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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Cause No. 283330-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Heidy McWain/ Linderman, Respondent/Appellant,

v.

Lance Linderman, Petitioner

REPLY BRIEF OF APPELLANT ON
CONSOLIDATED APPEALS

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I. REPLY

A. *In re Marriage of Pennamen* holdings are not a defense to the Grant County rulings at issue here.

In response to the two consolidated appeals, Linderman discusses the holding of *In re Marriage of Pennamen*, 135 Wn.App. 790, 146 P.3d 466 (Div. 1, 2006), but does not explain why *Pennamen* is relevant or why it supports his position. Linderman may cite to *Pennamen* as the only published WA case where the party objecting to the relocation files both an objection to relocation and a petition to modify – as prescribed in RCW 26.09.260(6) and as done by Appellant here. And like here, the objecting party’s petition for modification was denied at the time of the adequate cause determination. But, the similarities end there.

The differences include, in *Pennamen*, when the move was not allowed, changes to the parenting plan based on RCW 26.09.260(6) were also not allowed. *See Pennamen*, 135 Wn.App. at 796 -797. Secondly, in *Pennamen*, the father did not appeal, so the question of whether the court erred in not finding adequate cause to change custody based on the mother’s methamphetamine use is not precedent. *See Id.* at 797. Third, the father in *Pennamen* sought only a change in custody – a major modification – not minor modifications, as sought here. *See Id.* at 796. Fourth, unlike here, the trial court in *Pennamen*, made an understandable finding on why adequate cause for a major modification was being denied

based on the facts. *See Id.* (explaining that the commissioner found “no nexus” between the mother’s prior drug use and the statutory requirements for modification under RCW 56.09.260 sic.). In the case at bar, no rational finding to deny a *minor* modification was given.

And fifth, in *Pennamen*, when the relocation was denied and adequate cause had already been denied, no cause of action remained to modify the parenting plan, and the court then did not modify anything. *Id.* at 807. Unlike the trial court here, the *Pennamen* court did not take matters into their own hands, go out on a limb and modify the parenting plan without following any statutory criteria.

Very unlike the issues in *Pennamen*, McWain asks this court to determine first that the trial court’s not finding adequate cause was manifestly unreasonable, based on untenable grounds and untenable reasons, *See* Jan. 29, 2010 Opening Brief at 1-14; Oct. 4, 2010 Supplemental Brief at 1 and 7-9, and also then, erred, as a matter of law, to not allow the petition to stand while the relocation was being pursued. *See* Oct. 4, 2010 Supplemental Brief at 13-14. And secondly, the trial court again abused its discretion after deciding it could not modify a parenting plan due to the relocation factors (which is an error of law in itself), yet then modified anyway because Linderman offered modifications – but not based on any statutory criteria. *See* Oct. 4, 2010 Supplemental Brief at assignment of error 5 and at pgs. 18-24.

If those legal knots were untangled by this court, on remand the trial court could then properly and independently utilize RCW 26.09.260(5)(c), RCW 26.09.260 (6), and RCW 26.09.520 to modify the parenting plan to meet the needs and best interests of the child.

Respondent fails to squarely address or respond to any of the issues raised by McWain and such lack suggests there is no defense.

Linderman responds to this appeal primarily with his motions on the merit. McWain previously pointed out the deficiencies of Linderman's briefing in her Responses to the motions on the merits filed March 11, 2011 and June 9, 2010. Linderman has chosen to not correct any of his briefs' deficiencies. Instead, he incorporates his motions on the merit briefing as his responses. McWain now replies to those responses.

B. The lack of citation to the record and law precludes this court from considering Respondent's defense to this appeal and deserves sanctions.

Respondent's briefs (Motions on the Merits, incorporated as response briefs) are so far out of compliance with RAP 10.3, sanctions should be imposed. *See* RAP 18.9; RAP 10.7; *Hurlbert v. Gordon*, 64 Wn.App. 386, 400, 824 P.2d 1238 (Div. 1, 1992)(imposing sanctions of \$750 on Respondent for lack of citation to the record and errors in the citation to the record and citing to cases that did not support the positions for which they were cited.); *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn.App. 286, 305, 991 P.2d 638 (Div. 1999)(imposing sanctions

of \$500 for failure to correct errors, appropriately cite to the record, and file a brief in compliance with RAP 10.3).

