

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR....3

III. REPLY TO STATEMENT OF THE CASE.....8

IV. ARGUMENT IN RESPONSE.....21

 A. Standard of Review.....21

 B. The Final Parenting Plan Was Entered Based On the
 Evidence and the Law And Is In the Best Interests of the
 Children.....24

 1) The Mother’s Home Was a Detrimental Environment
 and Warranted a Modification of the Parenting
 Plan.....26

 2) Due to the Mother’s Physical and Emotional Abuse of
 the Children, the Trial Court Was Correct in Making
 Findings Under RCW 26.09.191.....32

 3) Due to the Mother’s Physical and Emotional Abuse of
 the Children, Limitations on the Mother’s Residential
 Time and Decision-Making Are Mandatory Under
 RCW 26.09.191(1.....34

C. The Court Did Not Err in Denying the Mother’s Motion for Reconsideration as There Was No Newly Discovered Evidence.....	37
1) Dr. McCollum’s Report is Not Newly Discovered Evidence Which Warrants Reconsideration.....	37
2) Even if the Trial Court Reviewed the Evaluation There is No Basis To Change the Final Orders.....	39
D. Father Requests an Award of Attorneys’ Fees on Appeal.....	42
V. CONCLUSION.....	43

TABLE OF AUTHORITIES

CASES

Anderson v. Anderson, 14 Wash.App. 366, 541 P.2d 996 (1975)	24
Bering v. SHARE, 106 Wn.2d 212, 721 P.2d 918 (1986).....	21
Bohn v. Cody, 119 Wash.2d 357, 368, 832 P.2d 71 (1992).....	40
Chapman v. Perera, 41 Wash.App. 444, 704 P.2d 1224 (1985).....	25
Edwards v LeDuc, 157 Wn. App. 455, 238 P.3d 1187 (Wash.App. Div. 2 2010).....	43
Fishburn v. Pierce County Planning and Land Services Department,161 Wash. App. 452, 473, 250 P.3d 146, 158 (2011).....	37, 39
George v. Helliard, 62 Wash.App. 378, 814 P.2d 238 (1991).....	25
In re Custody of Smith, 137 Wn.2d 1, 969 P.2d 21 (1998).....	35
In re the Marriage of Ambrose, 67 Wash.App. 103, 834 P.2d 101 (1992).....	29
In re Marriage of Cabalquinto, 100 Wash.2d 325, 669 P.2d 886 (1983).....	24
In re Marriage of Caven, 136 Wn.2d 800, 966 P.2d 1247 (1998).....	35
In re Marriage of Crosetto, 82 Wn.App. 545, 918 P.2d 954 (1996).....	22
In re Marriage of Fiorito, 112 Wash.App. 657, 50 P.3d 298 (2002).....	23
In re Marriage of Greene, 97 Wn.App. 708, 989 P.2d 144 (1999).....	22

In re Marriage of Griffin, 114 Wash.2d 772, 791 P.2d 519 (1990).....	25
In re Marriage of Griswold, 112 Wn.App. 333, 48 P.3d 1018 (2002).....	21
In re Marriage of Hansen, 81 Wash.App. 494, 914 P.2d 799 (1996).....	23
In re Marriage of Horner, 114 Wn.App. 495, 38 P.3d 317 (2002).....	25
In re Marriage of Kovacs, 121 Wash.2d 795, 854 P.2d 629 (1993).....	24, 25
In re Marriage of Littlefield, 133 Wash.2d 39, 940 P.2d 1362 (1997).....	25
In re Marriage of Mansour, 126 Wn.App.1, 106 P.3d 768 (2004).....	36
In re Marriage of McDole, 122 Wash.2d 604, 859 P.2d 1239 (1993).....	23, 24
In re Marriage of Rich, 80 Wn.App. 252, 907 P.2d 1234 (1996).....	22
In re Marriage of Stern, 115 Wash.2d 1013, 797 P.2d 513 (1990).....	24
In re Marriage of Timmons, 94 Wash.2d 594, 617 P.2d 1032 (1980).....	24, 27
In re the Marriage of Velickoff, 95 Wash. App. 346, 968 P.2d 20 (1998).....	27
In re Marriage of Wicklund, 84 Wn.App. 763, 770, 932 P.2d 652 (1996).....	25
In re Marriage of Zahm, 138 Wn.2d 213 (Wash. 1999).....	22
In re the Matter of Kourtney Scheib, 160 Wn.app. 345, 249 P.2d 184 (2011).....	42

In re Parentage of R.F.R., 122 Wn. App. 324, 93 P.3d 951 (2004).....	35
In re Sego, 82 Wash.2d 736, 513 P.2d 831 (1973).....	22
In re the Welfare of Sumey, 94 Wash.2d 757, 621 P.2d 108 (1980).....	34, 35
In re Zigler and Sidwell, 154 Wash.App. 803, 226 P.3d 202, 205 (2010).....	23, 27, 28
Landberg v. Carlson, 108 Wn.App. 749, 33 P.3d 406 (2001).....	42
Mellor v. Chamberlin, 100 Wash.2d 643, 673 P.2d 610 (1983).....	42
Miles v. Miles, 128 Wn.App. 64, 114 P.3d 671 (2005).....	22
Parham v. J.R., 442 U.S. 584, 603, 61 L. Ed. 2d 101, 119, 99 S. Ct. 2493 (1979).....	34
Perry v. Costco Wholesale, Inc. 123 Wn.App. 783, 98 P.3d 1264 (2004).....	21
State v. Koome, 84 Wash.2d 901, 530 P.2d 260 (1975).....	35
Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).....	34
Westberg v. All-Purpose Structures, Inc. 86 Wash.App. 405, 936 P.2d 1175 (1997).....	43
Wisconsin v. Yoder, 406 U.S. 205, 230, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972)	34

STATUTES

RCW 26.09.140.....	42
RCW 26.09.260.....	1, 4, 23, 26, 27, 28, 31, 41
RCW 26.09.191.....	3, 4, 19, 23, 26, 32, 33, 34, 35, 36, 41

RCW 26.44.020.....	32
RCW 9A.16.100.....	33

RULES

CR 11.....	43
CR 59.....	5, 37, 39
RAP 14.2.....	42, 43
RAP 18.1.....	42

OTHER SOURCES

WASH. STATE BAR ASS'N, WASHINGTON FAMILY LAW DESKBOOK section 65.4(1), at 65-9 (2 nd ed. 2006).....	2
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I. INTRODUCTION

The court should be aware that Appellant's, hereinafter "Mother", Introduction does not accurately represent the facts in this case and does not accurately represent the evidence presented at trial in this matter. This case arises from a Petition for Modification of Parenting Plan filed by Respondent, hereinafter "Father", which was filed in March of 2011. A trial was held in this matter wherein the parties submitted oral testimony from themselves and witnesses, and also submitted exhibits.

The case was presented and both parties provided witness testimony and exhibits. Multiple witnesses testified as to the children's disclosure of physical and emotional abuse by the Mother. At the initial phase of the trial, the Mother requested the court order a parenting evaluation before making a final decision. Despite the fact that the Mother had requested a parenting evaluation approximately six months or so prior to the trial which was denied by a different judge, the trial court granted the request.

The trial was continued and then rescheduled no less than three times to allow for the evaluation. The trial court maintained the temporary orders which required the Mother to engage in therapeutic visitation with the children. Because the Mother refused to pay her portion of the evaluation expenses, the psychologist would not release the report. Finally, the trial court refused the Mother's third request to continue the trial because

she had failed to pay her portion of the evaluation fee to Dr. McCollum.

