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NO. 51945-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NOLAN HAMILTON ANDERSON III,

Appellant,

vs.

SHERRI LYNNETTE KIRSCHBAUM,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Petitioner herein, Nolan Hamilton Anderson III (Nolan) and the Respondent herein, Sherri Lynette Kirschbaum (Sherri) are the parents of eight-year-old Alex Anderson (Alex). First names are being used for simplification and no disrespect is intended.

Nolan and Sherri are both US Army officers. Nolan is a Major on active duty in the San Antonio, Texas area. Sherri has been recently promoted to Major in the Army Reserves. She lives in the Chicago, Illinois, area.

Nolan is an African American male. Sherri is a Caucasian American female. Alex was conceived when both parents were stationed at Ft. Hood (Killeen), Texas. Alex was born while Nolan was deployed to Iraq. And, Nolan didn't redeploy from Iraq until Alex was about 3 months old.

Within a short time after Nolan redeployed, the parties participated in DNA testing and the test confirmed that Nolan was Alex's father. As soon as paternity was confirmed, the parties began co-parenting Alex pursuant to a temporary parenting plan. In fact, the parties mediated their respective parenting ideas and they were able to come to a full settlement that was encapsulated in a Mediated Settlement Agreement signed by both parties and both parties' respective attorneys on November 9, 2012.

Between November 9th and November 26th, 2012, they were able to finalize all the terms regarding Alex which is embodied in an order

entitled *Order on Suit Affecting Parent-Child Relationship and Adjudicating Parentage* (Texas Order).

The Texas Order provides for comprehensive, cooperative, and independent decision making depending on the circumstances. And, it provides for two alternative parenting schemes that depend on if the parents resided within 100 miles of each other or farther apart than 100 miles.

Just about the time the Texas Order was put in place, Sherri requested and obtained an order transferring her from the Ft. Hood, Texas, posting to a new posting at Joint Base Lewis-McChord (JBLM), Washington.

She and Alex moved to the JBLM area in March, 2013. In accordance with the Texas Order, this large distance triggered the alternative residential schedule which allows Alex to spend up to 48 consecutive days with Nolan. Alex spent at least four extended times with Nolan and Nolan's parents (the paternal grandparents) between March, 2013, and July, 2016.

Just before Alex was scheduled to arrive in Texas for his Spring, 2015, stay with Nolan, Nolan suffered from a brain aneurism and he had to be hospitalized. Nolan was actually in the hospital when Alex arrived. And, Nolan had to go back into the hospital one more time before Alex's Spring/Summer time with Nolan ended.

For the most part, Nolan's parents, Nolan Jr. and Claudia Anderson (the grandparents), cared for Alex over that visitation period. While the grandparents were caring for Alex, Alex made some remarkable statements that astonished and scared the grandparents. When Nolan was released after his second hospital stay, he heard about the events that caused his parents such concern. Apparently, what Alex revealed caused Nolan to be concerned to such a degree that he decided for Alex to see a therapist (Catherine Parten, PLLC). Before Alex saw the therapist, Nolan called Sherri and Sherri talked to the therapist. Sherri gave the therapist permission to meet with Alex.

Alex met with the therapist three times: June 29, 30, and July 6, 2015. Nolan testified that Sherri's original permission allowed all three sessions. Sherri denies giving such permission and denied knowing that more than one session took place until she read about it in a CPS report.

Alex's 2015 medical reports don't show Sherri doing any follow up after Alex returned to her in early July 2015. The 2015 medical records show two visits, February and April, 2015, but neither visit was a follow up to the Texas therapist sessions. Both parties testified that they didn't talk about the therapy session or sessions.

Alex returned to Texas two more times after that. He spent about 50 days in December, 2015, and January, 2016. He spent about 40 days in late May, June, and early July 2016. Sherri filed a Petition for Modification/Adjustment of Custody Decree/Parenting Plan/Residential

Schedule on April 28, 2016; she had it personally served on Nolan on May 2, 2016; and, she had her attorney write a letter to Nolan dated May 24, 2016; and, Alex arrived on May 28, 2016.