1. The December 6, 2010 Supplemental Response Brief does not comply with RAP 10.3.

Respondent's supplemental response brief and motion on the merits filed December 6, 2010 is out of compliance with RAP 10.3. Respondent's alleged statement of the grounds for relief sought is not a proper section of an appellate brief. *See* RAP 10.3. Pgs 2 -6 of the same brief, apparently intended to be a statement of the case, although partially citing to the record therein, does not cite to facts particularly relevant to the questions on appeal. Such is a violation of RAP 10.3 (a)(5). Within the next section at pgs 7-9, many of the alleged facts are without citation to the record and they are not accurate, in any event. *See* Respondent's December 6, 2010 brief at 7-9. RAP 10.3 a (5) and (6) requires that statements of facts from the record, whether in the statement of the case or argument, must cite to the relevant parts of the record. *See Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007) (stating, "we decline to consider facts recited in the briefs but not supported by the record"); *See also Harbor Enterprises, Inc.*, 116 Wn.2d 283, 290, 803 P.2d 798 (1991) (noting that the lack of citation to the record is "perhaps because the record does not support their unqualified statements."); *Hurlbert*, 64 Wn.App. at 400 (imposing sanctions, in part,

for errors in citing to the record, irrelevancy in the citations to the record, generalized citations to large sections of the record rather than specific pages of the record, and lack of citation to the record in the argument.)

The entire argument section of Linderman's brief of December 6, 2010, at 9-13, is devoid of citation to legal authority for any legal argument, other than a reference to the standards of review. And even then, the references to the standards of review do not reflect the propositions stated. See this reply brief at 9-10. This court can not consider legal argument without citation to legal authority. RAP 10.3 (a)(6); *Erection Co., Inc. v. Dept of L & I*, 160 Wn.App. 194, 211 n.3, 248 P.3d 1085 (Div. 3, 2011) (stating "[w]e need not consider undeveloped arguments and arguments without authority."); *Litho Color, Inc.*, 98 Wn.App. at 305 (stating "it is implicit in the rule that the citations to legal authority contained in the argument in support of a party's position on appeal should relate to the issues presented for review and should support the proposition for which such authority is cited."); *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (stating "[w]e will not consider issues on appeal that are not . . . supported by . . . citation of authority.").

2. The April 2, 2010 Motion on the Merits/Response Brief is also Out of Compliance with RAP 10.3.

Respondent's attorney also failed to comply with RAP 10.3 in his first response brief filed April 2, 2010. This brief is also so far out of compliance that sanctions are due and the legal arguments should be dismissed.

In the factual Statement of the Case section, Linderman's attorney fails to cite to the record for large portions of pgs 1, 3, 4 and 5, violating RAP 10.3 (a)(5). No unsupported factual statement should be considered as accurate or relied upon. *See* RAP 10.3 (a)(5) and (6); *Sherry*, 160 Wn.2d at 615 n. 1.

Additionally, Linderman's attorney inserts argument within her facts, which violates RAP 10.3 (a)(5). She claims Petitioner's heading on her Petition to Modify that includes the statement "Pursuant to Objection to Relocation" is "improper and erroneous" at 2, ln 5. Linderman does not cite legal authority for this opinion in this section of the brief, nor within the argument section. At 3 ln 2, Linderman's attorney adds "now suddently" as a fact that is not reflected in the record as cited by Linderman. Respondent claims and argues, at pg 4 lns 2-3 and 6, without citation to the record, that the request for temporary orders and parenting plan of CP 70-81 requests a change of custody, which is false, as that request for temporary orders proposes a minor, temporary modification,

