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JUN 11 2012

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DIVISION III
STATE OF WASHINGTON
By _____

No. 29653-9-III

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WASHINGTON

In Re the Marriage of:

LAURA LOUISE DE AGUERO (NKA RULAND), Respondent,

and

PARIS ANTHONY DE AGUERO, Appellant.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The parties to this case, Paris Anthony De Aguero and Laura De Aguero, now known as and hereinafter referred to as Laura Ruland, were married in 1987 and have four children together, Cierra, Marseilles, Brandon, and Dillon. CP 211. The decree of dissolution, CP 1-5, parenting plan, CP13-19, and order of child support, CP 6-12, were entered in Stevens County Superior Court on June 7, 2005. The court set Mr. De Aguero's child support obligation at \$1,086.00 per month, CP 8, and spousal support at \$1,500 per month. CP3.

On May 27, 2008, Mr. De Aguero filed a petition to modify the parenting plan, CP 323-334, and a petition to modify child support, CP 350-353. Mr. De Aguero has never petitioned for a modification of maintenance. On February 27, 2009, the court, having found adequate cause, entered a temporary parenting plan designating Mr. De Aguero as the temporary primary residential parent, CP 66, and suspending child support under the former order until further order of the court. CP 71.

On November 22 through 24th, November 30th and December 1st, 15th and 16th, 2010, the Honorable Allen C. Nielson conducted a trial on the issue of Mr. De Aguero's petition to modify the parenting plan and to modify child support. CP 210. At the time this matter was tried to the court, however, two of the older children were emancipated, RP 547 (Marseilles) CP 335

(Cierra), and the other, 17 year old Brandon, was deciding which college located back east he would be attending that fall, RP 708, so Ms. Ruland deferred to her son's career plans and agreed to allow him to stay with Mr. De Aguero in Florida. RP 1370. The trial of the parenting aspects of this case was thus only about the residential placement of Dillon De Aguero, age 8 at the time of trial. RP 1369-1370.

After hearing testimonial evidence from the parties, the two older siblings, both step-parents, Dillon's stepfather's siblings, Dillon's teacher and the school superintendent, as well expert testimony from the GAL, Rebecca Albright, and the court's appointed psychologist Clark Ashworth, Ph.D., and upon considering the numerous reports, declarations, and photographs admitted into evidence, the court entered its oral ruling on December 16, 2010, RP 1368-1401, and its written findings of fact and conclusions of law on February 22, 2011. CP 210-221.

The court determined that Mr. De Aguero's claim that he had lived with and supported Ms. Ruland and the children from August 2006 to February 2009, and that she had agreed to forgive his past due child support in exchange for a car had not been proven by clear, cogent and convincing evidence. CP 218-219. Judge Nielson also found that Mr. De Aguero did not prove that Ms. Ruland's alleged delay in enforcing his child support

obligation worked an inequitable detriment to Mr. De Agüero and therefore laches did not apply. CP219. He then concluded that, with applicable credits, Ms. Ruland was entitled to a judgment for past due support and maintenance in the amount of \$45,434.68. CP 221. These amounts were reduced by \$9,000 following Mr. De Agüero's motion for reconsideration. CP 313-314. The court then reviewed all of the pertinent factors of RCW 26.09.187, and applied the evidence that he heard and weighed to each of those factors, and concluded that Ms. Ruland should be the primary residential parent for Dillon. CP 219-221; RP 1378-1388. This appeal followed. CP 207.

ARGUMENT

Standard Applied by the Trial Court

The trial in this case was on Mr. De Agüero's May 27, 2008 petition to modify the initial parenting plan to allow Mr. De Agüero to have primary residential placement of Dillon De Agüero, CP 211. The June 2005 parenting plan was entered by default and provided primary residential placement to Ms. Ruland allowing Mr. De Agüero limited visitation. CP 6-12.

As the trial involved a petition to modify a parenting plan, the normal standard for the trial court to follow is found at RCW 26.09.260, which sets forth the procedures and criteria to modify a parenting plan. That statute provides, 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. . .

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child

Because there is a presumption of custodial continuity, *In re Marriage of McDole*, 122 Wash.2d 604, 610, 859 P.2d 1239 (1993), and a requirement to show a detrimental environment which is outweighed by the detriment of a custodial change, the standard to modify a parenting plan to change primary residential placement is necessarily more difficult to meet for the moving party than the standards that are applied by a court to decide an initial parenting plan. However, because the initial parenting plan was entered by default, the trial court in this case concluded and found that, under *In re Marriage of Rankin*, 76 Wn.2d 533, 536-537, 458 P.2d 176 (1969) and *In re Marriage of Timmons*, 94 Wash.2d 594, 601, 617 P.2d 1032 (1980), it had jurisdiction to proceed with a full evidentiary hearing and apply the standards for entry of an initial parenting plan found at RCW 26.09.187. CP 219. This conclusion of law has not been appealed

by either of the litigants to this case and is therefore the law of the case. *In re Marriage of Trichak*, 72 Wn.App. 21, 24, 863 P.2d 585, 588 (1993).