II. ASSIGNMENTS OF ERROR:

A. Assignments of Error

1. The trial court erred by finding Nolan withheld his address from Sherri. CP 122, p. 4 of 7, ¶ 10.11.
2. The trial court erred by finding that Nolan failed to sign releases. *Id.*, ¶ 10.16.
3. The trial court erred by finding that had releases been signed and a witness had been able to speak to the Guardian Ad Litem, that the witness's testimony would not have supported Nolan's testimony. *Id.*, ¶ 10.16 (second sentence).
4. The trial court erred by finding that Nolan took Alex to treatment providers "without any notice or agreement" by Sherri. *Id.*, ¶ 10.17.
5. The trial court erred by finding that the child was coached or encouraged to make false allegations of abuse to professionals by Nolan. *Id.*, ¶ 10.17 (second sentence).
6. The trial court erred by finding that Nolan created circumstances that caused others to make reports to CPS in Texas and Washington and erred by finding that Nolan created circumstances that caused others to make reports to the Criminal Investigation Division (CID). *Id.*, ¶ 10.18
7. The trial court erred by finding that Nolan taking Alex to the doctor was inappropriate. *Id.*, ¶ 10.19.

8. The trial court erred by equating one or more of Nolan's actions as "abusive use of conflict." *Id*, p. 5 of 7, ¶ 10.20, 10.21, 10.22, 10.23 and 10.27.
9. The trial court erred by finding that Nolan makes the child feel afraid. *Id*, ¶ 10.24.
10. The trial court erred by finding that Nolan emotionally abused the child. *Id*, ¶ 10.25 and 10.26.
11. The trial court erred by adopting the Mother's proposed Parenting Plan. *Id*, p. 6 of 7, ¶ 10.31.
12. The trial court erred by failing to recognize or even attempt to appreciate significant evidence related to Nolan's compliance with the Temporary Orders prior to trial. *Id*, ¶ 10.32.
13. The trial court erred by excluding Nolan from mutual decision making. *Id*, ¶ 10.33.
14. The trial court erred by finding Nolan was intransigent. *Id*, ¶ 10.34, 10.35, 10.36, and 10.37.
15. The trial court erred by granting a \$25,000.00 attorney's fee award. *Id*, ¶ 10.38; CP, 121.
16. The trial court erred by finding that Nolan had an unspecified emotional or physical problem that impeded his ability to parent Alex. CP, 179.

B. Issues Pertaining to Assignments of Error

1. Whether the trial court erred by entering a Final Parenting Plan that restricts Nolan's contact with Alex to a 15-minute phone call per week and seems to ignore his constitutional rights to be a parent. Assignments of Error 1-13, 16.
2. Whether the trial court erred by granting a \$25,000.00 award of attorney's fees based on intransigence and/or without considering the financial circumstances of the parties at the time of trial. Assignments of Error 14-15.

III. STATEMENT OF THE CASE

1. Sherri filed a Petition Motion to Modify on April 28, 2016, under Thurston County Superior Court Cause No. 16-3-00596-34. CP, p. 3-8. The Petition alleged, among several basis, adequate cause existed for a major modification, restrictions should apply, and modification to decision making. CP, pp. 5-7.

2. Nolan filed his Response to Petition on August 1, 2016, admitting to a substantial change of circumstances but denying Sherri's negative allegations against him. CP, 16-19.

3. Through their respective attorneys, the parties stipulated to a finding of adequate cause on August 4, 2016. CP, 21-23.

4. Through their respective attorneys, the parties stipulated to the appointment of attorney, Richard Bartholomew as the Guardian Ad Litem. The Order Appointing Guardian Ad Litem was entered on October 11, 2016. CP, 27-35.

5. Through their respective counsel, the parties presented an agreed Temporary Parenting Plan (TPP) to the court for entry on January 19, 2017. CP, 39-46. The TPP includes findings that Nolan uses conflict and, without identifying either party, indicates parental alienation. Id, p. 40.

6. The Guardian Ad Litem (GAL) report was filed with the court on January 23, 2017. Ex, 14.

7. Both parties filed requests for the setting of a settlement conference within a week of the GAL report being filed. CP, 47-50; CP, 51-52.

