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MAR 06 2012

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DIVISION III
STATE OF WASHINGTON
By _____

NO. 304426

IN THE COURT OF APPEALS
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In re the Marriage of

AMY VIRGINIA LANE, nka AMY VIRGINIA HOLCOMB, Appellant,

and

DAVID RYAN LANE, Respondent.

BRIEF OF APPELLANT

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509/662-7193
Attorneys for Petitioner Amy Holcomb

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I. INTRODUCTION

On June 3, 2011, the trial court determined, at the request of the respondent father, David Ryan Lane, that there was adequate cause to reopen the parties' 2006 Final Parenting Plan. (Order re Adequate Cause – Granted, CP 383-388) The trial court further ordered that a Temporary Parenting Plan be entered. (Temporary Order, CP 345) The Temporary Parenting Plan provided for an equally-shared residential schedule—a major modification from the 2006 Final Parenting Plan. (Temporary Parenting Plan, CP 348-357)

The June 3, 2011, hearing occurred prior to the lapse of the twenty-day period within which the appellant, Amy Holcomb, was allowed to respond to Mr. Lane's Petition for Modification and only two days after Mr. Lane filed a proposed Parenting Plan. (CP 383-384) Ms. Holcomb appeared *pro se* at the June 3, 2011, hearing, and asked the trial court to determine adequate cause did not exist. (CP 384) She also made an oral motion to continue the hearing. (CP 384, 410) The court orally denied her motion to find adequate cause did not exist. (CP 410) It also orally denied her motion for continuance. (CP 412)

At the August 10, 2011 presentation hearing on the form of the proposed Order re Adequate Cause, the trial court noted: "Court could not just let this case perk along due to all the conflict the parties had and the stress it had on the Mother." (CP 411) The court further noted that parental conflict could be a basis for adequate cause. (CP 411) When queried about the substantial change in circumstances, the court further noted: "Court found there was a substantial change of circumstances due to parental conflict, that these children are suffering and the Court wanted it to stop." (CP 412)

In accordance with CR 59, Ms. Holcomb asked the trial court to reconsider its decision. (CP 358-382) On November 8, 2011, the trial court concluded that substantial justice had not been done as it should have granted Ms. Holcomb's motion to continue at the June 3, 2011, hearing. (CP 430) It vacated its adequate cause determination (CP 430), but refused to vacate the Temporary Parenting Plan, leaving the equally-shared residential schedule in place, on the basis an emergency existed. (CP 429-430) The trial court further denied Ms. Holcomb's renewed request to dismiss the Petition for Modification. (CP 431)

A determination that adequate cause exists is a condition precedent to any modification of a parenting plan, even on a temporary basis. Ms. Holcomb appeals on both substantive and procedural grounds. She contends that when the trial court vacated the adequate cause determination, it also should have denied adequate cause and vacated the Temporary Parenting Plan.

Substantively, she contends that the father failed to allege or make a prima facie case for modification as there was no substantial change of circumstances. Ongoing parental conflict is not a substantial change in circumstances.

Finally, there was no emergency that warranted adopting or keeping in place a Temporary Parenting Plan that constitutes a major modification.

Respondent did not cross-appeal the trial court's granting of the motion for reconsideration as to the adequate cause determination.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that a substantial change in circumstances existed that warranted a major modification of the 2006 Final Parenting Plan. (CP 387)
2. The trial court erred in finding, after it vacated the adequate cause determination, that an emergency existed that warranted keeping in place the equally-shared residential schedule. (CP 430)
3. The trial court erred in concluding that there was no irregularity in the proceedings. (Conclusion of Law 3, CP 430)
4. The trial court erred in concluding that the respondent's failure to serve or file a proposed temporary parenting plan until two days before the hearing at which the court implemented the Temporary Parenting Plan did not violate RCW 26.09.181(1)(b), CR (6)(d), CR 7 or Chelan County Local Rule 7(b)(1)(c). (Conclusion of Law 2, CP 430)
5. The trial court erred in failing to conclude that its denial of Ms. Holcomb's motion for a continuance denied her substantial justice with respect to its adoption of an equally-shared

residential schedule on inadequate notice (only two days after the proposed parenting plan was served and filed). (CP 430)

6. The trial court erred in finding that the appellant's refusal to participate in family counseling and her failure to comply with the court's order that she undergo a psychological evaluation provided a basis for a finding of adequate cause to have an evidentiary hearing on father's Petition for Modification of Parenting Plan. (Finding of Fact 8, CP 429)

7. The trial court erred in instituting and then failing to vacate the Temporary Parenting Plan in light of its findings that (1) the parties have a history of conflict and lack of cooperation, and (2) the literature does not support an equally-shared residential schedule in such circumstances. (Findings 3 and 4, CP 429)

8. The trial court erred in finding that an equally-shared residential schedule would reduce the stress on, and is in the best interest of the children. (Findings of Fact at lines 1-2, Order re Adequate Cause – Granted, CP 387)

9. The trial court erred in finding that a "50/50" residential schedule would "buffer" the parents' actions and is in the best interest of the children. (Finding of fact at lines 3-4, Order re Adequate Cause – Granted, CP 387)

10. The trial court erred in concluding the father had met his burden of showing that the advantage of a change to an equally-shared residential schedule outweighed the presumed detriment. (Conclusion of law at lines 7-13, Order re Adequate Cause – Granted, CP 387)

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does a continuation of eleven years of parental conflict constitute either a substantial change of circumstances in the children's or the mother's circumstances or an emergency such as to warrant (1) a determination that adequate cause exists or (2) implementation of a major modification temporary parenting plan where:

a. The twenty-day period between service of the Summons and Petition has not expired;

b. The petitioning party failed to serve or file a proposed parenting plan at all until two days before hearing at which the court determined there was adequate cause and implemented the modified parenting plan;

c. There was improper notice to the non-moving party of the matters to be considered at the hearing?

