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TABLE OF AUTHORITIES

STATUTES

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CASE LAW

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Cummings v. Budget Tank Removal & Environmental Services, LLC, 163 Wn. App. 379 (Div. 1 2011)

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A. ASSIGNMENT OF ERRORS

The Trial Judge erred when he determined that he had the authority to review what happened in the alternative dispute resolution process pursuant to the parenting plan, relied upon statements made by the Respondent about events that occurred and statements that were made inside the arbitration proceedings, made findings about the arbitrator’s decision that were not evident from the face of the award, found that the Respondent did not freely and voluntarily enter into binding arbitration of her own accord, found that the arbitrator had not made a proper decision, did not sign the arbitration award, did not keep an official record of what transpired in the arbitration sessions, denied the Father’s motion to confirm the Arbitrator’s Decision, and instead ordered the Arbitrator’s Decision to be vacated for irregularities, lifted the stay of proceedings, and found that adequate cause needed to be determined prior to proceeding with the modification action.

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

When parties freely and voluntarily enter into binding arbitration, and the arbitrator issues a record of decision, does a Trial Court have authority to look into the proceedings to determine whether the process is complete or whether irregularities occurred that would justify vacating that decision after the time for vacating the award has passed, based solely upon verified and unverified statements of a party to the events occurring within the arbitration process, and upon allegations that the arbitrator failed to keep an official record of the proceedings?

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3 **B. STATEMENT OF THE CASE**
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5 **THE PARTIES**

6 The Appellant, James L. Andrews, (hereafter James), and the Respondent,
7 Angela M. Trager, (hereafter Angela), have one child in common, BA, 8
8 years old, and a parenting plan dating from 2012.

9 **PETITION TO MODIFY AND MEDIATION**

10 James filed a petition to modify the parties' parenting plan on March 31,
11 2015 (CP 16) because he suspected the mother was using drugs and unable
12 to safely parent their child (CP 1-3, 6-10). He also filed a motion and dec-
13 laration for ex parte restraining order and order to show cause (CP 11). A
14 Superior Court Commissioner signed a show-cause order requiring Angela
15 to appear on April 16, 2015 to address the issue of a temporary restraining
16 order (CP 23-24). The next day, April 1, 2015, the parties engaged the ser-
17 vices of a mediator, with a confirmed date of April 8, 2015 for their media-
18 tion session (CP 33-34). The parties attended mediation on April 8, 2015 (CP
19 35). Angela was very anxious to have the matter resolved quickly so that
20 she could have visitations with her son (CP 64; 95 ll. 10-11; 118 ll. 20-21; 119
21 ll. 11-12;).

22 **AGREEMENT TO BINDING ARBITRATION; ORAL AND WRITTEN DECISIONS**

23 At the mediation session, the parties jointly agreed to binding arbitration
24 with the mediator becoming the arbitrator (CP 28-30; 35-36; 37; 55-56; 60-62;
25 64; 79-81; 82; 85-86; 94-95; 113; 114; 115; 118-119). The Arbitrator issued his
26 oral decision at the arbitration session of April 8, 2015 (CP 28-29; 35; 61 ll.
27 10-12; 95 ll. 15-16; 113 ll. 4-7;), with a written decision to follow (CP 35),
28 and then subsequently issued a written decision on May 11, 2015 (CP 55-59;

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3 60 l. 3; 78-81; 82-83; 89 ll. 13-14; 91; 92; 113; 122 ll. 18-20;) that gave An-
4 gela immediate visitation, conditions for on-going drug testing, and made
5 provision for a parenting schedule for the long term (CP 55-59).

6 **JAMES' MOTION TO COMPEL ARBITRATION; ORDER STAYING PROCEEDINGS PENDING**
7 **ARBITRATION**

8 At the show-cause hearing of April 16, 2015, pursuant to a motion by
9 James to compel arbitration (CP 31-36), which motion was joined by Angela
10 (CP 37 l. 20), the Superior Court Commissioner issued an order staying
11 the proceedings pending arbitration (CP 37-38). According to this order,
12 the parties were to "follow the oral and written orders of the arbitrator in
13 matters relating to visitation. Motions including each party's requests for
14 fees shall be heard and decided by the arbitrator." (Id.)

