraining, and more thorough than motions calendars. Perhaps, with the benefit
21 of hindsight, a parenting coach might have been an alternative approach but there is no way of
22 concluding that it would have been less expensive or less stressful. Many issues of significant impact
23 on these children have been effectively addressed in ADR. Difficulties, delays and expenses have been
24 caused by both parties.
25
26

1 **The modification petitioner has not proved that the delays caused by the alleged**
2 **ineffectiveness of the ADR mechanism have an adverse impact on the children.**

3 **Zachary:** There is almost no evidence, certainly no persuasive evidence supporting this
4 assertion with respect to Zach. The basis of Sheila's claim appears to be that Ken objected to selecting
5 Engelberg as Zach's counselor. Ken prevailed on that issue. It took less than a month to resolve.
6 Ken's objections to and lack of confidence in Engelberg are reasonable. She had been unilaterally
7 selected in violation of the parenting plan. She was not covered by his insurance. Several professionals
8 including Engelberg and mediator Besk noted the importance of a provider that "both parents have
9 confidence in" (EX 247). Idalia herself had concerns about her brother being around her counseling
10 (EX 307). Ken's doubt that Zach needed counseling was also reasonable. Ken's parenting history on
11 the issue of counseling and ADHD medications for Zach is contrary to Sheila's assertions (EX 313).
12 Sheila wanted Zach in counseling because he asked for it and she wanted to be responsive. Ken
13 concluded that Zach most likely asked for it because he was bored waiting at his sister's sessions,
14 possibly envious. Zach's ensuing ten sessions suggests that Ken's view was the more realistic. EX
15 36 - 39 do not prove that Ken sabotages the children's treatment, but rather that Sheila becomes
16 quickly frustrated when Ken disagrees with her. This is an example of Sheila's difficulties with co-
17 parenting, not an example of a parenting plan that needs modification.

18 **Idalia:** Black's Law Dictionary, 4th ed. defines "emergency" as "A sudden unexpected
19 happening; an unforeseen occurrence or condition." There was no emergency justifying Sheila
20 violating the joint decision requirement for health care in unilaterally selecting Engelberg. Idalia's
21 treatment needs were specifically anticipated concerns in the parenting plan provision about therapy
22 (EX 13, sec. 3.14(n)). Counseling had been worked out by the parents for both children previously; so
23 had ADHD medication for Zach. Sheila testified on cross examination that both she and Ken knew
24 about the school conference about Idalia's behavior three weeks before but that neither of them came
25 with counselor names. This is inconsistent with her assertion that there was an "emergency". The
26 history of the counseling provided, mostly in the form of "play therapy", and the issues addressed

A.E. 5
BRIEF 24

A.E. 6
BRIEF 24

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9

APPENDIX

1 likewise is evidence that this was a routine situation, not an emergency. Engelberg in her deposition
2 describes Idalia as a child "withdrawn" and having "social difficulties", not as a child in crisis.
3 Sheila's unwillingness to delay the start of Idalia's counseling a week because Ken didn't ask in
4 writing as she told him to do was unreasonable. Notwithstanding Sheila's intentional violation of the
5 joint decision making requirement Ken agreed to Idalia staying with Engelberg for an interim period of
6 four weeks if some of his concerns could be addressed (EX 22). Ken's requested that Engelberg's
7 discussions about Idalia be with both parents jointly, which Sheila refused because she didn't want to
8 talk to him (EX 23).

9
10 Sheila complains that Ken does not administer the children's' ADHA medication on his
11 weekends as evidenced by teachers' reports of their behavior on Monday. There are several possible
12 reasons for Monday morning behavior, including the transition from the alternate parent. This claim
13 has not been proven. The assertion is additionally problematic because Sheila testified on cross
14 examination that she herself does not follow the medication regimen prescribed by Dr. Varley in 2008.
15 Sheila administers the medication as she perceives it is needed, situationally. Ken's assertion is
16 credible that he did not know that Sheila gave the school Idalia's medications to administer until she
17 testified to this at trial. This is another example of Sheila not following the parenting plan.