2. Does the failure to serve and file a proposed parenting plan concurrently with the service and filing of a Petition for Modification of a parenting plan violate RCW 26.09.181(1)(b) and require dismissal of the Petition?

3. Does the service by email of a Note for Motion weeks before the Petition for Modification and Motion/Declaration for Temporary Orders are served and filed constitute proper notice to the non-moving party?

4. Does the failure of the respondent to serve or file a proposed Temporary Parenting Plan concurrently with the Motion/Declaration for Temporary Orders constitute an irregularity in the proceedings that required the court to set aside the modified temporary parenting plan?

5. Did the trial court's denial of the appellant's motion for a continuance as to the respondent's Motion for Temporary Orders (including adoption of a tardily-filed Temporary Parenting Plan) deprive Ms. Holcomb of substantial justice?

6. Was the trial court's decision to adopt the temporary parenting plan and deny the appellant's motion to reconsider that adoption contrary to law?

7. Was the trial court's finding that Ms. Holcomb failed to comply with its prior orders, which did not relate to the residential schedule, a proper basis for the trial court to enter and refuse to set aside an equally-shared residential schedule?

8. Is it contrary to law for the trial court to set aside a determination of adequate cause but refuse to set aside the temporary parenting plan entered pursuant to its initial adequate cause determination?

9. In the absence of any substantial evidence that an equally-shared residential schedule would resolve the decade-long conflict between the parents, was the trial court's implementation of such a schedule contrary to law or did it constitute an irregularity in the proceedings?

10. Where the trial court determines adequate cause does not exist for hearing a petition for modification, does the court have authority to make a major modification on a temporary basis or is such a modification contrary to law?

IV. STATEMENT OF THE CASE

A. Procedure

This case, having been pending for over a decade, has an extensive procedural history. On June 26, 2006, the Chelan County Superior Court entered a Final Parenting Plan. (CP 1-10)

On May 23, 2007, the Chelan County Superior Court entered an Order re Adequate Cause (Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule) Denied. (CP 14-16) The father was the petitioning party in that modification action, which was a request for a major modification. The appellant, Amy Holcomb, was the non-moving party. (CP 15) In the May 23, 2007, Order, the court commissioner made a specific finding that the father had threatened to continue litigation until he achieved his goal of having the children placed primarily with him. (CP 16) The court commissioner also made a specific finding that the allegations the father made in support of his Petition were unfounded and that father's goal was to achieve a "split-custody arrangement." (CP 16)

The present round of litigation began May 6, 2011, when David Ryan Lane filed a Note for Special Setting. (CP 64-65) The Note indicated there would be a hearing on June 3, 2011, at 8:30 a.m. and that the Nature of the Hearing was "Modification of

Parenting Plan, Adequate Cause, Temporary Orders and 2011 Summer Visitation Schedule.” (CP 65) The certificate in the upper left hand corner of the first page of the Note indicates that a copy was mailed to the appellant Amy Holcomb. (CP 64) No other documents were filed with the court or served on appellant with the Note for Special Setting. (Declaration of Amy Holcomb, CP 281-282)

On May 20, 2011, the Mr. Lane filed the following:

1. Summons and Petition for Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule. (CP 66-73)
2. Motion and Declaration for Temporary Order, requesting the following relief: approves the parenting plan which is proposed by the father, set summer 2011 residential schedule, and appoints a guardian ad litem on behalf of the minor children. (CP 74-76) In the Declaration portion of the form Motion, the respondent listed 39 documents that had previously been either filed with the court or presented in chambers during 2010, but did not re-file or re-serve these declarations and other documents on Ms. Holcomb. (CP 75-76)
3. Declaration of David Ryan Lane (25 pages of narrative plus 187 pages of attachments). (CP 77-212)

4. Declaration of Jamie Lane. (CP 215-227)
5. Declaration of Alyssa Lane. (CP 228-233)
6. Declaration of Robert Sealby. (CP 234-256)
7. Notice of Hearing for Adequate Cause Determination, with a hearing date of June 3, 2011, at 8:30 a.m. (CP 213-214)

The Declaration of Service indicates that Amy Holcomb was personally served with the above documents on May 24, 2011 at 5:33 p.m., at her residence. (CP 257) Ms. Holcomb was not served with a proposed parenting plan, either permanent or temporary. (CP 257) Indeed, the respondent had yet to file such a plan.

The Notice of Hearing for Adequate Cause Determination served on Ms. Holcomb on May 24, 2011, did not indicate that the hearing would include consideration of Mr. Lane's Motion/Declaration for Temporary Orders. (CP 213-214) The Declaration of Service does not list a Notice of Hearing for the Motion/Declaration for Temporary Orders as one of the documents served on Ms. Holcomb on May 24, 2011. (CP 257)

On June 1, 2011, respondent Mr. Lane served and filed a proposed Parenting Plan, although it is not designated as either "temporary" or "final." (CP 258-267) The Declaration of Mailing in

the upper left corner of page one of the proposed Parenting Plan is not dated or signed. (CP 258)

At the hearing on June 3, 2011, Amy Holcomb appeared without counsel. She requested that the court postpone the hearing. The court denied the request and proceeded to determine that adequate cause existed to make a major modification, and that the father's proposed parenting plan, with some changes, should be adopted on a temporary basis. (CP 410)

On June 16, 2011, appellant, through counsel, filed her Response to Petition for Modification (CP 268-270), Proposed Parenting Plan (CP 271-280), Declaration of Amy Holcomb (CP 281-288), and Declaration of Susan Cawley (attaching copy of criminal charges against respondent David Ryan Lane brought in Chelan County District Court for an incident on May 8, 2011, as well as a list of law enforcement contacts with Mr. Lane) (CP 289-294).