only. Respondent Linderman, repeatedly attempts to spin the record to claim Petitioner sought adequate cause for a major modification at the July 10, 2009 hearing. *See* Linderman's April 2, 2010 brief at 4 ln 2-3, ln 6, and the citation to *Roorda* at 5. In fact, McWain's attorney sought adequate cause for a minor modification. *See* CP 485 ln 13-18; 488 lns 8-18; 489 lns 24-25; 490 lns 11-15; 491 ln 7- 492 ln 12; and CP 73-81. An order denying revision is entered at CP 148 - 49, but that is the only portion of the sentence with accurate citation to the record at p. 5 lines 11-14. In fact, the record does not reflect, anywhere, that the trial court actually distinguished between finding adequate cause for a major or minor modification. *See* CP 148-49 and CP 501-502.

Like in the second response brief, Linderman's counsel does not cite to relevant legal authority in her argument, and also fails to cite to the record. *See* April 2, 2010 brief at 12-14. Not surprising then, the stated facts are not accurate. *Compare e.g.* CP 500-501 to Linderman's Response Brief of April, 2010 at 12-13. The only legal authority to which Linderman cites are, again, only for the standard of review. Additionally, Linderman's arguments are not responsive to McWain's appeal. For example, section 2 addresses a change of custody, but McWain did not seek adequate cause for a custody change.

Other than citation to the standard of review, the only section of the April 6, 2010 response brief containing citation to authority is the

request for attorney fees at 15-17. The citation to authority for attorney fees by Linderman should be used against and applied to Linderman.

C. Linderman's responses are without merit.

Respondent Linderman claims that Petitioner McWain's appeals lack merit while citing incorrect standards of review, claiming incorrect facts with and without citation to the record, and not squarely addressing Petitioner McWain's assignments of error. The responses are without merit.

1. The first response filed April 6, 2010 does not squarely address the assignments of error in the first appeal and the citations to legal authority do not support the propositions asserted.

a. The small amount of law that Linderman does cite to and address is inapplicable or wrong.

At pages 9-10 of the April 6, 2010 brief, Respondent Linderman cite RCW 2.24.050 and *State ex. Rel. J.V.G. v. Van Gilder*, 137 Wn.App. 417, 423, 154 P.3d 243 (2007) in support of the proposition that on revision, judges are excused from making their own findings, and by denying a motion to revise, the court automatically adopts the commissioner's findings as their own.

Those citations do not stand for Respondent Linderman's proposition. The Div. 1's citation in *Van Gilder* to the *Estate of Larson* reveals that what the court was referring to was a trial court specifically incorporating the findings of the commissioner as his own, not as an operation of law. Our Washington Supreme Court does not condone even this practice, stating that

in reviewing decisions of the court commissioners, judges “should enter their own findings of fact and conclusions of law into the record” and not just reference or adopt the commissioner’s findings. *In re the Estate of Carl Larson*, 103 Wn.2d 517, 520, 694 P.2d 1051, n.1 (1985).

Furthermore, even if the commissioner’s decision was adopted by the judge, the commissioner’s decision was also in error and was addressed, in part, in assignment of error No. 3 on page 1 and 12-14, generally, of Appellant’s opening brief filed Jan 29, 2010, to which Respondent does not respond. Furthermore, the record does not reflect that after McWain’s briefing the issue of alternative pleadings to the trial court prior to hearing the motion to revise, *See* CP 139-147, J. Knodell did not set his foot back into the commissioner’s misunderstanding regarding alternative pleading. *See* CP 478-482 oral ruling of J. Knodell, compared to the oral ruling of Commissioner Chlarson at CP 123-125. RCW 2.24.050 also is not applicable, as it speaks only of the right to appeal to the appellate court from a commissioner’s decision, if there is no motion to revise, and does not discuss the duties and obligations on revision.

Next, Respondent apparently claims that the court’s findings were consistent with *Roorda* and therefore the court was excused from making findings regarding the statutory criteria. *Roorda* does not stand for Linderman’s proposition that “mere allegations” are insufficient to find adequate cause.

