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No. 51305-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

MICHAEL C. CODEKAS
Appellant

and

CAMERON CORNELL
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

OPENING BRIEF OF APPELLANT

PATRICIA NOVOTNY
NANCY ZARAGOZA
ZARAGOZA NOVOTNY PLLC
Attorneys for Appellant
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

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I. INTRODUCTION

This case involves a trial on cross-petitions for modification of a parenting plan concerning the child these parties co-parented with little trouble for the first five years of the child's life. Each party's family then grew another adult, as Cornell partnered with Conlen and Codekas with Enna. Eventually, frictions developed and the parties ended up in litigation. Over the course of five months, the parties also resolved a number of their disagreements, including de-escalations in the litigation. They also received counseling and parenting advice. However, the parties proceeded to trial on the modification. As bad as their conflict became, neither parent alleged a basis for limitations under RCW 26.09.191. Ex. 5 at 3; CP 563. Nor did the production of evidence at trial veer in this direction, but stuck to the track of establishing a reason for reducing Codekas's residential time under the detriment prong of the modification statute. See RP 606 (Cornell asking court to follow Hutchins-Cook's recommendation). Rather than ruling on the issues raised and the evidence presented, the trial court searched outside the evidence and entered "191" limitations against Codekas. The court made similar factual errors, including in determining child support and fees. In doing so, the court abused its discretion and violated the appearance of fairness doctrine.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by entering domestic violence findings that were not supported by the evidence. (Finding of Fact #2)
2. The trial court erred by relying on mother's deposition as substantive evidence of domestic violence when the deposition was "published" only for impeachment purposes and never admitted as evidence.
3. The trial court violated the appearance of fairness doctrine by conducting its own investigation into the facts (i.e., by relying on a deposition that was not admitted or offered as evidence) and by then relying on the results of its investigation to enter a findings adverse to Codekas, including a finding of domestic violence as a basis for limitations on residential time.
4. The violation of the appearance of fairness doctrine taints all of the court's orders.
5. The trial court erred by imputing father's income in violation of the statute.
6. The trial court erred by entering an order of child support without statutorily required verification of mother's income.

7. The trial court erred by awarding attorney fees without sufficient legal or factual basis.

8. At minimum, the court erred by awarding attorney fees without segregating the amount of fees related to the cross-petition.

9. The trial court erred by entering the following findings of fact:

Finding of Fact #3 (CP 720). In 2012, at a time when Father was living with his mother (Shirley Low, hereinafter "Shirley") and sister, Father's sister called the police because she was concerned about the way Father was disciplining [C.C.]. During trial, Father claimed he did not remember this incident. The Court had the opportunity to observe Father's demeanor and did not find him credible.

Finding of Fact #4 (CP 270). In 2014, when the uncontested parenting plan was entered, Mother did not ask for any restrictions on Father's residential time based on alleged domestic violence because she felt that there would be enough rules and family support in place to make sure that he would be a good dad.

Finding of Fact #11(CP 721). At trial, Father claimed that during [C.C.]'s sleepover, [C.C.] disclosed to Shirley that Sasha had sexually molested [C.C.]. Father immediately called the police to report the allegations. Father also arranged a meeting with Mother to discuss the allegations.

Finding of Fact #13 (CP 721). As a result of Father's call to law enforcement, a CPS investigation was launched, and Sasha also became a criminal suspect. During the CPS investigation, Sasha agreed to move out of his house so that [C.C.] could still have residential time with Mother.

Finding of Fact #18 (CP 722). In spite of the fact that the molestation allegations were deemed unfounded in February 2016, Father continued to maintain that Sasha

was a danger to [C.C.]. Father cited the allegations as one of the bases for his petition for modification, filed in July 2016.

Finding of Fact #19. Father did not concede that the allegations against Sasha were unfounded until trial (CP 722).

Finding of Fact #25 (CP 723). Dr. Hutchins-Cook did not have concerns about Mother and Sasha's general parenting of [C.C.]. Although Dr. Hutchins-Cook conceded that Mother had engaged in some negative parenting, she concluded that Mother was more willing to change than Father and Enna.

Finding of Fact #31 (CP 724). Father retained a psychologist, Dr. Landon Poppleton, PhD ("Dr. Poppleton"), to review Dr. Hutchins-Cook's report. Dr. Poppleton agreed that there was a lot of chaos in the family. He believed [C.C.] was a child caught between the two households. He opined that the conflict between the parties was not healthy for [C.C.]. He opined that the family dynamic was "tragic" because of Enna's beliefs regarding the molestation allegations. Although he did not provide recommendations regarding the parenting plan modification, he conceded he did not have any problems with Dr. Hutchins-Cook's findings and conclusions.

Finding of Fact #32 (CP 724): Both parties have testified that they believe that the current parenting plan is unworkable due to conflict between them.