Thus, even though the trial court provided Mr. De Agüero a standard to meet in order to prevail on his claims which contained no adverse presumption and allowed for a full evidentiary hearing, he now has the audacity to complain that the trial court manifestly abused its discretion in its application of this more favorable standard.

Appellate Standard of Review

By attempting to utilize this court to have another trial on the merits, Mr. De Agüero entirely misperceives the role of this court. Washington appellate courts have traditionally deferred to the trial court in the area of family law. *In re Marriage of Maughan*, 113 Wn.App. 301, 305, 53 P.3d 535 (2002). It is well settled that the trial court has broad discretion to fashion residential provisions for the parenting plan as long as it considers the child's best interest and the statutory factors. *In re Marriage of Possinger*, 105 Wn.App. 326, 335, 19 P.3d 1109 (2001); *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A reviewing court is reluctant to disturb child custody dispositions because of the trial court's unique opportunity for personal observation of the parties. *Kovacs*, 121 Wn.2d at 801 n. 10. Appellate courts do not reweigh the evidence. *In re Marriage of Rich*, 80 Wn.App. 252, 259, 907 P.2d 1234 (1996) (role of appellate court is not to reweigh the evidence). Trial of this case was partly a battle of experts, and partly a question of what to

believe. Determining the credibility of witnesses and the weight to assign to conflicting testimony is for the trial judge, whose findings are reviewed only to determine whether they are supported by substantial evidence. *In re Marriage of Pennington*, 142 Wn.2d 592, 602-03, 14 P.3d 764 (2000); *In re Marriage of Murray*, 28 Wn.App. 187, 189, 622 P.2d 1288 (1981) (appellate courts are reluctant to disturb child placement dispositions because of the trial court's unique opportunity to personally observe the parties). Substantial evidence is evidence sufficient to persuade a fair minded, rational person of the finding's truth. *Miles v Miles*, 128 Wn.App. 64, 69, 114 P.3d 671 (2005).

The standard of review to be applied in this case is very limited. A trial court's ruling dealing with the placement of children is reviewed for abuse of discretion. *Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Discretion is abused only when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Kovacs*, 121 Wn.2d at 801. A trial court's decision is manifestly unreasonable only if it is outside the range of acceptable choices, given the facts and applicable legal standard. *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004).

Finally, an appellate court may sustain a trial court's decision upon any correct ground, "even though that ground was not considered by the trial court." *In re Parentage of J.H.*, 112 Wn.App. 486, 495, 49 P.3d 154 (2002), *review denied*, 148 Wn.2d 1024 (2003).

The best interests and welfare of the children are paramount in placement decisions. RCW 26.09.002; *In re Guardianship of Palmer*, 81 Wn.2d 604, 503 P.2d 464 (1972); *Kovacs*, 121 Wn.2d at 801. In evaluating the best interest of the child, the Parenting Act of 1987 requires the trial court to consider the seven factors found in RCW 26.09.187(3). These include the relative strength, nature, and stability of the child's relationship with each parent (factor i); any agreements between the parties (factor ii); each parent's past performance and potential for future performance as a parent including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child (factor iii); the child's emotional needs and developmental level (factor iv); the child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities (factor v); the parents' and child's preferences (factor vi); and each parent's employment schedule (factor vii). RCW 26.09.187(3)(a)(i)-(vii). The first factor is given the greatest weight. RCW 26.09.187(3)(a). These guidelines must be applied in conjunction with RCW 26.09.184 (setting forth objectives of parenting plan), RCW 26.09.002 (policy of the parenting act), and RCW 26.09.191 (setting forth limiting factors upon a parent's involvement with a child). *In re Marriage of Katare*, 125 Wn.App. 813, 105 P.3d 44 (2004).

Importantly, RCW 26.09.191 (5) provides that in entering a permanent parenting plan, “the court shall not draw any presumptions from the provisions of the temporary parenting plan.” Further, under RCW 26.09.060 (10)(a), a temporary order pending trial “[d]oes not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding.” *In re Marriage of Watson*, 132 Wn.App. 222, 234, 130 P.3d 915 (2006). As the court in *Kovacs* explained:

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*.

Kovacs, 121 Wn.2d 795, 809, 854 P.2d 629, 637 (1993).

