

Trial Court No. 07-3-00376-8
Court of Appeals No. 42758-3-II
Court of Appeals No. 43518-7-II

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

In re the Marriage of:

ALEXANDRA SWAKA, Petitioner/Appellee

and

JAMES SWAKA, Respondent/Appellant

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This litigation began when Ms. Swaka, an adult woman, decided to stay in Spain with her children against the wishes of her very controlling parents. It did not begin because of allegations of sexual abuse or medical negligence, and it did not begin because Mr. Swaka had decided, after four years, that he finally wanted to see his children again. The story Mr. Swaka is telling the Court is coming from an entirely different book and is unsupported by the record. As is demonstrated below, the record demonstrates very clearly that Mr. Swaka was an alcoholic who left the children in 2008 and moved to Maine, made no efforts to see them since then, and made very little efforts to even talk to them over the phone despite Ms. Swaka's compliance. It was only when Ms. Swaka's parents decided that they wanted to carry through their threats and force their daughter to return home that they approached Mr. Swaka, paid for him to begin this litigation, and attempted to get custody of the children for themselves. The only miracle in this situation is that these two children have found a home in Spain and are happy, healthy, and doing well. Judge Haberly's parenting plan was entered after a year of litigation solely in her courtroom, and it is absolutely the best way to protect these children from further harm. Ms. Swaka respectfully requests that this Court affirm

the Final Parenting Plan and award her attorney fees for having to respond to these two appeals.

2007 Divorce

Mr. Swaka and Ms. Swaka were married on November 21, 2002. CP 34. They separated on November 25, 2006, CP 34, and Ms. Swaka filed for divorce on March 16, 2007. Along with her Petition for Dissolution, Ms. Swaka filed her Proposed Parenting Plan, which included a limiting factor and restrictions against Mr. Swaka for alcohol abuse and limited his residential time to supervised visitation only. CP 982-89. Mr. Swaka was personally served with these materials on May 16, 2007, in the state of Washington. CP 990. He did not appear or respond to the petitioner, and on August 16, 2007, Ms. Swaka filed a Motion for Default. CP 1-4. She obtained an Order of Default the same day. CP 5-7. The Final Order of Child Support and the Final Parenting Plan was entered on the same day, and included the same .191 findings and restrictions against Mr. Swaka as well as the same visitation schedule (with the exception of adding in the grandparents as supervisors) as the proposed parenting plan served to Mr. Swaka. CP 25-32. At this time, their daughter, Adriana, was four years old, and their son, Samuel, was 15 months old. CP 38. Also at this time, Mr. Swaka had moved to Maine, at first because he wanted to try out for a soccer team, RP 192-93, but he returned to

Washington because he had an “immigration thing going on,” RP 193, and then left for good because Maine was a place that was “comfortable” for him, RP 294. He later stated that he went to Maine because “I have my problems that I need to really fix,” and that he thought it would be a “cool-down” and a way to get away from someone who had a “grudge” against him. RP 295. During his time back, she stayed with Ms. Swaka’s parents (“the Snellers”), and saw the children at their home a few days a week while Ms. Swaka was in class for about 1.5 hours. RP 344-46. Even though Mr. Swaka was welcome to continue residing with the Snellers, he chose to relocate to Maine. RP 295-96. He did not see the children again for over four years. CP 82. The last time Samuel saw Mr. Swaka, he was a year and a half old. RP 351. The last time Adriana saw Mr. Swaka, she was four. RP 352. Ms. Swaka testified that Samuel never formed a bond with Mr. Swaka because he was so young. RP 352.

On June 16, 2009, Ms. Swaka emailed Mr. Swaka to let him know that she was applying to study abroad and requested that he complete an insurance form so the kids would be covered overseas. CP 152. Ms. Swaka was a student with UW in the Cadiz study abroad program. CP 272-73. On June 28, Ms. Swaka thanked him for sending the paperwork. CP 152. On June 29, 2009, Mr. Swaka wished Ms. Swaka “good luck.” CP 152. On November 27, 2009, Mr. Swaka asked Ms. Swaka for her

email, which she provided on December 4, 2009, stating "it's the same." CP 154. On December 31, Mr. Swaka sent a message stating that he did not send Ms. Swaka or the kids anything for Christmas. CP 154. On January 15, 2010, Ms. Swaka messages Mr. Swaka with an update on the children, their activities, and gives him a Skype phone number to us. CP 154. Mr. Swaka's response is "I am glad you are doing that. I might end up learning Spanish from all of you. I hope things are going wel[l] over there and I will try to call tomorrow." CP 154.

Ms. Swaka met Mr. Juan Gonzalez on October 4, 2009, and they began living together in June of 2010. CP 295. He has been an attorney for over 15 years, CP 297, and has two children almost the same age as Adriana and Samuel, of whom he has shared custody with his ex-wife and a good relationship with her. CP 276.

On April 15, 2011, Ms. Swaka filed a Notice of Intended Relocation of Children to Spain; her study abroad program was ending, and she had decided to remain in Spain permanently. CP 53-58, RP 342. The court granted her an Ex Parte Order Waiving Notice Requirements on May 10, 2011. CP 61-64.

During the same time period, Ms. Swaka's father, Mr. Jeffrey Sneller began sending threatening messages to Ms. Swaka that he would take action against her if she did not return the children to the U.S.. CP

156-163. On January 14, 2010, Mr. Sneller sent an email to Ms. Swaka's fiancé:

I made it clear in my previous e-mail that it is important that Adriana and Sammy go to an international school, and that the school they attended last semester is not acceptable. . . . [T]he nearest international school is in Sotogrande, and I want them enrolled there. Under no circumstances are they to go back to the school they attended last semester. All of my children attended the best schools in the world and my grandchildren will have the same opportunity or they are to return to the U.S., with Sherry, immediately!!!

As matters how stand Alex has taken the children outside the U.S. for an extended period of time, without written approval from their father or the Court. . . . I am sure you are aware that U.S. courts are stringent in their enforcement of child custody agreements and that violation of such order is a crime under U.S. law.

CP 156. The same day, he sent an email to Ms. Swaka:

I made it clear to you that the school the kids attended last semester is not acceptable, and if there is not a better school available in Cadiz then they are to either come back to ~~W~~ ainbridge with mom or be enrolled in an international school in Malaga. I am now told you are sending them back to the same ghetto school. Frankly, I don't know what is the matter with you, but you are really pissing me off, and if I have to pay send James to Cadiz or hire a lawyer I assure you, I will do that, and a lot more. You legally have no right to have the children out of the country without court approval, even on a temporary basis. You hear me!!! You are wrecking your children's lives. They are both miserable and I want them out of there, NOW!