Finding #4 (CP 715): The court finds that the Counter Petition for Major Modification of the Parenting Plan filed by Michael C. Codekas on July 13, 2016 and defense to mother's petition was: not well grounded in fact; interposed for improper purpose, such as to harass Cameron Cornell and to improperly leverage her into dismissing her Petition for Major Modification of the Parenting Plan as evidenced by his "day of trial" de fact nonsuit dropping his demand for a Major Modification pursuant to RCW 26.09.260(2) as well has [sic] his lack of credibility and the testimony of Wendy Hutchins-Cook Ph.D. and Guardian ad Litem

Suzanne Dircks whose investigations contradicted allegations made by Michael C. Codekas in support of his Petition for Major Modification of the Parenting Plan; and, brought in bad faith pursuant to RCW 26.09.260(13).

Issues Pertaining to Assignments of Error

1. Is a deposition transcript, published for the purpose of impeachment, evidence?
2. May the judge rely on matters outside the evidence as a basis for findings of fact?
3. May a judge search outside the record for evidence?
4. When a judge relies on the results of its own investigation, rather than on the evidence produced at trial, can the trial's fairness be presumed?
5. When a judge relies on the results of its own investigation, has the judge violated the appearance of fairness doctrine?
6. In determining child support, must the trial court comply with statutory requirements regarding imputation of income?
7. May a court sanction a party for defending against a petition to modify?
8. Was there evidence the cross-petition was filed in bad faith?
9. Where a court finds a cross-petition to modify to have been filed in bad faith, and awards fees on that basis, must the court segregate

those fees from the fees incurred in defending against the other parent's petition to modify?

10. In their totality, do the court's rulings in this case raise concerns of bias and require remand to a new judge?

III. STATEMENT OF THE CASE

Michael Codekas and Cameron Cornell met when Codekas was 21 years old and Cornell was 25. Ex. 2 at 8. Their son, C.C., was born a few years later in 2009. The parties never married but lived together until 2011 when they ended their relationship; C.C. was 2 years old at the time. RP 100. Thereafter, they continued to co-parent, sharing residential time equally with C.C., and in 2014 formalized this arrangement by entering into an agreed parenting plan that gave each parent 50/50 residential time (week on/week off). RP 106, Ex. 4 at 2-3. That same year, Codekas married Enna Codekas¹ and Cornell moved in with her companion, Sasha Conlen.

When it was time for C.C. to enter kindergarten, Codekas proposed he and Cornell meet to discuss options. RP 379. (The parenting plan provided for joint decision making on education decisions. Ex. 4 at 10). The parenting plan provided that C.C. was to attend school in the North Tacoma school district, Ex. 4 at 5, but the parties also wanted to explore

¹ To avoid confusion Enna will be referred to by first name.

other options, such as private school. RP 379. The parties, along with Conlen and Enna, met and Codekas expressed his preference for Life Christian, a private school close to Cornell's home. Cornell refused at first to agree to Life Christian, RP 23, but eventually said she would consider it. RP 381, 292. Cornell wanted C.C. to attend Lowell, a public school in the North Tacoma School District, but she also had a few private schools on her list (Waldorf school, Bryant Montessori school). RP 379-380, 109. The meeting ended with the parties agreeing to do additional research, go to open houses, etc., and come back with additional proposals. RP 320, 388.

In fact, there was no follow up meeting, RP 379, and in April 2015, Cornell unilaterally decided to enroll C.C. in public school in the Tacoma School District without telling Codekas. RP 292, 313, Ex. 17. But instead of putting down her home address on the enrollment form, she used her workplace address, RP 316-317, Ex. 17, and even asked her banker to write a letter verifying that address as her home address. RP 317. She did this because school assignments are determined by the student's home address and she wanted C.C. to be assigned to the school close to her workplace (Lowell), not the one associated with her home address (Point Defiance). RP 265. She also omitted Codekas from the parent/guardian section of the enrollment form but included Conlen as

“step parent.” Ex. 17 (Codekas’s information appears only in the emergency contact section, but is crossed out).

Meanwhile, Codekas took C.C. to a barbeque at Life Christian so they could check out the school. RP 381-382. C.C. enjoyed the visit and liked the school. RP 26. Because spots filled quickly, Codekas submitted an application for admission that summer and put down a deposit as a placeholder. RP 382; Ex. 36. Suspicious that Codekas had enrolled C.C. at Life Christian, Cornell called the school and was told that “he was good to go” and a deposit had been made. CP 293. Cornell then filed a motion for contempt alleging that Codekas had enrolled C.C. in Life Christian in violation of the parenting plan. CP 28, 65; Ex. 12. However, according to Codekas, he never made a tuition payment and the deposit was only a placeholder. RP 382. Shortly thereafter, Codekas learned that Cornell had enrolled C.C. at Lowell without his consent and with a false home address; he then notified the school of the correct home address. RP 27. As a result, the parties agreed to send C.C. to Point Defiance and Cornell dropped the contempt action. RP 65, 266.