Throughout his brief, Mr. De Agüero continually mis-cites *In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997) for the proposition that the parenting plan must solely be based on the circumstances of the parties at the time of trial. See Appellant’s Brief at 5. First, *Littlefield* was a parental re-location case and was subsequently explicitly overruled by the enactment of RCW 26.09.405, *et.seq.* Second, because the court in this case found that *In re Marriage of Rankin*, 76 Wn.2d 533, 536-537, 458 P.2d 176 (1969) and *In re Marriage of Timmons*, 94 Wash.2d 594, 601, 617 P.2d 1032 (1980) apply to this case, the court could and did consider the entire spectrum of facts involving Dillon’s parenting, even facts existing before the decree was entered in 2005. See *Timmons*, 94 Wash.2d at 600, 617 P.2d at 1036 (holding it was

proper for trial court in case where prior decree was not entered after trial, but rather by stipulation, to conduct complete inquiry into facts, and even facts that existed prior to entry of decree).

Judge Nielson's Findings are Supported by the Record and by Substantial Evidence

While space does not allow for fleshing out every inaccuracy in plaintiff's materials, Ms. Ruland believes it is incumbent for the court to realize that many of the citations to the record made by Mr. De Aguero are misleading and deliberately couched so as not to tell the whole story behind what occurred at the trial of this case. Additionally, much like his attempt to proffer "new" evidence (which was not really new evidence) to support his motion for reconsideration at the trial court level, he is attempting, by way of citations to outside articles and treatises, to shoe horn in to evidence a form of expert testimony to support this appeal that he failed to present at trial. Finally, utilizing a strategy that if you do not like the decision, then attack the decider, Mr. De Aguero tries to convince this court that his trial was not fair by unfairly attacking the integrity of the trial judge and of his opposing counsel.

Mr. De Aguero's brief mostly consists of picking and choosing from the record those things that marginally support the argument that he wants to make, while ignoring the entire picture that was made available to the trial court. At one point, for example, Mr. De Aguero cannot find support of his argument in

the record and so cites his counsel Mr. Glanzer's closing argument as substantive evidence of something he says that Dr. Ashworth stated, but actually did not state. See Appellant's Brief at p. 11 (citation to RP 1321- attributing Mr. Glanzer's statement in closing argument that extensive additional materials were "entirely negative" to Dr. Clark Ashworth). Statements of attorneys are not evidence. *City of Tacoma v. Wetherby*, 57 Wash. 295, 106 P. 903 (1910). Citation is made to trial Exhibit 23 for the proposition that Dr. Ashworth is self-contradictory because he states that Ms. Ruland's attitude is both benign and that she is exhibiting "strong reactions" to the situation. See Appellant's Brief at 11. Upon closer examination, the statement about "strong reactions" found on page 2 of Exhibit 23 is preceded by Dr. Ashworth's comment "I do not have evidence that Mr. Ruland has significant psychological problems that would preclude visitation with Dillon." Ex. 23. Immediately after his comment about her "strong reactions," Dr. Ashworth mentions that Ms. Ruland is in counseling at NEW Alliance to address those concerns." Ex. 23. Mr. De Aguero states that Dr. Ashworth did not conclude that he was the source of Dillon and Brandon's alienation from their mother, Appellant's Brief at 11, but this belays Dr. Ashworth's report, Ex. 23, wherein he states, "[b]oth Dillon and Brandon identify their father as a

primary source of negative information about their mother.” Ex. 23.

Mr. De Agüero repeatedly criticizes the trial court for failing to consider the photographs he brought to trial, See Appellant’s brief at 9, 32, but the court specifically stated in its oral findings, “And so, I think that these photos are impressive.” RP 1386. And Judge Nielson, showing his objectivity, goes on to state, “I’ve got to believe in a couple of years I could look at an album and see similar photos by the mother of Dillon and what he’s up to in Northport, you know, playing with kids and et cetera.”

At page 15 of his brief, Mr. De Agüero cites RP 84 for the conclusion that Ms. Ruland’s denial of contact in 2005 “creates desperation to the point that they [the older children] will run away to see him [Mr. De Agüero].” The testimony at RP 84 is Rebecca Albright’s report of what Wes Ruland told her about Cierra’s having left home after she was verbally abusive to her mother after getting off of the phone with Mr. De Agüero. At page 8 of Mr. De Agüero’s brief he states that psychological “experts” have concluded that psychiatric assessment is not reliable in assessing the bond between parent and child. He cites an article by a psychologist, Eric Mart, Ph.D., to support this argument. The problem with this, of course, is that Mr. De Agüero is attempting