CP 159. On May 25, 2011, shortly before this litigation began, Mr. Sneller sent the following email:

Alex, I am going to strongly encourage you to retain a U.S. attorney. If you think you can hide out in Spain, you are wrong. James' attorney has been in touch with the U.S. State Department, the Department of Immigration in Spain, and is filing child kidnapping charges against you. Both your visa and your passport will be revoked, and Juan will be in serious trouble as an accomplice. A warrant will be issued for your arrest, and under the Hague Convention Spanish authorities are compelled to enforce the warrant. As and fyi, a woman who ran off with her children to Mexico last month, under the same set of circumstances, was picked up by Mexican authorities, extradited to Texas, lost custody of her children, and was sentenced to 16 years in prison. Just because you are the primary custodial parent does not mean you can violate an order that you signed and think there will not be consequences. . . . You are on a slippery slope and after tomorrow there will be no turning back. I suggest you get in touch with this lawyer today, and tell him you would like to work things out amicably. If you don't, you and Juan, and the kids, will pay a heavy price.

CP 161. Although very, very threatening, none of these emails raised any allegations about Samuel's skin or inappropriate sexual contact with Adriana. It came out during Ms. Sneller's testimony that the litigation began when she and Mr. Sneller approached Mr. Swaka – not because of Mr. Swaka. RP 59. Ms. Sneller also admitted that she does not speak with two of her three children. RP 67. Mr. Sneller described how he

contacted Mr. Swaka after returning from Spain and helped get litigation started. RP 105-06.

Objection to Relocation

Shortly after they returned from Spain and contacted Mr. Swaka, Mr. Swaka objected to the relocation on June 17, 2011, claiming that the children's needs would best be met by residing in Washington with their grandparents. CP 168. Mr. Swaka noted that he is not in a position to relocate or travel. CP 168. His proposed parenting plan gave custody of the children to "the respondent, OR a third party custodian of the respondent's choosing i.e., the Maternal Grandparents (Jeffrey and Sherry Sneller)" and gave each parent supervised visitation in Kitsap County only, to be arranged with and supervised by the Snellers. CP 173-75. Mr. Swaka also moved for reconsideration of the Ex Parte Order Waiving Notice Requirements. CP 65. He admitted that Ms. Swaka had been in Spain since August of 2009. CP 74. That same day, he filed a Motion for Contempt, requesting an order that Ms. Swaka be required to return the children to Washington immediately and that a GAL be appointed. CP 76-77. As part of his motion, Mr. Swaka acknowledged that "Alexandra has repeatedly told me since the time of our divorce that my communication with the children, or visitation with them, is unhealthy and confusing for them because I am not a consistent and regular part of their

lives.” RP 81. He further acknowledged that the last time he had seen the children was in the “late fall of 2007” for six months. CP 81, 85. As part of his motion, he did not ask for custody of the kids; rather, he asked that custody go to the Snellers (Ms. Swaka’s parents). CP 87. Specifically, he stated “Because I currently reside in Maine, the children’s best interests would be served by residing with their maternal grandparents, Jeffrey and Sherry Sneller, in Bainbridge Island, Washington, at least until such time as a guardian or the Court determines that the children may safely reside again with Alexandra.” CP 87.

As part of his motion, Mr. Swaka claimed that Samuel has dermatitis that has grown “significantly worse” since he moved to Spain. CP 90. He claimed that “[h]is wrists and ankles are scar[r]ed and his legs are now covered in puss-filled whelps [sic].” CP 90. He alleged that Ms. Swaka “continues to resist any sort of legitimate medical treatment.” CP 90. He also claimed that Adriana had a scar on her face from a time she had a ringworm infection, CP 91, although the photo he provided showed no such scar, CP 92-93.

In supporting declarations, Ms. Swaka’s mother, Sherry, claimed that Adriana said she was forced to expose herself to Ms. Swaka’s fiancé so he could bathe her. CP 98. She also claimed that Juan’s “older son” pulled Adriana’s pants down in front of a bunch of people. CP 98. She

termed these incidents as “sexual abuse.” CP 98. Ms. Swaka’s parents, Jeffrey and Sherry Sneller, and her brother, Adam Sneller, all wrote declarations making what were almost verbatim word-for-word allegations in almost identical declarations. CP 99-114.

In response, Ms. Swaka described that this litigation began because she refused to return to the United States at her parents’ command. CP 145. She described how her mother had ambushed her that week, grabbing Samuel and trying to take pictures of him, alarming the kids and requiring police attention. CP 146. She noted that Mr. Swaka was not even requesting custody of the kids – he wanted it to go to her parents. CP 146.

Regarding his skin, Ms. Swaka responded and provided lengthy medical records showing several doctor appointments for Samuel’s skin as well as progress reports. CP 131-144, 1066-89. The medical records Ms. Swaka provided showed frequent and continuous doctor visits from 2006-2011 both in Spain and in Washington. 218-40. She described that there is no “cure” for Samuel’s skin condition, so they do their best to work with the doctor to control it. CP 249. She stated it is a hereditary condition that her father and brother also have, and that it tends to fade with age. CP 249. She also described all of the things they do to manage

his condition, including special food, special detergents, special shower water filters, creams, chemical free soaps, etc. CP 249-50.

Regarding the sexual contact, Ms. Swaka described how the kids returned from the beach and jumped into a bath together, that no one was uncomfortable and there was nothing sexual about it. CP 147. Ms. Swaka provided many pictures of herself, Mr. Gonzalez, and the kids in Spain. CP 253-268. They showed Samuel's skin to be clear, Adriana's face to be scar-free, and that everyone appears happy and healthy. CP 253-68, 1101-1116.

Mr. Swaka admitted he had no independent knowledge of any of the allegations he was making against Ms. Swaka. RP 234. "Well, that's all I'm just hearing, because I really don't – no real idea of what's going on, except I'm just hearing through the grandparents and the children. That's the only way I get my information." RP 234.

On June 24, 2011, after hearing the allegations regarding Samuel's skin and the sexual contact, Judge Haberly ordered that "there is a strong likelihood that the relocation will be allowed," retained Ms. Swaka as the children's primary caretaker, and specifically stated that "Father's request for custody of children to go to third party or maternal grandparents is denied. Grandparents have no standing under 26.09/RCW 26.10.