Ms. Holcomb filed her Declaration in response to Mr. Lane's 187-page Declaration on August 9, 2011. (CP 308-329) She also filed under seal her psychological evaluation. (CP 427, 428.99)

At hearing on August 10, 2011, the parties disputed the form of the proposed Order re Adequate Cause. (CP 304-307, Clerk's

Minutes, CP 411) The trial court entered the Temporary Parenting Plan (CP 348-357) and the Temporary Order (CP 344-347); the trial court entered the Order re Adequate Cause on September 7, 2011. (CP 383-388)

On August 18, 2011, Ms. Holcomb filed Declaration of Susan Cawley, attaching updated records from Mr. Lane's Apple Blossom 2011 arrest and associated criminal case in Chelan County District Court. (CP 498-522) The police report for the May 8, 2011 (CP 514) shows that Mr. Lane was extremely intoxicated and picking a fight in a bar.

Ms. Holcomb filed a Motion for Reconsideration (CP 358-359) and Brief in Support of Motion for Reconsideration (CP 360-382) on August 19, 2011. Respondent opposed the Motion for Reconsideration. (CP 403-418 and CP 389-402)

The Court entered the Order Granting in Part and Denying in Part Petitioner's Motion for Reconsideration on November 8, 2011. (CP 427-431) This Order granted Ms. Holcomb's motion to vacate the adequate cause determination, but denied her motion to vacate the temporary parenting plan and denied her motion to dismiss the father's Petition for Modification.

Ms. Holcomb served and filed her Notice of Appeal on December 6, 2011. (CP 432-438) Mr. Lane has not cross-appealed.

B. Facts

On January 4, 2000, Amy Lane, now Amy Holcomb, filed for dissolution of her marriage to David Ryan Lane. (CP 380) The parties have two children, Alyssa and Trenten, who were 14 and 12, respectively, when the court entered the Temporary Parenting Plan on August 10, 2011. (CP 349) The August, 10, 2011, Temporary Parenting Plan modified the Final Parenting Plan entered on June 27, 2006.¹ (CP 1-10) When the 2006 Final Parenting Plan was entered, the parties' children were 9 and 8, respectively. (CP 2) At paragraph 2.2 the court found the following RCW 26.09.191 factors:

The father's involvement or conduct may have an adverse effect on the child(ren)'s best interests because of the existence of the factors which follow.

¹ The 2006 Final Parenting Plan erroneously recites it is entered pursuant to a Decree of Dissolution (page 1); it should have recited that it is "the final parenting plan signed by the court pursuant to an order signed by the court on this date or dated _____ which modifies a previous parenting plan or custody decree." Mandatory Forms, page one Parenting Plan. The prior Final Parenting Plan was entered October 23, 2001.

Other: The father uses his computer in his work in the adult website industry and has access to chatrooms with adult content that would be damaging to the children if they viewed the images. The children are currently age 9 and 8. The parents acknowledge that the children could be damaged once they learn to read from discussions in the chatrooms that either use vulgar language or may refer to adult sexual issues.

(CP 2) The existence of this factor supported specific restrictions on the children's residential time with the father. (CP 5-6) The trial court added in handwriting, a "right of first refusal", triggered by a parent's unavailability [for scheduled residential time] for four or more hours "due to work-related needs." (Paragraph 3.13, CP 7)

The father brought a petition to modify the June 2006 Final Parenting Plan in early 2007. The children's school counselor, principal and the son's third grade teacher filed a joint Declaration in February 2007 regarding the pending Petition for Modification. (CP 11-13) In that Declaration, these professionals commented on the negative effect of the parental "Tug of War" on the children: "The children have come to school clean and feed [sic] although at times burdened by the conflict going on." (CP 13)

The trial court determined that adequate cause did not exist to modify the Parenting Plan to change placement from Ms. Holcomb to Mr. Lane. Order re Adequate Cause - Denied, entered

May 23, 2007. (CP 14-16) In that Order, the trial court found (CP 16):

3.7.1 The Court also finds that the father threatened to “keep doing this until I get what I want”, and that what the father meant by that threat was that he would continue litigation until he got the children in his primary care.

3.7.2 The Court also finds that the father brought this major modification action as an improper means of seeking to increase his residential time with the children to a “split custody” arrangement, even though he admitted that the mother was not a bad mother, and his older child the daughter, was still doing well since the maternal grandfather’s sudden death in September, 2006. The Court found the father’s allegations were unfounded.

In a somewhat contradictory finding, 3.7.3, the commissioner found the father was not in bad faith in filing his petition for modification. (CP 16) The father did not ask the superior court to revise this Order re Adequate Cause, nor did he appeal from the Order.

The parties’ skirmishes continued, and in 2010, Ms. Holcomb, first through counsel and then representing herself, filed two Petitions for Modification of the Parenting Plan. Ms. Holcomb’s April 13, 2010 Petition (CP 20-37) identifies ongoing attempts by the father to alienate the children; disputes over cell phones, and

threats from third parties to the father based upon his online work activities. (CP 23-26)

Mr. Lane, in response, filed two Declarations on April 30, 2010; one was 24 pages long (CP 38-62) and the other was 36 pages long. (CP 461-497) In the 24-page long declaration, Mr. Lane discusses the parents' disputes about the children's cell phone use (CP 46), states that the issues are due to the mother's hatred of him (CP 46), and admits his involvement directing people to porn sites on the Internet (CP 43-44).