In November 2015, C.C. had an overnight with his grandmother, Shirley Low (Codekas’s mother). RP 30. The next day, a Saturday, Low called Codekas and reported that C.C. disclosed to her that Conlen had molested him. RP 364; Ex. 3 (police report). Low also called the police,

who arrived at Low's home before Codekas arrived to pick up C.C. RP 306, 365; Ex. 3. Codekas decided he would tell Cornell about the allegations in person when they met at Starbucks that day for the exchange of C.C. He then went to Starbucks (along with Enna and Low) but did not bring C.C. RP 365-366. Conlen was with Cornell at Starbucks, and when Codekas told Cornell about C.C.'s disclosures, she got very upset, stormed out, and called the police (though was told there was nothing they could do). RP 32.

The very next day (Nov. 15, 2015) after meeting with her attorney, Cornell signed a petition for modification with a proposed parenting plan that reduced Codekas's time to two nights a month; her attorney filed the petition the next morning. Ex. 5. Cornell alleged that Codekas enrolled C.C. at Life Christian without her consent and "backed down" when she filed a contempt action; that ever since he "lost" the Life Christian issue he has been "a total nightmare" to her and Conlen; that C.C. reported to her that Codekas and Enna told him she and Conlen would burn in hell because they were not married and do not go to church; that Codekas caused a scene at school demanding Conlen be removed from the emergency contact list; that Codekas and Enna have physically disciplined C.C.; that Codekas and Enna told C.C. he cannot call anyone else "dad" (meaning Conlen), cannot refer to Cornell as "mom" in his home, and

forces him to call Enna “mom” and that Codekas is refusing to return C.C. to her based on the molestation allegations. Ex. 5 at 4-5. She further alleged that Codekas had been fired when he was deputy sheriff, that his sister is “a pornstar,” and that there have been allegations of sexual molestation “throughout Codekas’s extended family.” Ex. 5 at 6.

That same day, C.C. was interviewed by a detective and CPS worker, but did not disclose the abuse. RP 460-461. Following the interview, the CPS worker and detective met with Codekas and said something along the lines of “Do you really think she would do something like this....” RP 461. These and other comments worried Codekas about whether the interviewers were taking the allegations seriously, so he reported the comments to the CPS supervisor. RP 461, 464. See also RP 164 (Hutchins-Cook was not critical of this action).

C.C. was then interviewed by a forensic psychiatrist, Dr. Stanfill, and during that interview described the abuse he had disclosed to his grandmother. RP 366. Codekas filed a petition for a sexual assault protection order against Conlen. Ex. 25. Shortly thereafter, Cornell filed a motion for contempt against Codekas for withholding C.C. on the day of the exchange at Starbucks,² Ex. 13, and revoked the consent she had

² C.C. was to be returned to Cornell on that Saturday, but was scheduled to be back with Codekas on Monday. RP 299.

previously given for C.C to go to Hawai'i with Codekas over winter break.

Ex. 18. The contempt motion was ultimately denied, the court having found Codekas had a good faith belief he was complying with the parenting plan. Ex. 14.

Thereafter, on December 17, 2015, after unsuccessful attempts to serve Conlen with the sexual assault protection order petition, Codekas attempted to have Low (his mother) serve him. RP 369-370. On that day, Codekas saw Conlen's truck parked in a lot in a residential area of Tacoma and called Low. RP 371. Cornell then drove up in her car with Conlen in the passenger seat, planning to drop him off at his truck. RP 47. But when Cornell recognized Low's car, she decided to keep driving with Conlen in her car. RP 47. Codekas and Low then followed them in their separate cars; Low ultimately lost control of her vehicle and collided with Cornell's vehicle. RP 48. Cornell called the police, and Codekas and Low were arrested.³ RP 373. Following the incident, Cornell filed a petition for a domestic violence protection order (DVPO) against Codekas and Low. RP 354. Her DVPO petition was based solely on allegations related to the car chase. RP 354.

Cornell also obtained an ex parte restraining order that limited Codekas's residential time to one supervised visit in December. RP 332,

³ As a result of the incident, Codekas ended up pleading guilty to speeding. RP 373; Ex. 9 at 7.

Ex. 8. As a result, he did not see his son on Christmas, and C.C. missed out on a trip to Hawai'i over the winter break. RP 333. Shortly thereafter, the court reinstated the 50/50 parenting plan, granted adequate cause on Cornell's modification petition, and appointed a guardian ad litem (GAL). CP 418-419, 451-454. Around the same time, the CPS investigation concluded with allegations determined unfounded, CP 260-262; Codekas then agreed to dismiss the sexual assault protection order petition and Cornell agreed to dismiss her DVPO petition. CP 462-463; RP 377.

Over the next several months, things worsened between the parties and by summer, Codekas believed that a 50/50 plan would no longer serve C.C.'s best interests, Ex. 9 at 2, and filed a cross-petition for modification. Ex. 33, CP 561-565. As he noted in his petition, the Commissioner observed at the adequate hearing on Cornell's petition that unless things changed, a shared parenting schedule would not be possible. See Ex. 9 at 2 (citing VRP). Codekas's petition was based on allegations that C.C. reported witnessing domestic violence between his mother and Conlen, that Conlen had verbally abused C.C. and put him down, that Cornell failed to notify him of an injury C.C. suffered requiring stitches, that Cornell had lost C.C. at a baseball game at Safeco Field, and that Cornell neglects C.C.'s basic hygiene while in her care. Ex. 9 at 4-6. Codekas also pointed out that Cornell had enrolled C.C. at Lowell without his

consent while filing a contempt action against him claiming he enrolled C.C. at Life Christian without her consent, and that upon learning of the molestation allegations she immediately filed a petition for modification seeking to drastically reduce his time with C.C. without any further investigation of the allegations, and withdrew her consent for C.C. to attend the trip to Hawai'i Codekas had planned over Winter break. Ex. 9 at 2-3. The court granted adequate cause on his petition and set the case for trial. CP 613.