The Division 1 court in *In re Marriage of Roorda*, 25 Wn.App. 849, 611 P.2d 794 (1980) determined that the allegations by the father were insufficient to meet adequate cause for a change of custody in part because the most serious allegation (nervous breakdowns) had already existed at the time the prior custody decree was entered, and in part because the other allegations did not support the criteria required for a change of custody. The *Roorda* court looked to the required statutory criteria to guide its adequate cause findings for a major modification, *Id. at 852*, while Petitioner is requesting this appellate court require the trial court to look for adequate cause for a minor modification. Furthermore, because the *Roorda* court could not find a prima facie reason to modify custody, even if the mother had agreed with the allegations, it declined to determine what showing was necessary beyond prima facie allegations. *Id.*

In contrast, here, as discussed in Appellant's Opening brief of Jan. 29, 2010, at 8 – 10, there was no factual controversy on the substantial and tangible changes of circumstances that had occurred in the mother, the child, and even the father from 2003 forward to dispute or question the facts to be "mere allegations." *See Id.* All those changes prima facie qualify as substantial changes in order to seek minor modifications to the parenting plan, and to determine otherwise is unreasonable. *See e.g. In re Marriage of Hoseth*, 115 Wn.App. 563, 568-575, 63 P.3d 164 (2003). Linderman does not address the major changes in circumstances in his motion on the merits -

response brief, choosing instead to highlight minor issues not even addressed by Appellant on appeal as a change of circumstance for a minor modification. *See* April 2, 2010 response brief at 12-13. And, as briefed by Appellant McWain at 7 of her October 4, 2010 opening brief, a minor modification does not require the “detriment” to the child that Respondent claims is somehow relevant four different times on pages 12 -13 of his motion on the merits/Response brief.

Section 4 of Respondent’s April 2, 2010 Response Brief and Motion on the Merits at pages 14-15 claims that the appeal is meritless because untenable grounds, as an abuse of discretion, equates with a finding of fact standard, citing *Stachofsky*, and that such an issue cannot be an issue in this appeal.

The abuse of discretion standard noted in *Stachofsky*, does not equate untenable grounds with an unreasonable person standard. *See In re Marriage of Stachofsky*, 90 Wn.App. 135, 142, 951 P.2d 346 (1998). The only reference to an abuse of discretion provided in *Stachofsky* is: “A manifest abuse of discretion is present if the court's discretion is exercised on untenable grounds.” *Id.*

Furthermore, the *Stachofsky* case references the standard of review for a division of property in a marital dissolution, *see Id.*, not the standard of review for findings of adequate cause. Respondent does not dispute the

correct standard of review for issues related to adequate cause. *See* Petitioner's Jan. 29, 2010 Opening Brief at 5.

b. Linderman does not counter the issues in McWain's Opening Brief.

What Linderman does not respond to is whether the judge has the discretion to not tell us what he relied on (the basis) to deny adequate cause, when such denial was unreasonable. Such is per se, abuse of discretion. *See In re Marriage of Shryock*, 76 Wn.App. 848, 852, 882 P.2d 750 (1995).

The untenable grounds error for the court of appeal's review is due to the trial court's lack of basis and findings in its order. The findings and order should have referenced the criteria of RCW 26.09.260(5). A vague "belief" that adequate cause had not been met is not a sufficient basis for a determination. *See also* Petitioner's Jan. 29, 2010 opening brief at 13 for additional authorities and argument. What the belief was, whether law, fact, religion, or length of time in which changes were reviewed, is all a mystery and leaves the ruling with an untenable basis.

The correct standard of review for the adequate cause matter of the first appeal is cited in *Hoseth*, 115 Wn.App. at 569 (stating, "[a]n abuse of discretion occurs when the superior court's ruling is manifestly unreasonable or its ruling is based on untenable grounds or untenable reasons.") Examples of substantial changes of circumstances for a minor modification are also set forth in *Hoseth*, 115 Wn.App. at 568, and such

examples are similar to or less than the substantial changes noted here. *See Id.* and compare with Jan. 29, 2010 opening brief at 6-9. In comparing with *Hoseth*, to not find adequate cause here is manifestly unreasonable when the changes are both similar and greater. To claim McWain's offered substantial changes for a minor modification are "mere allegations" of substantial changes of circumstances, as if the situation is similar to *Roorda*, shows the denial of adequate cause was based on untenable grounds and for untenable reasons.