In his declarations, Mr. Lane stated and/or described:

- The parties are unable to co-parent, citing a disagreement about their daughter's participation in Facebook as one example (CP 478-480).
- He has a new baby in his home and the daughter wants more time at his home. (CP 464 at #9, CP 60)
- Co-parenting needs to be done by both parents "not just me." (CP 465, #19)
- A dispute about whether their daughter should have a cell phone (CP 465-466)
- "Amy has been putting the kids in the middle for MANY years" (CP 467)

- The daughter was unhappy with her mother; text message in February 2010 (“I hate this place” – meaning her mother’s home) (CP 496)

These Petitions have not been resolved. Instead, the parties agreed to try family counseling. (CP 90-91;315, 390) That failed. Next, each party convinced the trial court that the other should have a psychological evaluation. The court entered the order requiring the mother to have an evaluation on November 12, 2010. (CP 239-241) Father’s psychological evaluation was performed by Dr. Duane Green. (CP 447-458) Copies were provided to the court and to the mother, but the report was not filed in the Chelan County Superior Court until January 13, 2012. (CP 445-456)

On December 7, 2010, Mr. Lane’s evaluation was sent to Dr. Tye Hunter, a Seattle psychologist chosen by Ms. Holcomb to perform her evaluation. (CP 243) There is no evidence that Ms. Holcomb was notified that Dr. Green had sent the evaluation to Dr. Hunter. This was supposed to trigger Ms. Holcomb’s obligation to

obtain her own evaluation.² In her Declaration filed August 9, 2011, Ms. Holcomb states that she was never notified that the triggering events had occurred. (CP 309) Ms. Holcomb's failure to complete the evaluation was one of the bases upon which the trial court found on June 3, 2011, that there was adequate cause to make a major modification of the 2006 Final Parenting Plan, even though the court also noted that the mother had not been held in contempt for failure to have the evaluation, as Mr. Lane never filed such a motion. (CP 385)

Ms. Holcomb explained in her August 9, 2011, Declaration, she did not follow through with Dr. Hunter because she could not afford \$9,000 for the evaluation. (CP309) Ms. Holcomb later obtained an evaluation in Wenatchee and submitted it on August 9, 2011. (CP 330) Both psychologists noted the long-standing conflict between the parties. (CP 450; CP 333-335)

In mid-February 2011, there was an incident when Ms. Holcomb was picking their daughter up at Mr. Lane's home. This incident resulted in a contested hearing on February 17, 2011, at

² Although the November 12, 2010, Order re: Evaluation did not specifically require notice to Ms. Holcomb, it should be implied, as Dr. Hunter's receipt of the "data" from Dr. Green triggered the time within which Ms. Holcomb was supposed to complete her evaluation. (CP 240)

the conclusion of which Hon. Lesley A. Allan entered an Order that prohibited Mr. Lane from coming out of his home when Ms. Holcomb is picking up the children and restrained Mr. Lane from following Ms. Holcomb while she is driving. (CP 63) Ms. Holcomb filed the declaration portion of her Motion for a Protection Order with her June 16, 2011, Declaration. (CP 285-288) The father's version of this incident is described in his May 20, 2011 Declaration. (CP 84-85) Mr. Lane does not mention that at a hearing at which Mr. Lane and his counsel were present, Judge Lesley A. Allan addressed this incident by prohibiting Mr. Lane from leaving his home during exchanges. (CP 63)

On May 8, 2011, Mr. Lane was arrested for disorderly conduct (picking a fight) while drinking at a bar during Apple Blossom. (CP 291, CP 514) The criminal court required Mr. Lane to complete anger management counseling. (CP 504) Hopefully he did so.

Despite the father's long-standing complaints about the mother's "putting the kids in the middle", Mr. Lane did not, in his June 1, 2011, Proposed Parenting Plan, check any boxes alleging

the existence of 2.1 or 2.2 factors for Ms. Holcomb.³ (CP 259) Mr. Lane did not propose any restrictions on the mother's time with the children. (Proposed Parenting Plan, paragraph 3.10, CP 259) Mr. Lane did not propose that the court order that he have sole decision-making. (CP 264)

The mother contends that the father engaged in the abusive use of conflict. (CP 308-329) The father makes similar claims against the mother. (CP 77-212) Both parties describe the parental conflict as having continued for ten or eleven years. (CP 89, 319) The parties do not communicate about the children's activities, leading to misunderstandings and increased hostility, with the children in the middle. (CP 49, 82-83, 87-89, 309-310, 314)

The respondent father filed another Petition to Modify on May 20, 2011. (CP 69-73) Father alleged at paragraph 2.8 of the Petition (CP 72):

The custody decree/parenting plan/residential schedule should be modified because a substantial change of circumstances has occurred in the circumstances of the children or the other party and the modification is in the best interests of the children and is necessary to serve the best interests of the children. This request is based on the factors below.

³ Mr. Lane also eliminated the 2.2 factors and restrictions the court had included in the 2006 Final Parenting Plan relating to himself.

The children's environment with their mother under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children.

This is simply a recitation of the statutory requirements and does not contain any specific facts or allegations.

Paragraph 2.11 of mandatory form petition for modification requires the petitioning party to identify the substantial change in circumstance upon which the petition is based. (CP 72-73) The respondent father made the following conclusory statement: "Mother is providing a detrimental environment to the children." He then stated: "See Declarations filed by David R. Lane, Jamie Lane, Matt Wright and prior Declarations filed with the Court." (CP 73) There is no declaration from Matt Wright on file. The Relief Requested provision includes a request that the court find adequate cause for hearing the petition, and "enter an order modifying the parenting plan and approving the proposed parenting plan/residential schedule, which is filed with this petition." (CP 73 at lines 7-10) No parenting plan was filed with the Petition.

Mr. Lane's overlong Declaration⁴ filed May 20, 2011 (CP 77-212) mirrors his declarations from prior modification actions, referenced above. For example, he states at page 13, lines 9 through 14 (CP 89):

Your Honor, I have laid out to you ONLY the last 7 months out of the last 10 years that I have had to deal with Ms. Holcomb. Every single month Ms. Holcomb has started issue after issue, ordeal after ordeal. There is NO compromise, NO working together, or NO peace when dealing with Ms. Holcomb. If it's not her way then I am a "narcissist"⁵ that has many personality disorders.