Additional testimony and evidence was presented and based on all the evidence presented, the trial court made its ruling. The court found that the Mother had committed acts of physical and emotional abuse of the children. Further, the court found that the Mother had failed to exercise time with the children which was afforded to her in the temporary orders. To protect the children and to rebuild the children's relationship with the Mother, the court ordered reunification counseling and supervised visitation between the children and the Mother.

The final ruling of the court also included a provision wherein if the Mother obtained the evaluation, she could seek a modification of her visitation with the children before a family law commissioner. At some point after the trial and before presentation of final orders, the Mother made payment and the evaluation was released.

Based on the evidence presented at trial, the trial court entered a final Parenting Plan, Order on Modification, Restraining Order, and Order of Child Support with Worksheet. The trial court properly made findings under RCW 26.09.260 that the evidence showed there had been a change in circumstance since the entry of the 2008 Parenting Plan and the Mother's home was a detrimental environment for the children. It was in the children's best interests to reside primarily with the Father.

Further, the trial court properly made findings under RCW 26.09.191 that the Mother had committed acts of abuse against the children. The trial court entered restrictions and requirements in the Parenting Plan consistent with those findings and the law.

After the entry of the final orders, the Mother sought reconsideration of the final orders. There was no basis under law or fact for the trial court to grant a reconsideration of the final orders.

The Mother's Notice of Appeal challenges the Decree of Dissolution, Findings of Fact, Order of Child Support and Parenting Plan which were entered December 23, 2013.

The Mother's challenge to the final orders fails to demonstrate any abuse of discretion of the trial court. The Mother fails to provide any legal or factual basis to overturn the decision of the trial court. As to the parenting plan, the trial court's decision was based on the evidence presented and is in the best interests of the children. The Mother fails to provide any legal or factual basis for the court to grant her Motion for Reconsideration. The Mother's request for relief should be denied.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. In response to Appellant's Assignments of Error, Respondent responds as follows:

1.1 Did the trial court err by denying the Mother's Motion for Reconsideration of the final orders entered on November 25, 2013, when it concluded that there was no newly discovered evidence?

NO: The trial court did not err in denying the Mother's Motion for Reconsideration which was based solely on the release of Dr. McCollum's evaluation. Said evaluation was not newly discovered evidence and but for the Mother's own actions, was available at trial.

1.2 Did the trial court err in the Order of Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule by ruling that a substantial change in circumstance had occurred, based on findings of abuse committed by the Mother against the children under RCW 26.09.191?

NO: The trial court properly considered all the evidence, made findings under RCW 26.09.260 and RCW 26.09.191 and entered the final orders according to the evidence presented including CPS findings of abuse by the Mother against the eldest child.

1.3 Did the trial court err in the Letter Opinion by relying on

questionable comments made by the first Guardian ad Litem, Richard Bartholomew, in his February 2008 report?

NO: The trial court properly considered the Mother's Motion for Reconsideration pursuant to CR 59 and applicable case law and based on all the evidence from the trial, found that there was no basis for reconsideration of final orders in the matter. While the letter opinion references the initial GAL, the trial court clearly does not rely on that report but rather bases the decision on all the evidence presented at trial.

B. In response to Appellant's Issues pertaining to Assignment of Error, Respondent responds as follows:

1. The court properly denied Mother's Motion for Reconsideration. The report of Dr. McCollum was not newly discovered evidence pursuant to CR 59. Said report was available at the time of trial, however, it was solely due to the Mother's own actions that the report was not provided.

2. The Mother's failure to pay her portion of the evaluation does not change the fact that the evaluation was not newly discovered evidence under the law. The release of the evaluation was not a basis for reconsideration of the trial court's ruling. The Mother had requested the court order the parenting evaluation and that each party pay half of the cost.

The trial was continued for almost a full year during which the Mother had ample time to obtain funds to pay her portion of the report. Moreover, at trial Mother failed to provide any actual proof of her finances or alleged employment searches.

3. The Mother was fully aware of her financial obligation when the court ordered the evaluation at her request and she failed to meet that financial obligation. The Mother failed to pay her portion of the evaluation and thereby prevented it from being available at trial. The production of the evaluation after trial is not newly discovered evidence and is not a basis for reconsideration of the final orders.

4. The court did not err in its decision of reconsideration. The court's decision at trial was based on all the evidence properly presented by the parties. The court's mention of a comment made by the previous GAL was not the sole basis for its decision. There was ample evidence at trial to support the final parenting plan entered by the trial court.

5. The court accurately based its final decision and parenting plan on the evidence presented at trial. Further, there is no "Protection Order dated November 25, 2013." There was a Restraining Order entered on that date which corresponds with the restrictions in the Final Parenting Plan.

6. The court properly based its ruling on the evidence presented during the trial. A majority of the trial occurred in November of 2012. There was no evidence presented in October of 2013 that the evidence presented in November of 2012 had changed.

7. The trial court's decision is based on the evidence presented at trial in this matter. The court's ruling is supported by fact and law.

8. There is no error of law for the court to note the competency of a counselor. The parties followed the order of the court and agreed on a new counselor for the children, Dr. Leuke. The Father ensured the children engaged in counseling with Dr. Leuke.

9. The Appellant misstates the facts in her assignment of error. The trial court's statement regarding the Mother's lack of visitation referred to the two years the case had been pending, during which time the Mother had the opportunity to have visitation with the children. That visitation included supervised time with South Sound Family Services and then therapeutic visitation. The requirement for Robert Keller to be used for the reunification was part of the court's final order. Further, there was no evidence entered in the record that visits with anyone would cost \$300 per hour.

10. The trial court specifically found the testimony of the witnesses regarding the disclosures of abuse by the children to be credible.

The trial court's finding of abuse by the Mother is supported by evidence submitted at trial.

11. In the decision of the court rendered on December 12, 2012, the court found that the disclosure of abuse by the children to the GAL, Ralph Smith and to Ms. Hurd were credible. CPS likewise made a finding of abuse against the Appellant. The court's ruling was based on the actual evidence presented at trial. The court makes no mention whatsoever as to a disclosure of abuse by Richard Bartholomew.

B. REPLY TO STATEMENT OF THE CASE

The Statement of the Case provided by the Appellant is not supported by the record in this matter. Appellant fails to provide any citations to the record and includes information which was not properly admitted to the trial court and which is not properly before this court.

This is an action for modification of a Parenting Plan which was entered on or about June 24, 2008. RP at 11/27/12 p. 5¹; Ex. 1. Said Parenting Plan was entered by agreement of the parties and pursuant to aCR2A Agreement which had been reached at mediation. RP at 11/27/12

¹ The transcript of the trial was prepared by date and not in continuous format. Any citation to the record will include the date of the transcript so as to accurately identify the location of the reference.

p. 5; Ex 1. At the time this modification action was filed the minor children were Graham, age 12, and David, age 8. RP at 11/27/12 p. 5; Ex. 4.

John Mason, Respondent, hereinafter "Father" and Tatyana Mason, Appellant, hereinafter "Mother" were married in the summer of 1999 and on or about July 18, 2007, a divorce action was filed. RP at 11/27/12 p.13.

