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DIVISION II

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STATE OF WASHINGTON

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No. 46424-1-II

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

Teresa G. Harkenrider,
Respondent,

v.

Christopher Wodja,
Appellant.

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S CLAIMED ASSIGNMENTS OF ERROR

- A. Did the trial court improperly reverse a Superior Court Commissioner's finding of adequate cause and deny the petition for modification of the parenting plan even though it was within that court's discretion?
- B. Did the trial court circumvent an "objective investigation" by various "experts" into this matter by appointing and relying on the recommendations of a Guardian ad Litem even though it was within the trial court's discretion and when the Guardian ad Litem interviewed both "experts"?
- C. Did the trial court improperly continue to restrict contact between Mr. Wodja and the children even though the trial record and the Guardian ad Litem's report support those continuing restrictions?
- D. Did the trial court effectively and improperly terminate Mr. Wodja's parental rights when the trial court clarified the steps Mr. Wodja needs to take in order to obtain leave of court to begin reunification with the children?
- E. Did the trial court modify the current parenting plan, despite dismissing the petition for modification?
- F. Did the trial court ignore the testimony of court-appointed experts when it had reviewed their prior reports and recommendations and the Guardian ad Litem interviewed both and included that information in her report?
- G. Did the trial court give greater weight to the "hearsay reports" of the GAL than it did to the court-appointed experts even though the GAL's report was not hearsay and the GAL's report included information obtained directly from those experts?

- H. Did the trial court improperly order Mr. Wodja to pay all GAL fees when it was within the trial court's discretion to do so?
- I. Did the trial court err by awarding Ms. Harkenrider attorney's fees when the trial court found Wodja's most recent petition for modification was part of an ongoing pattern of vexatious litigation?

I. STATEMENT OF THE CASE

This appeal follows two prior appeals brought by Christopher Wodja under this Court's case numbers 43660-4-II and No. 44504-2-II (consolidated).

After a trial lasting nearly five weeks, orders dissolving the marriage of Christopher Wodja and Teresa Harkenrider, in addition to a parenting plan and child support order, were entered in Pierce County Superior Court on December 16, 2011; corrected orders were entered on February 7, 2012. CP 1-30, 2 VRP (March 14, 2014) at 6.

The parenting plan significantly restricts Wodja's contact with the parties' two children. CP 2 - 8. In fact, Wodja is not allowed to have any contact with the children until certain specific conditions are met. CP 2.

Prior to the court allowing any contact between the father and children he shall comply with the recommendations of Dr. Mark Whitehill which include:

1. Twelve months of weekly individual psychotherapy with Michael Compte [sic] to address Father's personality disorders as set forth in Dr. Whitehill's report.
2. Successful completion of a course in anger management with Bill Notarfrancisco.

Both treatment providers shall be provided collateral contacts, including expert reports, guardian ad litem information, criminal records related to Father's history, Department of

Health records, and declarations of individuals setting forth allegations of abuse, sexual deviance, and other evidence provided to the court as a basis for restrictions.

CP 7.

Following entry of the final orders, significant post-trial litigation ensued, culminating in the entry of an order finding Wodja had engaged in vexatious litigation. 2 RP 6. *See also, e.g.*, CP 31–102.

The first issue to be litigated was the psychological treatment Wodja was ordered to obtain. As noted above, Wodja had been ordered to complete individual psychotherapy to address his diagnosed personality disorders and to successfully complete treatment for anger management prior to seeking modification of the parenting plan. CP 7.

There was considerable litigation related to the identification and authorization of the providers themselves. For example, on March 16, 2012, the Court found

Christopher Alan Wodja intentionally misrepresented material facts to the court with regard to his alleged treatment with Dr. Allen Traywick. This misrepresentation is perjurious and warrants specific note in the file, and part of a repeated pattern of behavior on the part of Mr. Wodja.

* * * *

. . . Bill Notarfrancisco is dismissed as the anger management provider in this case. Steve Pepping shall substitute in as the anger management provider, and no treatment shall

commence until such time as all records are provided to him by counsel for Petitioner . . . by Friday, 3/23/2012.

CP 37.

On April 27, 2012, another order was entered with regard to Wodja's treatment providers. CP 40-41.

. . . Paula van Pul shall be the treatment provider for weekly psychotherapy, as previously recommended by Dr. Mark Whitehill, and ordered by the court under prior orders. . . . Bill Kohlmeyer shall substitute for Steve Pepping as the anger management/domestic violence treatment provider for Christopher Wodja.

CP 40-41. On May 11, 2012, yet another order was entered that states "A new anger management provider needs to be selected due to Bill Kohlmeyer's withdrawal from the case." CP 42-43.

After several motions and several potential providers were considered, the trial court ultimately approved Wodja's treatment providers. CP 107, 40, 42-43, 44-45.

On June 22, 2012, Diane Shepard was approved by the Court to provide Wodja's anger management therapy. CP 44. The order required Wodja to undergo one-on-one counseling with Shepard. CP 44.

On July 23, 2012, Shepard reported to the Court that Wodja began counseling sessions on July 11, 2012, and that as of the date of

her letter/report (July 23, 2012), Wodja had “completed the program requirements” in less than one month. CP 50.

Just three months after beginning therapy with van Pul, on July 24, 2012, van Pul provided a letter to the trial court in which she reported that Wodja had begun treatment on May 17, 2012, and that he was “active in working on the treatment issues identified by Dr. Mark Whitehill.” CP 47. Van Pul summarized Wodja’s treatment thus far, and recounted Wodja’s concerns about not having any contact with the children, and his hope to have visitation with them that same summer (2012), after undergoing two months of treatment with van Pul. CP 48.