Allegations of abuse by maternal grandparents made in hindsight. All

parties knew MS. Swaka was in Spain with children since 2009.” CP 308-09. The court further ordered that the “Father’s request for a Guardian ad Litem based on allegations is denied without prejudice.” CP 309. The court’s oral decision, CP 517-21, makes some more specific findings, including the following:

I think first to put this in context, we have a mother with two young children. She has been the primary parent since birth. We have a parenting plan that Mr. Swaka has restrictions on his visitation such that they are supervised, and the court entered a finding as to alcohol abuse and some other issues in the parenting plan. It was a default parenting plan, but the original parenting plan also had restrictions in it and he was on notice that Ms. Swaka was seeking a parenting plan that had restrictions on his time with the children

But, in any event, Ms. Swaka is not in Spain secretly. . . . We have a father before the court who has supervised visitation, has had no contact with the children by visitation . . . since '07, '08, and so that’s the context we are in here. [T]here father is before the court with a supervised visitation only parenting plan. It’s been argued there’s nothing he could do to change that. The parenting plan itself provides that visitation can be unsupervised if agreed to by the parties, and that might have happened if Mr. Swaka remained in the children’s lives, but that did not happen”

The Snellers have made a number of allegations, and Ms. Swaka has responded to those allegations. The allegations were made in hindsight it’s very clear. There has been other contact in Spain, but none of these allegations of sex abuse and no medical care were raised earlier, and I have

strings and strings and strings of e-mail that show that is true. This all started when Ms. Swaka decided she wanted to remain in Spain and her parents wanted her to return to the State of Washington with the children.

Mr. Swaka is seeking placement with the maternal grandparents . . . but the court is not going to allow that. . . . I find there are circumstances that warrant issuance of a temporary order allowing Ms. Swaka to stay in Spain with the children. The children have been there for some time. That's been their residence. Nobody has objected until these things started, this litigation started. The mother has been the primary parent all of their life, and it would be detrimental to the children to do a temporary order that would remove them from their mother's care.

CP 369-70. Regarding the request for appointment of a GAL, the court denied the request stating "No, unless you can figure out some way to do it in Spain." CP 520. Mr. Swaka did not seek reconsideration or appeal of this decision.

2011 Modification

Just a couple of months later, on September 9, 2011, Mr. Swaka filed a Petition for major/minor modification, making the same allegations regarding Samuel's skin and the sexual contact with no new allegations and no new evidence. CP 313. He alleged that the children's environment was detrimental to them, CP 315, and that he had demonstrated a substantial change in circumstances regarding the 26.09.191 finding against him for alcohol abuse. CP 316. He also used the following bases

for the modification: that Ms. Swaka had moved to Spain, that he had moved to Maine, that Ms. Swaka is not addressing the kids' medical needs, that Ms. Swaka is not addressing the sexual contact, that Mr. Swaka has been sober for two years, that Mr. Swaka has a safe home, and that Mr. Swaka has not had contact with the children since 2008. CP 317. Mr. Swaka asked that the court adopt his proposed parenting plan. CP 317. He did not file a new parenting plan with the petition; the only parenting plan he proposed was one that gave custody to the Snellers. RP 10/7/11 8-9.

As part of his motion for adequate cause, he raised the same allegations raised at the reconsideration hearing on June 24 regarding Samuel's skin and sexual contact, although he admitted he had no personal knowledge of those events. CP 345. He also alleged that he had not received all Skype calls as agreed with Ms. Swaka. CP 348. He asked for authority to record calls, and provided recordings to the court that he had already made. CP 349. Lastly, he requested the appointment of a GAL to interview the children in Kitsap County, stating that Ms. Swaka should fly the children there for "a visit." CP 350. He also provided a self-reported alcohol assessment with no collateral contacts to Ms. Swaka or anyone other than Mr. Swaka. CP 341. He asserted that his criminal record consisted of "a DUI in California . . . and . . . another driving offense in

Maine in early 2010.” CP 351. However, his own alcohol assessment indicated he had received two DUIs. CP 341.

In response, Ms. Swaka brought to the court’s attention that since the last hearing on June 24, 2011, and despite the court’s order and finding that it would be detrimental to the kids to remove them from their home in Spain, Mr. Swaka and the Snellers tried to have Ms. Swaka and the kids deported from Spain. CP 371, 385-396, RP 348. They claimed Ms. Swaka had listed Juan Gonzalez as the kids’ father, but the paperwork simply identified him as their “sponsor,” for they needed a European sponsor in order to get a resident visa. RP 349. They did not inform the Spanish authorities of the U.S. order, resulting in the revocation of the visas for Ms. Swaka and the kids. CP 371. As soon as the U.S. order was translated, however, the visas were reinstated and are good for another five years. CP 371, 398-401. Ms. Sneller later explained that she started the deportation process in Spain after seeing what Ms. Swaka had filed in court regarding the relocation matter. RP 63.

Ms. Swaka also pointed out that no new parenting plan had been filed, so Mr. Swaka was, yet again, requesting that custody go to the Snellers. CP 365. She also noted that the allegations and requests are almost identical to the requests made of the court on June 24, 2011. CP

368-477. She provided updated medical records showing that Samuel was doing fine and there were no ongoing concerns. CP 478-82.

Regarding Mr. Swaka's claimed sobriety, Ms. Swaka provided evidence to the court that Mr. Swaka was not honest about his criminal record, which, in fact, included several other drug, alcohol, and assault-related charges. CP 373-75, 438-454. There was one limited and sustained objection to a "police beat report" provided, but not to any of the other evidence provided. RP 14 10/7/11.

Regarding the Skype calls, she provided actual Skype logs showing that Mr. Swaka had received calls that he claimed he missed. CP 376-379, 456-66.

Regarding the request for a GAL, Ms. Swaka pointed out that neither party resided in Washington, so it made no sense to have a GAL investigation in Washington. Further, it was the court's specific order that the motion could be renewed if there was a way to do it in Spain. CP 365-375.

Regarding the other bases for changing the parenting plan, including the fact both parties relocated, Ms. Swaka pointed out they could be addressed in the relocation matter. CP 365-75. Lastly, she requested attorney fees for a meritless motion. CP 381, 476-77.

On October 7, 2011, Judge Haberly denied the motion in light of the modification already occurring pursuant to the relocation. CP 523.

Adequate cause is a statutory requirement, and it would be an abuse of discretion of this court not to follow that statute and make a finding one way or the other on adequate cause, and I will find there is not adequate cause for this petition for modification. It's very bothersome to the court that it's styled as a minor modification and a major modification, but there's no proposed parenting plan, but given all the information I received in the earlier hearings and what's been supplied here today, there's no question in my mind there's not adequate cause for a major modification. There is already going to be a minor modification in the relocation proceeding, so that's really not at issue.

RP 21 10/7/11. Regarding attorney fees, Judge Haberly stated:

And I am going to order attorney fees in this case. I don't think this motion for modification was brought on grounds that present issues of merit for the court to look at, and so I will grant an attorney fees award against Mr. Swaka.

RP 22 10/7/11. The parties entered an Agreed Judgment on the amount of attorney fees to be awarded on October 28, 2011. CP 570-71. Mr. Swaka thereafter appealed this decision.

While these hearings were pending, Ms. Swaka again offered Mr. Swaka time with the children in Spain. She told him he could come visit in September of 2011, but he did not, so she suggested December of 2011, and he told her "towards the end of December" that he was not coming.

