

**FILED**

JAN 31 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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OF THE STATE OF WASHINGTON**

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**IN RE THE MARRIAGE OF:**

**TOBIAS MICHAEL LYNN  
Appellant**

**V.**

**AMANDA SUSAN LYNN  
Respondent**

**NO. 30866-9**

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**RESPONDENT'S AMENDED BRIEF**

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**JULIE TWYFORD  
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Spokane, WA 99205  
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## **INTRODUCTION**

The Respondent requests that this Court affirm the trial court's ruling that the mother be awarded primary placement of the children.

Appellant challenges the trial court's findings of fact and conclusions of law awarding the Respondent primary custody of the children alleging an abuse of discretion by the trial court

Appellant misstates the facts, misquotes the trial courts findings, misquotes cases and submits no law or substantial facts that would justify overturning the trial court's sound exercise of its discretion in determining primary placement of the children.

The trial court's decision should be affirmed.

## **STATEMENT OF THE CASE**

The parties were married on July, 25, 2004. (CP 2). Two children were born to the couple, Taylour and Liam. (CP 1). A dissolution action was filed by Tobias on October 19, 2009. (Id).

Amanda described a long term history of dysfunction in the marriage and reported that Tobias' initial act of violence was when they lived in Colville where Tobias grabbed her arms and threw her to the ground. (RP 504). Amanda reported other concerns of aggressiveness toward herself and her mother including clenched fists, glazed over eyes and screaming. (RP 505). Additional actions by Tobias included control, anger and guilt trips. (RP 507). In February 2008, Tobias viciously attacked and assaulted Amanda, resulting in numerous injuries. The photos did not reflect all the injuries inflicted by Tobias. (RP 508); (CP Respondent's Brief- 5

760-761). Tobias did not contest that he caused the injuries depicted in trial exhibit number R102. (RP 159). Amanda described the beating to include that Tobias kicked her at least five times, choked her out, told her that he was going to kill her, threw an item at her that hit the wall causing a hanging to drop and cut Amanda's nose, and damaged her phone so she could not call 911. (RP 510). Tobias was in an alcoholic blackout when he beat his wife; however, the GAL did not include this fact in her report. (RP 393). The week before in January of 2008, Tobias grabbed Amanda and threw her to the ground. (RP 509). The parties' young child Taylour was present during the beating. (RP 578). The police were called and interviewed Amanda at the hospital, where Amanda reported prior assaults to the responding officers. (RP 508-509) The GAL did not interview the responding officers. (RP 367). Bonnie Scott the domestic violence expert testified that this domestic violence did not start with this horrendous beating and that the person that inflicted the injuries seen in the photos that were admitted by the court was a domestic violence perpetrator. (RP 249).

Although Tobias had two prior DUI arrests (RP 396), Tobias reported only one DUI to the psychological evaluator. (RP 226). Amanda has no history of clinical depression, no history of domestic violence, no treatment history (RP 365) and no arrests. (RP 364). Tobias grew up with an abusive father (RP 212) who was an alcoholic and attended in patient treatment (RP 214). Tobias continues to drink alcohol. (RP 164). On

December 22, 2009, Amanda filed a motion for ex parte restraining order which was granted by the court. (CP 68-72).

The parties had worked out a shared schedule until the assault on Taylour. (RP 503). At the time of trial, there was a finding by CPS that Tobias committed child abuse on the parties' then 2 ½ year old child Taylour. The GAL reported this abuse as a "spanking incident" and did not include in her report that CPS found child abuse by the father. (RP 352). However, the GAL did include in her report an "unfounded" CPS finding against Tobias on a report made by the child's doctor in regards to injuries to Liam. (RP 352); (RP 136). During her "investigation," the GAL did not interview witnesses to the bruising of Taylour and did not contact the CPS investigator who observed the bruises. (RP 367). Tobias called his mother after this assault on his child and told her that he "really goofed up. I hit her too hard. I didn't mean to. And he continued to be remorseful." (RP 128). At trial, Tobias confirmed this testimony. (RP 207). Tobias admitted that he was angry when he hit the child after she threw a rubber toy that hit him in the groin area. (RP 230). Tobias also changed his original trial testimony of hitting the child one time during his direct testimony to three. (RP 207). Tobias then acknowledged that he could have hit the child 4-5 times. (RP 208). Tobias acknowledged that the month before hitting the 2 year old, he had reported to his counselor, Deborah Norvell, that his stress was reduced. (RP 211). In May, 2010, the court did remove the supervision requirement. (CP \_475-481). While the

GAL reported that Tobias did “some work around anger management with Dr. Smith and also couples counseling (RP 276), there were no certificates of completing treatment produced by Tobias. (RP 207).