At the same time the Father filed the dissolution action, the Mother filed a petition for an order of protection alleging domestic violence. Ex. 39. Based solely on the Mother's testimony and no police reports, physical or other evidence and in spite of the Mother having been the one previously arrested for domestic violence, the pro tempore commissioner granted the Petition and issued a one year order of protection. Ex. 39; Ex 40. The dissolution case was especially contentious and a Guardian ad Litem (hereinafter "GAL") was appointed. RP at 11/27/12 of Ralph Smith p. 6.

After receiving a recommendation from the GAL, the parties engaged in an all-day mediation which led to an agreement on all issues. RP at 11/27/12 p. 13. Both parties were represented by counsel during the mediation. RP at 11/27/12 p. 13. The parties agreed to a Parenting Plan wherein they would each have the children half of the time in one week intervals. RP at 11/27/12 p. 14; Ex. 1. A fair and equitable division of marital property was negotiated. Ex. 54. The Mother was also awarded spousal maintenance and child support paid by the Father. Ex. 54. The

Father maintained the marital home which had been his property before the parties even met. RP at 11/27/12 p. 12; Ex. 54. On or about June 24, 2008, final orders in the divorce were entered including a final Parenting Plan. Ex. 1; Ex. 54.

In 2009, the Mother filed a Motion to Vacate the Decree of Dissolution which was denied. In 2009, the Mother filed a Petition for Protection Order against the Father which was also denied. Ex. 41; Ex. 42.

After the dissolution, the parties returned to court on more than one occasion. In addition, there were issues with the children's then counselor, Mr. Wilson, and the parties could not agree on a new counselor. RP at 11/28/12 p. 17-18. The Father filed a motion and on or about March 2, 2012, the court appointed Sandra Hurd as the children's counselor. RP at 11/27/12 p. 17; RP at 11/28/12 p. 18; Ex. 3. Both parents were ordered to participate in counseling per the recommendation of the counselor. Ex. 3. Initially both parties did actively participate in the counseling as Ms. Hurd requested. RP at 11/28/12 p. 18

On or about the end of February 2011, the oldest child disclosed physical and emotional abuse by the Mother. RP at 11/27/12 p. 20-21; RP at 11/27/12 of Ralph Smith p. 8-10; RP at 11/28/12 p. 36-39; Ex. 65. The younger child confirmed this abuse. RP at 11/27/12 p. 24-25; RP at 11/28/12 p. 39-41. The child began to disclose to the Father and the Father

immediately took the children to the counselor and CPS. RP at 11/27/12 p. 24-25. The children disclosed the physical abuse to the counselor and to CPS. RP at 11/27/12 p. 24-25; RP at 11/28/12 p.36-41; Ex. 65. After the disclosure, the children expressed extreme fear about having to return to the Mother's care. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p.39.

The Father took action and filed this Petition and obtained an emergency order. RP 11/27/12 p. 26; Ex. 4; Ex. 5. Subsequently, on March 17, 2011, the Father obtained a Temporary Order wherein the Mother was limited to professionally supervised time with the children. Ex. 6; Ex. 28; Ex. 29. The court made a finding of adequate cause. Ex. 8; Ex. 9. At the request of the Mother, the court appointed a new Guardian ad Litem, Ralph Smith. Ex. 11. After the temporary orders were entered, the Mother sought a revision which was denied. Ex. 10.

The GAL conducted an investigation and on August 4, 2011, issued a report. Ex. 12. The GAL found that the mother had used "fear and physical force" against her older son. Ex. 12. The GAL found her actions rose to the level of abuse. RP at 11/27/12 of Ralph Smith p. 6-10; Ex. 12. The GAL recommended the children remain with the father and have supervised visitation with the mother. RP at 11/27/12 of Ralph Smith p. 15-

16; Ex. 12. The GAL also recommended that the Mother have an evaluation by Dr. Carla Van Dam regarding any “tendency for violence”. Ex. 12.

The Mother’s visitation was supervised by South Sound Family Services. RP at 11/27/12 p. 29; Ex. 18. The Mother began visits with the children shortly after the temporary order was entered. RP at 11/27/12 p. 29; Ex. 18. She stopped visitation in May of 2011. RP at 11/27/12 p. 29; Ex. 18. She did not resume visits until November 10, 2011. RP at 11/27/12 p. 30-32; Ex. 18. In late 2011, the visitation agency documented various incidents during the mother’s time with the children. Ex. 18. On one occasion she brought a live animal to the visit. RP at 11/27/12 p. 31; Ex. 18. On another occasion she tried to bring a friend to the visit and then argued with the supervisor in front of the children. Ex. 18. The supervisor documented that the mother made inappropriate comments about the father and the court action during the visitation and in the presence of the children. RP at 11/27/12 of Ralph Smith p. 14; Ex. 18.

After the various incidents at the supervised visitations, the children’s counselor issued a recommendation letter which provided that the visits were very stressful for the children. RP at 11/27/12 of Ralph Smith p. 14; Ex. 13. The GAL filed a motion to have visitation suspended until the mother obtained the recommended evaluation. RP at 11/27/12 of Ralph Smith p. 14; RP at 11/27/12 p. 32; Ex. 13. In lieu of full suspension, on or

about March 20, 2012, the court ordered that the visits between the Mother and the children were to be therapeutic in nature and in a therapeutic setting. Ex. 14. The Father agreed to an agency which could provide such visits, but the mother never set-up the visits. RP at 11/27/12 p. 32; Ex. 17. The Mother did not spend time with the children from January 22, 2012 until approximately March of 2013. RP at 11/27/12 p. 32; RP at 10/17/13p. 39;

The Mother never obtained the evaluation as recommended by the GAL. On or about April 14, 2012, the Mother filed a motion requesting the court order a parenting evaluation for both parents. RP at 11/27/12 p. 32. The Mother also requested the trial be continued to allow for the evaluation. RP at 11/27/12 p. 34. The court denied the request for the evaluation but stated it would allow the evaluation only if the mother paid the upfront cost of the evaluation. Ex. 15; Ex. 38. The court granted the continuance for the trial date to allow for the evaluation. RP at 11/27/12 p. 34. The trial date was set for May 21, 2012, and was continued until September, 2012 (the trial was then continued due to the court's schedule until November 27, 2012). Ex. 15.

The parties agreed on an evaluator, Dr. Loren McCollum. RP at 11/27/12 p. 34; Ex. 16. The Father never heard from the evaluator or that the evaluation had been paid for and was starting. RP at 11/27/12 p. 34. The Father later learned that the Mother had gone to Dr. McCollum and

requested only an evaluation for herself without disclosing the court's order. RP at 11/27/12 p. 28. When Dr. McCollum was advised of the court's order, he did not continue in his evaluation of the Mother. RP at 11/28/12 of Dr. McCollum p. 10. The Mother never paid the full retainer for the evaluation and so one was not conducted. RP at 11/28/12 of Dr. McCollum p. 10-11. At trial, the Mother requested the Father pay half of the cost of the evaluation with Dr. McCollum.

During this modification matter and prior to the trial, the children have remained in counseling with Sandra Hurd. RP at 11/28/12 p. 9. The Father participated in said counseling as requested by Ms. Hurd. RP at 11/28/12 p. 9. The Mother had stopped participating in the counseling in or about December of 2010, even before this matter was filed. RP at 11/28/12 p. 17.