RP 399. He later admitted that he had that opportunity, but he went to Washington instead and spent Christmas with the Snellers. RP 302-04.

Motion to Present Testimony via Skype

On December 20, 2011, Ms. Swaka filed a motion to present witness testimony by Skype, citing the heavy burden of international travel not only financially, but also because it would remove the children from school, prevent Mr. Gonzalez from caring for his own children while their mother underwent cancer treatment, and allow greater access to the children's doctors and teachers in Spain. CP 624-26. Lastly, Ms. Swaka noted the threats made against her and Mr. Gonzalez by her family, which raised specific concerns about what would happen if she travelled to the U.S. CP 624-26. In response, Mr. Swaka suggested that the children could stay with Mr. Gonzalez while Ms. Swaka traveled to Washington, even though he had recently made allegations of inappropriate sexual contact against Mr. Gonzalez. CP 635-44. On January 6, 2012, Judge Haberly signed an order allowing both parties to present witness testimony via Skype. CP 656-57.

Trial

At trial, Mr. Swaka renewed his request for a GAL, stating that the Snellers would pay for a GAL to travel to Spain. CP 687, RP 56. This was the first time he had made this offer, even though Judge Haberly had

stated the previous summer that the request for a GAL could be renewed if there was some way to do it in Spain. At the same time, he conceded that the children should reside with Ms. Swaka in Spain on a primary basis. CP 689-90, RP 55. In what was the first time he proposed a parenting plan that did not give primary custody to the Snellers, he proposed that he have limited time in Spain with the children. CP 688-97. He agreed to continuing alcohol restrictions against him. CP 688-97. He did not request any restrictions against Ms. Swaka, Mr. Juan Gonzalez (her fiancé), or Mr. Gonzalez's children. CP 688-97.

Trial lasted for three days, during which Judge Haberly heard extensive testimony from the parties, the Snellers, the children's teachers, family members in Spain, and Mr. Swaka's friends.

It was uncontested that Mr. Swaka was an alcoholic and had extensive problems with alcohol. Mr. Swaka admitted that he had a problem with alcohol, stating "this is something I regret, and recognize there were times I had too much to drink, which affected my family, health and responsibilities" CP 356. Mr. Adam Sneller, Ms. Swaka's brother, testified that "James had a drinking problem. It was a recurring problem. It was something that I didn't know how to deal with. . . . It's just that when he does drink, he tends to drink to excess. This isn't something that you would see in the house. It was like when he

would go out with friends and then he would wind up in trouble and then, you know, there would be an incident and we would all have to deal with it.” RP 153. Ms. Swaka’s sister, Kelly Heinrichs, also testified that Mr. Swaka had problems with alcohol. RP 428-30. Mr. Jeffrey Sneller admitted that Mr. Swaka “drank a lot.” RP 68. He also stated that “I think James did have probably too many on occasion. I think, in fact, he did abuse alcohol.” RP 93. Ms. Sherry Sneller described times when Ms. Swaka brought the kids over to stay with her during the marriage because Mr. Swaka was “they had an argument and . . . he was drinking and she was coming over there.” RP 70. Evidence was even presented that on June 29, 2009, Ms. Swaka sent Mr. Swaka a message saying “Please don’t call me when you’ve been drinking. This is the second time in the last week and it’s not productive to talk to you this way.” CP 153. Mr. Swaka’s response was “Okay thanks.” CP 153.

Much of the testimony at trial focused on the extent and nature of Mr. Swaka’s contact with the children since he moved to Maine in 2008. It was uncontested that he had not seen the children face-to-face since the middle of 2008. Mr. Swaka admitted that he had not had in-person contact with the kids since the middle of 2008. RP 282. This was supported by Mr. Sneller, RP 111, and Ms. Sneller, RP 76-77. His explanation was that “most of it has to do with me because, I mean, at the

time, I just – it seems like I had been doing things that are not really going well to get the relationship with my children. . . . And Alex had the concerns. She applied her concerns in what was going on in my life – And I found out it was – happens Alex was right. So I will take responsibility for that part.” RP 282. One of Mr. Swaka’s own witnesses, Daniel Gallagher, testified that he has never gone more than a “couple of days” without seeing his children. RP 21. This lack of contact was not unusual for Mr. Swaka, as he admitted that his contact with his 16-year old son, Jimmy, from a different relationship is also limited to phone calls and that he does not travel out to California to see him.” RP 182.

Substantial evidence was also presented that Mr. Swaka had several opportunities to come visit the children, but chose not to do so. Mr. Swaka admitted that Ms. Swaka offered him an opportunity to come to Spain in December of 2011, but he went to Washington instead and spent Christmas with the Snellers. RP 302-04. He also admitted that he has a valid passport. RP 302. Ms. Swaka testified that the distance, flight times, and flight costs are equivalent between flying from Maine to Spain and flying from Maine to Washington. RP. 405 Mr. Swaka even testified that he flew to Washington, but Skyped with the kids in Spain. RP 273. Ms. Sneller admitted that she had paid for Mr. Swaka to come to Washington four times since the case began. She also admitted to paying

his attorney fees and car loan/expenses. RP 87-88. Mr. Swaka's argument was that he did not visit because some of his calls and emails were not returned. RP 290. He stated that Ms. Swaka was unhappy when he returned to Washington in 2007 to see the kids without notice, although he admitted that she did let him see the kids. RP 290-91, 294.

Ms. Swaka provided extensive evidence that she made sure Mr. Swaka had their contact information so he could reach the children. For example, Ms. Swaka provided emails where she gives Mr. Swaka her phone information and describes good times to call. CP 941, RP 361. Despite this evidence, Mr. Swaka claimed she refused to give him her contact information, RP 286, but did not provide any evidence of her doing so.

Ms. Swaka provided extensive evidence that it was Mr. Swaka who often missed calls or called at inappropriate times (such as late at night when the children were sleeping). RP 358-59. For example, Ms. Swaka described six-month gaps with no communication whatsoever from MR. Swaka. RP 460. Mr. Swaka admitted as much, stating that sometimes as many as three-six months would pass before he contacted Ms. Swaka or the kids again. RP 305-07. His explanation was that he did not want to "be bugging people." RP 305-07. Mr. Swaka admitted that he has been in constant contact with the Snellers, who were, up until

litigation began, close to Ms. Swaka and knew where she and the kids were as well as how to get in touch with her. RP 291. Ms. Swaka also provided evidence of times when she and the children tried to call Mr. Swaka, but could not reach him. CP 941.

Even Mr. Swaka admitted that Ms. Swaka facilitated contact with the children. He admitted that she does does return his calls. RP 318. He admitted that she encourages the children to speak during Skype calls, telling them to tell him about school, the things they are doing, etc. RP 323.