At page 22 of his May 20, 2011 declaration, Mr. Lane identifies what he believed to be the substantial change of circumstances: the addition of a daughter to his household and the wishes of the children at issue to spend more time with her. ("This court may be away [sic] that my wife and I have a new baby daughter, which is a major change.") (CP 98, lines 12-17) Mr. Lane had brought this up before as a central issue. In his April 2010 Declaration, Mr. Lane

⁴ Chelan County Local Rule 94.04E(5)(d)(i) limits the totality of declarations, less attachments, to 25 pages without prior authorization from the court. Mr. Lane's initial declaration alone was 25 pages of narrative and 110 pages of attachments, and there is no evidence he obtained prior authorization from the court. Mr. Lane's Declaration is replete with inadmissible hearsay, opinion and speculation.

⁵ Mr. Lane has been diagnosed with narcissistic personality traits. See report of Dr. Duane Green (CP453).

states: "Please, Your Honor, find away [sic] to look through this massive amount of stuff you have been subject to reading and please see the importance of Aly and Trent being able to get to spend more time with their Dad and Sister." (CP 60)

Mr. Lane also filed a declaration from the parties' daughter, 15 year-old Alyssa. (CP228-233) Declarations from minors are specifically disfavored, Chelan County Superior Court Local Rule 94.04E(5)(b), as doing so puts the child in the middle. Mr. Lane chose to disregard this local rule. Filing the daughter's declaration placed Ms. Holcomb in the difficult position of having to choose whether to depose the parties' daughter.⁶

V. SUMMARY OF ARGUMENT

The parties have a high conflict relationship that has resulted in a decade of court involvement, including multiple motions for contempt and petitions to modify the parenting plan. (CP 380-382, CP 410, 412) This conflict has had a documented effect on the children that predated the father's 2011 Petition for Modification. (CP 11-13)

⁶ Ms. Holcomb chose not to depose their daughter.

The trial court vacated its June 3, 2011, adequate cause determination because substantial justice was not done and because it should have granted Ms. Holcomb's Motion for Continuance. The trial court should have granted mother's motion to reconsider the adoption of the temporary parenting plan for the same reason. Even more importantly, in the absence of a determination that adequate cause existed, the trial court did not have the authority to modify the 2006 Final Parenting Plan, even on a temporary basis. It should have vacated the temporary parenting plan.

The father's piecemeal filings violated statutes and court rules regarding the proper procedure for modifying parenting plans and adopting temporary parenting plans in an action for a major modification of a final parenting plan. The trial court should have granted Ms. Holcomb's Motion for Reconsideration for procedural irregularities.

The trial court should have dismissed the father's Petition on substantive grounds: the absence of a substantial change of circumstances warranting a major modification.

Mother asserts that the Court erred in denying her request for a continuance, erred in determining adequate cause exists to

modify the 2006 Final Parenting Plan, erred in ordering an equally shared residential schedule, and erred in finding that an emergency existed which warranted keeping the Temporary Parenting Plan in place even after it vacated the adequate cause determination. An equally shared residential schedule will not ameliorate the effects of the decade of litigation fueled by harmful parental conflict.

Implementation of an equally-shared residential schedule is contrary to accepted principles that such a schedule is only indicated where the parties are able to parent cooperatively. The trial court erred in ignoring these principles.

The trial court's adoption of the equally shared residential schedule on inadequate notice deprived mother of the right to present evidence and be heard.

VI. ARGUMENT

A. Standard of Review

The trial court's decision on a motion for reconsideration is reviewed for "manifest abuse of discretion":

"Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Wilcox v. Lexington Eye Inst.*, 130 Wn.App. 234, 241, 122 P.3d 729 (2005). An abuse of discretion exists only if no

reasonable person would have taken the view the trial court adopted, the trial court applied the wrong legal standard, or it relied on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

Fishburne v. Pierce County Planning and Land Services Dept., 161 Wn.App. 452, 472, 250 P.3d 146 (2011).

The trial court's decision whether adequate cause exists or does not exist is reviewed under the abuse of discretion standard. Parentage of Jannot, 149 Wn.2d 123, 65 P.3d 664, *aff'd*, 149 Wn.2d 123, 65 P.3d 664 (2003); Marriage of Zigler, 154 Wn.App. 803, 808-809, 226 P.3d 202 (2010). The trial court decisions reviewed in both Jannot, *supra*, and Zigler, *supra*, were denials of a full hearing on a petition to modify.

Issues of law are reviewed *de novo*. Link v. Link, 165 Wn.App. 268, 268 P.3d 963 (2011).

B. The Trial Court Erred in Granting Ms. Holcomb's Motion for Reconsideration Based Solely Upon the Basis that Substantial Justice was not Done

CR 59 governs motions for reconsideration. Ms. Holcomb based her motion for reconsideration upon CR 59(a)(1), (7) and (9); irregularity in the proceedings, that the decision is contrary to law, and that substantial justice was not done.

CR 59(a) provides, in pertinent part:

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

* * *

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

* * *

(9) That substantial justice has not been done.

Barefield v. Barefield, 69 Wn.2d 158, 417 P.2d 608 (1966) upheld the trial court's granting a mother's motion for new trial on these bases. There the trial court had granted custody to the father at the close of the mother's case (she was the petitioner) without any testimony as to the father's fitness. In upholding the trial court's grant of the mother's motion for new trial, the Washington Supreme Court held:

The abrupt disposition of the issue completely deprived respondent [mother] of the opportunity to

cross-examine appellant on these important matters. Moreover it made it impossible for respondent to introduce in rebuttal the evidence on this subject that, according to the two affidavits of counsel for respondent, was available.

The foregoing constituted an irregularity in the proceedings of the court by which the respondent was prevented from having a fair trial. (RPPP 59.04W (paragraph No. 1).) It follows that there was no evidence or reasonable inference from the evidence to justify the court's decision on the matter of custody. (RPP 59.04W (paragraph No. 7).) In ruling on this issue at the close of respondent's case, the court committed a procedural mistake that constituted an error of law. (RPPP 59.04W (paragraph No. 8).) Finally, it is obvious that substantial justice was not done when respondent was deprived of her children and when they were awarded to appellant without any showing of fitness or ability on his part. (RPPP 59.04W (paragraph No. 9).)