Wodja then brought a “motion for visitation” in Superior Court on August 3, 2012. CP 53–59.

As noted above, although Dr. Mark Whitehill was unable to provide ongoing treatment for Wodja and had recommended Wodja work with van Pul instead (CP 36), he provided a letter Wodja filed in support of his motion for visitation. CP 60–62. In that letter, Dr. Whitehill acknowledged that Wodja had commenced working with van Pul. CP 62. However, he specifically stated his belief that Wodja should not have contact with the children until van Pul could attest to

sufficient progress in treatment “such that he does not pose a manifest risk to [the children].” CP 61.

Dr. Whitehill concluded his letter by stating

I am in no position to comment on Dr. Wodja’s treatment progress, as at no time have I provided therapeutic services to him. I defer to those persons who are providing such services or who have done so following the court’s ruling.

CP 62.

Van Pul then amended her letter on August 30, 2012 after Wodja had been in treatment with her for a total of four months. CP 64–65. Van Pul repeated her belief that Wodja was ready to have contact with the children. CP 64.

The trial court entered very detailed findings of fact and conclusions of law to support its denial of Wodja’s motion for visitation. CP 66–73. The trial court first found that “many declarations and arguments offered by Wodja were not relevant” to his motion. CP 67. The court further found

From the December [2011] entry of the Final Parenting Plan until the last court proceeding on August 31, 2012, the court found very little change in Mr. Wodja’s ability to manage his anger or change his focus and beliefs about issues involving the children and the proper parenting of them.

CP 68. While the court did state that it hoped that Wodja would ultimately have contact with the children, it pointed out its concern that

it would be extremely detrimental to attempt the children's reconciliation with Mr. Wodja and a resumption of any visitation only to have prior behaviors, attitudes and actions again cause an interruption of the child-parent bond, because Mr. Wodja was unable to sustain a change to sometimes immutable personality characteristics.

CP 69-70 (emphasis added). Wodja's subsequent motion for reconsideration was denied on October 12, 2012. CP 74-95, 96-97.

Wodja then filed a petition to modify the parenting plan on March 28, 2013. CP 123. After Ms. Harkenrider filed a detailed response to Wodja's motion for adequate cause, Wodja dismissed the petition. CP 123, 140-41.

On September 27, 2013, Wodja filed the petition for modification of the parenting plan that underlies this appeal. CP 103-08. Wodja acknowledged that he had neither sought nor obtained any further treatment with Shepard since July of 2012. CP 128. He also claimed his work with van Pul was "done." CP 128. Wodja included a page that appears to have been printed from the Internet regarding a "Love and Logic" parenting class. CP 92. Wodja provided proof of

registering/paying for that class, but no certificate of completion. CP 93.

Wodja argued the substantial change in circumstances sufficient to sustain a finding of adequate cause to modify the parenting plan was the fact that he had “completed all required therapy” as set forth in the parenting plan entered on December 16, 2011. CP 107, 7. The record confirms Wodja had done nothing more to address the court’s concerns about him. CP 103–45.

Pierce County Superior Court Commissioner Gelman initially denied adequate cause in light of Judge Nelson having previously retained jurisdiction of the matter, and because Wodja’s two prior appeals were then pending in Division II. CP 146–47. On revision, Judge Martin found that the Superior Court did have jurisdiction of the petition for modification and remanded the matter to the family law/Court Commissioner’s docket to address the merits of Wodja’s motion for adequate cause. CP 191–92.

The hearing for adequate cause was continued by Court Commissioner Johnson in order for Wodja to provide specific information to support a finding of adequate cause. CP 202–03. Commissioner Johnson requested specific examples illustrating that

Wodja had made progress in his therapies as well as supporting documentation from collateral sources. CP 203-04. Commissioner Johnson entered a finding of adequate cause on February 11, 2014. CP 207, 211-13. He also authorized appointment of a Guardian ad Litem. CP 208-10.

Ms. Harkenrider moved for revision of these rulings. CP 215-16, 225-30. By that time, Judge James Orlando had assumed jurisdiction of the case. CP 240. On March 14, 2014, Judge Orlando revised the ruling on adequate cause and appointed Sheri Nakashima to serve as Guardian ad Litem. CP 242-43. In effect, Judge Orlando delayed addressing the issue of adequate cause pending Ms. Nakashima's investigation and report. CP 243. He ruled:

The Court has appointed the GAL due to the significant prior rulings and orders and for the purpose of addressing current issues and whether there are objective findings of father's change in behavior that would justify a determination of adequate cause.

CP 235.

Judge Orlando ordered the GAL to speak with van Pul and Shepard as well as the children's counselor. CP 234. Judge Orlando ordered that Wodja would be solely responsible to pay the GAL's fees and costs. CP 236.

GAL REPORT

The GAL issued her report on April 28, 2014. Supp. CP (GAL Report). In the course of her investigation, Ms. Nakashima interviewed van Pul, Shepard and the children's counselor. Supp. CP (GAL Report at 4).

Van Pul Interview

Van Pul reported the focus of her work was Wodja's Axis II diagnoses and associated behaviors. Supp. CP (GAL Report at 5). Van Pul specifically told the GAL that

personality disorders are very resistant to change. Individuals diagnosed with personality disorders have difficulty because they believe everything is fine. Everything that is happening is the result of others – individuals may believe they are treated unfairly or misunderstood.

Supp. CP (GAL Report at 5–6). Van Pul further reported to the GAL that Wodja “had bad personal boundaries – never enough to put him in prison but which reflected poor judgment.” Supp. CP (GAL Report at 7). When asked why she recommended the children have contact with Wodja, van Pul responded that children need both parents, “even if a parent is not the best” and that because the children are now living in a different state, they are safe. Supp. CP (GAL Report at 7).