Before trial, Dr. Wendy Hutchins-Cook conducted a parenting evaluation. Ex. 2. Hutchins-Cook's evaluation concluded that while there was negative parenting in both households, more came from the father's household than the mother's, and she recommended that C.C.'s time with father be reduced. Ex. 2. However, the involvement of Hutchins-Cook appeared to have a salutary affect, improving communications among the parties, for example. RP 362. By the time the case came on for trial, things had calmed down to a point where Codekas felt it was best for everyone to keep the 50/50 plan; accordingly he only proceeded to defend against Cornell's petition for primary residential time, requesting that the 50/50 plan remain in place. RP 394-395.

At trial, Cornell argued consistent with her petition that a major modification should be granted based on Codekas's and Enna's abusive

use of conflict. RP 279, 575. Cornell called Hutchins-Cook, who testified that both parents had issues, RP 181 (both parents reinforce tattling by giving C.C. attention for tattling on the adults), but that she was more concerned about Michael's and Enna's willingness to change "because there was such certainty and firmness that their way was right." RP 182-183. However, she also acknowledged, as did her report, that Codekas and Enna were amenable to change. She further testified that while Enna was receptive to her parenting advice, Cornell seemed less inclined to accept any advice. RP 182. Hutchins-Cook also testified consistent with her report that no limitations under RCW 26.09.191 were warranted; in particular, she noted that abusive use of conflict would be the only limitation that is a "possible fit," but such a limitation would not be appropriate because Codekas and Enna had not had the opportunity to be provided guidance and make necessary changes. RP 146; Ex. 2 at 31. Finally, she testified that the sex abuse allegations did not bear on her recommendation and she did not question Codekas's good faith in making a report to CPS. RP 165-166.

Codekas called Dr. Landon Poppleton, who critiqued Hutchins-Cook's conclusions about Codekas. For example, Poppleton testified that Hutchins-Cook, in her analysis of detrimental environment, noted there were issues in both households but it was difficult to tell how she

determined Codekas was doing it more. RP 218. He also testified that he saw no analysis in her report of how the benefit of the recommended change in the parenting plan schedule outweighed the detriment; she did not explain how the decrease in the father's parenting time addressed her concerns, while co-parenting and counseling were actually what seemed to address her concerns. RP 224. Finally, he criticized Hutchins-Cook's interview of C.C. for failing to address his experience in each home, the central inquiry in this case. RP 235.

Following the trial, the court issued a letter ruling, granting Cornell's petition for modification and making detailed findings of a "history of domestic violence" that was neither alleged in her petition nor proved at trial. CP 701. The court also made findings of abusive use of conflict and imposed limitations based on these findings, concluding that the requirements of RCW 26.09.191(1), (2), and (3) have been met. CP 705-706, 715, 726-727. This resulted in a reduction in Codekas's time from 50% of overnights to 35%. CP 727, 728 (Thursday – Sunday every other week; Wednesday on alternating weeks). Additionally, the court granted Cornell sole decision-making based on the domestic violence findings. CP 727.

The court also entered a child support order that was based on an imputed income for Codekas, finding that his income was unknown, CP

739, despite his submission of current paystubs, CP 44-56, and an actual income for Cornell that was not supported by any financial documentation. CP 739; RP 287-289 (based only on financial declaration).

Additionally the court awarded Cornell \$5000 in attorney fees, finding that Codekas's counter petition and defense to Cornell's petition were not well grounded in fact, interposed for an improper purpose, and brought in bad faith. CP 715.

Codekas appeals. CP 753-792.

IV. ARGUMENT

A. THE STANDARD OF REVIEW.

Parenting plan modifications and child support modifications are reviewed for an abuse of discretion. *In re Marriage of Zigler*, 154 Wn. App. 803, 808, 226 P.3d 202 (2010); *In re Parentage of Goude*, 152 Wn. App. 784, 790, 219 P.3d 717 (2009). A trial court necessarily abuses its discretion if its decision is based on an erroneous view of the law. *In re Marriage of Choate*, 143 Wn. App. 235, 240, 177 P.3d 175 (2008). Findings of fact are reviewed for substantial evidence, meaning evidence "sufficient to persuade a fair-minded person of the truth of the matter asserted." *In re Marriage of Black*, 188 Wn.2d 114, 127, 392 P.3d 1041, 1048 (2017) (internal citations omitted).