McWain's appeal is primarily a matter of first impression. Respondent's Response brief and motion on the merits of April 6, 2010, section 3 at 13-14 does not cite to the record, nor legal authority to show why Petitioner's attempts to follow RCW 26.09.260(6) as a process to modify the parenting plan was error.

As addressed at page 13-14 of Petitioner's Opening Brief, on December 8, 2008, Petitioner set out to modify the parenting plan, one way or another, under the plain language of RCW 26.09.260(6), pursuant to her objection to relocation, and utilizing a petition to modify, also as required under RCW 26.09.260 (6). There are no cases on point to guide her in interpreting RCW 26.09.260 (6) on this quest. *In re Marriage of Grigsby*, 112 Wn.App. 1, 16, 57 P.3d 1166 (2002) only illustrated the pitfalls attendant in not simultaneously bringing a petition to modify in conjunction with an objection to relocation, as addressed at pages 13 – 14 of Petitioner's

opening brief. *Pennamen*, 135 Wn.App. 790 shows a situation where the father simultaneously filed a petition to modify with his objection to relocation, but he did not appeal the lack of modification and the lack of finding adequate cause after the relocation was denied.

In sum, whether standing on its own merits under RCW 26.09.260 (5)(c) or in conjunction with only a relocation under RCW 26.09.260 (6), appellant's Petition to Modify should not have been dismissed in 2009 and should have been utilized at the relocation trial to appropriately modify the parenting plan.

2. On his 2nd Motion on the Merits and Response Brief, Mr. Linderman simply echoes the trial court's actions and attitudes, citing no authority other than what the trial court stated.

a. Introduction and Restatement of Mr. Linderman's position

The trial court and Mr. Linderman seem to conclude that following the relocation trial, the court has no specific statutory authority by which to guide its modification of the parenting plan, other than as required by any geographic change and to avoid harm the geographic change might bring to the child, or unless otherwise unilaterally agreed by the relocating party – in this case, Mr. Linderman.

Secondly, the trial court and Mr. Linderman explain that the point of the trial was only to present evidence to allow or not allow the relocation, utilizing the factors of RCW 26.09.520, and not utilize or consider analysis and evidence admitted pursuant to the relocation factors, or any other statute, to modify a parenting plan in the best interest of the child – as argued by Ms. McWain.

Essentially, Mr. Linderman claims that the court did not error because the court thoroughly utilized RCW 26.09.520 to analyze whether the relocation should be allowed or not. *See* 2nd Motion on the Merits at 10. And the court did not error because it ordered what Linderman offered, which was within the scope of the changes requested by Ms. McWain. *See* 2nd Motion on the Merits at 6-7.

b. Linderman misconstrues McWain's issues on appeal in an attempt to avoid addressing the lack of statutory authority used in modifying the parenting plan.

Ms. McWain does not assert any error in the court's use of RCW 26.09.520 to allow the relocation. Nor does she cite error in the court using its discretion to not find harm in the child's move to Cottonwood. All of the errors cited by Ms. McWain focus on the trial court's lack of following statutory authority as a basis for allowing and not allowing minor modifications to the parenting plan pursuant to relocation. *See* Supplemental Opening Brief of Appellant filed Oct. 4, 2010 at 1-2.

It is error to not follow statutory authority to modify a parenting plan, as per se abuses of discretion. *See In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997); *Hoseth*, 115 Wn.App. at 569 (stating, “a superior court will abuse its discretion if it fails to base its modification ruling on the statutory criteria.”). *Shryock*, 76 Wn.App. at 852.