Shepard Interview

Shepard recalled Wodja had engaged in six two-hour sessions with her. Supp. CP (GAL Report at 9). She could not confirm that Wodja had actually put the skills he learned into practice because the sessions had ended. Supp. CP (GAL Report at 9).

Shepard reported there was “not a lot of information that would lead her to believe anger management was necessary.” Supp. CP (GAL Report at 9). Shepard added that **Wodja’s “narcissistic behavior was a source of concern because such a quality may make it hard for [Wodja] to see outside of himself.”** Supp. CP (GAL Report at 9) (emphasis added). Shepard noted **Wodja “did not report being upset because he was unable to see the children. He felt unfairly treated.”** Supp. CP (GAL Report at 10) (emphasis added). Shepard believed it was clear Wodja should continue therapy, focusing on his Axis II issues. Supp. CP (GAL Report at 10). She was unable to determine whether Wodja had put the skills he learned with her into practice. Supp. CP (GAL Report at 10).

Children’s Counselor

The children’s counselor has significant experience working with traumatized children. Supp. CP (GAL Report at 11). When the counselor first met the children, they were “out of control,” “hyper-

vigilant” and would not listen to Ms. Harkenrider. Supp. CP (GAL Report at 11).

Zoe

Even though the counselor could not say Zoe’s behaviors were associated with specific events, she displayed symptoms of PTSD, had night terrors, and cried and kicked in her sleep. Supp. CP (GAL Report at 11). Zoe recalled Wodja holding a gun to her head and seeing bullets. Supp. CP (GAL Report at 11).

Zoe was also “preoccupied” with nakedness. Supp. CP (GAL Report at 13). Zoe had started drawing anatomically correct naked people in her journal and completely undressed the dolls during play therapy “every single time.” Supp. CP (GAL Report at 12). She told another child at school that men “shave their private parts.” Zoe later told the counselor that Wodja had urinated in front of her, and that she had seen him shave his genital area. Supp. CP (GAL Report at 12). She reported Wodja made profane comments about her and Ms. Harkenrider, and would not stop after being asked. Wodja would walk around in his underwear. Supp. CP (GAL Report at 12).

The counselor emphatically stated she did not believe Zoe had been coached to make these statements. Supp. CP (GAL Report at 13).

The counselor reported that children are generally comfortable with a new counselor within “one to two sessions” but it took Zoe a year.

Supp. CP (GAL Report at 11).

Cory

Cory initially displayed an “entitlement – I’m better than you” attitude when he started therapy. Supp. CP (GAL Report at 13). The counselor also reported Cory was moody, had no respect for females (including Zoe), and did not listen to anyone in a position of authority. Supp. CP (GAL Report at 13). She observed that “Cory was very against his mother.” Supp. CP (GAL Report at 13).

The counselor observed that the children had boundary issues with one another – she reported they were “oddly dependent” on one another. Supp. CP (GAL Report at 13). They sat on each other’s laps, made “atypical eye contact” when asked questions, and were aligned with one another. Supp. CP (GAL Report at 13). They appeared to the counselor to only trust one another, and did not trust Ms. Harkenrider. Supp. CP (GAL Report at 14).

The counselor reported that by the time of her interview with the GAL, the children had “blossomed.” Supp. CP (GAL Report at 14). She described the relationship between Ms. Harkenrider and the

children as “very healthy, appropriate and positive.” Supp. CP (GAL Report at 11). She reported the children now feel safe, but she described Zoe as still “fragile.” Supp. CP (GAL Report at 12, 14).

Reunification

Cory had told the counselor he wants no contact with Wodja “over time.” Supp. CP (GAL Report at 14). Zoe vacillates between wanting no contact with Wodja, but at other times saying she does. Supp. CP (GAL Report at 14). Zoe has expressed fear of Wodja; she has asked whether Wodja can find them and what would happen if he does. Supp. CP (GAL Report at 14). She has told other children at school they are hiding from Wodja. Supp. CP (GAL Report at 14).

The GAL reported that **the counselor did not recommend reunification counseling at this time or in the foreseeable future.** The counselor believed Wodja appeared to have “difficulty observing and recognizing boundaries.” Supp. CP (GAL Report at 12).

The GAL pointed out that the children’s counselor is in the best position to report on the children. Supp. CP (GAL Report at 15). Based on speaking with all three counselors, the GAL did not recommend reunification counseling at this time. Supp. CP (GAL Report at 16).

Judge Orlando conducted a hearing on May 2, 2014 for the purpose of reviewing the GAL's report. CP 248-49, 245-46. After hearing from Ms. Nakashima and counsel at the hearing, Judge Orlando denied Wodja's motion for adequate cause and discharged the GAL. CP 248-49.

Wodja sought reconsideration of that ruling. CP 250-54. He presented a letter from van Pul confirming that he had worked with her from May 17, 2012 through May 11, 2013. CP 253. Ms. Harkenrider objected to the motion on the basis that the letter from van Pul provided no information that was unavailable at the time of the May 2, 2014 hearing. She also objected to the letter on the grounds of admissibility. CP 256. She requested an award of \$10,000 in attorney's fees, even though she had incurred nearly \$20,000 in attorney's fees in responding to Wodja's most recent petition for modification and the hearings related to it. CP 258, 259-66.

On May 23, 2014, Judge Orlando denied Wodja's motion for reconsideration, and he awarded Ms. Harkenrider attorney's fees in the amount of \$5,000. CP 272-73.