B. THE TRIAL COURT ERRED BY ENTERING DOMESTIC VIOLENCE AND OTHER FINDINGS THAT WERE NOT SUPPORTED BY THE EVIDENCE.

By the time these parties reached trial on modification, they were positioned to resume a semblance of their prior, reasonably successful coparenting. A parenting evaluation concluded both had contributed to recent conflict. Though viewing Codekas's behavior somewhat more critically, the evaluator also saw reason to expect improvement. Another expert, Dr. Poppleton, raised doubts whether blame for the parties' conflict was not equally shared. In any case, neither expert nor even Cornell recommended or sought the kind of findings and limitations imposed here by the trial court. Rather than deal with these parties as it found them, the court searched outside the record before it and relied on what it found to lower the boom on Codekas. For all the reasons discussed below, the court's orders cannot stand.

First and most basically, the trial court's findings of "a history of domestic violence" are not supported by the record and should therefore be vacated. Specifically, the trial court made findings about incidents allegedly occurring in 2009-2011, around the time of C.C.'s birth and the late stages of the parties' relationship. CP 701. As mentioned, domestic violence was not at issue in this proceeding: Cornell made no such allegations in her petition, produced no evidence at trial to support such

allegations, and made no argument for a domestic violence finding. Rather, the trial focused on the more recent deterioration in the parties' coparenting relationship, which Cornell blamed on Codekas's abusive use of conflict. CP 119-125; Ex. 5 (alleging abusive use of conflict and citing school enrollment issue, molestation allegations, Codekas's termination from jobs, and the fact that his sister is "a pornstar" and "there have been allegations of sexual molestation throughout [his] extended family"). The only domestic violence related aspect of the recent proceedings was Cornell's petition for a Domestic Violence Protection Order (DVPO), which was based on the driving altercation and which Cornell voluntarily dismissed. RP 354; CP 462-463. Otherwise, she made no mention of domestic violence in her case in chief.

Apart from the dismissed DVPO petition, the only other time domestic violence came up was when Cornell's attorney attempted to impeach Codekas on cross-examination. Her attorney asked Codekas about an incident in 2009 where he allegedly locked Cornell out of her apartment, to which Codekas objected as beyond the scope of direct examination. RP 445-445. Properly, the court sustained the objection. RP 447. Cornell's attorney then asked Codekas about an alleged assault in 2010 and he denied the allegation, consistent with what he told police officers at the time. RP 477. This was the extent of any discussion at trial

of any domestic violence “history.” Cornell did not seek to establish an assault had occurred in 2010; rather, she sought to challenge Codekas’s credibility. In other words, there were no domestic violence allegations made as part of the case in chief and, therefore, no full and fair adjudication of any domestic violence allegations.

Rather, the apparent source of the court’s detailed domestic violence findings is a deposition transcript Codekas used to impeach Cornell during cross-examination. See Ex. 19. Indeed the court’s findings are almost taken verbatim from the deposition. Ex. 19 at 83 (refers to Codekas calling her a “psycho bitch,” telling her he was going to take [C.C.] away from her, that “that was his usual, that I was crazy”), 82-83 (refers to a 2011 incident when he “bashed” her head on the door when she was trying to leave and that was when she ended the relationship), 124 (states that he raped her during the relationship). None of this was even referred to, let alone admitted as evidence at trial – any trial.

While the transcript of the deposition was identified as an exhibit, it was never admitted as evidence. CP 691 (court’s exhibit list); RP 330. Rather, Codekas’s counsel merely referred to portions of the deposition to impeach Cornell during cross-examination, none of which pertained to any of the alleged domestic violence incidents. See RP 272, 312 (Cornell stated that C.C. does not typically make false statements); RP 316

(admitted that she knew Codekas did not agree to enrolling C.C. at Lowell); RP 321 (admitted that she does not always bathe C.C. after he wets the bed); RP 330 (admitted that she told C.C. that his dad went on vacation to Hawai'i without him); RP 331-332 (admitted that Codekas did not say anything threatening when he got out of his truck after the collision with Low).

Counsel never moved to admit the deposition transcript; she simply asked that it be “published,” and did so only for purposes of impeachment. RP 330. Thus, the deposition transcript was never admitted as evidence; “publishing” it simply made the deposition available for use at trial. *See Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 540 n. 3, 114 P.3d 1182 (2005) (noting that “[t]he publication of a deposition at trial is simply the clerical act of ‘the breaking of the sealed envelope containing the conditional examination [deposition] and making it available for the use by the parties or the court’”); *see, also, Bennett v. Smith Bunday Berman Britton, PS*, 156 Wn. App. 293, 234 P.3d 236 (2010) (noting that depositions “having been published . . . were technically available for use at trial”).

The uses to which a deposition may be put are limited by the Rules of Evidence, which do not even use the term “publication.” *See Rufer*, 154 Wn.2d at 540 n. 3. Rather the rules simply permit a party to use a

deposition “for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Rules of Evidence.” CR 32(a)(1). Accordingly, a deposition would have to be admitted into evidence, not simply “published,” for it to be considered as substantive evidence. *See Peterson v. McDonald*, 4 Wn. App. 99, 102, 480 P.2d 774 (1971) (noting that a deposition “while published, was not offered nor admitted in evidence”); *In re Estate of Palmer*, 145 Wn. App. 249, 256, n. 2, 187 P.3d 758 (2008) (noting that trial court published depositions *and* admitted designated portions of them as evidence).