In June 2011, Tobias obtained work and put the children in daycare but did not inform Amanda. (RP 217). Tobias only put his own mother on the daycare records as a contact person. (RP 217). In June, he brought the children to daycare at 6:30 am then started bringing them at 4:30 am due to his work schedule. (RP 218). Tobias made another change in September 2011 to accommodate his work schedule. (RP 219). While this was occurring, the GAL did not recommend giving Amanda additional time even though she was off from school and not working. (CP 453). This was contrary to the GAL previously recommending that the children should be with the father instead of in the care of others when the mother was unavailable. (CP 453). In July 2010, Amanda’s residential time was expanded by the Court.

Tobias alleges some false reporting of domestic violence by Amanda and claims that Amanda made a CPS report of an assault against Liam. (Appellant’s Brief p. 12). However there were no findings made by the court to support that allegation. (CP 701-705). Dr. Boone, a mandatory reporter, made the report to CPS, not Amanda. (RP 136).

The GAL only saw the children with Amanda twice during the two years of her appointment (RP 303). At the time of trial, the GAL had not seen the children with either parent for the previous 7-8 months. (RP

375). At trial, the GAL recommended to the court that Tobias be given primary placement of the children and that Amanda receive every other weekend from Friday to Sunday. (RP 306); (CP 658-659).

In the GAL report and in trial testimony, after the GAL noted that Amanda would understand and expect that her son would have his fair share of tumbles, bumps and bruises, the GAL saw nothing concerning about Tobias's behavior in leaving the same rambunctious child alone inside the home while Tobias shoveled snow. (RP 296). The GAL reported that the 2008 beating by Tobias was not indicative of a pattern of domestic violence by Tobias. The GAL testified that she is not a domestic violence evaluator, that she is not an alcohol or chemical dependency evaluator nor an expert in those fields. (RP 342-343). Regarding the bruising to Taylour's bottom, the GAL depended upon viewing photos of the child, but never even talked to the CPS investigator that also saw the bruising, the police officer that saw the bruising and referred the matter to CPS (RP 340) nor the other witnesses. (RP 367). After only two visits with Amanda and the children, the GAL alleged that there was less of an attachment to Amanda. (CP 657). This evidence was disputed by the children's doctor, Dr. Boone, who indicated the children were very well bonded to Amanda. (RP 136). The doctor, who had known the children since birth and Amanda for many more years, went on to testify that he had no concerns about Amanda's parenting and no concerns that these

children were not appropriately attached to Amanda. (RP 136-137). Additionally, Dr. Boone testified that he had never met Tobias. (RP 145).

The GAL had a bumper sticker on her car that said, “Put on your big girl panties and deal with it.” (RP 346) The GAL testified that Amanda must not have been too concerned about child’s safety after the spanking because she returned the child to Tobias. (RP 346). However, the GAL did acknowledge that Amanda was Court ordered to return the child to Tobias. (RP 347). The GAL admitted at trial and in her report that the Court did make a finding that the spanking of the child was domestic violence under RCW 26.50.010. (RP 347). The GAL acknowledged that she did not receive any completion certificates of a domestic violence program for Tobias and no certificate of any anger management program. (RP 350). The GAL reported that CPS made an “unfounded” finding on the Liam incident reported by Dr. Boone but that she did not include anywhere in her report to the Court that CPS made a finding of child abuse against Tobias.<sup>1</sup> (RP 352). In the GAL report, the GAL states that Amanda unilaterally enrolled the children in daycare but failed to include in her report that Tobias also unilaterally enrolled the children in daycare and hid it from the Court and Amanda. (RP 356-357). The GAL confirms her statement in her report that when Amanda went to Court to request more time with her children since she was available with no school or work, the GAL reported that Amanda was seeking to “disrupt the children’s routine