Wodja appeals the denial of his petition for modification and motion for adequate cause.

II. ARGUMENT

A. WODJA HAS NOT “DONE EVERYTHING HE CAN DO” TO COMPLY WITH THE PARENTING PLAN

Wodja argues there is nothing more he can do to comply with the Court’s requirements set forth in the current parenting plan. Br. of Appellant at 18.

Van Pul reported she focused her work with Wodja on his Axis II diagnoses. Supp. CP (GAL Report at 5). She also reported

personality disorders are very resistant to change. Individuals diagnosed with personality disorders have difficulty because they believe everything is fine. Everything that is happening is the result of others – individuals may believe they are treated unfairly or misunderstood.

Supp. CP (GAL Report at 5–6).

Shepard similarly reported Wodja “did not report being upset because he was unable to see the children. He felt unfairly treated.”

Supp. CP (GAL Report at 10). Wodja’s brief clearly shows he believes everything “is fine” and that he believes he has been unfairly treated.

See, e.g., Br. of Appellant at 18, 33, 38.

Shepard also expressed her concern about Wodja’s narcissistic behavior making it hard for him to “see outside of himself,” and stated it is clear Wodja should continue therapy focused on his Axis II diagnoses. Supp. CP (GAL Report at 9, 10). Shepard reported she could

not determine Wodja had put the skills he learned with her into practice. Supp. CP (GAL Report at 10).

This Court should reject Wodja's argument. Wodja has not done everything he can do to comply with the requirements of the current parenting plan.

Additionally, Wodja's passing arguments that the children are now "suffering" and that Ms. Harkenrider put them in counseling after he filed his most recent petition for modification are contradicted by the record. Br. of Appellant at 19. No cites to the record are provided in his brief. Br. of Appellant at 19. RAP 10.3(a)(5), (6). These arguments should not be considered by this Court.

B. JUDGE ORLANDO PROPERLY FOLLOWED THE STATUTORY REQUIREMENTS FOR DETERMINING ADEQUATE CAUSE.

Wodja misstates the law when he argues "[t]he issue was if there could be an INFERENCE to establish grounds for modification." Br. of Appellant at 21. This is contradicted by the law, even as stated in Wodja's brief. The law instead requires "**something more than prima facie allegations**" and inferences to establish a sufficient legal basis for modification of a parenting plan. *In re Parentage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003). Wodja has failed to do that.

A trial court's primary concern in establishing a parenting plan is protecting the best interests of the children. RCW 26.09.002; *In re Marriage of Stern*, 57 Wn. App. 707, 712, 789 P.2d 807 (1990).

Especially important and relevant here is that our legislature has established that

The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, **the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered** only to the extent necessitated by the changed relationship of the parents or **as required to protect the child from physical, mental, or emotional harm.**

RCW 26.09.002 (emphasis added).

Parenting plans are modified using a two-step process, codified by the legislature. RCW 26.09.270; *In re Marriage of Zigler*, 154 Wn. App. 803, 809, 226 P.3d 202 (2010). First,

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

RCW 26.09.270.

As required by this statute, the moving party is required to submit an affidavit establishing “adequate cause” for modification. *Zigler*, 154 Wn. App. at 809. The trial court will allow the moving party to proceed on their petition for modification only if the affidavit establishes adequate cause. RCW 26.09.270; *In re Custody of T.L.*, 165 Wn. App. 268, 275, 268 P.3d 963 (2011). This threshold requirement prevents “movants from harassing non-movants by obtaining a useless hearing.” *In re Marriage of Adler*, 131 Wn. App. 717, 724, 129 P.3d 293 (2006).

As stated above, the petition for modification must contain more than prima facie allegations that could support inferences that would establish grounds to modify the parenting plan. *Grieco v. Wilson*, 144 Wn. App. 865, 875, 184 P.3d 668 (2008), *aff’d sub nom. In re Custody of E.A.T.W.*, 168 Wn.2d 335, 227 P.3d 1284 (2010).

The moving party must provide evidence sufficient to support a finding on each fact the moving party must prove in order to modify the parenting plan. *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966 (2004). The information provided by the moving party should be something not considered in the original parenting plan. *Zigler*, 154 Wn. App. at 809.

A trial court can modify the existing parenting plan only if it finds – based on new or previously unknown facts – that there has been a substantial change in the circumstances of the child or the nonmoving party and that the modification is in the child’s best interest and is necessary to serve the best interests of the children. RCW 26.09.260(1); *Zigler*, 154 Wn. App. at 809; *George v. Helliard*, 62 Wn. App. 378, 382–83, 814 P.2d 238 (1991).

This court reviews a trial court’s finding or denial of adequate cause for abuse of discretion. *In re Parentage of Jannot*, 149 Wn.2d 123, 128, 65 P.3d 664 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997).

1. Judge Orlando did not abuse his discretion by denying adequate cause.

Judge Orlando’s denial of adequate cause was the proper exercise of his discretion. He specifically found that “given the level of trauma that these kids report and now is being addressed by their counselor, [Wodja] was premature to move forward with a modification.” 3 RP at 9 (May 2, 2014). This comports with the

statutes defining the purpose of all parenting plans, which is safeguarding the best interest of these children. RCW 26.09.002.

2. Judge Orlando properly appointed, then relied on, the investigation and report of the Guardian ad Litem.

RCW 26.12.175(1)(a) provides:

The court may appoint a guardian ad litem to represent the interests of a minor or dependent child when the court believes the appointment of a guardian ad litem is necessary to protect the best interests of the child[ren] **in any proceeding under this chapter.**

Emphasis added.