15 **JAMES' MOTION TO CONFIRM ARBITRATION AWARD**

16 Six months later, on November 20, 2015, James filed a motion for order
17 confirming the arbitration award (CP 39-41). The motion included the fol-
18 lowing itemized Statement of Facts/Statement of Grounds (CP 39 ll. 22-28,
19 40 ll. 1-6):

- 20 1. The parties entered into binding arbitration to resolve a petition for
21 modification brought by the respondent on March 31, 2015.
22 2. This court issued an order staying proceedings pending arbitration on
23 April 16, 2015.
24 3. The arbitrator issued a written decision modifying the final parenting
25 plan on May 11, 2015.
26 4. The arbitrator issued an oral decision modifying the final order of
27 child support, which the parties used to prepare an agreed final or-
28 der of child support;
29 5. **The parties held further conferences with the arbitrator in attempts**
30 **to obtain modifications of the arbitrator's written decision, but the**
31 **arbitrator has steadfastly refused to modify his written order, indicating**
32 **that the parties may agree to modify the orders as they can, but his**
33 **written order shall stand.**

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3 6. The parties have been unable to agree on further modifications of the
4 written arbitration award.

5 In addition, the motion included the following Statement of Issues/ Argument
6 (CP 40, ll 8-9):

7 1. The only issue presented is whether the arbitrator's written decision
8 of May 11, 2015 should be confirmed, and judgment awarded on that
9 written decision.

10 **ANGELA'S RESPONSE AND MOTION FOR FURTHER ARBITRATION**

11 In response to this motion, Angela asked the court to deny the motion to
12 confirm and moved for an order directing the parties back to arbitration (CP
13 60, ll. 17-18), as follows:

14 Comes now the Petitioner, Angela Trager, and moves this court
15 to deny the relief requested by James Andrews, **direct the parties**
16 **back to Arbitration regarding the remaining issues related to**
17 **the parenting plan...**

18 Attorney Affidavit:

19 I am the attorney for Ms. Trager and competent to speak to such
20 matters.

21 The parties entered into binding arbitration on May 11, 2015
22 with the Honorable Judge Edwin Poyfair, Retired. As a result
23 of no less than three separate sessions, including a session on
24 September 16, 2015, the parties argued to Judge Poyfair(Ret.)
25 regarding the language of the final parenting plan. At issue is
26 when and under what circumstances the parties will return to
27 a 50-50 parenting schedule. ... Ms. Trager argued heavily for
28 this position because adequate cause normally is only granted
when there is a substantial change of circumstances with the cus-
todial parent. **Because as a result of the arbitrator's decision**
she was not going to be the custodial parent at the time of
her motion. Specific language had to be entered in the final
parenting plan which granted her the authority to return to
court to re-establish the 50-50 schedule.

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4 Both attorneys for the parties submitted their proposed lan-
5 guage to Judge Poyfair for his consideration. **Judge Poyfair declined**
6 **to act further in the case....**

7 This situation left the parties in a quandary. The essential
8 language in the parenting plan was not decided by the arbitra-
9 tor, despite argument, and oral decisions made in September 16,
10 2016. **Judge Poyfair has declined to act further in the case.**

11 (CP 61 ll. 1-23, 62 ll. 1-3)

12 **JAMES' REPLY WITH MEMORANDUM OF POINTS AND AUTHORITIES**

13 In response to Angela's motion and declaration which included numer-
14 ous references to events and statements occurring inside the arbitration ses-
15 sions (CP 61, ll. 7-11, ll. 13-15, ll. 21-23, 62 ll. 5-12, 19-23) James filed a reply
16 motion to confirm arbitration award and memorandum of points and au-
17 thorities on December 11, 2015 (CP 66-72) which pointed out that "the Court
18 may not look beyond the face of the Arbitrator's Decision, and the criteria
19 that should be utilized is whether the Arbitrator's Decision shows manifest
20 errors amounting to fraud or corruption." (CP 68 ll. 12-14).

21 **DENIAL OF MOTION TO CONFIRM; MOTION FOR REVISION**

22 On December 17, 2016, a Superior Court Commissioner denied James'
23 motion to confirm on the ground that arbitration "may not be complete"
24 (CP 73-74). James filed a motion for revision of the Commissioner's order
25 on December 18, 2016 (CP 75-77).

26 **RENEWED ARBITRATOR'S DECISION TO MODIFY FINAL PARENTING PLAN**

27 In response to requests for confirmation of his decision, the arbitrator is-
28 sued a second "Arbitrator's Decision to Modify Final Parenting Plan" signed
as of May 11, 2015 (CP 78-81).