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<sup>1</sup> This court should note that the trial court did not make a finding of child abuse against Appellant for any of the incidents with the children.

for several weeks. (RP 360). The GAL stated in Court that was not a criticism of Amanda. (RP 361). The GAL specifically stated in her report that “the court has chastised mom in particular for her behavior”; however, the GAL did acknowledge the fact that she did not mention the actual Court FINDING that the father was hiding the ball when he put the children in daycare without telling the mother or disclosing he was not available for their children. (RP 363). Although the GAL reported that Amanda’s recounting of the savage beating “became more exaggerated each time I spoke with her,” the GAL admitted she had not talked to police that recorded the events on the night they occurred, never talked to any of the four officers that responded, never looked at their file, never talked to the prosecutor on the case, or even reviewed their photos before making a statement that Amanda’s story had changed. (RP 377-378). Other elements consistent with domestic violence were disclosed by Amanda to the GAL including controlling behavior, restricting friends, anger when she was late from work, anger when she wanted to see friends and checking up on her. (RP 383). The GAL acknowledged she did not report Tobias’s inconsistencies in his report of the spanking of Tylour. (RP 386). The GAL was aware that Liam was only injured at Tobias’s home, that the first injury required stitches, and that within months Liam’s second injury occurred when Tobias left this same child alone in the house. (RP 388).<sup>2</sup>

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<sup>2</sup> Tobias removed stitches himself and there was a scar. (RP 359). Witness for Tobias noted that it could be dangerous for a parent to remove stitches and they recommend that

When the GAL made her first visit to Amanda's home, the children awoke from a nap, and Amanda had worked all night and had not been to bed before the meeting with the GAL. (RP 374 and 518). The GAL acknowledges that following a nap is not always the best time to observe children particularly if they are a little slow to warm as is Tylour. (RP 426-427). During trial and her written report, the GAL made no assertions of any negative findings about Jeff Beegle and his relationship with the children. (RP 374).

Although there was a "founded" CPS finding of child abuse at time of trial, the GAL reported that Tobias had to change his education plans due to "allegations" of child abuse. (RP 389). The GAL acknowledged that if Tobias got placement and moved it would separate the children from their half-brother Hunter and from the maternal grandparents. The GAL reported that "He freely discloses alcohol use in his past, but has never been in treatment." (RP 392). The GAL acknowledged that statement was inconsistent with Tobias's trial testimony (RP 392) and that Tobias admitted that he continued to drink while this case was pending. (RP 391). The GAL also acknowledges that Tobias did not disclose to her his father's alcoholism and inpatient treatment. (RP 392). The GAL acknowledged that she did not include in her report that Tobias was in an alcoholic blackout when he beat his wife. (RP 393). The GAL acknowledged that she had incorrect information about the fact that Tobias had two prior DUI arrests and made mistakes when reporting the dates.

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a child be brought back to the doctor for suture removal. (RP 487).

(RP 396). Also, there was a mistake in the reporting of only one CPS complaint. (RP 397). The GAL acknowledged that she left the investigation of the child abuse allegations to CPS, that CPS found child abuse and that she did not include that fact in her report. (RP 398). The GAL included in her written report that Tobias attended anger management and alcohol counseling after the 2008 attack but that was also an acknowledged mistake in her report. (RP 400). Tobias testified he was voluntarily attending programs but they were actually court mandated. (RP 400). The GAL put in her written report that Tobias reports successful completion of the programs but admits there were no programs checked or certificates produced. (RP 305; 401). The GAL testified that counseling was helpful for Tobias but also admits that Tobias told Dr. Smitham his counseling was garbage. (RP 403). The GAL did not see that as an inconsistency of Tobias's testimony. (RP 403).

When discussing the angry spanking of Taylour, Tobias testified that the 2 year old hit him so hard that it brought him to his knees in pain. (RP 207). Although the GAL makes no mention about the viciousness of the blow by the two year old in her report for the court, the GAL asserted that Tobias told her about it although it was not in her report. (RP 405 and RP 208-209). The GAL stated in her report that the combination of naughty behavior of throwing things, the tantrum and location of the hit from the hard object combined with Tobias's high stress around the divorce resulted in excessive spanking. (RP 406). Tobias's mother

testified that Tobias sent her pictures of the bruising from the spanking he inflicted on Taylour. (RP 410). The GAL did not see an inconsistency at Tobias's trial position that this was only diaper rash and Tobias sending his mother pictures of the bruising on the child. (RP 410). The GAL acknowledged she did not include in her report the number of times Tobias hit the child Taylour. (RP 411).