8. Through their respective counsel, the parties presented an agreed Order Waiving Mandatory Mediation on March 31, 2017. CP, 53-54.

9. Nolan filed his first pre-trial Motion, Motion for Temporary Orders, on October 16, 2017. CP, 57-59; CP, 98-106.

10. The Court Commissioner denied the Motion. CP, 107. However, the record reflects that the parties stipulated to and entered an agreed Order increasing the GAL fee cap. Id.

11. The original trial date got bumped during a regularly scheduled pre-trial conference. CP, 113.

12. The attorneys for both parties participated in the second status conference and signed the Trial Schedule Order entered on January 25, 2018. CP, 114-115.

13. Trial started on February 12, 2018. CP, 171-177. And, portions of the trial took place on February 12, 13, 14, 21, and 28, 2018. Id.

IV. STANDARD OF REVIEW

1. With respect to the trial court's determination of a FPP, the standard of review is, "A trial court's parenting plan is reviewed for an abuse of discretion, which " occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Chandola, 180 Wn.2d 632, 327 P.3d 644, (2014), citing, In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012) (citing, In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

"The trial court's findings of fact are treated as verities on appeal, so long as they are supported by substantial evidence." Id. (citing, Ferree v. Doric Co., 62 Wn.2d 561, 568, 383 P.2d 900 (1963)). "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted." Id.

2. With respect to attorney's fees, the standard of review is, "Awards of attorney fees based upon the intransigence of one party have been granted when the party [327 P.3d 658] engaged in " foot-dragging" and " obstruction" ... or simply when one party made the trial unduly difficult and increased legal costs by his or her actions.'" In re Marriage of Chandola, 180 Wn.2d 632, 327 P.3d 644 (2014), citing, Katare, 175 Wn.2d at 42 (alteration in original) (quoting, Greenlee, 65 Wn.App. at 708).

V. APPELLANT'S ARGUMENTS

A. THE TRIAL COURT SHOULD NOT HAVE APPLIED RCW 26.09.191 TO THE MODIFICATION DECISION.

The trial court should not have entered a parenting plan that limits Nolan to one phone call a week and no actual time with Alex. The court's allowance of an RCW 26.09.191 reference is not supported by the facts. And, certain statements made by the court during the trial suggest that the court had a predisposition toward a restrictive parenting plan before the court had heard all of the testimonial evidence.

- a. **There is no basis for a finding that Nolan has either an emotional or physical impairment that prevents him from parenting.**

The Final Parenting Plan contains a finding that says, "Nolan Anderson III has a long-term emotional or physical problem that gets in the way of his ability to parent [Alex] as detailed in the Court's Final Order and Findings on a Petition to Change a Parenting Plan, Residential Schedule or Custody Order." CP, 179. However, there was no evidence present at trial supporting any physical limitations. In fact, the only evidence that was presented at trial that related to Nolan's physical condition at the time of trial was his own testimony and his medical records. RP, Vol. 2 of 2, p. 288; Ex, 54. The only trial evidence presented about Nolan's emotional health was the same. Id.

- b. **There is no basis for restricting Nolan's parenting opportunities with Alex because of Nolan's failure to provide an address or failure to sign a release.**

The Final Order and Findings on Petition contains a finding that Nolan withheld his address and Nolan did not sign a release. CP, 174 (¶10.11, 10.16). Nolan testified about how he provided Sherri with his address. RP, Vol. 2 of 2, p. 288-289. Sherri testified that she'd been given Nolan's address. RP, Vol. 1 of 2, p. 100. The evidence presented at trial doesn't support a finding that Nolan didn't sign a release. The only two witnesses that testified about a release were the GAL and Nolan. The GAL's testimony is clear. It reads, Question by Mr. Houser, "To the best of your knowledge, Mr. Anderson has never signed a release?" And, the GAL's answer was, "I don't know. What I can tell you is she said she was going to get a release and then call me back." RP, Vol. 2 of 2, pp. 204-205. Nolan testified, Question by Mr. Houser, "Were you asked to give a release by either Mr. Bartholomew or Ms. Parten?" And Nolan's answer was, "Not that I can recall sir." RP, Vol. 2 of 2, p. 314.