JUDGE'S ORAL DECISION TO CONFIRM ARBITRATION AWARD

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4 At a hearing in front of the Superior Court Judge on March 24, 2016, the
5 judge issued the following oral findings, as evidenced by the clerk's record
6 of the hearing (CP 82-83):

- 7 • Court finds that the Order entered during arbitration by Mr. Poyfair
8 in May 2015 was his decision.
- 9 • Mr. Poyfair had the opportunity to incorporate language regarding
10 stage in residential time for Petitioner and should have been entered
11 into the Order if intended.
- 12 • Court cannot determine if Mr. Poyfair signed the document nunc pro
13 tunc to May of 2015 or was not signed until March of 2016.
- 14 • Court can only determine that it was signed in May 2015.
- 15 • Court finds that the time has elapsed for an appeal of arbitration de-
16 cision.
- 17 • Court rules that Mr. Poyfair's decision for final parenting plan made
18 May of 2015 stands.
- 19 • Language of decision will be incorporated into the Final Parenting
20 Plan.
- 21 • Set over for Entry of Final Order with Child to 4/8/2016 at 9:00 AM

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ANGELA'S MOTION TO VACATE ARBITRATOR'S DECISION

The next week, on April 1, Angela filed a motion to vacate arbitrator's
decision and motion to dismiss for lack of adequate cause (CP 84-93). The
evidence presented with her motion were three email records, as follows
(CP 91-93):

- 1/20/2016, at 2016 PM, Loretta Steele <poyfairmediation@gmail.com>
wrote: Josie:
Your last question was in regard to Judge Poyfair signing the Parent-
ing Plan. I spoke with him again today and his answer is: No. He will
sign and forward his Decision of May 11, 2015, but will not discuss or
sign anything further.
Sincerely,
Loretta Steele
- On Feb. 14, 2016, at 7:34 PM, Loretta Steele <poyfairmediation@gmail.com>
wrote:
[Counsel for James]:
I have forwarded again to Judge Poyfair the document for signing. He

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3 will sign off as of May 11, 2015, and return the document to me. I will
4 hand deliver it to your office.

5 ...
6 Thank you for bringing this to our attention.

7 Sincerely,
8 Loretta Steele, Assistant
9 POYFAIR MEDIATION LLC

- An email from [James' counsel] to poyfairmediation@gmail.com indicating that he would pick up the document.

10 No other evidence was presented in conjunction with Angela's motion
11 to vacate the arbitrator's decision. Her motion was confined to allegations
12 made by her attorney in her moving document relating to events and state-
13 ments purportedly made inside the arbitration process (CP 85-86). In refer-
14 ence to her claim that the decision be vacated because it had been procured
15 by corruption, fraud, or other undue means, Angela's counsel stated (CP
16 88, ll. 1-8):

17 In January of this year, [James' counsel] indicated that he would
18 send the order to Mr. Poyfair for signature. Without explanation it would appear that Mr. Poyfair back dated the order and
19 signed in this year, but put a prior date on the order without indicating it was being signed nun-pro [sic] tunc. The improper
20 manner in which the order was signed also authorizes this court to vacate that order. The emails between [James' counsel] and
21 Ms. Steele, the assistant to Judge Poyfair (Ex A) clearly indicate that he had not signed the order as of January 20, 2016.

22 Therefore, Mother also moves to set aside any orders issued by
23 Mr. Poyfair in this case under RCW 7.04A.230. Vacating award.

24 **JAMES' RESPONSE TO ANGELA'S MOTION TO VACATE**

25 James filed a declaration countering allegations that Angela did not enter
26 into arbitration freely and willingly (CP 94-94) and a response to Angela's
27 motion to vacate arbitrator's decision (CP 96-117), both on April 7, 2016.
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4 **TRIAL COURT ORDER VACATING ARBITRATION DECISION AND RETURNING PARTIES
TO PRE-ARBITRATION STATUS**

5 On May 13, 2016, the Superior Court Judge issued an order vacating the
6 arbitration order, and denying the motion to confirm, finding that (CP 122,
7 ll. 13-25):

- 8
- 9 • The arbitration order signed by Judge Edwin Poyfair (ret) was not
signed in May of 2015 and the emails of the parties and Ms. Loretta
Steele confirm that;
 - 10 • ...
 - 11 • The court finds that the order signed by Judge Edwin Poyfair (ret) was
a temporary plan and not a final decision of the arbitrator;
 - 12 • The parties held several sessions after the May decision to determine
what the parenting plan would be and this court finds that the May
order was a temporary order;
 - 13 • The process involving the parties and Judge Poyfair was fraught with
irregularities including that:
14 Judge Poyfair (ret) himself converted the mediation session to arbitra-
15 tion;
Loose ends regarding the process were not completed including a de-
16 cision on a final parenting plan;
There should have been a statement in the May 2015 order which in-
17 dicated what steps were remaining to complete the process;
Loretta Steele had no authority to sign Judge Edwin Poyfair's name to
18 any orders;
When the order was presented again in 2016 to Judge Edwin Poyfair
19 (ret) for his signature, it was not signed nun [sic] pro tunc or properly
dated;
 - 20 • There is no official record of what transpired in the sessions which
followed the May 2015 session;
 - 21 • The final parenting plan authorizes review of the alternative dispute
22 resolution process with the superior court;
 - 23 • The court finds good cause to review the ADR process which was uti-
lized by the parties in this case;