Neither Codekas nor Cornell offered any part of the deposition as evidence. It was never admitted as evidence. Its use was limited to the purpose of impeachment. No court rule permits the court to reach out and rely on it for findings of fact. In fact, a deposition is hearsay and inadmissible for that reason unless the declarant is unavailable as a witness. *See* ER 804 (deposition testimony not excluded by hearsay rule if declarant unavailable as a witness); *see, also*, ER 612 (limits and procedure on writing used to refresh memory, including excising sections not related to the subject matter of the testimony). Obviously, here, Cornell testified; she was not unavailable.

Not only could the court not rely on the deposition, since it was not evidence, the attempt to do so implicates Codekas’s rights to a fair trial,

which includes a right to a neutral arbiter. *State v. Madry*, 8 Wn. App. 61, 68, 504 P.2d 1156, 1160 (1972) (“A fair trial in a fair tribunal is a basic requirement of due process”). One aspect of the court’s neutrality is that it does not engage in investigation. For example, it is reversible error for a judge to search for and rely on “extrinsic evidence to be applied in corroborating or discrediting the testimony of a witness.” *Christensen v. Gensman*, 53 Wn.2d 313, 318, 333 P.2d 658 (1958). This rule is grounded fundamentally in our commitment to a trial that is not only fair but appears fair. *Elston v. McGlaufflin*, 79 Wash. 355, 359, 140 P. 396 (1914). That is, “[t]he law goes farther than requiring an impartial judge, it also requires that the judge appear to be impartial.” *State v. Romano*, 34 Wn. App. 567, 569, 662 P.2d 406 (1983). “Without this the judgments of courts would no longer command or deserve public confidence, and without confidence courts have no function to perform.” *Elston*, 79 Wash. at 359. This is the principle at stake in this case.

In *Romano*, the trial judge contacted several jewelers to verify the defendant’s statements about his income. In *Elston*, the court examined the premises in dispute in search of extrinsic evidence. In *Madry*, the court refused a presentence investigation based on “background” that was not part of the evidence presented at trial. 8 Wn. App. at 66. Here, similarly, the court searched through a document that was not evidence –

not offered or admitted to prove anything. It then extracted parts of the eight-year old deposition testimony and entered them as findings of fact and then relied on these “facts” to reach its ultimate decision.

This the court simply cannot do, as expressly addressed in the Code of Judicial Conduct, which provides:

A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law.

CJC Canon 2.9(C) (emphasis added).⁴ As the comment makes clear,

“[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums ...” *Id.*, *Comment* (6).

Not only may a judge not investigate, a judge “must be expected not only to shield himself or herself from improper communications, but also to remain impartial when improper communications inadvertently and inevitably occur.” *In re Marriage of Davison*, 112 Wn. App. 251, 257, 48 P.3d 358, 362 (2002).

As these cases make clear, the court must confine itself to the evidence presented. Not only did the parties have no notice the judge would search the deposition and use parts of it as if it was evidence, now

⁴ Relatedly, CJC Canon 3(A)(4) declares a judge “should ... neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.” The provision allows the judge to seek advice “on the law” by means of “amicus curiae only,” and then only if the parties have an opportunity to respond. CJC Canon 3(A)(4) (emphasis added).

one party necessarily knows the trial took place in the absence of a neutral arbiter. Rather, the judge essentially assumed the role of advocate for one of the parties, making a case even Cornell did not choose to make. Obviously, this, too, violates judicial conduct canons. CJC Canon 3(A)(5) mandates that judges “shall perform judicial duties without bias or prejudice.” Similarly, CJC Canon 3(D) requires judges “to disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: ... the judge has ... personal knowledge of disputed evidentiary facts concerning the proceeding;”

These principles are absolutely fundamental to our justice system, nothing less than an aspect of due process. U.S. Const., amend. 14; Const. art. I § 3. “Due process, the appearance of fairness, and canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned.” *State v. Ra*, 144 Wn. App. 688, 704-705, 175 P.3d 609 (2008).

Here, findings derived from the deposition included matters beyond the issue of domestic violence. For example, the court’s finding that Codekas’s sister called the police in 2012 because she was concerned about the way Codekas was disciplining C.C., CP 720, was only

mentioned the deposition. See Ex. 19 at 119. While Codekas was asked about the incident on cross examination, he said he did not recall it and an exhibit he was shown to refresh his recollection was never admitted as evidence. RP 447-448, 451. The court also relied solely on the deposition to make the finding that Cornell did not ask for restrictions based on domestic violence in the 2014 agreed parenting plan because she felt there would be enough rules and family support in place to ensure he would be a good dad. CP 720; Ex. 19 at 84-85.