A trial court considers the report and recommendation, along with the parties' comments and criticisms. The court is not bound by the report, but makes its own assessment of what is necessary to protect the children's best interest. *See In re Marriage of Swanson*, 88 Wn. App. 128, 138, 944 P.2d 6 (1997).

The role of the guardian ad litem is to investigate the relevant facts concerning the circumstances of the children and family at issue. *Swanson*, 88 Wn. App. at 137 (citations omitted). *See also In re Guardianship of Stamm*, 121 Wn. App. 830, 836, 91 P.3d 126 (2004); *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997).

The GAL analyzes the potential courses of action available to the trial court, identifies the course or courses of action that he or she

thinks will best serve the children's interests, and makes a report and recommendation to the court concerning those interests. *McDaniels v. Carlson*, 108 Wn.2d 299, 302-03, 738 P.2d 254; *Swanson*, 88 Wn. App. at 137. For purposes of any appeal, the propriety of the guardian's performance must show on the record. *Swanson*, 88 Wn. App. at 137 (citations omitted).

The GAL is a neutral advisor to the court. Although the GAL is an "expert" as to the status and dynamics of the family at issue, and is in a position to offer a common sense perspective to the court, the trial court remains free to ignore the GAL's recommendations **if they are not supported by other evidence or if it finds other testimony more persuasive**. *Stamm*, 121 Wn. App. at 836; *Fernando*, 87 Wn. App. at 107 (emphasis added).

Judge Orlando was authorized by RCW 26.12.175(1)(a) to appoint a GAL, even for purposes of determining whether there was adequate cause to modify this parenting plan.

Contrary to Wodja's argument, a GAL is not required to provide the court with a sworn affidavit. Br. of Appellant at 19. Instead, the GAL makes a report and recommendation to the court concerning their investigation and the best interests of the children. *McDaniels v.*

Carlson, 108 Wn.2d 299, 302-03, 738 P.2d 254 (1987); *Swanson*, 88 Wn. App. at 137. That is precisely what the GAL did in this case. Supp. CP. Wodja can point to nothing in the record to show any impropriety on the part of the GAL. *Swanson*, 88 Wn. App. at 137 (citations omitted).

The GAL interviewed van Pul twice and Shepard once. She interviewed the children's counselor twice. Supp. CP at 5, 8, 11. Therefore, the propriety of the GAL's work is evident. *Swanson*, 88 Wn. App. at 137.

Judge Orlando is vested with the discretion to adopt or ignore the recommendations of the GAL. *Stamm*, 121 Wn. App. at 836; *Fernando*, 87 Wn. App. at 107. He chose to accept the GAL's recommendations because they were supported by significant evidence (the GAL's interviews) and he did not find Wodja's testimony more persuasive. *Stamm*, 121 Wn. App. at 836; *Fernando*, 87 Wn. App. at 107.

3. Judge Orlando was not biased.

On review, this court presumes a trial court "perform[ed] its functions regularly and properly without bias or prejudice"; the party claiming bias or prejudice "must support the claim with evidence of

the trial court's actual or potential bias." *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (citing *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000)), *review denied*, 167 Wn.2d 1002 (2009).

The test to determine whether a judge's impartiality is subject to scrutiny "is an objective one that assumes that a reasonable person knows and understands all the relevant facts." *Hickok-Knight v. Wal-Mart Stores, Inc.*, 284 P.3d 749, 769, 284 P.3d 749 (2012) (citing *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 159 Wn. App. 591, 600, 245 P.3d 257 (2011), *aff'd*, 174 Wn.2d 304, 274 P.3d 1025 (2012)); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 340, 54 P.3d 665 (2002) (internal quotation marks omitted) (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)). While a pattern of erroneously denying motions may indicate bias on the part of a trial court, rulings "consistent with applicable law" show the opposite. *State v. Turner*, 143 Wn.2d 715, 728, 23 P.3d 499 (2001). Each of Judge Orlando's rulings at issue was consistent with applicable law and well supported by the record. Wodja has provided nothing in the record below to show the contrary.

“A litigant who proceeds . . . knowing of potential bias by a trial court waives his objection and cannot challenge the court’s qualifications on appeal”; *Brauhn v. Brauhn*, 10 Wn. App. 592, 597, 518 P.2d 1089 (1974) (“One who claims a judge trying claimant’s case is biased may waive his right to complain thereof by not timely raising the objection and proceeding with trial or continuing with a pending trial as if the judge were not disqualified.”). Wodja never raised the issue of his perception that Judge Orlando was biased against him at any point in time below. Therefore, he has waived this argument. RAP 2.5(a).

Judge Orlando went out of his way to extend Wodja the opportunity to establish adequate cause, which he was not required to do. He initially noted the difficulty he was presented with in measuring “whether or not [Wodja] is going to do equally as well in the real world in a parenting context based upon these relatively minimal evaluations that he’s had.” 2 RP (March 14, 2014) at 7. He further observed “I think there was an insufficient basis to determine adequate cause[.]” 2 RP (March 14, 2014) at 7. But rather than dismissing the petition for modification outright, Judge Orlando appointed a GAL to investigate “whether or not [Wodja] has truly

made gains in treatment and whether or not there is a therapeutic course of action that would be set forward to reintegrate [Wodja into] the lives of these kids.” 2 RP (March 14, 2014) at 8.

Judge Orlando maintained a parenting plan that is in the best interest of these children in accordance with RCW 26.09.002. He properly followed the statutes in determining whether there was adequate cause. RCW 26.09.270; *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 227 P.3d 1284 (2010); *Grieco v. Wilson*, 144 Wn. App. 865, 875, 184 P.3d 668 (2008), *aff'd sub nom.*; *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966 (2004).