24 and ordering that (CP 123, ll. 12-25):

- 25
- 26 • This court has the authority to review what happened in the alterna-
tive dispute resolution process pursuant to the final parenting plan;
 - 27 • Mother's motion to vacate the May 2015 arbitration order, whenever
it was actually signed, is granted. Father's mother to confirm the ar-
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3 arbitrator's decision is denied.

- 4
- ...
 - The stay of proceedings in this case is lifted and the parties are returned to their positions prior to mediation.
 - The father may petition the court for a hearing on adequate cause before the assigned commissioner.
 - Each party's request for attorney fees is denied.
- 5
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8 This appeal followed.

9

10 **C. SUMMARY OF ARGUMENT**

11 The parties mutually entered into binding arbitration of a parenting plan
12 dispute. Both parties agreed to suspend the pending Superior Court liti-
13 gation in favor of allowing an arbitrator to quickly and efficiently handle
14 the matter. The arbitrator did so by issuing a decision that made James the
15 primary residential parent, while granting Angela substantial weekly visi-
16 tation time, but also placing her under scrutiny in case she should relapse.
17 No provision was placed into the decision to allow her to seek a return to a
18 50-50 schedule in the future.

19 After six months of following the arbitrator's oral and written decisions,
20 James moved the Superior Court to confirm the arbitrator's decision. Ini-
21 tially Angela opposed the motion to confirm on the ground that she did not
22 have the right to return to a 50-50 schedule in the future. She argued that the
23 arbitrator had orally given her that right, but then refused to follow through
24 on his oral ruling by placing that ruling in writing. Because she felt that she
25 was entitled to the oral ruling, she continued to fight any conclusion that
26 the arbitration process was completed and instead argued that the court
27 should order the parties to continue with arbitration, only with a different
28 arbitrator, one who she believed would issue the ruling she desired.

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4 Following a preliminary determination by the Trial Judge that the arbi-
5 trator's decision was complete and final and ready to be turned into a final
6 parenting plan, Angela then filed a motion to vacate the arbitrator's deci-
7 sion, citing to numerous events and statements that had occurred within the
8 arbitration process itself, including details that the arbitrator had signed the
9 same decision twice. Angela argued that because the arbitrator had signed
10 the decision multiple times, and had back-dated the decision to reinforce
11 his idea of finality, that the decision was corrupt.

12 The Trial Court retracted from its initial stance by declaring that, based
13 upon its review of the arbitration process and the events and statements
14 made inside the arbitration process, it was vacating the arbitration decision,
15 placing the parties back into the position they held prior to arbitration, and
16 requiring James to seek adequate cause more than one year after the filing
17 of the initial petition for modification.

18 James argues that Angela did not present any evidence that would jus-
19 tify vacating the arbitration decision. Rather, the Trial Court committed an
20 abuse of discretion by relying upon statements made by Angela and An-
21 gela's counsel about events that purportedly occurred within the binding
22 arbitration session to vacate the arbitration decision. A reviewing court may
23 not look into the arbitration process, but rather must rely upon a facial re-
24 view of the arbitrator's award to determine whether irregularities occurred.
25 Further, the motion to vacate did not come within the proper timeframe as
26 allowed by the statutory scheme.

27 **D. ARGUMENT**

28 **STANDARD OF REVIEW**

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4 James argues that the Trial Court abused its discretion by denying his
5 motion to confirm the arbitration award, and instead vacating the award in
6 the absence of any evidence to support such an order.