Mr. Linderman simply claims that the court correctly followed RCW 26.09.520 and rejected analysis under the statutes that discuss modifications and establishment of a final parenting plan, namely RCW 26.09.260, RCW 26.09.184, and RCW 26.09.187. *See* 2nd Motion on the Merits at 10. Mr. Linderman cites no authority nor provides any analysis to his claim that he and the court are simply “correct.” As apparently, that is just the way the world works in Grant County.¹ And contrary to the requirements of RAP 10.3 (a)(6), Linderman does not cite to the record anywhere within his legal argument, which consists of only 2 ½ pages, to completely respond to Ms. McWain’s 18 pages of argument and citation to the record and authority in her brief filed October 4, 2010.

As stated in McWain’s Supplemental Opening Brief of October 4, 2010 at 6, it is the Court of Appeals that determines, de novo, if the trial court followed the correct legal authority. The historical practice in any

¹ A legal search for family law cases originating from Grant County finds very few appellate court family law cases originating from Grant County.

given county is, of course, not binding precedent. “A court's choice, interpretation, or application of a statute is a question of law that we review de novo under an error of law standard.” *In re Marriage of Kinnan v. Jordan*, 131 Wn.App. 738, 751, 129 P.3d 807 (2006) (citing *In re Marriage of Hansen*, 81 Wn.App. 494, 499, 914 P.2d 799 (1996); see also *State v. Law*, 110 Wn.App. 36, 39, 38 P.3d 374 (2002); *State v. J.A.*, 105 Wn.App. 879, 884-85, 20 P.3d 487 (2001)).

Ms. McWain's appeal seeks the Appellate court's de novo review of the trial court's application, interpretation, and choice of law, or lack thereof, on the ordered modification to the parenting plan - not on how it determined to allow or not allow the relocation.

Mr. Linderman suggests the appellate court should confirm the order if it finds the order to be just and equitable. See 2nd Motion on the Merits at 11. “Just and equitable” is language used for debt and property division, maintenance, and even sometimes child support, but not parenting plans. See RCW 26.09.080; RCW 26.09.090; RCW 26.09.100; and see no such language in RCW 26.09.184; RCW 26.09.187; and RCW 26.09.520. Mr. Linderman goes on to suggest that within the entire verbatim report of proceedings evidence supports the conclusions made by the trial judge, 2nd Motion on the Merits, filed December 9, 2010, at 9 and 11, which, before the court accepted Linderman's offer, was limited to allowing the relocation and not allowing a change of the primary

residential parent based on the fact finding of RCW 26.09.520. But again, Ms. McWain did not appeal the issues of fact regarding allowing or disallowing the relocation.

Linderman continuously sidesteps the reality of the lack of legal basis for the parenting plan modification by continuing to claim that the court considered all necessary factors [for the relocation]. 2nd Motion on the Merits at 9-11. Linderman states vaguely, “the trial court record as reflected in the verbatim report of proceedings provides a basis replete with support for the trial judge’s decision.” 2nd Motion on the Merits at 9-10. Obviously, vaguely citing to the entire record is an impermissible citation to the record and the proposition cannot be accepted. *See Hurlbert*, 64 Wn.App. at 400.

Linderman further explains that the appellate court can sustain a trial court’s decision on any theory and cites *Weiss v. Glemp*, 127 Wn.2d 726, 730, 903 P.2d 455 (1995) for this proposition. *See* Motion on the Merits at 9 – 10. But *Weiss* does not excuse courts from not utilizing a correct legal basis and standard.

In *Weiss*, our Supreme Court upheld the decision of the trial court to dismiss the case but chose insufficiency of process as the basis rather than lack of due process – a constitutional basis. The Supreme Court’s policy is to avoid making decisions based on constitutional issues, where

possible, and avoided it in *Weiss* by analyzing the issue under the insufficiency of process argument instead. *Weiss*, 127 Wn.2d at 730.

Weiss does not excuse a trial court from utilizing statutory criteria to modify a parenting plan. Mr. Linderman cites no authority that does, presumably, because none exists.