Judge Orlando appointed a GAL because he agreed with Commissioner Johnson that the material Wodja provided with his petition was factually deficient. CP 202-04; 2 RP (March 14, 2014) at 3, 7. Judge Orlando properly relied on the GAL's report, as he is permitted to. *Stamm*, 121 Wn. App. at 836; *Fernando*, 87 Wn. App. at 107. Judge Orlando's ultimate decision was made after affording Wodja an additional opportunity to provide evidence sufficient to sustain a finding of adequate cause, and after appointing a GAL to provide further information for his consideration. Wodja's argument fails.

4. **Judge Orlando did not ignore Wodja’s “expert witnesses.”**

Wodja argues Judge Orlando ignored the affidavits of his “expert witnesses,” van Pul and Shepard.¹ Br. of Appellant at 23. The record amply supports the contrary.

At the March 14, 2014 hearing, Judge Orlando observed

[T]he only thing that was presented after January 21, 2014 was a letter from Mr. Wodja² saying that, oh, geez, and it’s just text book psychological stuff, and it really doesn’t say, he never admits that he abused his children. He never admits that he abused Ms. Harkenrider. He never admits any of the sexual deviant behavior that came out at the time of trial. He never admits any of his deficiencies. **All he says is that everything’s fine and I should see my children.**

2 RP (March 14, 2014) at 3–4 (emphasis added).

At the March 14, 2014 hearing, Wodja argued that Shepard believed Wodja “learned what he needs to do in order to manage his anger, at least as of July 23, 2012.” 2 RP (March 14, 2014) at 4.

As to Ms. Van Pul, Judge Orlando observed

I have no idea whether or not just by going to Paula van Pul and participating with her and getting her recommendation or seeing the anger management therapist whether or not in the context of parenting these kids [Wodja] would be able to put those lessons learned into play or he would revert back to his old behavior. . . . That’s the dilemma I have in this case is how

¹ Wodja also argues that Ms. Harkenrider has stated the children are “suffering” under her care, but he points to nothing in the record to support this claim. Br. of Appellant at 17, 23. This claim is belied by the children’s counselor.

² CP 196–201.

do you measure whether or not [Wodja] is going to do equally as well in the real world in a parenting context based upon these relatively minimal evaluations that he's had.

2 RP (March 14, 2014) at 7. This lack of information in Wodja's petition coupled with the fact that Wodja did minimal work with his "experts" is precisely why Judge Orlando appointed the GAL and instructed her to interview the children's therapist as well as van Pul and Shepard. 2 RP (March 14, 2014) at 8-11.

In ruling after the GAL presented her report, Judge Orlando stated he had considered the report, which included detailed accounts of the GAL's interviews with both of Wodja's counselors. 3 RP (May 2, 2014) at 2.

Neither expert was as helpful to Wodja's claims of rehabilitation as he may believe. Van Pul acknowledged to the GAL that personality disorders are very resistant to change, and that such individuals believe everything is fine. Everything that is happening is the result of others - individuals may believe they are treated unfairly or misunderstood. Supp. CP (GAL Report at 5-6). This describes the tenor of Wodja's argument throughout his brief - he is fine, and he has been wronged. Br. of Appellant.

Van Pul reported to the GAL that Wodja had bad personal boundaries, and that his narcissistic behavior concerned her because it difficult for Wodja to “see outside of himself.” Supp. CP (GAL Report at 9).

Shepard’s reports to the GAL also raise concern about Wodja’s lack of progress and lack of treatment appropriately tailored to his Axis II diagnoses. Shepard believed Wodja should continue therapy with focus on those issues. Supp. CP (GAL Report at 10). She could not determine whether Wodja had put any skills he learned with her into practice. Supp. CP (GAL Report at 10). These are valid observations and concerns raised by Wodja’s own “experts” that support Judge Orlando’s denial of adequate cause.

This court defers to the trial court’s determinations of witness credibility and the persuasiveness of the evidence. *In re Marriage of Wehr*, 165 Wn. App. 610, 615, 267 P.3d 1045 (2011) (“We do not review credibility determinations or weigh evidence on appeal.”) (citing *In re Marriage of Meredith*, 148 Wn. App. 887, 891 n.1, 201 P.3d 1056, review denied, 167 Wn.2d 1002, 220 P.3d 207 (2009)); *In re Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011).

Judge Orlando did not ignore Wodja's "experts;" he clearly found them to be credible and they provided substantial support for his denial of adequate cause.

5. Judge Orlando did not terminate Wodja's parental rights.

Wodja next argues that Judge Orlando terminated his parental rights with "no remedy or recourse." Br. of Appellant at 32. Wodja make several incorrect and contradictory arguments in this portion of his brief. Br. of Appellant at 32.

Trial courts have broad discretion in all matters concerning the welfare of children. *In re Cabalquinto*, 100 Wash.2d 325, 327, 669 P.2d 886 (1983), *appeal after remand*, 43 Wn. App. 518, 718 P.2d 7 (1986).

RCW 26.09.191(2)(a) provides criteria under which a parent's contact with their children may be limited or suspended entirely.

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; or (iv) the parent has been convicted as an adult of a sex offense.

Emphasis added. Application of this statute is not discretionary.

RCW 26.09.191(3) also provides:

A parent's involvement or conduct may have an adverse effect on the child's best interests, **and the court may preclude or limit any provisions of the parenting plan**, if any of the following factors exist:

- (a) A parent's neglect or substantial nonperformance of parenting functions;
- (b) **A long-term emotional or physical impairment** which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
- (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
- (d) The absence or substantial impairment of emotional ties between the parent and the child;
- (e) **The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;**
- (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
- (g) **Such other factors or conduct as the court expressly finds adverse to the best interests of the child.**

Emphasis added.