7 **THE TRIAL COURT ERRED BY REFUSING TO CONFIRM, BUT RATHER VACATING AN**
8 **ARBITRATOR'S RECORD OF DECISION FOLLOWING THE PARTIES' AGREEMENT TO**
9 **ENTER INTO BINDING ARBITRATION AND THE ISSUANCE OF A RECORD OF DECISION,**
10 **BASED UPON THE OPPOSING PARTIES' STATEMENTS ABOUT THE INTERNAL PROCESSES**
11 **OF THE ARBITRATION PROCEEDINGS MADE AFTER THE OPPOSING PARTY DID NOT**
12 **OBTAIN LANGUAGE IN THE DECISION THAT SHE FELT SHE DESERVED**

13 Parties Who Choose Binding Arbitration Are Bound by Washington's
14 Uniform Arbitration Act, Ch. 7.04A RCW

15 Litigants in Washington who choose to resolve their disputes through
16 voluntary binding arbitration are governed by Washington's Uniform Ar-
17 bitration Act, Ch. 7.04A RCW, which took effect on January 1, 2006. RCW
18 7.04A.900. Pursuant to this Act, an "Arbitrator" means in individual ap-
19 pointed to render an award in a controversy between persons who are par-
20 ties to an agreement to arbitrate. RCW 7.04A.010(2). "Authenticate" means
21 to sign or to execute or adopt a record by attaching to or logically associating
22 with the record, an electronic sound, symbol, or process with the intent to
23 sign the record. RCW 7.04A.010(3). A "Record" means information that is
24 inscribed on a tangible medium or stored in an electronic or other medium
25 and is retrievable in perievable form. RCW 7.04A.010(7).

26 Washington's Uniform Arbitration Act governs "agreements to arbitrate"
27 entered into at any time. RCW 7.04A.030(2). It does not govern arbitration
28 governed by Ch. 7.06 RCW, Mandatory Arbitration of Civil Actions, nor
does it govern any "arbitration agreement between employers and employ-
ees or between employers and associations of employees." RCW 7.04A.030(3),
(4). As this matter involves a voluntary agreement to arbitrate the resolu-

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2 tion of a dispute between two parents and their parenting plan, Ch. 7.04A
3 applies.

4 Once an agreement to arbitrate has been freely entered into, certain con-
5 sequences ensue. RCW 7.04A.040 "Effect of agreement to arbitrate — Non-
6 waivable provisions." The parties may waive or vary any requirements of
7 the chapter except those specifically detailed in subsections (2) and (3). Sub-
8 section (2) deals with the time prior to an agreement being entered into,
9 while Subsection (3) deals with the time after an agreement has been en-
10 tered into. Pursuant to Subsection (3), as germane to this appeal, the par-
11 ties cannot vary or waive 7.04A.140 (the immunity of an arbitrator and the
12 arbitrator's competency to testify), 7.04A.220 (confirmation of award), and
13 7.04A.230 (vacating awards).

14 Under 7.04A.220 "Confirmation of Award":

15 After a party to the arbitration proceeding receives notice of an
16 award, the party may file a motion with the court for an order
17 confirming the award, at which time the court shall issue such
18 an order unless the award is modified or corrected under RCW
19 7.04A.200 or 7.04A.240 or is vacated under RCW 7.04A.230.

20 Under 7.04A.230 "Vacating Award":

21 (1) Upon motion of a party to the arbitration proceeding, the court shall vacate
22 an award if:

23 (a) The award was procured by corruption, fraud, or other undue means;

24 (b) There was:

25 (i) Evident partiality by an arbitrator appointed as a neutral;

26 (ii) Corruption by an arbitrator; or

27 (iii) Misconduct by an arbitrator prejudicing the rights of a party to
28 the arbitration proceeding;

(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause
for postponement, refused to consider evidence material to the controversy, or

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3 otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;

4 (d) An arbitrator exceeded the arbitrator's powers;

5 (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or

6 (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

7
8 (2) A motion under this section must be filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, unless the motion is predicated upon the ground that the award was procured by corruption, fraud, or other undue means, in which case it must be filed within ninety days after such a ground is known or by the exercise of reasonable care should have been known by the movant.

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12 (3) In vacating an award on a ground other than that set forth in subsection (1)(e) of this section, the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (1)(c), (d), or (f) of this section, the court may order a rehearing before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in RCW 7.04A.190(2) for an award.

13
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15 (4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

16
17 Pursuant to 7.04A.040(3), neither the parties nor the Trial Court may vary
18 or waive any portion of either 7.04A.220 or 7.04A.230. Case law supports
19 this interpretation. "Arbitration is a statutory proceeding. Both the rights
20 of the parties and the power of the court are governed entirely by statute."
21 *In re Smith-Bartlett*, 95 Wn. App. 633, 636 (Div. 3 1999). This means that
22 voluntary binding arbitration is always "binding" as to the parties. *Id.*