During this matter the Father agreed that the Mother would not pay child support to him as she was ordered to pay for the visitation supervisor. RP at 11/27/12 p. 40. From May until November of 2011, the Mother failed to pay for visitation or child support. RP at 11/27/12 p. 32. From January of 2012 to present the Mother paid for approximately four visits with the children, not including the visitations observed by Dr. McCollum. RP at 10/7/13 p. 39. Up until the final trial in October of 2013, the Mother had failed to pay any child support. RP at 11/27/12 p. 40.

The case went to trial in November of 2012. The trial was held November 27, 2012, November 28, 2012, November 30, 2012 and December 2, 2012.

The Father requested the court adopt his proposed Parenting Plan which had the children continuing to reside primarily with him and have therapeutic visitation with the Mother. RP at 11/27/12 p. 38-39. The Father requested the Mother be ordered to pay child support for the minor children. RP at 11/27/12 p. 39; Ex. 23. The basis for the Father's request was the physical and emotional abuse of the children by the Mother. RP at 11/27/12 p. 39. Further evidence to support the Father's position was the Mother's failure to engage in regular visitation with the children. RP at 12/12/12 p. 80.

The Mother's primary request at trial was that the court allow a parenting investigation to take place and order the Father to pay half of the retainer. The Mother requested Dr. Loren McCollum conduct the investigation. The Father opposed the evaluation arguing there was no reason to further delay the trial. RP at 11/28/12 of John Mason p. 57-58. The Mother had the opportunity since May of 2012 to obtain the evaluation and failed to do so. RP at 11/28/12 of John Mason p. 57-58. Testimony at trial was heard from both parties and witnesses on both sides. The court

appointed Guardian ad Litem (hereinafter “GAL”), Ralph Smith, also testified. RP at 11/28/12 of Ralph Smith p. 1-36.

Testimony was presented by the Father, the GAL and Sandra Hurd that both children had disclosed physical and emotional abuse by the Mother. RP at 11/28/12 p.36-41; Ex. 65; RP at 11/27/12 p. 24-25; RP at 11/28/12 p. 36-41. The witnesses testified as to the fear and anxiety the children had with the regards to the Mother because of the abuse. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p.39. The Mother denied any physical abuse by her of the children. RP at 12/4/12 p. 16-17. The court found credible the testimony regarding the children’s disclosures of abuse at the hands of Mother. RP at 12/12/12 p. 11. The trial court made a point to state that “the allegations that the boys made and the testimony that Ms. Hurd gave about how Graham shook and cried while he told her about what his mother told him –that was very credible to me. I don’t think he was making things up. He is a scared or was a very scared young boy. His brother corroborated what he claimed...That part of Ms. Hurd’s testimony was very credible.” RP at 12/12/12 p. 11.

The trial court did find that after the disclosure of abuse by the children, Ms. Sandra Hurd, the children’s counselor, had taken on the role of a “protector for the children”. RP at 12/12/12 p. 41. Ms. Hurd herself testified that it would be difficult for her to work with the Mother. RP at

11/18/12 p. 61 & 70. The court found that a new counselor should be found for the children so that reunification efforts could be made. RP at 12/12/12 p. 18.

The Mother refused to provide information regarding her residence or with whom she was residing to the court. RP at 12/12/12 p. 19. The Mother admitted to having higher education from the Ukraine and also earning a four year business degree from the University of Washington, Tacoma while in Washington. RP at 11/30/12 p. 8. The Mother testified that she was unable to find employment but provided no proof of any efforts to find employment. RP at 12/12/12 p. 19.

The court granted the Mother's request for a parenting evaluation with Dr. Loren McCollum and each party was ordered to pay half of the cost. RP at 12/12/12 p. 17. All of the temporary orders which had been entered in the case remained in full force and effect, including the requirement that the Mother have only therapeutic visitation with the children. RP at 12/12/12 p. 19-21. The trial was continued to allow for the parenting evaluation. RP at 12/12/12 p. 18.

The parties agreed that Dr. Leuke would be the new counselor for the children. RP at 10/7/13 p. 13. The Father enrolled the children in counseling with Dr. Leuke. RP at 10/7/13 p. 13-14.

Dr. Loren McCollum conducted a parenting evaluation. RP at 10/7/13 p. 4-5. The Father fully complied with the trial court's order and cooperated with the evaluation, including paying his portion of the cost. RP at 10/7/13 p. 37. The trial date was continued from April 8, 2013 until July 8, 2013, as said evaluation was not complete. RP at 10/7/13 p. 4. The trial date was continued again until September 1, 2013, because the evaluation was complete but the Mother would not pay her portion of the retainer and Dr. McCollum's office would not release the report without full payment. RP at 10/7/13 p. 4-5. Because the Mother had still not paid, the trial was continued a third time until October 7, 2013. RP at 10/7/13 p. 4-5. At the time of trial, on October 7, 2013, the Mother still had not paid the fees owed to Dr. McCollum and she tried to have the trial date continued again. RP at 10/7/13 p. 4-5. The court denied the request and went forward with the remainder of the trial. RP at 10/7/13 p. 9; Ex. 81.

On October 7, 2013, the trial court heard additional testimony from the parties. RP at 10/7/13 p. 10-63. The evidence presented included the official finding from CPS which stated that the allegations of abuse by the Mother were "founded". RP at 10/7/13 p. 12; Ex. 65.

The parties had agreed that child support would be set at the Mother's last rate of pay. RP at 10/7/13 p. 47. The Mother continued to refuse to disclose where she was residing or with whom. The Mother failed

to provide any financial information to the court. RP at 10/7/13 p. 56. The Mother failed to provide proof of any job searches to the court. RP at 10/7/13 p. 56. The trial court made a finding that the Mother was voluntarily unemployed. CP at 238-242.

From approximately late January of 2012 until October of 2013, the Mother had engaged in a total of six (6) visits with the children including two for the purpose of Dr. McCollum's evaluation. RP at 10/7/13 p. 38-39. The Mother had no other contact with the children during that time. RP at 10/7/13 p. 38-39.

The trial court made an oral ruling and a date was set for presentation of the final orders. RP at 10/7/13 p. 80-89. The trial court found that CPS did conduct an investigation and the abuse disclosed by the children was "founded". RP at 10/7/13 p. 83. The court found that the testimony of the children's therapist, Sandra Hurd, and the GAL, regarding the disclosures of abuse by the children was credible. RP at 12/12/12 p. 11. The court made findings of abuse under RCW 26.09.191 by the Mother. RP at 10/7/13 p. 83. The court found that the Father did have a civil finding of domestic violence against him in 2007, however, there was no evidence to support any additional finding of domestic violence and the court did not have any current concerns regarding the Father's ability to care for the children. RP at 10/7/13 p. 83.

The court expressed concern that during this proceeding, the Mother did not exercise visitation which was made available to her based on the various court orders. RP at 10/7/13 p. 80. During the matter, the Mother had let close to one year pass without any contact with the children. RP at 10/7/13 p. 80.

The trial court did find that it was important for the children to have a healthy relationship with both parents. The trial court made it clear that the goal was to “establish a system whereby the Respondent (Mother) and children can be reunified and have a healthy relationship.” CP at 240. The court found that to protect the children and work to rebuild their relationship with the Mother, the Mother and the children would have time based on a reunification plan developed by Dr. Leuke and Robert Keller, of Family Preservation Services. RP at 10/7/13 p. 84. CP at 238-242; CP at 243-251.

In addition, the trial court appointed a court case coordinator to monitor the case and the reunification process. CP at 238-242; RP at 10/7/13 p. 84.