- c. **There is no basis for a finding that had releases been signed and the Guardian Ad Litem had a chance to interview the witness, the witness' testimony would not have supported Nolan's testimony.**

The Final Order and Findings on Petition contains a finding that says, "The Court finds that if the Guardian ad Litem would have been able to speak with the provider, that they (more likely than not) would not have supported the Father's testimony as to her counseling with the child and statements the child made to her." CP, 174 (¶ 10.16 second sentence). This finding is based on speculation. This finding also illustrates that the

information presented by the GAL was incomplete. The GAL filed no supplemental report pending trial. The only involvement that the GAL had with the parties or Alex after filing the GALR on January 23, 2017, and before the first day of trial, February 12, 2018, was he facilitated a visit between Nolan and Alex that took place a day or two before trial. RP, Vol. 2 of 2, p. 219.

The GALR indicates that Mr. Bartholomew attempted to call Catherine Parten on 12-16-2016, 12-18-2016, and 12-27-2016. Ex, 14, p. 4 of 12. Sherri spoke to Ms. Parten before Ms. Parten interviewed Alex the first time. RP, Vol. 1 of 2, p. 59. Sherri didn't indicate Ms. Parten asked for a release. Sherri also testified that she asked Ms. Parten why Nolan said he [Alex] needed to be seen by this counselor? Ms. Parten told her he [Alex] was having nightmares. Id. Nolan testified about why he called Sherri and why he took Alex to Ms. Parten. His testimony was, "The reason was to notify his mother what was going on. Alex was experiencing nightmares, and he was also having high anxiety of being left alone." RP, Vol. 2 of 2, p. 310. Nolan also testified about how he became interested in Ms. Parten. His testimony was, "That was a referral from Dr. Cornell Martin." Id.

Again, it is pure speculation what information may or may not have come from Ms. Parten testifying at trial or speaking with the GAL. And, the cumulative effect of such errors was used to make the larger finding of "abuse" and "abusive use of conflict."

- d. There is no basis for a finding that Nolan took Alex to counselors without any notice or agreement; similarly, there is a very limited basis for correcting Nolan based on his having Alex looked at by three medical treatment providers.**

The Final Order and Findings on Petition contains a finding that says, “the Respondent/Father took the child to counselors without any notice or agreement by the Mother/Petitioner” and/or his doing so was inappropriate. CP, 174 (¶10.17, 10.19).

With respect to the first of these findings, on direct examination Mr. Houser asked Sherri, “What was the counselor’s name?” Ans. “Ms. Parten.” “Did you talk to Ms. Parten?” Ans. “Just for her to ask if she could treat Alex that day.”

With respect to the second, the basic idea is the parties had joint decision making and they (as in both of them) didn’t follow that protocol in 2015 and 2016. Nolan cooperated in the GAL investigation and provided the GAL with the names and contact information for Ms. Parten and Dr. Lockhart who had both seen Alex in 2015 and 2016. Ex, 14, p. 4 of 12.

The undisputed testimony was that Alex made statements to his grandmother and acted in a way that was very concerning to Nolan and the paternal grandparents. RP, Vol. 2 of 2, p. 310 (Nolan’s testimony about nightmares, etc.); Id, pp. 391-393 (Claudette Anderson’s testimony about concerning behavior); RP, February 21, 2018, pp. 7-9 (Nolan Anderson, Jr., testimony about Alex’s nightmares, etc.).

Alex's 2015 medical records also suggest that Alex's disclosures to Ms. Parten and Dr. Lockhart about peanut butter and epi-pen is in his medical records. Ex, 52, p. 3 of 7 (February 17, 2015, treatment by Madigan South/Dr. McCleod for accidental ingestion of peanuts and use of an epi-pen); Id, p. 1 of 3 (April 16, 2015, treatment by Mr. Magpantay for follow up on peanut allergy).