to utilize this article for the first time as substantive evidence at the appellate court level. There was no motion at trial challenging the scientific reliability of Dr. Ashworth's psychological testimony, nor was there any cross-examination of Dr. Ashworth using this article. In fact, Mr. De Agüero's counsel did not object to Dr. Ashworth being qualified as an expert at trial. RP 749. But when it suits Mr. De Agüero he will rely on psychological evidence to bolster his claims. At page 35 of his brief, he states that it was "reckless" for the trial court not to "probe more deeply" into Wes Ruland's statement that he takes medication for a diagnosis of bipolar. RP 1237. In support of this concern, Mr. De Agüero again cites evidence that was not presented to the trial court, but could have been, in the form of the DSM-IV. See Appellant's Brief at 35. At trial, Mr. Glanzer learned of this condition and did not ask Mr. Ruland any questions about it, nor did he raise any concerns over the diagnosis utilizing the DSM-IV. RP 1237-1238. Judge Nielson stated that he considered the fact that Mr. Ruland was on medication, but that concern, if any, was outweighed by the stability Mr. Ruland showed in raising his own children as well as the fact that people on medication live "fully productive and stable lives." RP 1385. Mr. De Agüero outright defames Wes Ruland at page 37 of his brief by stating, without any reference to the record, that Mr. Ruland is a "white racist supremacist who makes

derogatory remarks about people of color.” Mr. De Agüero cites the DSHS child development guide, See Appellant’s Brief at 30, but again this is evidence that was never presented to the trial court. Over and over again, the conclusions Mr. De Agüero reaches and the evidence he cites do not find support in, and in many cases are not found in, the actual trial court record. The role of this court is not to re-try the case. *In re Marriage of Rich*, 80 Wn.App. 252, 259, 907 P.2d 1234 (1996) (role of appellate court is not to reweigh the evidence).

Throughout Mr. De Agüero’s brief, citation is made to the GAL Rebecca Albright’s various reports and conclusions contained therein as though they are verities; sparse mention is made of the fact that the GAL actually testified extensively before the trial judge and was subject to cross-examination by opposing counsel, and also that Ms. Ruland presented opposing expert testimony from Dr. Clark Ashworth which the trial court heard and weighed. The court heard all of the testimony and reviewed all of the reports and ultimately found that, although he had previously relied upon her reports when he denied Ms. Ruland’s motion to revise the temporary orders, Ms. Albright’s report viewed in light of all the evidence presented at trial was “not complete as it could have been.” RP 1382. In his ruling on reconsideration the judge elucidated that Ms. Albright presented a “tendentious treatment of

the facts,” RP 48 (3/5/11 ruling on motion for reconsideration), noted that she was “not as objective and as neutral” as he is accustomed to seeing a GAL be, and commented that Ms. Albright “fell prey” to Paris De Agüero’s manipulating behavior. RP 48 (3/5/11 ruling on motion for reconsideration). He also commented on her lack of resources, RP 1380, and the fact that, as just one example, Ms. Albright found that Dillon’s health was not being adequately looked after, but that was contradicted by the medical records which demonstrated that every time Dillon was taken to the doctor it was by his mother or grandmother. RP 1380.

In terms of the medical visits, Mr. De Agüero again mischaracterizes the record by stating that the medical records document neglect of Dillon. See Appellant’s Brief at 20. The records, when read fairly and objectively as Judge Nielson did, indicate that Dillon generally had ongoing issues with diagnosed sinusitis, adhesions on his foreskin, and poor teeth brushing and that his mother took him in to address these issues. CP 434-486. The doctor actually notes throughout the records that Dillon is a “surprisingly happy, alert child,” CP 439, who exhibited “appropriate behavior” and was “well dressed and clean.” CP 445. While the issue of the grandmother’s smoking is raised, it is stated in the records that, “It is questionable whether or not she is smoking in the room with the child.” CP 440. As the visits for

sinusitis continue, smoking is not mentioned, except to say that there is “no secondary smoke exposure.” CP 455. Although Dillon had some dental work done, the pediatrician notes that Dillon’s “dentition is in good condition.” CP 452. By October 2002, the issue with adhesions was “being followed by the urologist” who states that “things are going well.” CP 452. Dillon’s immunizations are also up to date. CP 462. The medical records in evidence demonstrate good parenting and are hardly akin to evidence of neglect of any kind. Neglect would be not getting Dillon his shots, and not taking Dillon to the doctor or dentist. There is no evidence of that.

Judge Nielson indicated that the GAL’s conclusions and concerns over Mr. Bill Harris’s alleged molestation of Cierra were unfounded, RP 1382, and that the GAL over stated the poor condition of the Ruland house. RP 1381. Mr. De Aguero disingenuously states that Dr. Ashworth never recommended primary residential placement with Ms. Ruland whereas the GAL did have a definitive recommendation. See Appellant’s brief at 9. Again, this does not find support in the record. Dr. Ashworth specifically testified that his recommendation based on “the best interests of Dillon” was that “Dillon stay with Ms. Rulan^d” and attend school in Stevens County. RP 789-790.