When the GAL interviewed Tobias with the children, they had not been napping. (RP 411). The GAL saw Tobias twice and the second visit could have been only 20-30 min. (RP 412). Amanda expressed concern about the children not wanting to go back to their father's but the GAL never observed any exchanges of the children. (RP 415-416) Another witness testified to this. (RP 451-Alan West). The GAL asserted that Amanda loves her children and they love her but their needs are not consistently and routinely met by Amanda. (RP 435) Dr. Boone disagreed. (RP 136-137). As did Pat Mally (RP 444-445), Alan West (RP 450-452), Don Mally (RP 469) and Amanda Lynn.

### **ARGUMENT**

#### **A. The Trial Court did not abuse its discretion when awarding Respondent primary custody of the children.**

##### **1. Respondent agrees that the Standard for Review is an abuse of discretion by the Trial Court.**

The Standard of Review for placement of children is an abuse of discretion standard. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854

P.2d 629 (1993). Within the trial court's broad discretion is the ability to not be bound by and even reject the GAL recommendations. In re Marriage of Swanson, 88 Wn. App. 128, 138, 944 P.2d 6 (Div II 1997); Fernando v. Nieswandt, 87 Wn. App. 103, 107, 940 P.2d 1380 (Div I 1997). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. In re Marriage of Fiorito, 112 Wn. App. 657, 663-64, 50 P.3d 298 (Div I 2002). A decision is based on untenable grounds "if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). The Appellate court must determine whether findings of fact are supported by substantial evidence. Brandli v. Talley, 98 Wn. App. 521, 523, 991 P.2d 94 (1999). The Appellate Court does not, and is in no position to, reweigh the evidence or decide witness credibility. In re Marriage of Magnuson, 141 Wn. App. 347, 170 P.3d 65 (Div III, 2007).

**2. The Trial Court's decision was supported by substantial evidence and should not be disturbed.**

In child placement cases, RCW 26.09.187 sets forth the criteria for establishing a permanent parenting plan. The trial court considered the following seven factors when establishing the parenting plan/residential schedule:

- i. The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- ii. The agreements of the parties, provided they were entered into knowingly and voluntarily;
- iii. Each parent's past and potential for future performance of parenting functions;
- iv. The emotional needs and developmental level of the child;
- v. 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;
- vi. The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
- vii. Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) is given the greatest weight. RCW 26.09.187(3).

The Appellant fails to demonstrate that the trial court abused its broad discretionary powers. The Appellant submits several cases to support its position. However, many of these cases do not support

Appellant as they either apply an inapplicable standard or are cited incorrectly.

In re Marriage of Allen, 28 Wn. App. 637, 626 P.2d 16 (Div. III 1981) was decided before the Parenting Act of 1987. Furthermore, Allen involved a stepmother seeking custody of a non-biological child. Allen, 28 Wn. App 637. The Court ruling and standards applied were based on non-parental custody. Id. The Appellant misconstrues In re Marriage of Cabalquinto, 100 Wn.2d 325, 669 P.2d 886 (1983). Appellant states that the Appellate Court found “remand necessary where court made finding of harm based upon parent’s status as a homosexual.” (Appellant Brief page 21). However, the Appellate Court did not make a “finding of harm,” and the case was remanded since the Appellate Court could not determine what standard the trial court used. Calbalquinto, 100 Wn.2d at 329. The Appellant also misquotes In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Appellant asserts a holding from Kovacs on pages 801 of the decision. Kovacs, 121 Wn.2d at 801 does not support Appellants assertion. However Kovacs does state that:

The temporary parenting plan is to be based upon a look at the preceding 12 months to determine the relationship of the children with each parent subject, of course, to the other limitations. In the permanent parenting plan, the court is to evaluate the ability of each parent to perform the parenting functions for each child prospectively. Drawing any presumption from the temporary plan is inappropriate.