Next, Nolan testified that he wasn't involved in the decision to take Alex to the doctor in 2015 (two appointments) or 2017 (a combined six appointments in 2016 and 2017). RP, Vol. 2 of 2, p. 317. When asked when he' found out about Alex's medical records, his answer was, "About two weeks ago." Id.

With all due respect to the trial court, the negative finding of Nolan taking Alex to be seen by medical personnel without obtaining advance permission from Sherri but not holding Sherri to the same standard and/or not addressing the larger problem, that neither parent was following the joint decision-making requirement, seems to reward Sherri and punish Nolan. Frankly, it seems prejudicial. And, I would argue Alex's best interests are not met by denying Nolan the right to participate in non-emergency medical treatment decisions.

e. There is no basis for a finding that Nolan coached or encouraged Alex.

The Final Order and Findings on Petition contains a finding that says, "The Court finds that the child was essentially coached or encouraged into making false allegations of abuse in his mother's care to

professionals the Father took the child to.” CP, 174 (¶10.17, second full sentence). When the trial court ruled, she indicated, “There was significant testimony on this issue, and it includes, first of all, the mother's allegations that the father and/or his family instigated multiple CPS and/or CID investigations of the mother and her alleged abuse to Alex, and that they did so either directly or by bringing Alex without any notice or agreement by Ms. Kirschbaum to professionals where the court finds that Alex was essentially coached or encouraged into making false allegations of abuse in his mother's care. And I'll say again the father denied that at trial, but the court did not find that denial credible given the other evidence.” RP, Ruling, p. 14. In fact, the word “coach” or “coaching” is nowhere to be found in the record. The word “encourage” or “encouraging” may be found but that word is not used in a way that would support this finding.

Because the trial court connected her finding of coaching to “multiple CPS and/or CID investigations, here is a summary of the evidence associated with CPS and CID. Question by Mr. Houser, “And you became aware that Mr. Anderson had filed a complaint with CID?” Ans. “Yes, I was very aware.” RP, Vol 1 of 2, p. 74. Question by Mr. Houser, “What did they [CID] actually call the complaint to investigate?” Ans. “That I don't know, because it was unfounded.” RP, Vol. 1 of 2, p. 110. While Sherri testified that she could count 6 CID investigations, the

summary of her testimony is there was only one. And, Nolan testified that he was directed to CID by his commander. RP, Vol. 2 of 2, p. 290.

No investigator, CID or CPS, were called to testify. No CPS report or CID reports were included in the exhibits admitted at trial. The GAL testified as if he had personal knowledge of multiple CPS and/or CID investigations, but his Report shows he reviewed just one CPS Report, no CID Reports, and he interviewed no CPS or CID agents. Ex, 14, p. 4 of 12.

f. There is no basis for a finding that Nolan interrogated Alex during phone calls or otherwise.

The Final Order and Findings on Petition contains a finding that says, “The Court finds that the Respondent/Father engaged in abusive use of conflict by interrogating the child during his phone and Facetime conversations.” CP, 175 (¶ 10.20). The Final Order also contains, “The Court also finds that there was emotional abuse of the child by the father ... constant reminding by the Father to the child to tell the truth, constantly asking him questions about many, many things, such that the child feels afraid to answer for fear of letting his father down or telling him the wrong answers.” CP, 175 (¶ 10.24).

Mr. Houser called three witnesses at the beginning of the trial. These were Monique Ferrer (MF), Beth Harley (BH), and Beth Brown (BB). Ms. Brown is Ms. Harley’s mother. The sum of their testimony regarding Nolan and Alex’s phone or Facetime interactions is:

MF was asked, “So, you are only aware that he [Nolan] would call and speak to Alex?” Ans. “Yes.” RP, Vol. 1 of 2, pp. 8-9. Question, “Did Alex ever tell you anything about his father?” Ans. “He never mentioned anything.” Id, p. 10. BH was asked, “Have you seen him [Nolan] on Facetime [or] on a phone?” Ans. “Yes, I have.” Id, p. 14. Question, “[H]ow did those phone calls go?” Ans. “Some calls went pretty well, in my observation, sometimes not so well. They were upsetting to Alex.” Id. Question, “Can you give me some examples?” Ans. “One time. I was with Alex at her home when while she was residing at JBLM ... Alex [had been playing] dress up ... Alex was putting on a tutu ... Facetime ... Nolan was very upset that Alex was not wearing boy-appropriate clothing.” Id, pp. 15-16. BH was also asked a follow up, open ended question, “Thank you for that example. Were there other times when you saw Alex was upset?” Ans. “”Frustration” was the word for it ... in the experience I have had where Nolan was speaking with Alex over the phone, he [Nolan] had difficulty embracing Alex’s train of thought ...” Id, p. 16. Mr. Houser also asked BH, “Was there, at times, Alex being hesitant to want to take these calls ...?” Ans. “Yes. Many times ... he wanted to continue playing.” Id, pp. 17-18. On cross examination, I asked BH, “When you were talking about the tutu incident, how old was Alex?” Ans. “Alex was approximately four years old, three or four years old.” Id, pp. 18-19. BB was asked basically the same questions. And, there was no testimony about “interrogating” or “constantly reminding

Alex to tell the truth.” *Id.*, pp. 20-29. These witnesses represented the only third-party witnesses that had observed the phone calls or Facetime between Nolan and Alex from when Alex was about three to four years old.

g. There is no basis for a finding that Nolan made or created circumstances that cause others to make reports to CPS and/or CID.

The Final Order and Findings on Petition contains a finding that says, “The Court finds that the Respondent/Father made or created circumstances that caused others to make reports to CPS in Texas and in Washington and the CID, all of which were later determined to be unfounded.” CP, 174 (¶ 10.18). Again, no CPS or CID representative gave testimony at trial. The GALR contains a summary of the GAL interview with Sherri. Ex, 14, pp. 5-7 of 12. The GALR doesn’t reflect any CPS or CID agent interviews. *Id.*, pp. 3-4 of 12. So, it is not appropriate to find or conclude that Nolan created such circumstances. At least, the evidence is susceptible to hearsay objection and/or requires a lot of speculation.

h. There is no basis for a finding that Nolan made the child feel afraid or that Nolan emotionally abused Alex.

The Final Order and Findings on Petition contains a finding that says, “The Court finds that there was emotional abuse of the child by the father ... constant reminder to tell the truth, constantly asking him questions about many, many things, such that the child feels afraid to

answer ...” CP, 175 (¶ 10.24, 10.25, 10.26). As indicated in the previous arguments, the three third-party witnesses described three specific calls and calls generally and none of this testimony indicated Alex being afraid of Nolan. “Frustration” is what was described by the third witness. The kind of frustration that can happen when Nolan is talking to his 3 or 4-year-old son and Alex was pulled away from other play or activity that he was enjoying when the call came in. “Frustration” and distraction is no fear.

The GAL interviewed Alex on December 29, 2016. Ex, 14, p. 7 of 12. Yes, the GALR says, “He [Alex] doesn’t like the phone calls ...” Id. However, the GALR contains no observations of Nolan and Alex on the phone or sharing Facetime and there was an entire year from date of GAL appointment until the trial started. The GAL testified that he observed Nolan and Alex together and he described their interaction as “a very good interaction,” “Alex appeared to be happy to see his father.” RP, Vol. 2 of 2, p. 219. The GAL also summarized two visits that took place in Texas prior to the start of trial. His summary was, “I didn’t hear anything negative from anybody, including the mother, about those visits. So, I am assuming they went well.” Id., pp. 246-247.

Over objection, the trial court allowed evidence dating back to before the child was born. RP, Vol. 1 of 2, pp. 40-41. Sherri testified about horrible actions by Nolan that supposedly occurred before Alex was born. Id., pp. 41-42. Her testimony fast-forward to the filing of the

Petition without any description of Alex being afraid of Nolan. Id., pp. 42-47.