Thus, under this provision of the statute, the trial court is vested with the discretion to preclude or limit contact between Wodja and the children.

Wodja has been diagnosed with Axis II personality disorders, including narcissistic personality disorder. Supp. CP (GAL Report at 5, 9, 10). Wodja's brief clearly demonstrates and supports Shepard's observation that his "narcissistic behavior was a source of concern

because such a quality may make it hard for [Wodja] to see outside of himself.” Supp. CP (GAL Report at 9). This is further supported by Shepard’s observation that Wodja “did not report being upset because he was unable to see the children. He felt unfairly treated.” Supp. CP (GAL Report at 10).

After unsuccessfully filing two petitions to modify the parenting plan, Wodja continues to refuse to follow the trial court’s clear instructions and orders in order to resume contact with the children. What Wodja fails to understand is that he is not required to simply complete treatment with any given counselor; he is required to demonstrate that he accepts responsibility for his past behaviors, demonstrate that he understands the effect those behaviors had on the children, and demonstrate that he has actually changed to a degree that satisfies the Court that reunification is warranted and in the best interest of the children. 2 RP (March 14, 2014) at 7.

The children are in counseling as a direct result of Wodja’s actions. Their counselor has been working with them since May of 2012. Supp. CP (GAL Report at 11). She does not believe reunification is in the children’s best interest at this time. That does not foreclose her recommending reunification in the future.

Judge Orlando did not foreclose the possibility of Wodja having contact with the children in the future.

If [Wodja] reconvenes with Paula van Pul and is in therapy and down the road she finds he's made such terrific progress that there's no reason why he would be a threat to the children and that there should be some mechanism to communicate with their therapist, then [Wodja] could refile [his] request to modify [the parenting plan].

3 RP (May 2, 2014) at 10. Judge Orlando did not terminate Wodja's parental rights. This argument fails.

6. Judge Orlando did not violate Wodja's Constitutional rights.

Wodja is correct that the relationship between a parent and child is constitutionally protected. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000); *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L.Ed.2d 101 (1979). However, the safety of children outweighs any individual's constitutionally protected interest in parenting their children. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 233-34, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (parent's constitutional rights may be overcome if health or safety of child in danger). *See also DuPuy v. Samuels, et. al*, 462 F.Supp.2d 859, 897 (N.D.Ill. 2005).

A reviewing court evaluates what degree of due process protection was afforded in balancing those interests in order to

protect against erroneous deprivation of a parent's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The record shows the Court's primary concern was with protecting the best interest of these children. RCW 26.09.002. *See, e.g.*, 3 RP at 9 (May 2, 2014). Wodja's constitutional rights were not improperly infringed.

7. Judge Orlando had the discretion to apportion payment of the Guardian ad Litem's fee.

RCW 26.12.175(d) provides

The court shall enter an order for costs, fees, and disbursements to cover the costs of the guardian ad litem. The court **may order either or both** parents to pay for the costs of the guardian ad litem, according to their ability to pay.

Emphasis added. This is not the only basis available to Judge Orlando for ordering Wodja to pay the entirety of the GAL's fees.

A trial court is vested with discretion to award attorney fees and costs under any statute or contract. This court reviews such an award for abuse of discretion. *Fluke Capital & Mgmt. Servs. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986).

The Order Appointing Guardian ad Litem provides that Wodja was responsible to pay 100% of the fees and costs of the guardian ad litem. CP 236.

RAP 2.5(a) also provides

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:

- (1) lack of trial court jurisdiction,
- (2) failure to establish facts upon which relief can be granted, and
- (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

Wodja did not object to the allocation of the Guardian ad Litem's fees below. The record indicates Wodja never sought reconsideration of this ruling. This issue is not jurisdictional, is not related to the failure to establish facts upon which relief could be granted, nor does it affect a constitutional right. RAP 5.2(a). Therefore, this court should not consider this argument.

Even if this court chose to consider this issue, Wodja has not provided or designated anything from the record below that demonstrates his inability to pay the fees and costs. This court should not consider this issue on this basis as well.

In addition, as argued immediately below, a trial court has the discretion to order payment of fees and costs as a sanction to a party. *In re Kelly*, 170 Wn. App. 722, 739–40, 287 P.3d 12 (2012). Ms. Harkenrider has been responding to Wodja’s unsuccessful attempts to resume visitation or modify the parenting plan since final orders were entered in early 2012. CP 1–30. She was required to respond to two unsuccessful appeals brought by Wodja since final orders were entered in early 2012. Washington State Court of Appeals Case Nos. 43660–4–II and No. 44504–2–II (consolidated) (Div II). The trial court did not abuse his discretion in ordering Wodja to pay the GAL’s fees and costs.

8. Judge Orlando had the discretion to award Ms. Harkenrider’s attorney’s fees.

Wodja opposes Judge Orlando’s award of attorney’s fees to Ms. Harkenrider. Br. of Appellant at 35. Wodja argues that if a parenting plan modification action is brought in bad faith, attorney’s fees “can” be awarded pursuant to RCW 26.09.260(13).³ Based on the history as indicated throughout the record on appeal, it is clear that Wodja brought the modification action at issue in bad faith.

³ RCW 26.09.260(13) is not discretionary; it is mandatory. “If the court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court **shall** assess the attorney’s fees and court costs of the nonmoving parent against the moving party.” (Emphasis added.)