Prior to presentation, the Mother paid the funds which she owed to Dr. McCollum and the evaluation report was released and filed with the court. The details of the recommendations were very similar to what the trial court had ordered. CP 195-197.

On November 25, 2013, the court entered the Final Parenting Plan, Order of Child Support, Order on Modification, and Restraining Order. CP at 238-242; CP at 243-251; CP at 252-254.

After the entry of the final orders, Appellant filed a Motion for Reconsideration. Said Motion was denied. CP at 255-257; CP at 237.

On January 29, 2014, the Appellant filed her Notice of Appeal with the Thurston County Superior Court.

IV. ARGUMENT IN RESPONSE

A. Standard of Review

The final orders in this matter entered by the trial court are supported by the evidence presented at trial. Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge. *See* WASH. STATE BAR ASS'N, WASHINGTON FAMILY LAW DESKBOOK section 65.4(1), at 65-9 (2nd ed. 2006); *Perry v. Costco Wholesale, Inc.*, 123 Wn.App. 783, 792, 98 P.3d 1264 (2004). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Griswold*, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002) (quoting *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)). *See also Perry*, 123 Wn.App. at 792. “The fact finder measures the witness

credibility, and we [Court of Appeals] do not review that determination on appeal.” *Miles v. Miles*, 128 Wn.App. 64, 70, 114 P.3d 671 (2005). The Court in *Miles* further stated, “if supported by substantial evidence, we do not reverse a trial court’s findings of fact on appeal.” *Id.* at 69. *See also In re Marriage of Zahm*, 138 Wn.2d 213 (Wash. 1999), citing *In re Marriage of Crosetto*, 82 Wn.App. 545,556, 918 P.2d 954 (1996).

The higher courts have found that where the trial court has weighed the evidence, the reviewing court’s role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court’s conclusions of law. *In re Marriage of Greene*, 97 Wn.App. 708, 989 P.2d 144 (1999). A higher court should “not substitute [its] judgment for the trial court’s, weigh the evidence, or adjudge witness credibility.” *Id.* at 714 (citing *In re Marriage of Rich*, 80 Wn.App. 252, 907 P.2d 1234 (1996)). In *In re Sego*, the Supreme Court held that the witnesses are before the trial court and the trial court is “more capable of resolving questions touching upon the weight and credibility than we are.” 82 Wash.2d 736, 740, 513 P.2d 831 (1973). The Supreme Court further stated that “as an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of the witnesses even though we may disagree with the trial court in either regard.” *Id.* at 740.

Specifically regarding petitions to modify a parenting plan, the courts have held “[w]e review a trial court's decision to modify a parenting plan for abuse of discretion. *In re Marriage of Hansen*, 81 Wash.App. 494, 498, 914 P.2d 799 (1996). We will not reverse the decision unless the court's reasons are untenable. *In re Marriage of McDole*, 122 Wash.2d 604, 610, 859 P.2d 1239 (1993).” *In re Zigler and Sidwell*, 154 Wash.App. 803, 808, 226 P.3d 202, 205 (2010). The Court of Appeals, Division Three, went on to state that “[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; [and] 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. *In re Marriage of Fiorito*, 112 Wash.App. 657, 664, 50 P.3d 298 (2002).” *Id.* at 809.

In this case the trial court, after hearing and seeing the witnesses and reviewing all of the documents properly entered as exhibits, weighed the evidence and made findings based on the law. CP at 238-242. The trial court entered a parenting plan and order of modification which followed the requirements of RCW 26.09.260. CP at 238-242; CP at 243-251. The trial court made proper findings and restrictions pursuant to RCW 26.09.191. CP at 238-242; CP at 243-251. The final Parenting Plan entered by the court is

in the best interests of the children. CP at 243-251. There is no basis in fact or in law for the court to overturn the orders entered by the trial court in this matter.

B. The Final Parenting Plan Was Entered Based On the Evidence and the Law And Is In the Best Interests of the Children

The Supreme Court in *In re the Marriage of McDole*, 122 Wash.2d 604, 610, 859 P.2d 1239, 1242 (1993), held that “[c]ustodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification. *See In re Marriage of Stern*, 57 Wash.App. 707, 712, 789 P.2d 807, *review denied*, 115 Wash.2d 1013, 797 P.2d 513 (1990); *Anderson v. Anderson*, 14 Wash.App. 366, 541 P.2d 996 (1975), *review denied*, 86 Wash.2d 1009 (1976).” However, the Supreme Court went on to state “[n]onetheless, trial courts are given broad discretion in matters dealing with the welfare of children. *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Cabalquinto*, 100 Wash.2d 325, 327-28, 330, 669 P.2d 886 (1983). A trial court's decision will not be reversed on appeal unless the court exercised its discretion in an untenable or manifestly unreasonable way. *Cabalquinto*, at 330, 669 P.2d 886; *In re Marriage of Griffin*, 114 Wash.2d 772, 779, 791 P.2d 519 (1990); *In re Marriage of Timmons*, 94 Wash.2d 594, 600, 603-

04, 617 P.2d 1032 (1980); *George v. Helliard*, 62 Wash.App. 378, 385, 814 P.2d 238 (1991); *Chapman v. Perera*, 41 Wash.App. 444, 446, 704 P.2d 1224, *review denied*, 104 Wash.2d 1020 (1985).” *Id.* In addition, the Court held that “a trial court’s findings will be upheld if they are supported by substantial evidence. *See Chapman*, at 449, 704 P.2d 1224.” *Id.*

Trial courts are given broad discretion when determining how to best deal with the welfare of children, as they are in a unique position to weigh the evidence and determine credibility. *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993), *In re Marriage of Littlefield*, 133 Wash.2d 39, 46, 940 P.2d 1362 (1997). Therefore, a trial court’s decision with regard to provisions of a parenting plan is reviewed for abuse of discretion. *In re Marriage of Kovacs*, 121 Wash.2d at 801, *In re Marriage of Wicklund*, 84 Wn.App. 763, 770, 932 P.2d 652 (1996), *In re Marriage of Horner*, 114 Wn.App. 495, 501, 38 P.3d 317 (2002), *review granted*, 149 Wash.2d 1027, 78 P.3d 656 (2003).

A trial court’s 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 Wash.2d at 47. A court’s decision is “based on untenable grounds if the factual findings are unsupported by the record.” *Id.* The decision would be manifestly unreasonable “if it was based on incorrect standards or the facts do not meet

the requirements of the correct standard.” *Id.*

The final Parenting Plan entered by the trial court in this matter is fully supported by the evidence and the record. CP at 238-242; CP at 243-251. The terms of the final Parenting Plan are also based in the law. *See* RCW 26.09.260; RCW 26.09.191; CP at 238-242; CP at 243-251.

1. The Mother’s Home Was a Detrimental Environment and Warranted a Modification of the Parenting Plan

RCW 26.09.260 states

“(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.”

The statute goes on to state that “(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless...(c) [t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.” RCW 26.09.260 (2) (c).

The initial Parenting Plan entered in 2008 provided a joint parenting arrangement for the children. Ex. 1. That Plan was entered by agreement of the parties. Ex. 1; Ex. 54. Each parent was equally designated the “custodial parent”. Ex. 1. A change to either parent’s time would require a finding under RCW 26.09.260. Because the 2008 Plan was entered by agreement without trial, the trial court in this matter may “hear testimony concerning events and conditions prior to the decree.” *In re the Marriage Timmins*, 94 Wash. 2d 594, 600, 617 P.2d 1032, 1036 (1980). However, there was ample evidence regarding events after the entry of the 2008 which showed the Mother’s home was a detriment to the children. CP at 238-242.