Judge Nielson also heard and weighed the testimony of both Ms. Albright and Dr. Ashworth on the issue of alienation. After hearing and reviewing all of the evidence at trial, Judge Nielson found that Dr. Ashworth concluded that Mr. De Aguero had alienated the boys from their mother, RP 1383, and that this shortcoming will not be remedied by the father, and if Dillon is in his custody, the child will be alienated from his mother and family.” CP 220. This conclusion is supported by the record and was sufficient to persuade Judge Nielson that Mr. De Aguero was the source of alienation between the older children and Ms. Ruland. See RP 792- (“Q. And again, you attribute much of what Brandon’s animosity toward his mother to the things his father’s told him. A. I believe so.”) See also Ex. 23 (“Both Dillon and Brandon identify their father as a primary source of negative information about their mother.”) Dr. Ashworth testified regarding Mr. De Aguero that he, “certainly, in interviews with me, spent a lot of time talking about bad stuff about Ms. Ruland instead of good stuff about him, and Ms. Ruland did not do that.” RP 790-791. On page 3 of Exhibit 23, Dr. Ashworth states, “However, I note that Paris De Aguero in my wait room spoke openly to his older son, Marseilles, making negative comments about Ms. Ruland in the presence of Dillon.” Ex. 23 (emphasis in original). Additionally, during his observed play interaction with Dillon, Mr.

De Aguero took it upon himself to ask Dillon questions about what had been happening with Ms. Ruland, which Dr. Ashworth felt was similar conduct to what he had previously observed in the waiting room. RP 785. Importantly, Dr. Ashworth also concluded that the same type of alienating behavior instilled in the older children by Mr. De Aguero would likely be instilled in Dillon if he were left in Mr. De Aguero's custody. RP 793-794. This was the court's finding as well, CP 220 (finding "E"), and it is certainly supported by substantial evidence in the trial record.

In this case, the trial court carefully discussed each applicable factor from RCW 26.09.187 (3) in turn, citing the testimony of the parties, the guardian ad litem, and the record, and noting the strengths and weaknesses of each parent. RP 1379-1388, CP219-220.

Regarding the most heavily weighted factor- the relative strength, nature, and stability of the child's relationship with each parent- Judge Nielson found that Ms. Ruland had the "stronger more stable relationship" with Dillon. CP 219. He pointed to Dr. Ashworth's recommendations and particularly his testimony that Ms. Ruland's observed time with Dillon was as remarkable as any Dr. Ashworth had seen in 20 years of working with families, and that she is a gifted mother with a strong relationship with her son. RP 1383-1384. This finding, like all of Judge Nielson's findings, is

supported by the record. Dr. Ashworth describes his observations of the parents' interactions with Dillon at RP 783-786. He testified that Ms. Ruland's interaction with Dillon was a "very—very positive interaction." RP 784. By contrast, Dr. Ashworth commented that Mr. De Aguero's interaction with Dillon "wasn't as positive an interaction." RP 784.

Judge Nielson considered Dillon's relationship with his siblings, but also applied the other relevant factors found at RCW 26.09.187 (3) (a)(v), i.e., the child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities. Judge Nielson heard testimony from Ms. Beardslee, Dillon's teacher, and Ms. Guglielmino, the superintendent at Northport. As a disinterested lay witness, Ms. Guglielmino's testimony is especially telling about the nature of Dillon's schooling when he was in Northport with his mother. She states that, "Laura [Ruland] stands out in my 13 year career as the superintendent and principal to be one of a minority group that come to school frequently." RP 1001. She described Ms. Ruland's involvement in Dillon's schooling as "very participatory" and recalls seeing her at least once or twice a week. RP 1000. She describes the children as being good kids and even "exemplary" and describes Mr. Ruland's involvement with them as positive. RP

1001. In contrast, Ms. Guglielmino recalls seeing Paris De Agüero a total of two times. RP 1001. Tellingly, despite these conclusions, Ms. Guglielmino testified that GAL Rebecca Albright did not include any of these positive comments in her report to the court. RP 1016. Had she been asked by the GAL to state what she thought was positive about Ms. Ruland's parenting abilities and relationship with Dillon, Ms. Guglielmino stated that she would have told her that Ms. Ruland attended conferences, volunteered, discussed her children with her in her office, and inquired about their education, and that Dillon was pleased to have his mother at school. RP 106-1017. Ms. Guglielmino testified that she thought that Dillon was doing well in school, had enough food to eat at home, and was properly attired. RP 996. While Mr. De Agüero attempts to once again cite the GAL report to put words in Ms. Guglielmino's mouth that Marseilles acted as a "pseudo-parent" to Dillon, See Appellant's Brief at 27, Ms. Guglielmino herself specifically testified that the GAL's report was wrong both in that she did not say those words, RP 1008, and that it was not her observation of what was happening because she testified that Marseilles did not have much exposure to Dillon during the school day. RP 1009.