23 This is not the same as saying the arbitration is binding as to the Trial
24 Court when the modification of a parenting plan is at issue. The Trial Court
25 was being asked to confirm the arbitrator's decision. This means that the
26 Trial Court would be able to refer to it when deciding how to proceed in the
27 modification action. But if the arbitrator's decision were not confirmed,
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3 but rather vacated, then it would in effect erase all of the work done by the
4 arbitrator and the parties to resolve the dispute quickly, efficiently, cost-
5 effectively, and privately as they had intended, and place them back where
6 they started, resolving a petition to modify the parenting plan in court pur-
7 suant to a trial, after having expended time, money, and other resources in
8 trying to settle the case. Thus, while it is true that “The ultimate responsi-
9 bility for overseeing the performance of the parenting plan remains with
10 the court,” *id.* at 640, nevertheless, in a case involving two parties volun-
11 tarily and freely engaging in binding arbitration to resolve their dispute,
12 the Trial Court has a duty to confirm that award unless grounds exist to to
13 vacate it. In this case, no such grounds existed, and it was manifest error
14 for the Trial Court not to confirm the award and instead vacate it.

15 The Parties Voluntarily and Freely Entered Into Binding Arbitration of
16 their Parenting Plan Dispute

17 James filed a petition to modify the parenting plan on March 31, 2015 on
18 the grounds that Angela was abusing drugs and was a danger to their child.
19 The parties engaged a mediator on April 1, 2015, and attended a mediation
20 session on April 8, 2015. The first mention that the parties had agreed to en-
21 gage in arbitration came from Angela’s counsel in her response motion to
22 compel arbitration, signed on April 11, 2015, and filed in the case on April
23 13. She said in her “Affidavit of Attorney,” at CP 113, ll. 4-7: “After the fa-
24 ther’s motion was rejected, a mediation meeting was scheduled. **The par-**
25 **ties aged to arbitration of their parenting plan with Judge Poyfair (ret.)**
26 **and a parenting plan agreement was reached; finalization of that plan is**
27 **expected in due course.”**

28 The second mention of an agreement to arbitrate their parenting plan

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dispute came in an email of April 13, 2015, again from Angela's counsel: "My client indicates that at mediation, she agreed to arbitrate the parenting plan." (CP 114). The third mention of the parties having chosen arbitration again came once again from Angela's counsel in an email dated April 14, 2015: "I am trying to get them where they belong. With Judge Poyfair. That is what I told you from the beginning. They belong in mediation per their agreement. **When they went to mediation they agreed to allow Judge Poyfair to arbitrate their parenting plan. We have no problem with that.**" (CP 36). About 15 minutes later on April 14, 2015, Loretta Steel of Poyfair Mediation wrote in an email: "2. Judge Poyfair responds as arbitrator as follows: 'On April 8, 2015, at 1:00 p.m., the parties, James Andrews and Angela Trager, met with Arbitrator/Mediator Judge (R) Edwin L. Poyfair, for a period of 3 ½ hours. Mr. Andrews was represented [counsel]. Ms. Trager appeared pro se but was in contact by telephone with her attorney ... on several occasions during the mediation. The parties acknowledged that they agreed to Binding Arbitration and at the conclusion an agreement was reached that will be set forth in a CR2(A) regarding the Parenting Plan.'" (CP 35). On April 16, 2015, Angela's counsel interlined the order staying the proceedings pending arbitration, as follows (CP 37-38):

Both parties ~~James Andrews [Name of Moving Party (Requestor)]~~ presented a motions for order re: *Stay of Proceedings Pending Arbitration* to this court. The court having considered the motion, declaration(s), testimony and the court file, and finding good cause,

It is Ordered:

The parties have entered into binding arbitration. The show-cause is terminated. This court matter is stayed pending resolution by the arbitrator and entry of final orders. During this stay, the parties shall follow the oral and written orders of the arbitrator in matters relating to visitation.

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2 Motions including each party's requests for fees shall be heard and de-
3 cided by the arbitrator.

4 The arbitrator issued a written ruling on May 11, 2015 in which he stated
5 (CP 55-59):
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7 During the mediation, each of the parties personally and with approval
8 of their respective attorneys requested that the mediator change hats and
9 become an arbitrator binding the parties to the decision of the arbitrator.

10 ...
11 2. Each party has agreed to have this mediation changed to binding
12 arbitration.

13 ...
14 4. The issues consist of (a) should the Petitioner have a drug evaluation
15 and, if positive, rehabilitation, (b) Should there be a change of the Parent-
16 ing Plan, (c) Should there be an end to mediation requirements, (d) Who
17 should be designated the primary custodian.

18 ...
19 13. The Parenting Plan should be modified to make the Respondent
20 the primary parent of BA.

21 14. There are limiting factors imposed on Petitioner due to her drug
22 usage....