Pursuant to RCW 26.09.260, “a trial court may modify a parenting plan if a substantial change has occurred in the circumstances of the child or the nonmoving party, and such modification is necessary to serve the best interests of the child. RCW 26.09.260(1).” *In re the Marriage of Velickoff*, 95 Wash. App. 346, 352, 968 P.2d 20, 23 (1998). Further, in *Zigler and Sidwell*, the Court of Appeal, Division Three, stated that “the court may then modify the existing parenting plan if it finds that (1) a substantial change occurred in circumstances as they were previously known to the court, (2) the present arrangement is detrimental to the child's health, (3) modification is in the child's best interest, and (4) the change will be more helpful than

harmful to the child. RCW 26.09.260(1), (2)(c).” *In re Zigler and Sidwell*, 154 Wash.App. 803, 809, 226 P.3d 202, 206 (2010).

In this case, there is evidence that the Mother was physically abusive to the oldest child and emotionally abusive to both children. RP at 11/27/12 p. 20-21; RP at 11/27/12 of Ralph Smith p. 8-10; RP at 11/28/12 p. 36-39; Ex. 65; RP at 12/12/12 p. 11. She repeatedly hit the eldest child with her hand and various objects. RP at 11/28/12 p. 36-40. On more than one occasion the Mother physically restrained the older child and told the younger child to hit him. RP at 11/28/12 p. 40.

The Mother was mentally abusive to both children. RP at 11/28/12 p. 37-40. The Mother would interrogate the children upon their return from time with the father. RP at 11/28/12 p. 36-37. The Mother was verbally abusive to the older child in the younger child’s presence. The Mother encouraged conflict between the two children including telling the younger child to hit the older child. RP at 11/28/12 p. 40. The Mother’s actions instilled fear of harm in both the children. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p.39.

Both children disclosed not just the abuse but also their fear of not just residing with the Mother but even being left alone with her. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p. 39. The children exhibited signs of anxiety and stress because of the

Mother's actions. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p. 39. The Mother's actions caused her home to be a detrimental environment to the children.

The trial court is to look not just at the events at the time of the filing of the Petition but also at the time of trial. *In re the Marriage of Ambrose*, 67 Wash.App. 103, 108-109, 834 P.2d 101, 103-104 (1992). In this case, the actions of the Mother after the initial Petition and temporary orders show that she made no effort to change her behavior. RP at 10/7/13 p. 80. In fact, by her own actions she separated herself further from the children. RP at 10/7/13 p. 80.

Subsequent to the filing of this action, the Mother did nothing to remedy the harmful environment that she had created. The Mother did not engage in any anger management classes or parenting classes. The Mother engaged in sporadic and limited supervised visitation with the children going for almost a full year having no contact with the children. RP at 10/7/13 p. 80. At the initial visitations held at South Sound Family Services, the Mother continued to engage in inappropriate behavior in the presence of the children. Ex. 18. The Mother made inappropriate statements regarding the father and the court action in the presence of the children. Ex. 18. The Mother argued with the supervisor in the presence of the children. Ex. 18. The Mother refused to follow the rules of the visitation agency. Ex.

18. After the visitation order was changed, the Mother failed to engage in therapeutic visitation with the children as ordered by the court. RP at 11/27/12 p. 32. It was only after the initial phase of the trial that the Mother then engaged in approximately six (6) visits with the children over a one year period. RP at 10/7/13 p. 38-39.

Moreover, during the trial, the Mother refused to provide any information to the court as to her residence or with whom she resided. RP at 10/7/13 p. 57. In addition to the abuse and lack of contact, the trial court had no way to even simply judge the safety of the Mother's home.

During this matter, the children have resided with the Father and done well in his home. The court had no concerns regarding the Father's ability to care for the children. RP at 10/7/13 p. 83. The children have continued in counseling, first with Ms. Hurd and then with Dr. Leuke. While the trial court noted that the removal of the Mother from the children's lives had been traumatic, RP at 12/12/12 p. 3, the transition into full-time residence in the Father's home has not had any negative impact on the children. RP at 11/27/12 of Ralph Smith p. 15. The Father provided a stable environment for the children and it was in their best interests to remain in his care.

The trial court made it clear that the "goal" was to reunite the children with the Mother and establish a healthy relationship. CP at 238-

242. The requirements of the final Parenting Plan seek to obtain that goal. CP at 243-251. Using a professional, Robert Keller, and the children's therapist, Dr. Leuke, the court ordered that a reunification plan be developed. RP at 10/7/13 p. 84; CP at 238-242; CP at 243-251. It is the Mother who has failed to take any action to follow the court's order and work to reunify with the children.

There is no question that the Mother's abusive behavior is a change in circumstance from the initial Parenting Plan. This abuse was a circumstance that was not and could not have been contemplated during the original dissolution action and in the original final Parenting Plan, as the disclosure of abuse by the children happened well after the original Parenting Plan was entered.

The Mother's abusive behavior has caused her home to be a detrimental and dangerous environment for the children. The Mother's refusal to take action, even court ordered action, to rebuild her relationship with the children has perpetuated the detrimental environment. There is a clear basis under RCW 26.09.260 for the court to modify the current Parenting Plan. It is in the best interests of the children for the Father to remain the primary residential parent and of the Mother to engage on the reunification process as outlined in the final Parenting Plan entered by the trial court.

2. Due to the Mother's Physical and Emotional Abuse of the Children, the Trial Court Was Correct in Making Findings Under RCW 26.09.191.

RCW 26.09.191 states,

“(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm. (2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.”

Further, RCW 26.44.020 states “[t]he definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Abuse or neglect" means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's

health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100.” In this case, CPS made a finding that the Mother had committed “physical abuse towards Graham”. Ex 65.

The record reflects that the Mother was physically abusive to the eldest child and emotionally abusive to both children. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p. 39. Over a period of time, the Mother repeatedly hit the child with her hand and objects. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p. 39. The Mother required the younger child to hit the older child. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p. 39. The Mother’s actions went far beyond acceptable discipline. The Mother’s actions were abusive and caused emotional damage to the children.

To date the Mother has done nothing to change her behavior. The Mother has not engaged in therapy with the children. The Mother has not participated in anger management classes or parenting classes. The children are fearful of the mother. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p. 39. The children have expressed anxiety and stress about being around the Mother. RP at 11/27/12 p. 25; RP at 11/27/12 of Ralph Smith p. 10; RP at 11/28/12 at p. 39. The Mother’s actions warranted a finding under RCW 26.09.191 (1) and (2) and required

the trial court to place restrictions on her time with the children in order to protect the children from additional abuse and harm.

3. Due to the Mother's Physical and Emotional Abuse of the Children, Limitations on the Mother's Residential Time and Decision-Making Are Mandatory Under RCW 26.09.191(1) and (2).

There is no question that the due process clause of the Fourteenth Amendment establishes a strong constitutional right of parents to the care, custody, and companionship of their children. *See, e.g., In re the Welfare of Sumey*, 94 Wash.2d 757, 621 P.2d 108 (1980). *See also Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). This right of parents however, is not an absolute protection against State interference. It is now well established that where a parent's actions or decisions seriously conflict with the physical or mental health of their child, the State has a right and responsibility to intervene to protect the child. *See Parham v. J.R.*, 442 U.S. 584, 603, 61 L. Ed. 2d 101, 119, 99 S. Ct. 2493 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 230, 233-34, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972).