Mr. Swaka was only able to present limited evidence of his contact with the children or efforts to contact them. For example, he described two days in 2009 when he emailed back-and-forth with Adriana, but nothing since. RP 313. In fact, he admitted that he did not provide evidence where he should have been able to provide it. For example, Mr. Swaka admitted that he had not provided emails where he requested Adriana's email address or complained that she had not responded. RP 314. He also vaguely claimed that Ms. Swaka had accessed his email account and deleted his email, but could not recall any specifics, demonstrate why he thought it had been her to access his account, give any indication as to when or why she had accessed his account, describe

what was deleted, or even recall if he ever raised the issue with her. RP 332.

Evidence was also presented that Mr. Swaka's decision not to have a relationship with the children had harmed them – something even Mr. Swaka admitted. RP 308. Mr. Swaka admitted that he is a stranger to the children. Mr. Swaka admitted that he didn't know he would interact with the kids "at this point" because "I would be a stranger to them, basically, at this point, unless I left to go there and see how things are and see if they are actually – accept me for, you know, as their father" RP 285.

Evidence was presented, even by Mr. Swaka, that it would be a good idea for visitation to be supervised because he is a stranger to the children and it would be overwhelming for them to suddenly have visitation with him. RP 312. In fact, Mr. Swaka explained that he wanted custody to go to the Snellers because the kids knew them, and it would make it more comfortable for the children to have someone there they knew. RP 312. He explained that to just suddenly drop the kids off with him would be "overwhelming for them, as far as I know." RP 312. When asked why he did not do anything between 2008 and 2011 to address the parenting plan he stated it was because he felt the children were safe. "The children were already living here on Bainbridge, and I know the grandparents were here. I feel that the security is not

jeopardized at all, for whatsoever reason. I had trusted that because I lived with the grandparents for a while, and so I knew that really nothing wrong would happen. If there's anything, that would let me know." RP 199.

And when asked why he did not do more to address his stated frustrations at the level of contact he received, he said "Well, I mean, a lot of it is my fault. I knew that I should have done a lot more than what I was doing."

RP 200.

Testimony regarding the children's health, happiness, and safety

The court heard evidence about the children's welfare in Spain.

Ms. Swaka testified that she and Juan Gonzalez went through a civil union, but had not yet had their big planned wedding because the litigation had sapped their finances. RP 362. Ms. Sneller admitted that she

described Juan Gonzalez, Ms. Swaka's fiancé, as a "mother hen," because "he did the house cleaning, he did the cooking, he did the laundry. He pretty much, you know, took care of everything." Ms. Swaka stated that

Juan Gonzalez's children are the same ages as her children: one is one month younger than Samuel and the other is five months older than Adriana. RP 363.

Samuel's teacher described him as "very happy child, very affectionate, very patient and intelligent." RP 253. She described how Ms. Swaka takes him to school every day. RP 253. And that she is an

“excellent mother. She’s very affectionate; she’s very sweet. She’s always ready to participate in activities. She’s worried about Samuel because of the problem . . . Samuel has a type of dermatitis . . .” RP 254-55. She described how they keep a tube of cream for him in the classroom in case his skin begins to itch. RP 254. She had no concerns about him or his home life, saying “His behavior that I’m seeing as being – he’s a happy child. He trusts people. I have seen this reflected also in his drawings that he does of his family. They seem happy. He uses bright colors. And he seems to be a loving and confident young man and he feels sure of himself. And that’s what I’m seeing in his family life.” RP 255. Adriana’s teacher testified that she is “Very nice, very industrious, very polite, and very happy.” RP 276. She described Ms. Swaka as “a good mother. She’s taught [Adriana] Spanish very well and she speaks English very well.” RP 277. She testified that Adriana never appeared neglected, stating “She always comes to school with her hair properly combed. She wears a uniform. She has a very neat and tidy appearance. And she seems very happy at school.” RP 277. She also described Adriana as having a lot of friends and a “very sociable girl” who “helps out in English a lot. And she likes to play.” RP 277.

Ms. Swaka testified that the kids have access to great medical care in Spain. RP 368. Ms. Swaka described three times when they took

Samuel to the emergency room for his skin due to a flair up over the weekend when the offices of his regular doctor were closed. RP 401.

Exhibit 117. Ms. Swaka addressed the concerns regarding nude contact between the children when they were little, including one time over two years ago when they all jumped into a bubble bath together, and one time when Adriana touched Juan's son briefly out of curiosity. RP 454-55.

She described how she had talked to the kids about being nude/private parts, and there had not been any other issues. RP 454-55. Ms. Swaka also described a cultural difference between the U.S. and Spain regarding nudity, stating that people are nude more often there in general. RP 462-63.

Parenting Plan

Ms. Swaka testified that she felt an hour and a half per day of visitation "gives the kids a chance to get to know [him] slowly, it gives us time to go to a movie, we can go have a picnic on the beach. And I also said, it's a minimum. If the visit goes really well, then there's no problem of taking it forward. And that's a great sign if the visit goes well. But it also protects the kids, that if the visit isn't going well and if they're super uncomfortable and want to get out of there, that after an hour and a half, they can do so." RP 397-98.

The court's oral decision is located at CP 1005-1034 and contains an extensive review of the record. The Final Parenting Plan was signed on May 15, 2012, and gives Mr. Swaka visitation with the children for 1.5 hours per day for six days every three months, to be supervised by the mother or another mutually agreed upon person. CP 709-10. The parenting plan includes findings against Mr. Swaka for willful abandonment and the absence/substantial impairment of ties between the father and children. CP 709. The findings made by the court and entered on May 15, 2012, consisted of fifteen pages of very specific findings. CP 718-732.

ARGUMENT

Our Supreme Court has made it clear that trial courts are given broad discretion in determining the residential placement of a child, and that such determinations should not be disturbed on appeal because the appellate courts are unable to view the parties, evidence, and testimony in the same light as the trial court. *Kelso v. Kelso*, 75 Wn.2d 24, 27, 448 P.2d 499 (1968) (“We will not substitute our judgment for that of the trial court”); *Baker v. Baker*, 80 Wn.2d 736, 743, 498 P.2d 315 (1972) (“This court is most reluctant to substitute its evaluation and judgment for that of the trial judge”). See also *In re Marriage of Rich*, 80 Wn. App. 252, 258, 907 P.2d 1234 (1996) (“Trial courts are given broad discretion in matters

concerning children”); *In re Marriage of Luckey*, 73 Wn. App. 201, 208, 868 P.2d 189 (1994); *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 327, 669 P.2d 886 (1983). Nor is it appropriate for the appellate courts to weigh evidence or make credibility determinations. *In re Marriage of Rich*, 80 Wn. App. at 259 (“Our role is not to substitute our judgment for that of the trial court or to weigh the evidence or credibility of witnesses.”).