Kovacs, 121 Wn.2d at 809 (citing Washington State Bar Ass'n, Family Law Deskbook 45-25 (1989)).

Appellant seeks to bolster his case by repeatedly referring to statements by judicial officers during temporary order hearings during the pendency of the case, which comments should be disregarded by this Court. (Appellant's Brief p11, p12, p13 and p14). The trier of fact here was the trial judge who had the opportunity to hear and observe witnesses on direct and cross-examination and determine the credibility of each and made findings based on the testimony of witnesses and admitted exhibits.

Furthermore, Appellant continually misquotes the trial court. This can be seen in Appellant's elaboration of the trial court's holding and application of the RCW 26.09.187(3) factors.

In regards to factor (i) of RCW 26.09.187(3), Appellant ignores the trial court's Findings of Fact which state "The mother has always been nurturing and loving in the care of her three children. The children have healthy attachment with their mother." (CP 804). This is supported by witness testimony of Amanda, Dr. Boone, the maternal grandparents, and of Tobias himself. (Id.). The trial court also noted that "The father also has a strong healthy bond with the children." (Id.). Appellant puts a lot of emphasis on the trial court's oral Ruling wherein the trial court gave a "nod" to Tobias for his strong bond with the children. (RP 584). As the trial court later in the same sentence stated that this factor was a tie between the parties, it is apparent that this "nod" was a compliment to the father for his strong ties. The trial court noted "I acknowledge the father has an outstanding bond and I think that is notable. I don't remember a

case I've had where I've had a father at this level of ability, this excellence in detailing with his children and that says a great deal." (RP 584). Substantial evidence supports the trial court's finding that both parents had a strong bond with the children after all the testimony, not just that of the GAL.

As for factor (iii) of RCW 26.09.187(3), the trial court did conclude that the parenting functions had been performed by both parents roughly equally. (CP 809). The trial court found that prior to separation, the parents worked together since both were employed from time to time. (Id.). The evidence did not support that Jeff Beegle performed more parenting functions than Amanda. Mr. Beegle was there to assure that Amanda could meet with the GAL. (RP 518). Furthermore, Appellant claiming that Amanda sought changes to the residential time to "suit her needs" completely ignores the fact that Tobias had done the same exact thing. (RP. 218-219). The Appellant ignores the fact that he himself unilaterally enrolled the children in daycare, did not inform the daycare of the existence of the children's mother, and hid the daycare from the mother. (RP 217-219 and 363).

As for factor (iv) of RCW 26.09.187(3), Appellant seems to use the emotional needs and development of the children to again argue the bond between the children and parent. The GAL only saw the children with Amanda twice during her two year appointment. (RP 303). And by the time of trial, the GAL had not seen the children with either parent for

the previous 7-8 months. (RP 375). Testimony by other witnesses was considered by the trial court. Appellant rests its whole case on the GAL report and fails to address all other testimony in the case.

As to factor (v) of RCW 26.09.187(3), the trial court properly found that this factor weighed in favor of Amanda. The children do have a half-brother who lives with Amanda and who has lived with Tylour and Liam their whole lives. The children have a close and healthy bond with him. (RP 316). The trial court did not give this factor more weight than the others. However, this factor added to the conclusion that the best interests of the children were for them to be placed primarily in the custody of Amanda.

As to factor (vii) of RCW 26.09.187(3), the trial court properly considered the parties employment schedule and found this factor was in favor of the mother. The mother had no employment schedule; therefore, she was more available for the children than the father as he had recently started new employment. The prior holding of the trial court in regards to daycare, was during a temporary orders hearing and was not a trial issue.

In regards to RCW 26.09.004(d), this section does not, as Appellant asserts, require the Court to take into account “whether each parent helps to facilitate a relationship with the other parent or other significant family members.” (Appellant’s Brief page 28). It defines parenting functions to include “assisting the child in developing and maintaining appropriate interpersonal relationships.” RCW 26.09.004(d).

The evidence supports and the trial court found that both parents had contributed with this factor. (CP 804, 808-809).

As to the interaction between the parents, Appellant misstates the trial court's findings. Appellant leaves off the first part of the trial court's Findings "*While they both participated in the conflict*, the mother pushed harder and accelerated the rancor." (CP 806). (emphasis added). Additionally, Appellant did not include the court's additional finding of: "But they have both made use of conflict." (Id.). Even the GAL's noted that "both parties have a role in the use of conflict." (CP 657).