The court modified the parenting plan here simply because Mr. Linderman offered some additional time to the mother through his counsel during closing argument. *See* RP 497 ln 25- 299 ln 20; RP 550 lns 20 – RP 551 ln. 21. No case law an Appellant has found anywhere allows a unilateral offer of one party to be the sole basis of a judge's parenting plan modification, other than via default. As observed in *Kinnan v. Jordan*, 131 Wn.App. 738, 751, 129 P.3d 807 (Div 2, 2006), parenting plan modifications actions with clear statutory directives otherwise do not permit the court to engage in alternative dispute resolution at any given point in the proceedings.

c. Linderman cannot complain that errors made at the start of the relocation litigation which materially affected the relocation trial one year later are not ripe for this appeal, when the error affected the trial and the issues are different than what was relevant and ripe for review in the first appeal.

A final reason Mr. Linderman asks the appellate court to dismiss the second appeal is an objection to Ms. McWain appealing the court's failure to allow her original modification petition and the issues therein to

be considered at trial alongside the objection to relocation, when that petition is already at issue in the first appeal. *See* second Motion on the Merits at 11. But the issue involving the bifurcation and dismissal of the Petition to Modify in this second appeal is different than in the first appeal.

In the second appeal, the court's error in dismissing the petition for modification "Pursuant to the Objection to Relocation" has everything to do with the court's errors at the relocation trial, rather than not finding adequate cause in July 2009. With the help of Linderman's counsel, by the time of trial, the court had backed itself into a corner with no legal authority on which to rely in modifying the parenting plan - even though all parties agreed some modification was appropriate. Had the court allowed the original petition to modify to stand per the plain language of RCW 26.09.260 (6), then the court would have had the clear and proper parameters on which to base a modification to the parenting plan. RCW 26.09.260 (6) states:

"The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued."

RCW 26.09.260 (6). *Emphasis added.*

A court must construe a statute according to its plain language. Statutory construction is unnecessary and improper when the wording of a statute is unambiguous. *Kinnan*, 131 Wn.App. at 751.

Appellant had exactly followed the clear and unambiguous language of RCW 26.09.260 (6) verbatim and had filed a petition to modify concurrently with the objection to relocation, See CP 20-52, in order to clearly place before the court all possibilities for appropriately changing the parenting plan to fit the evidence at trial, just as RCW 26.09.260 (6) affords. The trial court's bifurcation of the objection to relocation from the petition to modify, see CP 112 and 133, thwarted the legislative path and plan for the trial court, especially when the petition was then required to be scrutinized for adequate cause and summarily dismissed for lack of adequate cause. The error of requiring a finding of adequate cause for the petition while the relocation was pending (and then not finding it per the first appeal) materially curtailed the court's ability and basis to properly modify the parenting plan at the trial on relocation and tied the court's hands from entering a parenting plan that was truly in the child's best interest. See RCW 26.09.002 (stating that "[i]n any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities.")

Had the court allowed itself to consider the possibilities for change, at least to the scope of a minor modification requested in the original petition such as allowed under RCW 26.09.260 (5)(c), it could and expectantly would have appropriately modified the parenting plan to conform to the best interests of the child via the evidence presented pursuant to relocation and the court's own fact finding, not just based on what one parent offered, which the court adopted in hopes of blocking future litigation.

And, as requested in the opening brief, and not addressed by Respondent at all, this court could also interpret and rule that the invitation to modify the parenting plan under RCW 26.09.260 (6) pursuant to relocation, means that the court shall use RCW 26.09.520 to not only determine if a relocation is going to happen, but to also be the criteria to guide the court to modify the parenting plan in a similar way to how RCW 26.09.187 guides the court to order a final parenting plan. This appears to be the legislative intent since the criteria of RCW 26.09.187 and RCW 26.09.187 are so similar to the criteria of RCW 26.09.520. *See* October 4, 2010 Opening Brief at 16 - 17 and 19-22 for a fuller analysis and argument.

D. Summary.

Throughout the two years of this appeal, Respondent has not squarely addressed any of the legal issues raised by Appellant and has

never cited to any authority contradicting Appellant's position. From the lack of legitimate defense, it should be inferred that Appellant's request for relief must be granted, and that there is no defense.

II. Attorney Fees should be Denied to Linderman but Granted to McWain

This court should not award attorney fees to Respondent Linderman with his summary claims of intransigence without specific reference to the record.