69 Wn.2d at 163. The same analysis applies here: the trial court abruptly determined that adequate cause existed and adopted a 50/50 shared residential schedule before Ms. Holcomb was required to respond to the Petition, only two days after Mr. Lane filed his proposed parenting plan, and in light of the father's other errors in providing proper notice. The trial court should have found that there was irregularity in the proceedings which prevented Ms. Holcomb from having a fair hearing, and that the trial court's decision was contrary to law.

C. The Trial Court Abused its Discretion by failing to follow Statutorily Prescribed Procedure before Making a Major Modification to the 2006 Final Parenting Plan

Trial courts are required to follow the statutory procedures for modifying final parenting plans. Marriage of Tomsovic, 118 Wn.App. 96, 74 P.3d 692 (2003); Marriage of Hoseth, 115 Wn.App. 563, 63 P.3d 164 (2003).⁷ Temporary orders in family law cases are appealable where trial court departs from the accepted and usual course of judicial proceedings by ignoring unambiguous language in the statutory scheme and case law on the subject. Folise v. Folise, 113 Wn.App 609, 613, 54 P.3d 222 (2002).

The procedure for requirements to modify is set out in RCW 26.09.260 and RCW 26.09.270. RCW 26.09.260 provides:

(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:

⁷ Both Tomsovic and Hoseth dealt with minor modifications.

(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; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

RCW 26.09.060 (1) and (2) (2009). The threshold question is whether a substantial change in circumstances has occurred:

Neither the commissioner nor the revision court addressed directly the threshold substantial change requirement, a matter we necessarily consider now. A superior court may modify a custody decree if it finds a substantial change of circumstances grounded upon facts occurring since entry of the prior decree or plan or were unknown to the superior court at the time it entered that prior decree or plan.

115 Wn.App. at 570.

Mr. Lane's Petition for Modification failed to allege facts to support a claimed substantial change of circumstances; instead he simply asserted that the "Mother is providing a detrimental environment to the children. See Declarations filed by David R.

Lane, Jamie Lane, Matt Wright and prior Declarations filed with the Court.”⁸ (Petition for Modification, paragraph 2.11, CP 73)

Mr. Lane’s multiple declarations state facts that identify changes in his own circumstances or factors that have existed throughout the case (parental conflict), rather than the facts that establish there has been the required change in the circumstance of the mother or the children. The primary circumstance, and the one the trial court focused on, is the ongoing hostility and conflict between the parents and its effect on the children. That is not a change as it has been going on for over ten years.

Another change Mr. Lane identified is that he has a child with his subsequent wife. Mr. Lane states that his children with Ms. Holcomb wish to spend more time with that child, but that Ms. Holcomb will not allow such a deviation from the residential schedule. This, again, is a change in Mr. Lane’s circumstances, not the mother’s or the children’s. Such a change may support a minor modification under RCW 26.09.260(5), Marriage of Hoseth, 115 Wn.App. 563, 63 P.3d 164) (2003), but will not support a major

⁸ This general reference to “prior declarations” does not provide adequate notice to the court or the opposing party of the evidence relied upon, and is an example of the father’s disregard for the court rules demonstrated throughout this case.

modification. No case has held that such changes constitute a substantial change of circumstances sufficient to support a major modification. No court should so hold, as such a holding would eviscerate the clear and oft-stated principles underlying Washington's modification statutes and cases: custody litigation is harmful to children and there is a presumption of continuity. Marriage of Jannot, 110 Wn.App. 16, 23, 37 P.3d 1265; aff'd on other grounds, 149 Wn.2d 123, 65 P.3d 664 (2003)

A child's wishes can be considered, but only in the context of establishing a permanent parenting plan. RCW 26.09.187(3)(a)(vi). A child's complaints and preferences are not a sufficient basis for the court to find a substantial change of circumstances upon which to base a major modification. Marriage of Mangiola, 46 Wn.App. 574, 732 P.2d 163 (1987).

A trial court abuses its discretion if it modifies a parenting plan for orders of contempt other than as provided by RCW 26.09.260(2)(d). Custody of Halls, 126 Wn.App. 599, 606, 109 P.3d 15 (2005). In Halls, supra, the court of appeals held the trial court abused its discretion by modifying the parenting plan based upon orders of contempt against the mother when the father had not petitioned for modification. Here, the trial court found various

acts by Ms. Holcomb (CP430) as support for its order granting adequate cause and adopting the temporary parenting plan. While, if true, these acts might support a finding of contempt, Mr. Lane had not asked the court to hold Ms. Holcomb in contempt. To the extent the conduct did not relate to violation of the residential schedule, it does not provide a basis for modification in any event. RCW 26.09.260(2)(d). Thus, Ms. Holcomb's alleged failure to submit to a psychological evaluation is not a basis to make a major modification to the residential schedule.