In citing RP 1387, Mr. De Agüero states that Judge Nielson "blamed the kids" for their poor relationship with Ms. Ruland. This

argument highlights Mr. De Agüero's win at all costs strategy of deflecting any blame from himself on to others. Again, this is not found in the record. It is abundantly clear from Judge Nielson's comments that he blames the parents, not the older kids, for their poor relationship with Ms. Ruland. RP 1387 (And this—likeable little boy could be damaged if the two of you don't change—right away.") He goes on to order both parties to refrain from making disparaging remarks about the other. RP 1387.

Judge Nielson compared the influence of other significant adults in Dillon's life, particularly Elaine Davis and Wes Ruland. RP 1384-1385; CP 220. The judge noted that Wes and Laura Ruland are involved in stable marital relationship with an established lifestyle and established family connections, RP 1384, whereas Mr. De Agüero is not married to Elaine Davis, which is a less stable relationship than a marital relationship. RP 1385.

Judge Nielson also heard evidence from Marseilles and Brandon De Agüero as well as the Ruland children. CP 210-211. While noting the strong bond between the siblings, RP 1379, the judge weighed that bond with evidence that the older boys were moving out of the De Agüero home to go to college (Brandon) and live with a significant other (Marseilles), and that Dillon would have a network of family members including cousins and grandparents in Northport that he would not have at all were he

residing primarily in Florida with Mr. De Agüero and his girlfriend. RP 1379. These are all facts supported by the record and it is up to the trial court to take these facts and make recommendations based on listening to the evidence, judging credibility, and weighing the testimony. That is exactly what Judge Nielson did in this case. There is just no basis whatsoever to find that Judge Nielson abused his discretion by going outside the record or range of acceptable choices, or that no reasonable person charged with evaluating the facts could have found the way that he did.

There is No Evidence of Judicial Bias

Mr. De Agüero attempts to paint Judge Nielson as being biased because he may have worked with Ms. Ruland's cousins and because he found Mr. De Agüero to not be credible and stated so. "For a judge to be biased or prejudiced against a person's cause is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge. It is a particular person's state of mind that affects his opinion or judgment." *In re Application of Borchert*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961). In this case, Judge Nielson had previously found *for* Mr. De Agüero when he denied revision of the temporary orders. He can hardly be said to have had a preconceived animosity toward Mr. De Agüero coming into the trial. Importantly, it is presumed that the trial court performed its functions without bias or

prejudice. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn.App. 836, 841, 14 P.3d 877 (2000). A party alleging judicial bias must present evidence of actual or potential bias. *State v. Post*, 118 Wn.2d 596, 618, 619 n. 9, 826 P.2d 172, 837 P.2d 599 (1992). Courts use an objective test to determine whether a judge's impartiality might reasonably be questioned by a reasonable person who knows all the relevant facts. *In re Marriage of Davison*, 112 Wn.App. 251, 257, 48 P.3d 358 (2002) (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)). Without evidence of actual or potential bias, a claim of judicial bias is without merit. *Post*, 118 Wn.2d at 619.

In the present case, Mr. De Aguero is disappointed with Judge Nielson's ruling and cannot accept that it is *his* conduct and *his* parenting skills, or lack thereof, which gave rise to the judge's decision. There is no evidence of bias that has been presented and the presentation of this argument, without citation to any case law, is further evidence of Mr. De Aguero's intransigence in pursuing this appeal, further discussed below.

Mr. De Aguero's Motion to Reconsider was Properly Denied

Following the trial, Mr. De Aguero moved for reconsideration and attempted, as he is doing with this court, to present additional evidence to the court of a claimed molestation by one of Ms. Ruland's relatives that allegedly occurred in Southern California six years prior. RP 45 (3/15/11 ruling on motion for reconsideration). The motion was accompanied by a polygraph report, which was not made under penalty of perjury,

purporting to show the boy's truthfulness. RP 46 45 (3/15/11 ruling on motion for reconsideration).

First of all, polygraph testing has consistently been recognized by our courts as being unreliable and therefore inadmissible. *In re Detention of Hawkins*, 169 Wn.2d 796, 802, 238 P.3d 1175, 1177-1178 (2010). More importantly, evidence presented for the first time in a motion for reconsideration without a showing that the party could not have obtained the evidence earlier does not qualify as newly discovered evidence." *In re Marriage of Tomsovic*, 118 Wn.App. 96, 109, 74 P.3d 692 (2003). In *Tomsovic*, the court held that the trial court did not abuse its discretion by denying the appellant's motion for reconsideration where the additional evidence presented to the court in his motion for reconsideration was available at an earlier stage in the case, and the appellant failed to explain why he neglected to bring the arguments to the court's attention earlier. *Tomsovic*, 118 Wn.App. at 109. The same is true here. Mr. De Agüero could have presented this evidence at trial, but chose not to. Such evidence is not newly discovered and cannot be the basis for reconsideration of a multi-day trial.