In the Ruling, the trial court stated, “the Texas order is unworkable, was unworkable for some time, ...” RP, Ruling, p. 4. However, none of the following witnesses testified that Alex showed any fear of Nolan: Nolan, Nolan Anderson, Jr., Tonya Anderson-Brown, Claudette Anderson, or John Paul Trossi. RP, Vol. 2 of 2, pp. 362-365 (Trossi); Id., pp. 366-383 (Anderson-Brown); Id., pp. 384-386 (C. Anderson); and, RP, February 21, 2018, pp. 6-9. All of the Anderson family members observed Alex with Nolan over periods of time exceeding 40 days at a time. Id. Mr. Trossi was present for an exchange that took place in Washington. His testimony included answering this question, “And what was Alex’s experience from your observation?” Ans, “We had a good time, just kind of having fun, just bowling, drinking coke, you know, like a little boy would enjoy bowling with friends and family.” RP, Vol. 2 of 2, p. 364.

Dr. Lockhart’s report, although not admitted for the truth of the matter asserted, doesn’t include Alex showing any fear of Nolan. And, Alex’s 2015 – 2017 medical reports don’t include any treatment or counseling related to fear of any kind. Ex, 51 & 52.

i. The trial court erred by adopting the mother’s proposed parenting plan.

The adoption of the mother’s proposed parenting plan presupposes all or most of the findings being challenged on appeal. Chapter 26.09.260

RCW reads, in pertinent part, *(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.* This appeal is not contesting a finding of substantial change of circumstances. What this appeal is about is the trial court focused on a series of negative allegations and accepted them as truth in spite of overwhelming evidence to the contrary. The trial court's application of this section is misapplied.

(4) The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

Because the Final Parenting Plan (FPP) generally refers to RCW 26.09.191 in support of FPP ¶ 3(b), the standard for application of this law should be considered and the facts of the case applied. This Court of Appeals, in deciding In re Watson, included this reference, "See RCW 26.09.191(4) (a trial court may not draw any presumptions from a temporary parenting plan in determining the provisions of the permanent parenting plan or resolving a modification petition)." In re Marriage of Watson, 132 Wn.App. 222, 234, 130 P.3d 915 (Div. II, 2006). The

Washington Supreme Court also analyzed (4) by, “The Family Law Deskbook explains: The temporary parenting plan is to be based upon a look at the preceding 12 months to determine the relationship of the children with each parent subject, of course, to the other limitations. In the permanent parenting plan, the court is to evaluate the ability of each parent to perform the parenting functions for each child prospectively. Drawing any presumption from the temporary plan is inappropriate. In re Marriage of Kovacs, 121 Wn.2d 795, 809, 854 P.2d 629 (1993), citing, Washington State Bar Ass'n, Family Law Deskbook 45-25 (1989). Here, the FPP entered by the trial court is essentially the same PP entered in early 2017 by the Court Commissioner. CP, 39-46. The trial court took into consideration facts dating back to before Alex was born; all three witnesses for the Petitioner testified about experiences that were from 2-4 years before the Petition was filed; and, there was basically no attempt to analyze Nolan’s prospective ability to parent Alex at trial.

The trial court didn’t take into consideration the two years that had gone by without Alex spending any substantial time with Nolan. None of the two supervised visits that took place in Texas and the one time in Washington just before trial were even mentioned in the trial court’s ruling. Section 14 of the FPP lists several courses that Nolan is required to attend, but the evidence at trial included TPP requirements had been completed by Nolan. He had completed both the “Children in the Middle” course (Ex, 48) and “The Nurturing Father’s Program” (Ex,

49). And as argued above, the GAL observed Alex with Nolan and his having a good time with his dad. In spite of substantial evidence to the contrary, the trial court made the FPP even more restrictive than the TPP.

(7) A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191 (2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.

As I read this section of RCW 26.09.260, the FPP at issue provides no opportunity for Nolan to expand his parenting opportunities. My question is, how would Nolan's completion of the courses listed in the FPP, ¶ 14 (B), (C), (D) in Texas provide the trial court the opportunity to determine adequate cause for medication and expansion of his parental opportunities. How is forcing him to complete new education substantially different from the courses he completed prior to trial? Is Nolan supposed to Petition for Modification?

In Watson, the court noted that "RCW 26.09.260(1) sets forth a general standard for modification: Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the

child and is necessary to serve the best interests of the child. Watson, at 230. If Nolan completed all the training listed in the new FPP and he changed, his application for modification would be denied because the change wouldn't be in Sherri's house (the nonmoving party) or with the child's circumstances. His change cannot support a petition to modify.