Wodja also argues that a party requesting attorney's fees under RCW 26.09.140 must make a **present** showing of need to support the award. Br. of Appellant at 36, citing *Marriage of Konzen*, 103 Wn.2d 470,478, 693, P.2d 97, *cert. denied*, 473 U.S. 906 (1985).

However, RCW 26.09.140 provides that a trial court **may** order one party to pay the other party's attorney's fees after considering the relative financial resources of both parties.

Just as he did previously, Wodja has overlooked the fact that there are different bases upon which a court may award attorney's fees.

A trial court's finding of intransigence is also a basis for an award of attorney's fees, irrespective of the relative financial resources of the parties. *In re Kelly*, 170 Wn. App. 722, 287 P.3d 12 (2012), provides a highly pertinent illustration:

Washington courts have recognized intransigence as a basis for attorney fees in dissolution proceedings. *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). 'Intransigence' may be shown by **'litigious behavior, bringing excessive motions**, or discovery abuses.' *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). Washington courts have also used the phrase to describe parties motivated by their desire to delay proceedings or to run up costs. *See id.* (citing *Gamache v. Gamache*, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965); *Eide v. Eide*, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969)).

Kelly, 170 Wn. App. at 739–40 (emphasis added).

A review of the record confirms the basis for Judge Orlando’s award of attorney’s fees was based on Wodja’s continuing intransigence. The following exchange occurred near the conclusion of the hearing on Wodja’s May 23, 2014 motion for reconsideration:

WODJA’S COUNSEL: Your Honor, just for the record and so that I understand your ruling, that \$5,000 for attorneys’ fees you’re basing on vexatious litigation?

COURT: Yes, and what I believe to be an unnecessary motion for reconsideration.

4 RP (May 23, 2014) at 8. Vexatious litigation by its very definition is overly–litigious behavior and is, therefore, intransigence. *Wallace*, 111 Wn. App. at 710.

A trial court’s award of attorney fees is reviewed for abuse of discretion, “whether the award is under a statute or for intransigence.” *In re Marriage of Bobbitt*, 135 Wn. App. 8, 29–30, 144 P.3d 306 (2006). The award will not be disturbed unless the trial court exercised its discretion in an untenable or manifestly unreasonable manner. *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). Judge Orlando made the basis for this award very clear on the record, upon the urging of Wodja’s counsel. 4

RP (May 23, 2014) at 8. This was not an abuse of discretion. This court should affirm this award.

C. THIS COURT SHOULD DISREGARD ANY ASSIGNMENTS OF ERROR THAT HAVE NO ARGUMENT IN WODJA'S BRIEF.

Wojda assigns error to (1) the court "disregarding one child's wishes to see her father; (2) the court "testifying" and "relying on its own opinion and testimony; (3) the court allowing Ms. Harkenrider's attorney to testify and (4) court relying too heavily on the mother's "testimony" even though it was "inconsistent and disingenuous". Br. of Appellant at 8, 10, 11 (Assignments of Error 7, 13, 14, 16, 17).

Wodja includes no argument in his brief related to these claimed errors. Therefore, this court should not consider them. *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960); *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 319, 450 P.2d 940 (1969) (assignment of error not argued in brief cannot be considered).

Wodja also failed to provide any citations to the record to support these claims. RAP 10.3(a)(5), (6). These arguments should not be considered by this Court. *See, e.g., Hardcastle v. Greenwood Sav. & Loan Ass'n*, 9 Wn. App. 884, 890-91, 516 P.2d 228 (1973); *State v. Reader's Digest Ass'n, Inc.*, 81 Wash.2d 259, 501 P.2d 290 (1972). Br. of Appellant at 8, 10, 11 (Assignments of Error 7, 13, 14, 16, 17).

D. MS. HARKENRIDER SHOULD BE AWARDED HER ATTORNEY'S FEES FOR THE NECESSITY OF RESPONDING TO THIS APPEAL.

RCW 26.09.140 provides:

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.

RAP 18.9 provides, in pertinent part:

The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who . . . files a frivolous appeal . . . to pay terms . . . to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

"An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985) (citations omitted).

Reasonable minds cannot differ as to the issues presented by Wodja in his brief; nor can reasonable minds differ as to the propriety of Judge Orlando's rulings. Therefore, this Court should deem Wodja's appeal to be frivolous and should award Ms. Harkenrider her reasonable attorney's fees for having to respond to it.

III. CONCLUSION

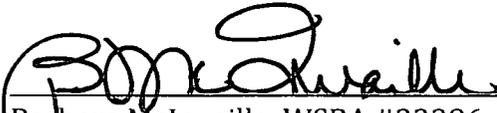
Christopher Wodja doggedly resists taking the steps clearly set out by the court necessary to allow the reunification process with the children to begin. As is apparently normal for one suffering from narcissistic personality disorder, Wodja looks to everyone but himself to find fault with his current circumstances.

The trial court's reluctance to begin this process is well supported by the record. The safety and wellbeing of these children is and should be the court's paramount concern.

Ms. Harkenrider respectfully asks this Court to affirm Judge Orlando's rulings and award her attorney's fees for having to respond to this appeal.

DATED this 5th day of February, 2015.

RESPECTFULLY SUBMITTED,


Barbara McInville, WSBA #32386
Attorney for Teresa Harkenrider

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by the e-filing portal, and delivered a copy of this document via United States Postal Service, postage prepaid, and via e-mail to the following:

Christopher Wodja
PO Box 71
Spanaway, WA 98387

Stephen W. Fisher
6314 19th Street W.
Suite 8
Fircrest, WA 98466-6223

via e-mail only

Signed at Tacoma, Washington on this 5th day of February, 2015.


Barbara McInville

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