The court made additional findings for which no evidence had been presented, for example, that Codekas called the police to investigate the molestation allegations, CP 721, 722, when everyone, including Cornell, testified that his mother called the police. RP 306, 365. Nor was there record support for the court's finding that Dr. Poppleton conceded that he did not have any problems with Hutchins-Cook's findings and conclusions, CP 724; in both his report and his testimony, he was critical of her analysis. See Ex.7 at 3; RP 241, 218, 224, 235. Nor did both parties testify they believed that the current parenting plan was unworkable as the court further found, CP 724; Codekas was clear at trial that he was seeking to maintain the current 50/50 plan. RP 394-395.

Finally the record does not support the court's findings that Codekas persisted with claims of sexual abuse. CP 722. In the

modification proceeding, the only mention of the molestation allegations appeared in his declaration as a concern that Cornell did not investigate the allegations. Ex. 9 at 3. Criticizing Cornell for her response is not the same as continuing to claim abuse occurred. Likewise there is no support for the court's finding that Codekas did not concede the allegations were unfounded until trial. As detailed above, the record is undisputed that he accepted the CPS report that the allegations were unfounded and thereafter dismissed the sexual assault petition against Conlen.

Not only do all these findings lack substantial evidence in the record, they reinforce the appearance of bias and undermine the court's findings overall, including as to credibility.

It was error for the trial court to search the deposition and to rely on it to make findings adverse to Codekas, then to rely on those findings to make its ultimate decision on modifying the parenting plan. It was error for the court to make findings for which there is no evidence. The court's actions cannot be segregated from the court's decisions overall. Rather, its orders are the result of an unfair process in fact and in appearance. Accordingly, the orders should be vacated and the case remanded for a new trial before a different judge.

Nor can this defect be remedied by resort to the court's additional finding of domestic violence based on the "car chase." CP 705-706.

However regrettable the “car chase,” the incident resulted only in a speeding ticket and Cornell dismissed her protection order petition.

Cornell acknowledged she did not understand at the time Codekas and his mother were just trying to serve Conlen and agreed Codekas said nothing threatening to her at the time. RP 332. And it was Codekas’s mother’s vehicle that collided with hers.

In any case, this incident was not the basis for the court’s domestic violence finding. Rather, overwhelmingly the court relied on the deposition testimony it improperly read. Nor can the court’s orders be affirmed on the basis of the abusive of conflict finding. Rather, as discussed above and discussed further below, the court’s bias permeates these proceedings. As in the cases cited above upholding the necessity of impartiality, the orders here must be vacated and the cause remanded for trial before a new judge.

C. THE COURT’S CHILD SUPPORT ORDER LIKEWISE IS NOT BASED ON THE EVIDENCE.

The court also determined child support on an erroneous apprehension of the evidence properly before it, reinforcing the appearance of unfairness.

With respect to Codekas, the court improperly imputed income to him of \$2850, finding that his income was unknown. CP 739. In fact, his income was established by nearly ten months of paystubs, which showed a

monthly income of \$1,687. CP 44-56. The court cannot impute income where the income is known, but only where the court finds a parent is voluntarily unemployed or voluntarily underemployed. RCW 26.19.071(6). Neither of those facts exists here. Rather, Codekas provided the verification of his income as the statute describes. RCW 26.19.071(2). Cornell argued he was working only part-time but Codekas showed he was working all the hours available to him in his job as a construction foreman. RP 622-625. It appeared he was “gainfully employed on a full-time basis.” *In re Marriage of Peterson*, 80 Wn. App. 148, 153, 906 P.2d 1009, 1011 (1995) (describing criteria for analyzing voluntarily underemployment). The court made no finding that he was voluntarily underemployed, just that his income was “unknown.” In fact, his income appeared on his paystubs. Moreover, even if the court finds a parent is underemployed, the court must further determine, where that parent is gainfully employed on a full-time basis, whether the underemployment is for the purpose of reducing child support. *Peterson*, 80 Wn. App. at 153. None of this analysis was undertaken and none of the evidence supports imputation of income. See RP 361 (Codekas testified that he typically works up to 40 hours but it varies because he takes some more time away on the weeks he has C.C.) A court abuses its discretion when it applies the law incorrectly and when it determines child support

without sufficient evidence. *Choate*, 143 Wn. App. at 240 (lack of findings and evidence).

By contrast, when determining Cornell's income, the court actually lacked the evidence it needed, but made a finding anyway. That is, without anything more than Cornell's declaration of income, the court found her income to be \$2847. CP 739; RP 626. Both the statute and the local rule require verification. RCW 26.19.071; PCLSPR 94.04(b). Moreover, in violation of the statute, the court accepted as a deduction from income Cornell's claimed monthly retirement contribution of \$272. CP 747; RP 627. While RCW 26.19.071(5)(g) permits a party to deduct from gross monthly income actual voluntary retirement contributions, the deduction is not permitted if "the contributions were made for the purpose of reducing child support ..." Accordingly, the parent must "show a pattern of contributions during the one-year period preceding the action ..." *Id.* Cornell did not produce the evidence the statute requires. She offered only her financial declaration and her testimony that she makes a contribution to a 401-K. Ex. 15; RP 287-89. She said nothing about how long she had been making the contributions. Nevertheless and over objection, the court permitted the deduction. RP 622-623, 626-627. The court said "there was at least circumstantial evidence presented that it was paid during the last twelve months." RP 627. In fact there was no

evidence at trial of this fact. See RP 288 (testifying only that she contributes to a 401-K). Here, again, the court abused its discretion by ignoring the statute's requirements and making a factual finding in the absence of sufficient evidence.