D. The Trial Court Committed Error in Making an Adequate Cause Determination and Implementing a Temporary Parenting Plan Ten days after Ms. Holcomb had been Served

The primary purpose of the threshold adequate cause requirement is to prevent moving parties from harassing nonmoving parties by obtaining a useless hearing. Marriage of Lemke, 120 Wn.App. 536, 540, 85 P.3d 966, *rev. den.*, 158 Wn.2d 1026, 152 P.3d 347 (2007). The adequate cause determination is important because it shifts the burden to the nonmoving party. That burden-shifting should not occur before 20 days have elapsed after service of the Summons and Petition. Some jurisdictions have a local rule that makes this clear: "The adequate cause hearing may not be heard

before the deadline for filing the response to the petition has passed.” King County Superior Court Local Family Law Rule 13(d)(2)(B). Nor should the court change primary placement on a temporary basis without the full hearing. See, e.g., 20 Wash. Practice § 33.38 “Modification or adjustment of parenting plan – Modification procedure and forms (2008-2009), at 117:

Except in cases which require immediate action to protect the child and in specific circumstances regarding relocation (see RCW 26.09.510(1)(c), it is inappropriate to enter a temporary order changing the primary residence of the child prior to the court conducting the statutory hearing, for to do so is directly contrary to the spirit and wording of the statutes. However, in appropriate cases the court does have discretion to enter a temporary order.⁹ *[footnote cites provisions of the relocation statute.]*

Those wishing to set the adequate cause hearing right away after filing the petition for modification must wait a minimum of 20 days, which is the required notice period from the time of service of the petition on the opposing party, provided he/she is in Washington. If the party filing the modification believes something must be done on an emergency basis (before the 20-day period elapses), he/she will have to file a motion for a hearing for temporary orders and will have to make a showing that it is an emergency.

⁹ The footnote to this paragraph cites to provisions of the Relocation Act, RCW 26.9.510 – relocation pending modification trial. Making a major modification in other cases on a temporary basis is not permitted in the absence of an emergency.

The adequate cause hearing and the hearing on the defective motion/declaration for temporary orders in this case occurred merely ten days after Ms. Holcomb was served and before she was required to appear or respond to the Petition. This deprived her of a meaningful opportunity to respond.

There was nothing that required immediate action, and Mr. Lane did not assert that there was an emergency. "Emergency" is defined as "An unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate action." The American Heritage Dictionary, 2d College Edition, 1982. Merriam-Webster Online defines emergency as "An unforeseen combination of circumstances or the resulting state that calls for immediate action" and indicates that this word came into use in about 1631. There was no emergency here—just more of the same harmful parental conflict that had been going on for years.

The daughter does not provide dates for any of the incidents she describes in her declaration, except that one occurred "last summer." (CP 231) That would have been the summer of 2010. She further states that she wants more time with her father, because she has a baby sister. (CP 230)

The daughter's declaration does not support the court's adequate cause determination or its finding that an emergency existed that warranted immediate implementation of an equally-shared residential schedule. The February 2011 incident during visitation exchange may have been an emergency at the time, but it was not an emergency in late May 2011 when Mr. Lane filed his Petition for Modification. Ms. Holcomb had addressed that emergency by obtaining an order at a contested hearing on February 17, 2011, that prohibited Mr. Lane from exiting his residence when the visitation exchange occurred at his home:

IT IS ORDERED THAT David Ryan Lane shall remain inside his home when the children are exchange at his home for visits and shall not, at any time, make any attempt to follow Ms. Holcomb when she is driving. Ms. Holcomb may file her petition for anti-harassment order in this case # and it can be treated as a motion for restraints within this action.

(Order, CP 63) The trial court's Order was an appropriate attempt to protect the children from parental conflict.

Had there truly been an emergency, Mr. Lane would have obtain an *ex parte* restraining order and order to show cause as permitted by RCW 26.09.194(3) and removed the children from Ms. Holcomb's home, as he did on February 26, 2007, prior to filing his 2007 Petition for Modification to change placement. (CP 381).

There was and is no emergency warranting an equally-shared residential schedule. When the court set aside its adequate cause determination, it should also have reinstated the 2006 Final Parenting Plan. Instead the trial court denied the mother's motion to reconsider implementation of the Temporary Parenting Plan, stating that an emergency existed. There was no emergency.

E. The Trial Court Committed an Error of Law in Refusing to Set Aside the Temporary Parenting Plan after Vacating the Adequate Cause Determination

Once the trial court set aside the adequate cause determination, it lacked authority to modify the parenting plan even on a temporary basis. RCW 26.09.270; Marriage of Zigler, 154 Wn.App. 803, 809, 226 P.3d 202 (2010); Marriage of Watson, 132 Wn.App. 222, 130 P.3d 915 (2006); Bower v. Reich, 89 Wn.App. 9, 964 P.2d 359 (1997). RCW 26.09.270¹⁰ provides:

A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his or her motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his or her

¹⁰ RCW 26.09.270 applies only in modification cases. RCW 26.09.194 and RCW 26.09.197 address the procedure and requirements for a temporary parenting plan in the initial proceeding.

affidavit, to other parties to the proceedings, who may file opposing affidavits. *The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits*, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted. (Emphasis added.)

After vacating the adequate cause determination, the trial court had no authority to implement or maintain in effect a temporary parenting plan. It should have vacated the temporary parenting plan. The court committed an error of law when it refused to do so.

F. The Trial Court Erred in Concluding that there was no Irregularity in the Proceedings

RCW 26.09.181(1)(b) required that Mr. Lane file his proposed Parenting Plan with his petition for modification:

In proceedings for a modification of custody or a parenting plan, a proposed parenting plan shall be filed and served with the motion for modification and with the response to the motion for modification.

The Washington Rules of Civil Procedure govern proceedings under RCW Chapter 26.09. RCW 26.09.010(1). CR 6(d) rules requires that the moving party serve a written motion and accompanying affidavits on all parties at least 5 days prior to hearing.

CR 7(b)(1) provides:

How Made. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

CR 7(b)(4) *Identification of Evidence* provides: "When a motion is supported by affidavits or other papers, it shall specify the papers to be used by the moving party."

Mr. Lane did not serve Ms. Holcomb with a proposed parenting plan until the evening of June 1, 2011. The hearing occurred at 8:30 a.m. on June 3, 2011. This procedural irregularity deprived Ms. Holcomb of due process.

Although the time limit is not jurisdictional, Loveless v. Yantis, 82 Wn.2d 754, 513 P.2d 1023 (1973), improper notice to the respondent requires that the court at least continue the hearing. The trial court in the present case did not continue the hearing. That constitutes an irregularity in the proceedings and a departure from accepted practice. Indeed the trial court reversed the adequate cause determination on the basis that its failure to grant Ms. Holcomb's motion for a continuance deprived her of substantial

justice. The trial court should have made the same ruling with respect to the implementation of the temporary parenting plan.