The Trial Court Correctly Determined that Mr. De Agüero Was Not Entitled to Equitable Remedies

Maintenance

Mr. De Agüero never petitioned the court to modify maintenance, which can only be modified prospectively in any event, RCW 26.09.170 (1), nor did he ever move to vacate the decree. Instead he argues here that

the dissolution decree did not account for his inability to pay and was inequitable. This is an impermissible collateral attack on the decree and should not be allowed. *See Peste v. Peste*, 1 Wn.App. 19, 25, 459 P.2d 70 (1969)(“To permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses. The uncertainties which would result would be devastating.”)

Child Support

Once again, Mr. De Agüero is presenting evidence to this court, in the form of a “child support chart,” A-2, which was not presented to the trial court. He argues that he should be entitled to equitable relief from his past due child support because he and Ms. Ruland reconciled and lived together for a period of several years and that she allegedly agreed to forego child support collection in exchange for a car. CP 213. The court did not find that either of these contentions was supported by the level of proof required to grant equitable relief. CP 218-219.

Generally, child support payments become vested judgments as the installments become due. *Hartman v. Smith*, 100 Wash.2d 766, 768, 674 P.2d 176 (1984); *Schafer v. Schafer*, 95 Wash.2d 78, 80, 621 P.2d 721 (1980). Money paid to the custodial parent for past-due support serves to reimburse the custodian for monies actually expended. *Hartman*, 100 Wash.2d at 768, 674 P.2d 176. The accumulated child support judgments

generally may not be retrospectively modified. *Id.*; *In re Marriage of Stoltzfus*, 69 Wn.App. 558, 561-62, 849 P.2d 685, *review denied*, 122 Wash.2d 1011, 863 P.2d 72 (1993). In very limited circumstances, however, Washington courts have allowed equitable principles to mitigate the harshness of particular claims for retrospective support if it will not work an injustice to the custodian or the child. *In re Marriage of Shoemaker*, 128 Wash.2d 116, 122-23, 904 P.2d 1150 (1995); *In re Marriage of Hunter*, 52 Wn.App. 265, 270, 758 P.2d 1019 (1988), *review denied*, 112 Wash.2d 1006 (1989).

Here, the trial court concluded that the facts did not support application of the equitable defense of laches. The defendant who asserts laches must prove: (1) the plaintiff had knowledge or a reasonable opportunity to know of the facts constituting a cause of action; (2) commencement of the action was unreasonably delayed; and (3) the defendant was damaged by the delay. *Hunter*, 52 Wn.App. at 270, 758 P.2d 1019; *In re Marriage of Watkins*, 42 Wn.App. 371, 374, 710 P.2d 819 (1985), *review denied*, 105 Wash.2d 1010 (1986).

Ms. Ruland's ability to enforce Mr. De Agüero's obligations was not and is not barred by the statute of limitations. RCW 6.17.020 (10 years). "Absent unusual circumstances, the doctrine of laches should not be invoked to bar an action short of the applicable statute of limitation." *Hunter*, 52 Wn.App. at 270, 758 P.2d 1019. *Accord In re Marriage of Sanborn*, 55 Wn.App. 124, 128, 777 P.2d 4 (1989).

Accordingly, the trial court had to decide whether unusual circumstances made Ms. Ruland's delay unreasonable. *See Sanborn*, 55 Wn.App. at 128, 777 P.2d 4 (delay of 28 months not unreasonable); *Hunter*, 52 Wn.App. at 270-71, 758 P.2d 1019 (facts that father was unable to pay support during seven-year delay and mother knew it was ill-advised to seek legal action were not unusual circumstances that proved the delay was unreasonable). Here, there is no clear and convincing evidence that, by seeking a remedy in 2010, Ms. Ruland unreasonably delayed collection of past due support that was ordered to start in 2005.

Even if the delay was unreasonable, Mr. De Agüero also had to prove he suffered damage as a result. *Sanborn*, 55 Wn.App. at 128, 777 P.2d 4; *Hunter*, 52 Wn.App. at 270, 758 P.2d 1019. Mr. De Agüero cannot prove damage simply by showing he is having to do now what he has been legally obligated to do for years. *Sanborn*, 55 Wn.App. at 128, 777 P.2d 4; *Hunter*, 52 Wn.App. at 271, 758 P.2d 1019.

In light of the Legislature's finding that "there is an urgent need for vigorous enforcement of child support," RCW 26.18.010, equitable relief from past-due support obligations should be limited to those cases where enforcement would create a severe hardship on the obligor-parent and where the facts support traditional equitable remedies. Here, Mr. De Agüero's alleged hardship was created by his own failure to pay, to inquire, or to seek earlier modification. Moreover, the facts simply do not fulfill the elements of laches.