This discretion is not due to mere respect for judicial colleagues or out of a desire for judicial economy; it is because the trial courts sit in an entirely different position than the appellate courts. “Trial courts are given this broad discretion because they have the great advantage of personally observing the parties.” *In re Marriage of Luckey*, 73 Wn. App. at 208. This is especially true in matters regarding children, as “a trial court enjoys the great advantage of personally observing the parties, [making us] reluctant to disturb a custody disposition.” *In re Marriage of Timmons*, 94 Wn.2d 594, 600, 617 P.2d 1032 (1980). The custody determinations of a trial court must be given great deference because:

so many of the factors to be considered can be more accurately evaluated by the trial judge, who has the distinct advantage of seeing and hearing witnesses, and is in a better position to determine their credibility, than the members of the appellate court, who have access only to the printed record on appeal, and to the briefs and argument of counsel.

Chatwood v. Chatwood, 44 Wn.2d 233, 240, 266 P.2d 782 (1954). In *Chatwood*, for example, our Supreme Court went so far as to say it would have made a different decision than the trial court. *Id.* But, because the evidence had been presented to the trial court and, after weighing that evidence, the trial court had made a decision, this Court did not want to disturb that custody determination. *Id.*

Therefore, the trial court's decision is only to be disturbed if it constitutes an abuse of discretion. "Because the complexities inherent in child custody matters defy precise definition, let alone categorically sound solutions . . . a trial judge's findings and conclusions will not be reversed unless the evidence clearly preponderates against them." *Richards v. Richards*, 5 Wn. App. 609, 613, 489 P.2d 928 (1971). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A decision is manifestly unreasonable if it "is outside the range of acceptable choices, given the facts and the applicable legal standard . . ." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). A decision is based on untenable grounds if "the factual findings are unsupported by the record" or if "it is based on an

incorrect standard or the facts do not meet the requirements of the correct standard.” *Id.*

In this case, Judge Haberly knew this case well after having three hearings and a three-day trial with these parties. Her oral decision reflects a very careful and very thorough review of the evidence presented, to the extent that she even referenced evidence directly in support of the findings she made. Substantial evidence was provided that supports the parenting plan entered by the court, and as such, the parenting plan should be affirmed.

A. There is no legal support for a lesser “adequate cause” or lower threshold for modification of a default order; but even if there is, Mr. Swaka did not satisfy his burden.

Mr. Swaka’s petition for modification was a disguised appeal of the June 24, 2011, decision in the relocation matter. This is demonstrated by the fact that he made no new allegations; he simply recited the same allegations and evidence already raised during that hearing (a hearing in a matter about modifying the parenting plan pursuant to a relocation) and asked for the same relief — that custody go to the Snellers, that the Court appoint a GAL. For this and the following reasons, it was appropriate to deny the motion for adequate cause and dismiss the petition.

First, RCW 26.09.260 is explicit: be it a major or minor modification, a “court shall not modify a prior custody decree or parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan . . . that a substantial change of circumstances has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interests of the child and is necessary to serve the best interests of the child.” Acting after *In re Rankin* was drafted, upon which Mr. Swaka relies primarily as the basis for his argument, the legislature made it clear that adequate cause is required. There is no exception in the statute for default orders. Further, it is an abuse of discretion to fail to follow this statute’s criteria. *In re Custody of Halls*, 126 Wn. App. 599, 607, 109 P.3d 15 (2005).

In fact, the only difference in the adequate cause process for default orders/agreed orders as opposed to orders entered after trial is that the evidence examined by the court may include events that occurred prior to entry of the order. *In re Marriage of Zigler*, 154 Wn. App. 803, 811, 226 P.3d 202 (2010). *Rankin* merely refers to the evidence that is required, not to the standard. It is not appropriate for a party to ignore a court proceeding and then expect to return to court for a freebie after several years have passed. Under Mr. Swaka’s theory, a party could follow a default parenting plan for years and then decide on a whim to

have it change without any showing of a change in circumstances justifying a change to the parenting plan.

Further, RCW 26.09.260(7) demonstrates that the legislature knew how to decide whether adequate cause is required or not, as they made no such requirement when a parent is subject to a finding under RCW 26.09.191. Adequate cause is not required to make a finding against a parent, so long as there is evidence sufficient to support that finding.

Nevertheless, even if default orders should have a lesser burden, that burden was not satisfied here. Mr. Swaka approached the court for modification of a parenting plan already subject to a relocation action; by necessity, then, the relocation action is already set to modify the parenting plan as necessary to address the fact Mr. Swaka lives in Maine and the fact Ms. Swaka lives in Spain, which easily include adjustments to the contact provisions and transportation provisions as needed to make the parenting plan work. That leaves Mr. Swaka's bases as follows: 1) that he stopped drinking, 2) that he had no contact since 2008, 3) Samuel's skin, and 4) allegations of sexual contact with Adriana. None of these is a basis to modify the parenting plan beyond what occurred as part of the relocation. First, Mr. Swaka misled the court about his drinking and criminal record. The evidence provided by Ms. Swaka showed that he continued to have problems with alcohol/drug-related criminal behavior well after the

divorce and up until 2011. Mr. Swaka's own alcohol assessment was self-reported and the number of DUIs listed did not even match his own declaration. There was no basis presented to lift his restrictions, and the fact that he had not seen the children since 2008 was a basis to actually add a restriction. Second, as stated above, the fact Mr. Swaka had no contact since 2008 was not a basis to lift his supervision requirement; it is a basis to maintain it. Finally, the allegations made by Mr. Swaka had already been raised verbatim in the relocation matter. They provided no separate basis for a modification. Further, the evidence was weak and did not rise to the level Mr. Swaka claimed. He alleged that Samuel suffered from skin problems, but the pictures provided to the court showed that Samuel's skin looked clear and healthy, and the medical records provided showed that he was receiving regular treatment and his skin was doing well. Regarding the alleged sexual contact, even the events recounted by the Snellers appear to be exaggerated on their face. They characterize Mr. Gonzalez's son as a predator, and yet he is almost the same age as Adriana – both are little kids. The events described were innocent, and although they contained nudity, they were not sexual. One child pantsing another child in public is not sexual abuse. A bunch of young kids jumping into a bathtub together is not sexual abuse. There is a very specific reason that these allegations did not warrant a GAL and were not cause for alarm.

Most importantly, as the court found, they were raised in hindsight, which Judge Haberly stated means that they were not raised in any of the emails between the parties or the Snellers until litigation began, and even then, the incidents described had occurred a long time ago. Had there been genuine concern, it makes sense that the concern would have been raised in some communication somewhere. It was not. The modification was appropriately denied.