This court should not award attorney fees to Linderman here, when, clearly, it is the motion on the merit and response briefs that lack merit. Linderman does not substantively or directly respond to any of McWain's cited assignments of legal error, authorities or theories, other than to inform this court that Appellant is wrong, per Grant County precedent. *See* 2nd Motion on the Merits/ Response Brief at 7-11.

And as previously discussed *supra*, 3-6, Linderman has miserably failed to comply with RAP 10.3 and should be sanctioned.

An appeal is frivolous under RAP 18.9 "if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *In re Marriage of Fiorito*, 112 Wn.App. 657, 50 P.3d 298 (2002). The same should hold true of a Motion on the Merits and a Response Brief as a

corollary to CR 11 sanctions before superior courts. Appellant asks for sanctions.

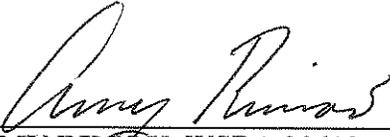
The motions on the merits, per RAP 18.14 (e), at least should have explained how the issues on review are controlled by settled law, are factual and supported by the evidence, or are clearly within the discretion of the trial court. *See* RAP 18.14 (e). Of course, Linderman could not do that because McWain claimed no error of fact on appeal, only error of law and conclusions of law regarding the effected parenting plan modification. Additionally, there is no settled case law on the issues raised by Appellant, which lack seems to have caused part of the confusion for the trial court. Linderman's overbroad generalized responses do not constitute a legitimate motions on the merits or response briefs. Appellant McWain seeks an attorney fees award for defending Respondent Linderman's frivolous Motions on the Merits that fail to address the issues raised by McWain. *See also* March 11, 2011 Response to the Motion on the Merits at 8-11.

RCW 26.09.550 allows fees for objection to a proposed revised residential schedule if the objection is made to harass a person, or to unnecessarily delay or needlessly increase the cost of litigation. The minor modification parenting plan the mother had offered and requested at CP 315 - 322 reflected the kind of actual schedule the parents had been utilizing for years. *See e.g.* CP 237-ln 13-17; RP 515 ln 22-25. The

evidence at trial and backed by the Guardian ad Litem showed that the mother's request was in the best interest of the child. See CP 521-524; CP 217-238 and RP 279 In 17 – 280 In. 4. Linderman used his attorney to needlessly increase the cost of litigation by confusing the superior court and encouraging the court to make the legal errors now on appeal. See e.g. CP 517 In 9 – 518 In 9 In 22 CP 541 In 7- 542 In. 8. This court should order sanctions against Linderman per RCW 26.09.550 for needlessly increasing the cost of this litigation by encouraging legal errors, followed, now, by a meritless motion on the merits and response briefs.

Linderman's fee request should be dismissed and McWain's granted.

Respectfully submitted this 2nd day of June, 2011.



AMY RIMOV, WSBA 30613
Attorney for Appellant/Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 2nd day of June, 2011, the within document described as REPLY BRIEF OF APPELLANT ON CONSOLIDATED APPEALS was delivered to the following persons in the manner indicated:

| | |
|--|---|
| Barbara J. Black Attorney at Law PO Box 1118 Moses Lake, WA 98837-0169 Telephone: 509 765 1688 Facsimile: 509 766 2153 Counsel for Respondent/Petitioner, Lance Linderman | Via Hand Delivery <input type="checkbox"/> Via United States Mail <input checked="" type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Facsimile Transmission <input type="checkbox"/> Via Electronic Mail <input type="checkbox"/> |
| Court of Appeals, Division III Clerk's Office 500 N Cedar St Spokane, WA 99201 | Via Hand Delivery <input checked="" type="checkbox"/> Via United States Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Facsimile Transmission <input type="checkbox"/> Via Electronic Mail <input type="checkbox"/> |
| Heidy McWain | Via Hand Delivery <input type="checkbox"/> Via United States Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Facsimile Transmission <input type="checkbox"/> Via Electronic Mail <input checked="" type="checkbox"/> |


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