A defendant who asserts equitable estoppel must prove that: (1) the plaintiff asserted a statement or acted inconsistent with a claim afterward asserted; (2) the defendant acted on the faith of that statement or act; and (3) the defendant would be injured if the plaintiff were allowed to contradict or repudiate the statement or act. *Hunter*, 52 Wn.App. at 271, 758 P.2d 1019. “Equitable estoppel is not favored, and the party who asserts it must prove every element with clear, cogent, and convincing evidence.” *Sanborn*, 55 Wn.App. at 129, 777 P.2d 4; *Mercer v. State*, 48 Wn.App. 496, 500, 739 P.2d 703, *review denied*, 108 Wash.2d 1037 (1987). Under this burden of proof, the trier of fact must be convinced the fact in issue is “highly probable.” *Kramarevcky v DSHS*, 122 Wn.2d 738, 744, 863 P.2d 535, 539 (1993).

Again, Mr. De Aguero presented no clear cogent and convincing evidence that Ms. Ruland represented to him that she would forgive this debt and that he relied upon this to his detriment. Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy. *Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973, 974 (1940). Mr. De Aguero has not shown that he is acting in good faith. In fact, Judge Nielson has described him as being manipulative of this process. RP 50 (3/15/11 ruling on motion for reconsideration). Equity should provide him no remedy here.

Motion for Award of Attorney's Fees to Respondent

Pursuant to RAP 18.1, Ms. Ruland moves for and requests an award of attorney's fees for defending this appeal. Under RCW 26.09.140, the trial court has discretion to award attorney fees after considering the financial resources of both parties. In making its determination, the court must balance the needs of the spouse requesting the fee award against the ability of the other spouse to pay. *In re Marriage of Stenshoel*, 72 Wn.App. 800, 813, 866 P.2d 635 (1993). Need, ability to pay, and equity are the primary considerations for the award of attorney's fees in a dissolution action. *In re Marriage of Van Camp*, 82 Wn.App. 339, 342, 918 P.2d 509, *review denied*, 130 Wash.2d 1019, 928 P.2d 416 (1996). Fees may also be equitably awarded when one party acts intransigently. *Marriage of Greenlee*, 65 Wn.App. 703, 708, 829 P.2d 1120, 1123 (1992).

In the present case, Mr. Ruland will file a financial declaration with this court, pursuant to RAP 18.1 (b) and (c). Ms. Ruland asks that this court determine that she has financial need as compared to Mr. De Aguero and award her attorney's fees consistent with the affidavit of counsel that will be filed per RAP 18.1 (d) if the court decides that such is appropriate. Further, Judge Nielson, in denying the motion for reconsideration commented, "I'm very close, here, now to finding that he [Mr. De Aguero] has manipulated this litigation, and he done it in a way that's harmful to

his children.” RP 50 (3/15/11 ruling on motion for reconsideration). This appeal is an extension of Mr. De Aguero’s ongoing attempts to manipulate the process to his advantage. Ms. Ruland should be entitled to a finding that Mr. De Aguero intransigently brought the present appeal and is entitled to attorney’s fees on that basis.

Further, this appeal purely involves issues of discretion where it is clear that the court considered both sides of this matter and where his findings are supported by substantial evidence. It is therefore frivolous and Ms. Ruland requests attorney’s fees for the necessity of responding to this appeal and her costs in obtaining the transcript. As indicated herein, a substantial portion of plaintiff’s appellate materials is devoted to an irrelevant and time wasting attempt to re-try this case in the court of appeals. An appeal is frivolous under RAP 18.9 if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *In re Marriage of Fiorito*, 112 Wn.App. 657, 669-70, 50 P.3d 298 (2002). RAP 18.9 provides:

- (a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the

case arose and direct the entry of a judgment in accordance with the award.

Ms. Ruland should be awarded her reasonable attorney's fees not only for her demonstrated need and Mr. De Agüero's ability to pay, but also for the necessity of responding to this frivolous appeal.

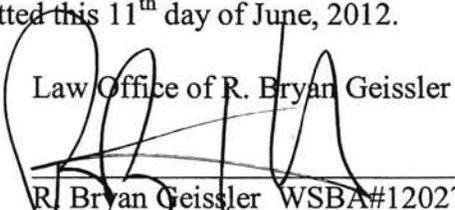
Finally, as the prevailing party in an action to enforce a support order, she is entitled to an award of costs and attorney fees at the trial level. RCW 26.18.160; Hunter, 52 Wn.App. at 273, 758 P.2d 1019. If the court finds in her favor on the child support issue, she should also be entitled to, and moves herein for, an award of fees and costs on appeal. Id. at 273-74, 758 P.2d 1019.

CONCLUSION

This court should recognize Mr. De Agüero's appeal for what it is- an attempt to re-try this case to obtain a result different than that given to him after a fair trial by Judge Nielson. Ms. Ruland respectfully requests that this court find that the trial court acted within its discretion and affirm the result below in its entirety. Additionally, Ms. Ruland respectfully requests that the court award her attorney's fees and costs.

Respectfully Submitted this 11th day of June, 2012.

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