Furthermore, the reliance on *George v. Helliar* is also an abuse of discretion; the court there did not err because of the finding of adequate cause, but because of the actual visitation schedule entered. 62 Wn. App. 378.

Regarding Mr. Swaka's request for a GAL, Judge Haberly's order from the June 24, 2011 hearing was specific: a request could be renewed if there was "some way to do it in Spain." Mr. Swaka's request at this hearing was to have the GAL conduct an investigation in Kitsap County. This did not meet the requirements of the court's order, and was appropriately denied. Further, it made no sense to have Ms. Swaka and the children travel to Washington for an investigation when she lived in Spain, Mr. Swaka lived in Maine, and all of the allegations centered around the kids' lives in Spain.

Further, the award of attorney fees was appropriate, and findings were made to support them. Ms. Swaka requested fees based on RCW 4.84.185, which allows a court to award fees incurred in opposing an action that was “frivolous and advanced without reasonable cause.” Based on the law and the evidence provided, as well as the fact that this was a repeat motion of what had already been filed, the motion was frivolous and advanced without reasonable cause. It was just another attempt to give custody to the Snellers and require Ms. Swaka to return the children to Washington. Judge Haberly found as such, stating that the motion was advanced without merit, and that Ms. Swaka should receive her fees. As to the amount of the fees, that is not properly before this Court, as that was an agreed judgment.

- B. The court made very extensive and adequate findings supporting the decisions made.

Judge Haberly made very specific, very lengthy findings in this matter and clearly reviewed quite a bit of evidence, which was referenced in her oral decision. The Statement of the Case above provides support for each of these findings. Moreover, as discussed below, there is very good support and very good reasons for those findings. Mr. Swaka’s reliance on *Littlefield* is misplaced, as the court there remanded because the trial

court abused its discretion by ordering the mother to move back to Washington so a shared parenting plan could be entered. 133 Wn.2d 39.

C. It was not error for the court to hear testimony via Skype.

Washington's CR 43(a)(1) provides:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute. ***For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.***

Emphasis added. The last sentence of CR 43(a)(1) was added in 2010, when the rule was amended to permit testimony by contemporaneous transmission from a different location, and mirrors the provision in FRCP 43(a) permitting testimony by contemporaneous transmission from a different location. See WSR 10-05-090. The means of transmission of contemporaneous testimony is not specified. See CR 43(a)(1); WSR 10-05-090; FRCP 43 *Advisory Committee Notes*.

In *In re Vioxx Products Liability Litigation*, 439 F.Supp.2d 640, 641-44 (E.D. La. 2006), the court permitted the contemporaneous transmission of testimony where the witness where the witness's testimony would be highly relevant to the plaintiff's claims and the defendant would not suffer any true prejudice in having the witness testify by contemporaneous videoconferencing. Similarly, in *Beltran-Tirado v.*

I.N.S., 213 F.3d 1179, 1186 (9th Cir. 2000), the Ninth Circuit Court of Appeals found that an out-of-state witness's telephonic testimony was "fair" because the testimony would have been admissible under FRCP 43(a) and the petitioner had an opportunity to cross-examine the witness. In *Beltran-Tirado*, the witness lived in Missouri and the hearing was in San Diego. 213 F.3d at 1186. In *Edwards v. Logan*, 38 F.Supp.2d 463 (W.D. Va. 1999), the court found that the jury trial could be conducted by two-way interactive video-conferencing.

In this case, there were compelling circumstances, not only because of the distance and number of witnesses that would need to travel, but because of the unique circumstances of this case. A great deal of witnesses for the children lived in Spain – people who could not necessarily leave their jobs to come all the way to Washington for a week for trial. The expense and time alone would prohibit many of the most important witnesses from testifying. Additionally, there were other concerns involving removing the children from school as well as the effects of flying on Samuel's skin (flying aggravates his condition).

Further, Ms. Swaka's parents made and carried through on threats to destroy Ms. Swaka and Mr. Gonzalez. They tried to have Ms. Swaka and the children deported even though a court order allowed her to remain in Spain. They threatened them with everything from Hague Convention

abduction threats, arrests, passport revocations, crimes, etc. There was a real concern about what Mr. Swaka and the Snellers would attempt to do if Ms. Swaka and Mr. Gonzalez came to the United States.

Mr. Swaka claims that these circumstances do not rise to the level of "compelling," but he wrongly terms Ms. Swaka's argument as mere inconvenience. The reasons discussed above go to the health and safety of the children.

Further, Mr. Swaka claims that the use of Skype allows for witness manipulation, whether by instant messaging or by someone off of the screen. First, it is important to note that there is not one single instance in the record where someone pointed out that a witness appeared to be looking at something else, reading answers, or getting answers from someone else in the room. Since Skype allows a person to be seen and heard, it seems that the people in the courtroom could tell if a person was taking too long to respond, looking to the side, or not giving answers from their own brain. Second, our courts have long allowed telephonic testimony, which carries an even greater concern of outside influence. With a telephone, the people in the courtroom do not know where the person is, if he/she is alone, whether he/she is reading or reviewing notes, or even if the person is who he/she claims to be!

Mr. Swaka's reliance on *Vioxx* is misplaced and misstates the circumstances in *In re Vioxx Products Liability Litigation*, 439 F. Supp.2d 640 (2006). The court in the *Vioxx* litigation applied a five-factor test under circumstances where the party objecting to the presentation of contemporaneous video testimony (or any requirement that the witness appear at all) was the party who had control over the witness. 439 F. Supp.2d at 643. In *Vioxx*, the defendant wished to prevent the plaintiff from presenting the testimony of an officer of the defendant's corporation. *Id.* at 643. In addition, the court discussed the defendant's wish for a tactical advantage in not producing the witness *at all*. *Id.* Applying the five-factor test to Ms. Swaka's request to present testimony by Skype, the court should find that the factors weigh in favor of permitting the presentation of witnesses via Skype.

- (1) The control exerted over the witness: Unlike the defendant in *Vioxx*, Ms. Swaka did not request that the court deny the production of the witnesses. Rather, Ms. Swaka requested that the witnesses be produced via a contemporaneous transmission, as contemplated by CR 43(a)(1).
- (2) The complex, multi-state nature of the litigation: Although the case at issue did not involve a complex, multistate litigation, the fact that significant evidence is located in Spain and the

process involved in international travel to bring witnesses to Washington State to testify created a similar logistical challenge.