The child support order should be vacated and the matter remanded for correct application of the statute's requirements based on an accurate determination of the facts.

D. ATTORNEY FEES

The modification statute permits an award of "attorney's fees and court costs of the nonmoving parent against the moving party" where the court finds a motion to modify "has been brought in bad faith." RCW 26.09.260(13). Here, the court cited to this statute and further found Codekas's counter-petition and his defense to Cornell's petition was "not well grounded in fact" and was "interposed for an improper purpose, such as to harass [Cornell] and to improperly leverage her into dismissing" her petition. CP 715. In support of these conclusions, the court cited Codekas's withdrawal of his counter-petition and his lack of credibility. Id.

First, the court's fees award, including its credibility finding, must be viewed in context with the fairness problem discussed above. For this reason alone, the attorney fees order should be vacated.

Second, it is not bad faith to defend against a petition for modification. *Compare* RCW 26.09.520(5) (bad faith opposition to relocation). A parent may in good faith disagree about whether and how a parenting plan should be re-structured. Nor should the court’s credibility assessment be viewed as sufficient support for this finding, both because a failure to persuade is not necessarily evidence of bad faith, but especially in this case where the court appears biased by the “background” it sought out.

Nor was Codekas’s cross-petition filed in bad faith, if by that the court means he failed to prove his allegations. He did not pursue the sexual abuse allegations as the court’s erroneous findings imply, see Argument, § IV.B (no evidence to support findings that Codekas initiated police investigation, based his petition on the allegations, or failed to concede the allegations were unfounded until trial); quite the opposite (dismissed SAPO); see, also RP 165-166 (Hutchins-Cook found that his investigation of the allegations was not unreasonable). Cornell did not prove all her allegations either. Both parents seemed to be acting in good faith.

The statute does not define “bad faith” and it has not often been applied in the modification context. Basically, bad faith is “[d]ishonesty of belief or purpose[.]” *Black’s Law Dictionary* (Abridged 8th Ed. 2005).

It is not the same as being wrong. Here, Codekas satisfied the adequate cause threshold, but failed to prove his allegations. This failure does not make his petition a bad faith petition. Nor is there proof to support the court's speculation that Codekas was trying to pressure Cornell to dismiss her petition. Especially in light of the court's overall apparent bias, these findings are not supported by substantial evidence.

The court did not cite to any authority other than the modification statute, but it used language resonating with CR 11. Here, the court misuses that rule, despite warnings against the chilling effects of such misuse. *See Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992).

In *Bryant v. Joseph Tree*, this Court laid out clearly how CR 11 structures a court's discretion in making an award of attorney fees. Sanctions are warranted only where the pleadings are baseless, made without reasonable and competent inquiry into the facts and the law. 119 Wn.2d at 220. The rule seeks to reduce "delaying tactics, procedural harassment, and mounting legal costs." *Id.*, at 219. Here, there is no such evidence. Codekas had legal and factual bases for his petition – the difficulties the two parents were having with the 50/50 schedule, Cornell's unilateral efforts to enroll C.C. in school, her response to the sexual abuse allegations, her disparagement of Codekas. It did not violate CR 11 for

Codekas to respond to Cornell's pursuit of primary residential custody with a petition seeking the same. To hold otherwise would chill such petitions in a subject area where parents should be able to argue their positions, consistent with CR 11's requirements, without fear of sanction. *See In Re Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998) (re chilling right to petition).

Finally, even if the court's bad faith finding supported fees for Codekas's cross-petition, it would be necessary to segregate the cost of those fees from the costs of the fees incurred in Cornell's own proceeding. This case was already set for trial on her petition; the issues were the same; indeed, by trial the only dispute regarding the plan was whether to retain the 50/50 schedule or to have Cornell become the primary residential parent. The failure to segregate what additional fees, if any, related to Codekas's cross-appeal would require reversal, if this issue were not already controlled by the fairness defect.

IV. CONCLUSION

For the foregoing reasons, Michael Codekas asks this Court to vacate the modification and child support orders because they are based on the errors described above and to remand for a new trial before a different judge.

Respectfully submitted this 4th day of June 2018.

/s Patricia Novotny, WSBA #13604

/s Nancy Zaragoza, WSBA #23281

ATTORNEYS FOR APPELLANT

ZARAGOZA NOVOTNY PLLC

3418 NE 65th Street, Suite A

Seattle, WA 98115

Telephone: 206-525-0711

Fax: 206-525-4001

Email: Patricia@novotnyappeals.com

Nancy@novotnyappeals.com

ZARAGOZA NOVOTNY PLLC

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