23 15. Respondent will be the primary custodial parent.

24 ...
25 25. Respondent shall draft the appropriate modification documents to
26 conform to this decision.
27

28
29 Angela did not object to the issuance of this arbitration decision, but
30 rather engaged in the arbitration process for months in what turned out
31 to be a futile attempt on her part to change the arbitrator's mind as to the
32 issue of Primary Parent. In her Response to James' motion to confirm, her
33 counsel wrote (CP 60-63):

34 The parties entered into binding arbitration on May 11, 2015 with the
35 Honorable Judge Edwin Poyfair, Retired. **As a result of no less than three**
36 **separate sessions, including a session on September 16, 2015, the parties**
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3 argued to Judge Poyfair (Ret.) regarding the language of the final parent-
4 ing plan. At issue is when and under what circumstances the parties will
5 return to a 50-50 parenting schedule.

6 ...
7 Ms. Trager argued heavily for this position because adequate cause
8 normally is only granted when there is a substantial change of circum-
9 stances with the custodial parent. **Because as a result of the arbitrator's**
10 **decision she was not going to be the custodial parent at the time of her**
11 **motion. Specific [sic] language had to be entered in the final parenting**
12 **plan which granted her the authority to return to court to re-establish**
13 **the 50-50 schedule.**

14 ...
15 Judge Poyfair declined to act further in the case...
16 This situation left the parties in a quandary. **The essential language in**
17 **the parenting plan was not decided by the arbitrator, despite argument,**
18 **and oral decisions made on September 16, 2015. Judge Poyfair declined**
19 **to act further in the case.**

20 In fact, instead of arguing that the arbitrator's decision was somehow
21 corrupt, or there had been some irregularity in the arbitration process grant-
22 ing a right to vacate the decision, Angela instead moved the court to direct
23 the parties back to arbitration "regarding the remaining issues related to
24 the parenting plan," (CP. 60), meaning that she would not accept an arbi-
25 tration decision that did not result in her obtaining a 50-50 parenting plan
26 schedule.

27 Her position was again described in her motion to vacate, CP 85, where
28 she described participating in several arbitration sessions in July, August
and September of 2015. At CP 86, ll. 5-6, she said "Without explanation
Judge Poyfair then withdrew from the case without finalizing the parent-
ing plan or order on modification." In fact, what he had done was refuse
to further engage in the arbitration process because he had issued his final
decision and did not intend to modify it to accommodate Angela's desire
for a 50-50 schedule.

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3 In January and February of 2016, the arbitrator re-affirmed his decision
4 by signing his arbitration decision and re-issuing it to the parties as it had
5 originally stood in May 2015 (CP 78-81). While Angela portrays his action
6 as “declining to act further,” (CP 61, l. 21; 62, l. 3), it must be clear that
7 the arbitrator had issued his final decision and did not agree that Angela
8 should be able to return to a 50-50 schedule based upon his concerns for
9 the stability of the child. This result is also clear from the two emails issued
10 by Ms. Steele of Poyfair Mediation (CP 91-92): “He will sign and forward
11 his Decision of May 11, 2015, but he will not sign anything further.”, and
12 “He will sign off as of May 11, 2015, and return the document to me. Upon
13 receipt, I will hand deliver it to your office.”

14 Thus, there can be no question that the parties mutually and voluntar-
15 ily engaged in binding arbitration to resolve their parenting plan dispute.
16 There can also be no question that both parties received the arbitrator’s
17 decision of May 11, 2015, and attempted through the arbitration process to
18 modify the arbitrator’s decision. Finally, there can be no question that the
19 arbitrator had issued a decision in a record and, after reissuing the same
20 decision in another record, directed the parties to take the matter up with
21 the Superior Court.

22 Angela’s Motion to Vacate the Arbitrator’s Decision Did not Contain any
23 Creditable Evidence That Would Justify Its Vacation and It Was An Error
24 For the Trial Judge to Vacate it Rather Than Confirm It

25 At a hearing on the record before the Trial Court Judge on the issue of
26 the revision of the Commissioner’s order refusing to confirm the arbitra-
27 tor’s decision, the Trial Judge affirmed in an oral ruling that he would con-
28 firm the arbitrator’s decision (CP 82-83). One week later Angela filed her
motion to vacate the arbitrator’s decision (CP 84-93). The main thrust of

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3 her argument centered around alleged statements that the arbitrator had
4 made during arbitration sessions, and the alleged fact that the arbitrator
5 had not kept a recording or any records of the sessions, and that the arbi-
6 trator re-issued his decision following email exchanges. She also alleged
7 that an arbitrator cannot modify a parenting plan, and no adequate cause
8 had ever been found. She did not present any evidence to support her claim
9 other than several emails from Ms. Steele regarding the re-issuance of the
10 arbitrator's decision.