The trial court erroneously concluded (CP 430) that Mr. Lane's failure to file a proposed parenting plan until two days before the hearing at which the court modified the parenting plan did not constitute a violation of statutes and court rules and that there was no irregularity leading up to the hearing. (CP 430, #2 and #3) The trial court's conclusions are a departure from the "accepted and usual course" of legal proceedings.

The trial court further erred to the extent it based its modification of the parenting plan on conduct of Ms. Holcomb's that did not relate to the residential schedule and which had not been the subject of motions for contempt. The trial court cannot change placement unless it finds the primary parent in contempt for violation of residential schedule twice in three years. RCW 26.09.260(2)(d). That is not the case here.

G. Mr. Lane Failed to Meet his Burden of Showing that the Benefit of the Change Outweighed the Harm

The trial court should deny adequate cause where the moving party provides insufficient facts to show that the advantage

of the change outweighs the presumed detriment. Marriage of Potts, 40 Wn.App. 582, 699 P.2d 799 (1985).

Here, other than the father's opinion, there was no evidence that an equally-shared residential schedule would buffer the children from parental conflict. These parents argue about much more than the residential schedule: counseling, who is responsible to deliver the children's effects that they leave behind when changing homes, what discipline should be imposed, whether the children should have cell phones or be on Facebook, etc. Changing the residential schedule will not eliminate the opportunity for conflict in these other areas. Moreover, it is well recognized that in cases of parental conflict, the court should not implement an equally-shared residential schedule.

In a 1999 study made at the request of the Washington State Supreme Court Gender and Justice Commission and the Domestic Relations Commission¹¹, Diane N. Lye, Ph.D. summarized her findings:

¹¹ Lye, Diane N, Ph.D., Washington State Parenting Plan Study, 1999, at page iii. See, also Marriage of Pape, 139 Wn.2d 694, 705-709, 989 P.2d 1120 (2000), where the Washington Supreme Court cited not only to Dr. Lye's study, but to many others regarding the effect of relocation on children.

- No single post-divorce residential schedule has been demonstrated to be most beneficial for children.
- Absent high levels of parental conflict, there are no significant disadvantages to children of shared or 50/50 residential schedules. Nor are there significant advantages to children of shared or 50/50 residential schedules.
- Parental conflict is a major source of reduced well-being among children of divorce.
- Shared or 50/50 residential schedules have adverse consequences for children in high conflict situations.
- Shared or 50/50 residential schedules and frequent child nonresidential parent contact do not promote parental cooperation.

At page v of her report, Dr. Nye notes:

Child development and post-divorce parenting experts agree that shared or 50/50 residential schedules can harm children when parental relations are conflicted.

As in Potts, supra, there was insufficient evidence to support the court's finding that an equally-shared residential schedule would "buffer" the effect of the parental conflict on the children. The trial court erred in implementing such a plan on June 3, 2011.

H. This Court should Award Attorneys' Fees to Ms. Holcomb

RAP 18.1 provides for an award of fees and costs on review and sets out the procedure for requesting such an award. The

Court should award Ms. Holcomb attorneys' fees on appeal based upon RCW 26.09.140 which provides for an award of fees to one party based upon that party's need and the other party's ability to pay. Ms. Holcomb has timely filed her Financial, as required by RAP 18.1(c). If Mr. Lane does not comply with RAP 18.1(c) and file his own Financial Declaration, then the Court should award Ms. Holcomb fees. Mansour v. Mansour, 126 Wn.App. 1, 106 P.3d 768 (2004)(husband's failure to file an affidavit proving his inability to pay was one factor the court considered in awarding wife fees on appeal).

VII. CONCLUSION

Mr. Lane had the burden to prove a prima facie case. George v. Helliard, 62 Wn.App. 378, 814 P.2d 238 (1991); Marriage of Mangiola, 46 Wn.App. 574, 732 P.2d 163 (1987); Marriage of Roorda, 25 Wn.App. 849, 611 P.2d 794 (1980) Mr. Lane failed to prove a prima facie case as to the existence of the required substantial change in circumstances. He failed to prove a prima facie case that the environment in the mother's home is detrimental to the children other than due to stress created by the parental conflict. Mr. Lane failed to meet his burden to prove that the

advantage of a change to an equally-shared residential schedule would outweigh the detriment from the change.

The trial court, in a misguided attempt to shield the two children of the parties from over ten years of parental conflict, initially found adequate cause existed for a major modification of the parties' parenting plan and implemented an equally-shared residential schedule. Had the trial court followed statutory procedures, it would have dismissed the father's Petition for Modification (major modification) at the first hearing on June 3, 2011, as there was no substantial change in circumstances. The parties and their children should not be put through a trial on the petition. Custody trials only exacerbate parental conflict.

Ms. Holcomb respectfully requests that this Court dismiss the father's Petition for Modification on substantive and procedural grounds.

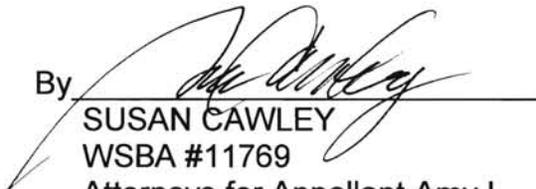
Ms. Holcomb further requests that this Court vacate the Temporary Parenting Plan and Temporary Order. Once the trial court determined adequate cause did not exist, it had no authority to modify the 2006 Final Parenting Plan and should have set the temporary parenting plan aside in response to Ms. Holcomb's Motion for Reconsideration.

Finally, this Court should award Ms. Holcomb attorneys' fees
on the basis of her need and Mr. Lane's ability to pay.

Respectfully submitted,

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By


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