Although the family structure is a fundamental institution of society, and parental prerogatives are entitled to considerable deference, they are not

absolute, and must yield to fundamental rights of the child or important interests of the State. *State v. Koome*, 84 Wash.2d 901, 907, 530 P.2d 260 (1975), *In re Parentage of R.F.R.*, 122 Wn. App. 324, 331, 93 P.3d 951 (2004); *In re Custody of Smith*, 137 Wash.2d 1, 18-19, 969 P.2d 21 (1998); *In re the Welfare of Sumey*, 94 Wash.2d at 762. The terms of the final Parenting Plan in this matter do not terminate the Mother's rights to the children but, rather, seek to rebuild the relationship between the Mother and the children while at the same time protecting the children from further abuse. CP at 238-242; CP at 243-251.

Given the ample amount of evidence presented at trial regarding the physical and emotional abuse perpetrated by the Mother against the children and the court's findings of abuse, the trial court then imposed appropriate restrictions to protect the children and reunify them with the Mother. RCW 26.09.191 (1) and (2)

When the court finds there has been abuse of a child, restrictions are mandatory. RCW 26.09.191 (1) and (2). If the trial court finds that a parent engaged in physical abuse, it *must* not require mutual decision-making and it *must* limit the abusive parent's residential time with the child. *In re Marriage of Caven*, 136 Wash.2d 800, 966 P.2d 1247 (1998), *emphasis added*. Further, once there has been a finding that a parent has committed acts of abuse, the Washington State legislature requires courts to impose

certain limitations or conditions upon the parent who committed those acts, unless the court also makes specific and express findings why such limitations are not necessary under the specific facts of a case. RCW 26/09.191(1); *In re Marriage of Mansour*, 126 Wn.App.1, 10, 106 P.3d 768 (2004).

Here, after weighing all of the evidence, the trial court found that the Mother had committed acts of abuse against the children. RP at 12/12/12 p. 11; RP a 10/7/13 p. 83; CP at 238-242. There is ample evidence in the record to support the restrictions imposed by the court, as said restrictions were to protect the children from harm. There was no reason to find that the required restrictions were anything but necessary.

In compliance with the law and to protect the minor children, the court properly imposed restrictions on the Mother's residential time with the children. The court also properly imposed limitations on the Mother's decision-making with respect to the children, as required by RCW 26.09.191(1).

The Restraining Order entered by the court is consistent with the Parenting Plan. CP at 252-254; CP at 243-251. In the Plan, the Mother is not permitted unsupervised time with the children until approved by a professional. CP at 243-251. The Restraining Order forbids the Mother from going to the children's school or daycare. CP at 252-254. The

Restraining Order is consistent with the court's findings and the restrictions of the Parenting Plan. There is no basis for the Restraining Order to be dismissed.

The trial court emphasizes that the "goal" was to reunify the Mother and children. The terms of the final Parenting Plan are geared to accomplish that. CP at 253-251. Two professionals are to collaborate to determine the best way to rebuild the Mother's relationship with the children while, at the same time, keeping the children safe. CP at 253-251. The terms of the final Parenting Plan are fully supported by the evidence entered at trial and the law.

C. The Court Did Not Err in Denying the Mother's Motion for Reconsideration as There Was No Newly Discovered Evidence

1. Dr. McCollum's Report is Not Newly Discovered Evidence Which Warrants Reconsideration

There is no basis under Washington Superior Court Rule 59 for the court to grant a reconsideration. Dr. McCollum's evaluation report is not "(4) newly discovered evidence, material for the party making the application, which (s)he could not with reasonable diligence have discovered and produced at the trial." In *Fishburn v. Pierce County Planning and Land Services Department*, 161 Wash. App. 452, 473, 250 P.3d 146, 158 (2011), the Court of Appeals, Division

Two, held that “[i]f the evidence was available but not offered until after the opportunity passed, the party is not entitled to submit the evidence.”

In this case, Dr. McCollum’s report was available to the parties but it was the Mother’s own actions which prevented the report from being released. RP at 10/7/13 p. 81. The Mother did not pay her portion of the remaining evaluation. As a result, Dr. McCollum did not release the report prior to trial. RP at 10/7/13 p. 81.

The court had originally ordered the Mother to pay the cost of the evaluation in May of 2012. RP at 10/7/13 p. 81. Then at trial, the court ordered each party to pay half of the retainer. RP at 12/12/12 p. 17. The parties contracted with Dr. McCollum to pay half of the evaluation fee. Then, in June of 2013, the trial court actually ordered the parties to each pay half of the remaining fee for the evaluation. The Mother simply ignored the orders of the court and failed to pay her half of the evaluation fee for an evaluation that she requested. RP at 10/7/13 p. 81. As a result of the Mother’s own actions, the report was not released prior to the trial date. RP at 10/7/13 p. 81.

The report would have been available to the parties and the court, had the Mother simply abided by her contract with Dr. McCollum and the order of the court. The Mother should not now benefit from her own contemptuous actions. The Mother could have paid her remaining portion of the evaluation and had the

evaluation available at trial. The Mother chose to wait until after trial to make the payment.

The Mother could have produced the report at trial had she followed the court's order. There is no basis under CR 59(a) (4) to deem the report "new evidence". Clearly the evaluation was available prior to the final phase of the trial, and with even the slightest amount of diligence could have been provided to the trial court but for the failings of the Mother. There is no basis for the court to reconsider its decision and rulings.

2. Even if the Trial Court Reviewed the Evaluation There Is No Basis To Change the Final Orders.

The Mother demands that this court review Dr. McCollum's evaluation and reverse the trial court's decision and grant her primary custody of the minor children.² *Opening Brief of Appellant* p. 24-25. In her Opening Brief, the Mother fails to argue how Dr. McCollum's report would change the trial court's decision as to the custody of the children. In fact, even in her original Motion for Reconsideration, the Mother fails to argue how the review of Dr. McCollum's evaluation would change the trial court's decision. CP at 232.

In *Fishburn v. Pierce County Planning and Land Services Department*,

² In fact the Appellant also asks the court to award her maintenance. A claim for maintenance was never part of this action. Said request is completely improper and should be denied.

161 Wash. App. 452, 473, 250 P.3d 146, 158 (2011), the Court of Appeals, Division Two, held that the petitioner had failed to argue “how the allegedly newly discovered evidence would change the trial court’s determination...and, thus, we need not consider it. *Bohn v. Cody*, 119 Wash.2d 357, 368, 832 P.2d 71 (1992).” As the Mother fails to explain how the review of Dr. McCollum’s evaluation would change the final orders, this court should not even entertain the request.

However, even if the court reviews Dr. McCollum’s evaluation, there is no basis to change the trial court’s order. In fact, the trial court’s findings and ruling is extremely close to the recommendation of Dr. McCollum’s evaluation. CP at 238-242; CP at 243-251; CP at 195-197.

While Dr. McCollum states “whichever parent is named primary”, it is inherent in his recommendation that the children cannot be placed in the primary custody of the Mother. CP at 195-197. Dr. McCollum states “[f]or the boys to develop generally productive relationship with their mother, they (the children) will require a substantial period of professionally facilitated contact where gradually, at the facilitator’s initiative, increasing periods of mother-son contact on their own without professional facilitation is recommended.” CP at 195-196. Dr. McCollum goes on to state “[f]or this outcome to happen, two services are necessary...parent coaching... [t]he other is for mother-son reconciliation therapy.” CP at 196. This

recommendation is extremely similar to what the trial court orders for reconciliation efforts in the Parenting Plan. CP at 195-196; CP at 243-251.