- (3) The apparent tactical advantage by not producing the witness voluntarily: The presentation of witness testimony via Skype involved producing the witnesses for testimony, just as the court ordered the defendant to produce its officer for video testimony in *Vioxx*. Testimony via Skype permitted cross-examination of the witnesses, allowed the court to view the witnesses, and did not limit the witnesses' testimony to previously made statements.
- (4) The lack of prejudice: The *Vioxx* Court discussed the lack of prejudice to the defendant in producing the witness. The court ordered that the defendant produce the witness for video testimony. Similarly, there is no prejudice when the witnesses will be produced to testify via a contemporaneous transmission through Skype.
- (5) The flexibility needed to manage a multi-district litigation: While this case does not involve a multi-district litigation, flexibility is needed to manage a case where witnesses and evidence are located in two countries.

Lastly, even if it was error to allow testimony via Skype, it was harmless error. Mr. Swaka points to no place in the record (other than the screen freezing for a few seconds one time) where any of the witnesses in Spain appeared to be reading responses, giving canned answers, or looking at someone else in the room. This is supported by *Kinsman*, which specifically stated reversal was not required because the error was harmless. 140 Wn. App. at 845

D. It was not error for the court to set a minimum of the father's time at 1.5 hours per day for six days every three months when he has not exercised any visitation over four years and has directly harmed the children.

As stated in the Statement of the Case, it was uncontested that Mr. Swaka did not have time with the children for four years. It was uncontested and even admitted by Mr. Swaka that the children do not know him and that he is a stranger to them. Of specific concern is that Mr. Swaka did not come see the children when he had opportunities to do so, not even during the case when he had every reason to start visitation and was being financially supported by the Snellers. This was unrefuted.

Mr. Swaka seems to think that this is a reason for giving him more time with the children, but he missed two critical points: 1) if he actually exercises the time given to him in the parenting plan, it is more time than he has had since 2008; and 2) by disappearing from the children's lives for

many years, it hurt them, especially Adriana who remembered him. He cannot undo that damage by simply reappearing as though nothing had happened. Ms. Swaka's testimony about the effects of his sporadic contact on the children demonstrate that. It only hurts and confuses them further. Small periods of time that are actually exercised consistently over a long period are the only way to reintroduce Mr. Swaka's life without overwhelming them.

Further, there are practical realities that need to be considered as well. Mr. Swaka could not manage to fly to Spain during the last year even when the Snellers would have paid for it. He has never flown to Spain (or even to Washington) in four years to see the children. The parenting plan gives him visitation four times per year, which is realistic given the distance, cost, and past experience.

Additionally, the parenting plan allows visitation to occur naturally while still protecting the children if things do not go well. As Ms. Swaka testified, 1.5 hours is enough time to visit, but not so long that if the children are really not doing well with the visit, they are forced to bear with a damaging situation. Further, it only sets a minimum. If the children are doing well, visitation can last longer than 1.5 hours. The evidence provided shows that Ms. Swaka is willing to facilitate contact

with the children, so there is no reason to believe that she would not allow visits to last longer if things are going well.

Finally, the parenting plan is meant to last for four years, which, if followed, would give Mr. Swaka as much consistent time with the children as he had missed. If something else changes in the meantime, the law still allows a modification pursuant to RCW 26.09.260.

E. It was not error for the court to require Mr. Swaka's time to remain supervised.

As provided above, Mr. Swaka did not give the court any reason to think he could have unsupervised time with the children, especially considering he had not even exercised his supervised time. First, the previous parenting plan gave him supervised time, a request he did not address during the divorce. Second, he acknowledges that the supervision requirement based on his alcohol use was appropriate; it was undenied that he was an alcoholic. Third, the findings made against him for abandonment mean that he does not act in the children's best interests, which means he cannot be trusted to watch the children unsupervised. This is a man who disappeared for years without seeing his children, even though he admits that he knew it hurt them. This is a man who tried to have the children deported from the home they had known for two years after a court in the U.S. found that it would be detrimental to them to be

removed from Spain. This is a man who was not honest about his own criminal record until trial, and even then he had trouble recalling details. This is a man who started this litigation in an attempt to give custody of the children to the Snellers – not himself. Mr. Swaka cannot be trusted to act in the children’s best interests. Therefore, it is appropriate and in the best interests of the children to have visitation be supervised.

Mr. Swaka’s only arguments in this regard are an article that actually supports supervised visitation, and *Jensen-Branch*, which is specifically discussing religious restrictions and does not apply here. 78 Wn. App. 482, 491.

F. It was not error for the court to deny Mr. Swaka’s requests for a GAL.

As described above, Mr. Swaka made two requests to the court before trial for a GAL. Both times, his requests were denied without prejudice with the instruction that he could renew his request if he found a way to do it in Spain. Not once did he approach the court with a “way to do it in Spain” before trial. The denial of a GAL was appropriate. First, substantial evidence was presented – and not refuted – about the care and welfare of Adriana and Samuel in Spain. The court received evidence and testimony from their teachers, doctors, and family members. Second, the allegations about Samuel and Adriana were proven to be baseless time and

again. No GAL was needed. Third, Mr. Swaka's pre-trial requests for a GAL were simply attempts to have the children "visit" in Washington. It made no sense for a GAL to conduct an investigation here when neither party resided here and the children (as well as all witnesses and evidence about their well-being) were in Spain. Fourth, if Mr. Swaka's concerns were genuine, then it makes no sense that he would concede to the relocation and not even request any restrictions on Mr. Gonzalez or his children, or any provisions regarding medical care for Samuel. In sum, the request was disingenuous and not needed. Mr. Swaka had plenty of opportunities to propose paying for a GAL to travel to Spain during the year of litigation, but chose not to do so. If he had really been concerned, it seems like he would not have waited so long.

Further, Mr. Swaka's reliance on *Waggener* is misplaced. There, the court was simply concerned about whether an objective decision was made below; it did not support that a GAL is always required. 13 Wn. App. 911.

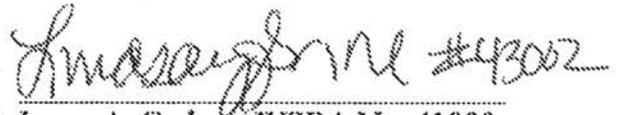
CONCLUSION

For the reasons set forth above, Ms. Swaka respectfully requests that this Court affirm the trial court's decision and award her attorney fees for the necessity of responding to these appeals. RAP 18.1 allows a party to recover attorney fees in responding to an appeal. RCW 26.09.140 and

RCW 4.84.185 allow for recovery on a frivolous matter that is advanced without reasonable cause. In this case, Mr. Swaka has persisted in driving forward litigation without evidence or legal arguments to support his claims without facing any financial responsibility for the claims since the Snellers are paying his fees. Ms. Swaka has incurred great expense in responding to these claims, and Mr. Swaka should be forced to repay at least some of the fees and costs incurred.

DATED: October 22, 2012.

McKinley Irvin, PLLC

A handwritten signature in cursive script, appearing to read "Laura A. Carlsen #43002".

for Laura A. Carlsen, WSBA No. 41000