18 Co-parenting has been a heavy burden for Sheila. Her distress is notable throughout the history
19 of the dissolution and parenting plan. It is obvious in her testimony. The history of the marriage itself
20 is largely unknown to this court, however in the parenting evaluation Dr. Wieder observed issues with
21 Sheila letting go of control over the children (EX 167). The vocational assessment recommended that
22 Sheila receive another two years of once-weekly psychotherapy to help with the anticipated transition
23 (EX 309). Apparently Sheila did some therapy and clearly acknowledged the need for more in rebuttal
24 testimony. Sheila testified that the extreme stress she experiences could not but effect the children.
25 This is a Sheila problem not a parenting plan problem. There is very little evidence that the children are
26 adversely impacted by the difficulties with the ADR mechanism. Both had special learning needs
during the marriage. These needs were addressed by their parents in appropriate and effective ways.

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APPENDIX

A.E. 16
BRIEF 31

1 Although there is evidence that both parents may have exposed the children to more of their
2 disagreements than is optimal, and that each child continues to have some special needs the evidence
3 that they have been harmed by the joint decision making or the ADR process is not persuasive. These
4 children are very well cared for. They have a life rich with recreational activities, material and spiritual
5 support, excellent education, and loving, attentive parents. Furthermore the last disputes about joint
6 health care seems to have been two years ago.

7
8 **Is there a fundamental change in the ability of the parties to cooperate from that**
9 **anticipated in their agreed parenting plan sufficient to modify the plan pursuant to RCW**
10 **26.09.187?**

11 The court understands the decision on appeal as requiring a hearing on whether there is a
12 fundamental change in the ability of the parties to cooperate from that anticipated in their parenting
13 plan applying the provisions of RCW 26.09.187. Section 187 does not address modification or
14 adjustment of parenting plans. Section 187 does address the criteria for ordering ADR other than court
15 action, and for allocation of decision making. Reading both statutes together this court must first
16 determine whether there is a fundamental change in the parties ability to cooperate from that
17 anticipated in the agreed plan, and if so whether the proposed adjustments to ADR or allocation of
18 decision making are in the children's best interests.

19 Sheila testified that her twelve years of marriage to Ken justifies her anticipating that Ken
20 would refuse to adhere to a court ordered parenting plan. This is bad faith. It also means that one of the
21 parties, did not expect the other to cooperate. As noted above this has proven self-fulfilling. It colored
22 Sheila's attitude towards the parties situation after the parenting plan was entered, as illustrated by her
23 addressing FAXs and messages to Ken as "Dear Co-parent". As Dr. Wieder anticipated in his
24 parenting evaluation making the change from *de facto* decision maker to co-parenting was difficult for
25 Sheila. The issue is not whether one of the parents is exceptionally stressed. The issue is what is in the
26 children's best interests? Public policy recognizes the fundamental importance of the parent-child
relationship with each parent, RCW 26.09.002. All parts of a parenting plan including shared decision

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A.E. 1
BRIEF 20

A.E. 16
BRIEF 31

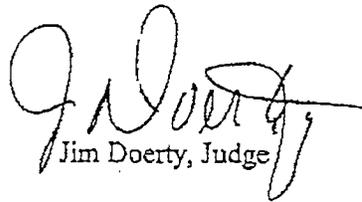
APPENDI'

1 making should be considered in terms of fostering the relationship with both parents. Sheila herself
2 recognizes this. She testified about her wish that Ken be an involved father and a participant in her
3 children's lives several times. She also wants Ken to parent her way. That such involvement is a
4 source of stress and frustration for her does not diminish the importance and value to the children of
5 shared decision making. The parenting plan anticipated that the parents share decision making about
6 health care and education. These children are well cared for in both regards. The outcomes are
7 successful in both regards. There have been many joint decisions other than the disputed ones. The
8 parenting plan's overall history and the evidence at this trial show a demonstrated ability and desire to
9 cooperate with one another, which is the only RCW 26.09.187 factor at play in this case. There is no
10 fundamental change in the ability to cooperate from what was anticipated. It has been difficult which
11 was anticipated. But for this trial on a petition filed four years ago the more recent parenting history
12 may even suggest a trend towards improvement.

13 The relief Sheila has petitioned for is not supported by the evidence. The modification to
14 impose some sort of time limit on decision making proposed by Ken does not seem workable given the
15 diversity of decisions that will need to be made. The court has no other modification ideas that would
16 be likely to work any better than the current parenting plan provisions, therefore

17 The Petition to Modify the Parenting Plan is herewith DENIED. Each party is responsible for
18 their own attorney fees.

19
20 DONE this 8th of June, 2009

21
22 
23 Jim Doerty, Judge
24
25
26