Further, Dr. McCollum finds that “[h]e (the Father) appears to be attuned to the (the children) needs and interest...they (the children) each enjoy a positive and productive relationship with their father.” CP at 195. In addition, Dr. McCollum states “there is insufficient information to conclude that Mr. Mason in general is a systematic domestically violent male or that he poses a physical risk to any identifiable person.” CP at 193.

Dr. McCollum found that the children’s disclosure of abuse was credible. He states “[f]or the issue of physical abuse by Ms. Mason, it is informative that both boys have maintained consistent accounts of what occurred.” CP at 193. He goes on to state, “[t]he boys’ account also have been repeated in a consistent but not particularly scripted manner to Dr. Leucke and to this psychologist.” CP at 193. That is incredibly significant. It supports the trial court’s findings of abuse and application of RCW 26.09.260 and RCW 26.09.191.

Even though the evaluation was released after the court’s final orders, the recommendations of Dr. McCollum match very closely to the final Parenting Plan entered by the trial court. There is absolutely nothing in Dr. McCollum’s recommendations that would warrant the trial court granting primary custody to the Mother. There is nothing in Dr. McCollum’s

recommendation that would warrant this court or the trial court changing the final orders in this matter. The Mother's request for reconsideration based on Dr. McCollum's evaluation should be denied.

D. Father Requests an award of Attorneys' Fees on Appeal

The court has the discretion to order a party to pay the other party's attorney fees and costs associated with the appeal of a dissolution and modification action. RCW 26.09.140; RAP 18.1. RCW 26.09.140 states in pertinent part that: "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." RCW 26.09.140. Attorney fees can be awarded when they are authorized by contract, statute, or are a recognized for equity. *In Re the Matter of Kourtney Scheib*, 160 Wn.App. 345, 249 P.3d 184, 188 (2011), *citing Mellor v. Chamberlin*, 100 Wash.2d 643, 649, 673 P.2d 610 (1983). If attorney fees are recoverable at trial, then the prevailing party may recover fees on appeal. *Id.*, *citing* RAP 18.1, *see also Landberg v. Carlson*, 108 Wn.App. 749, 758, 33 P.3d 406 (2001).

RAP 14.2 provides in pertinent part that a commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision

terminating review. RAP 14.2. The court should consider the abusive litigation that the Mother engaged in during this appeal. There is no basis in law or fact for the Mother to have filed this appeal. It was filed to continue to harass the Father and cause him to incur unnecessary legal expenses; expenses which he cannot afford.

The Mother is held to the same standard as a party represented by counsel. *Edwards v LeDuc*, 157 Wn. App. 455, 460, 238 P.3d 1187 (Wash.App. Div. 2 2010), citing *Westberg v. All-Purpose Structures, Inc.* 86 Wash.App. 405, 411, 936 P.2d 1175 (1997). If an attorney had filed this appeal with the allegations made by the Mother it would be a basis for CR 11 sanctions. This court must hold the Mother accountable for her actions in this matter. The Mother's appeal is frivolous and filed in bad faith. The Father should not have to incur the expense of defending against such action.

The Father has properly submitted his affidavit of financial need and, the court can see that he does not have the funds to pay attorney fees to respond to this frivolous appeal which the Mother has filed. The Father is supporting himself and the parties' two children. The Father is requesting he be awarded fees and costs incurred in responding to this appeal.

V. CONCLUSION

In this case, the trial court carefully reviewed the testimony of the

witnesses and the evidence presented at trial. The court properly considered the evidence with regards to the child abuse perpetrated by the Mother against the children and established a parenting plan which is in the best interests of the children. The court properly entered a Restraining Order consistent with the terms of the Parenting Plan. The court followed the statute and properly imputed income to the Mother as he was voluntarily unemployed. The court properly denied the Mother's requests for reconsideration as there was no newly discovered evidence. The decision of the trial court and the final orders should be affirmed.

The Father, John Mason, respectfully requests that this court affirm the trial court's decision and issue an award of attorney's fees and costs in his favor.

DATED the 8 day of January, 2015.

RESPECTFULLY SUBMITTED,

in line

2-2 42504 for Laurie Robertson

Laurie G. Robertson, WSBA#32521
Attorney for Respondent/Father

Law Office of Jason S. Newcombe
1218 Third Ave. Suite 500
Seattle, WA 98101
P: (206) 624-3644
F: (206) 624-3677

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN MASON)	NO. 45835-7-II
)	
Respondent,)	AFFIDAVIT OF SERVICE BY MAIL
v.)	
)	
TATYANA MASON)	
)	
Appellant.)	

AFFIDAVIT OF MAILING

I certify that on the 8th day of January, 2015, I caused a true and correct copy of the following documents:

Response Brief of Respondent

to be served on the following by U.S. Mail:

Tatyana Mason
PO Box 2082
Olympia, WA 98502

Dated: January 8, 2015



Erin Lane
Law Offices of Jason S. Newcombe
1218 Third Ave., Suite 500
Seattle, WA 98101
(206) 624-3644

No. 45835-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN MASON)	NO. 45835-7-II
)	
Respondent,)	RESPONDENT'S NOTICE OF
)	SCRIVENER'S ERROR IN
v.)	RESPONDENT'S RESPONSE BRIEF
)	OF RESPONDENT
TATYANA MASON)	
)	
Appellant.)	

NOTICE OF SCRIVENOR'S ERROR

COMES NOW the Respondent, by and through his attorney of record, and notifies the Court and Appellant of a scrivener's error contained in Respondent's Response Brief of Respondent.

The third sentence of the second paragraph of the Response Brief of Respondent, subsection Reply to Statement of the Case on Page 10 reads "The Father filed a motion and on or about March 2, 2012, the court appointed Sandra Hurd as the children's counselor." This sentence should

NOTICE OF SCRIVENER'S ERROR

Law Offices of Jason S. Newcombe
1218 Third Ave., Suite 500
Seattle, WA 98101
(206) 624-3644
WSBA# 32521

read "The Father filed a motion and on or about March 2, 2010, the court appointed Sandra Hurd as the children's counselor."

Dated this 9th day of January, 2015.

Respectfully Submitted,
Gina Lee for Laurie Robertson

LGR 42504

Laurie G. Robertson
Attorney for Respondent
Law Offices of Jason S. Newcombe
1218 Third Ave., Suite 500
Seattle, WA 98101
(206) 624-3644
WSBA# 32521

AFFIDAVIT OF MAILING

I certify that on the 9th day of January, 2015, I caused a true and correct copy of the Respondent's Notice of Scrivener's Error in Respondent's Response Brief of Respondent to be served on the following by U.S. First Class Mail:

Tatyana Mason
PO Box 2082
Olympia, WA 98502

Dated: January 9, 2015



Diane M. Hickman, Paralegal
Law Offices of Jason S. Newcombe
1218 Third Ave., Suite 500
Seattle, WA 98101
(206) 624-3644

NOTICE OF SCRIVENER'S ERROR

Law Offices of Jason S. Newcombe
1218 Third Ave., Suite 500
Seattle, WA 98101
(206) 624-3644
WSBA# 32521