B. THE FINDING OF INTRANSIGENCE IS IN ERROR AND SHOULD NOT SUPPORT AN AWARD OF ATTORNEY'S FEES.

- a. **The trial court erred by granting an award of attorney's fees based on intransigence instead of applying a need and ability to pay analysis.**

"Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in " foot-dragging" and " obstruction" ... or simply when one party made the trial unduly difficult and increased legal costs by his or her actions." Chandola, at 656, citing, Katare, 175 Wn.2d at 42 (alteration in original) (quoting Greenlee, 65 Wn.App. at 708). The record in this case is replete with agreement and cooperation. And, there is nothing in the record that suggests the outcome was delayed by Nolan.

As described in the Statement of the Case, the original Texas Order was entered by Agreement. Two additional agreements were reached by the parties before Sherri left Texas in March, 2013. Ex, 25 & 26.

After Sherri filed the Petition on April 18, 2016, Nolan's attorneys agreed with and cooperated in the entry of these orders: Order, Re: Adequate Cause (CP, 21-23); Order Appointing GAL (CP, 27-35); Order Transferring to Family Court (CP, 24-25); Order Waiving Mandatory

Mediation (CP, 53-54); and, TPP (CP, 39-46). The only pleadings filed between the inception of the case and trial that were opposed to those filed by the Petitioner were the Response, Amended Response, and Motion for Temporary Orders. None of the pleadings filed by Nolan could be considered “foot dragging” or “obstruction.”

Both parties filed their respective trial requests within a week of each other and both within a week of the entry of the TPP. The trial was scheduled by the court in the normal due course. The original trial date was continued by the court and not by virtue of a request by either party.

This case and trial took place in Washington in spite of the fact that Nolan never lived in Washington, Nolan travelled to Washington twice for trial, his parents traveled to Washington twice for trial, and his sister traveled from Texas to Washington to support Alex and Nolan.

Finally, the court seemed to be most heavily influenced by the allegations that Nolan made false reports and/or caused such reports through third parties but no such third parties were called to testify or stand cross examination. And, no CID or CPS reports are in the trial record.

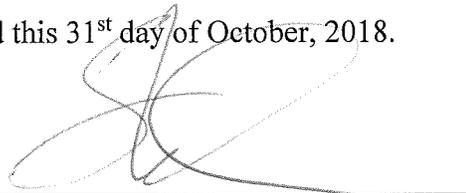
VI. CONCLUSION

The most important person in this case is Alex. It's not Nolan and it's not Sherri. The case went to trial because the parties couldn't agree on either continuing to follow the Texas Order or to adopt a new Final Parenting Plan by agreement. So, the decisions related to Alex's best

interest fell on the trial court. Unfortunately, the FPP and the findings described in the Final Order and Findings on Petition to Change Parenting Plan don't currently provide for Alex's best interest because they don't provide a way for Nolan to be in Alex's life now or in the future. Therefore, Nolan respectfully requests that this court grant his appeal and restore some or all of his rights to parent Alex.

With respect to attorney's fees, the law cited herein and the almost complete cooperation by Nolan suggests that a finding of intransigence is reversible error.

Respectfully submitted this 31st day of October, 2018.



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Declaration of Transmittal

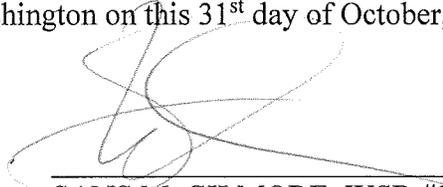
Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

I transmitted Appellant's Opening Brief by electronic filing to:

Washington State Court of Appeals
Division II
950 Broadway, Ste. 300
Tacoma, WA 98402

on October 31, 2018, and by either hand delivery to or electronic service (pre-arranged and agreed to Respondent's attorney of record, Sidney C. Tribe, WSB #33160, Talmadge/Fitzpatrick/Tribe.

Signed at Tumwater, Washington on this 31st day of October, 2018.



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