11 The alleged statements of events that occurred inside the arbitration ses-
12 sions are not evidence and cannot be considered in deciding whether to
13 vacate the decision. An arbitrator is immune from process and is not re-
14 quired to keep records. RCW 7.04A.140. The Trial Court is not allowed to
15 look inside the arbitration proceedings to review the work of the arbitra-
16 tor. *Boyd v. Davis*, 127 Wn.2d 256 (1995); *Cummings v. Budget Tank Removal*
17 *& Environmental Services, LLC*, 163 Wn. App. 379 (Div. 1 2011). The Supreme
18 Court in *Boyd* gave a long explanation of the policy against allowing Trial
19 Courts the right to review an arbitrator's process in the context of a motion
20 to vacate. It stated in part:

21 The very purpose of arbitration is to avoid the courts inso-
22 far as the resolution of the dispute is concerned. The object
23 is to avoid what some feel to be the formalities, the delay, the
24 expense and vexation of ordinary litigation. Immediate settle-
25 ment of controversies by arbitration removes the necessity of
26 waiting out a crowded court docket...

27 Arbitrators, when acting under the broad authority granted
28 them by both the agreement of the parties and the statutes, be-
come the judges of both the law and the facts, and unless the
award on its face shows their adoption of an erroneous rule, or
mistake in applying the law, the award will not be vacated or
modified.

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3 *Boyd*, at 262-263.

4 **REQUEST FOR ATTORNEY FEES**

5 James requests an award of attorney fees pursuant to RCW 7.04A.250,
6 which states that a prevailing party may apply for an award of attorney's
7 fees on a motion for confirmation. James argues that Angela's motion to
8 vacate was basically frivolous and based primarily upon her not accepting
9 the decision of the arbitrator in not allowing her 50-50 residential time.
10 Angela's refusal to accept the arbitrator's decision goes not only against
11 her early agreement, but against the very principle of binding arbitration,
12 and has resulted in delay and expense that is completely unwarranted for
13 the case.

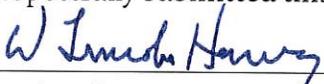
14 **E. CONCLUSION**

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16 Significantly, as evidenced by the parties' rush to mediation, then to ar-
17 bitration, to resolve their parenting plan dispute, the above-quoted pur-
18 pose of arbitration was at the heart of these parents' actions. They did not
19 want to engage in another long, drawn out, expensive, and vexatious court
20 battle, and so within a week of the initial petition had a parenting plan
21 that they could work with and the parties stayed out of court for over six
22 months. As time went on, and Angela felt that she would fare better in
23 court than in arbitration where she had had to air her dirty laundry, she
24 then realized that if she could start over in court, she would prevail, and so
25 in April 2016, one year after the initial filing, filed a motion to vacate and
26 asked for a hearing on adequate cause or a dismissal of the entire action.
27 She argued that she had not freely engaged in the arbitration process. She
28 argued that the arbitrator had not done his job. But the facts belie these

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3 interpretation of events. The plain and simple fact was that she did not
4 obtain her 50-50 schedule, and so found a way to discredit the arbitration
5 process through numerous allegations of events that allegedly happened
6 inside the arbitration process. However, these allegations are not suffi-
7 cient to overcome an authenticated record of decision by an arbitrator that
8 does not contain evidence of errors on its face.

9 The arbitrator's decision should be confirmed and become a permanent
10 part of the parents' file for review by the Trial Court.

11 Respectfully submitted this November 21, 2016,

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13 _____
14 W. Lincoln Harvey, WSBA No. 31116
15 Attorney for Appellant
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

IN RE THE PARENTING AND SUPPORT OF BA
JAMES L. ANDREWS, APPELLANT,
AND
ANGELA M. TRAGER, RESPONDENT.

CAUSE NO. 49070-6-II
Proof of Service by Mail
Certificate (CR 5)

CR 5 Certificate of Attorney

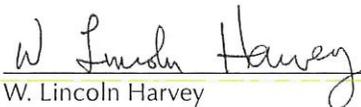
I certify that on November 21, 2016, I mailed, postage prepaid, a copy of the

- **Brief of Appellant**

to Josephine Townsend at

211 E. 11th St. Suite 104, Vancouver, WA 98660.

Date: November 21, 2016



W. Lincoln Harvey
Attorney for Appealapp

WSBA #31116