The trial court did make a notable Conclusion of Law as to Amanda's response and actions towards Tobias: "The mother, as a result of the domestic violence she has suffered and her tacitum [sic] nature, has not been as willing to communicate." (CP 809). Dr. Smitham's evaluation of Amanda supported this Conclusion of Law. (CP 806). Dr. Smitham's evaluation also explained some of Amanda's reactions and guardedness towards the GAL. (Id.); (RP 583). Furthermore, Appellant completely disregards the evidence presented to the Court and the admonishment Tobias received for "hiding the ball" when he enrolled the children in daycare and hid it from Amanda. (RP 217-219, 363).

Finally in regards to Appellant's argument that the trial court allegedly made a presumption in favor of the mother, that allegation is not supported by the record. The Court was presented with extensive testimony and evidence of Tobias's past domestic violence, possible child

abuse, alcohol problems, anger problems, and criminal record. The Court then looked at the mother and noted that she did not have these problems. She had a strong and healthy bond with the children. Therefore, the Court concluded that this factor was a tie. But the Court assuredly did keep in mind Tobias's problems when determining what was in the best interest of the children.

In closing, Respondent asserts that there was enough evidence presented for the Court to find restrictions under RCW 26.09.191. It was in the broad discretion of the Court to find the mother as primary parent and that decision was supported by the evidence.

**3. The GAL's recommendations were considered but justifiably disregarded by the Trial Court.**

Under RCW 26.09.220, a guardian ad litem may be appointed to make **recommendations** to the Court. The trial court is not bound by the recommendations of the Guardian Ad Litem. In re Marriage of Magnuson, 141 Wn. App. 347, 170 P.3d 65 (Div III, 2007). Appellant makes an unsupported statement that "where appellate courts have affirmed a rejection of a GAL recommendation, there has been some evidence justifying the rejection of the report." (Appellant's Brief page 35). However, Appellant has no legal authority for such a statement. In Magnuson, the case supplied NO evidence as to why the trial court rejected the GAL report. Appellant also cites State ex rel. Campbell v. Cook, 86 Wn. App. 761, 938 P.2d 345 (Div III 1997) to support his

position; however, the trial Court in Campbell actually followed the GAL recommendations.

Statute and case law is clear, the trial court does not have to follow the **recommendations** of the GAL. All the GAL provides to the Court is recommendations on their opinion. At trial, the court hears all the evidence from all witnesses. The court may decide, as it did in this case, that the GAL recommendations were not in the best interest of the children.

In this case, particularly upon cross-examination of the GAL, it was clear that the GAL recommendations were not properly based in fact nor were they in the best interest of the children. During cross-examination, the GAL admitted to not including in her report substantial negative facts about Tobias including the CPS finding of child abuse, the family history of domestic violence, Tobias's history of alcohol and his family history of alcoholism, the secreting children in daycare and failing to advise the mother, the prior history of domestic violence against the mother including assaults, control, guilt and physical abuse. All the evidence considered by the trial court supported that the stability of the mother and the best interests of these children support the finding of the mother as the primary parent.

Furthermore, the trial court did make a finding in regards to the GAL report. "And so I do think this report is in part, uh, tendencious [sic] and I think that it draws conclusions really from the mother's personality, her

way of doing things, that, uh, seen from the Guardian Ad Litem's perspective, uh, says something about her parenting. I do not conclude that it does." (RP 583). In view of all the evidence, the Court did not abuse its discretion in not following the recommendations after carefully considering all testimony, exhibits and credibility of witnesses.

**B. The Appellant's Motion for Reconsideration was properly denied.**

Appellant raised as an Assignment of Error the trial court's denial of Mr. Lynn's Motion for Reconsideration; however, Appellant did not address that issue in his brief.

A motion for reconsideration is not a chance for a do over after an extensive trial on the issues. Under CR 59, a motion for reconsideration "should be filed not later than 10 days after the entry of the judgment, order or other decision." Under CR 59, the 10 day period under civil rules for serving and filing a motion for a new trial or for reconsideration begins to run upon entry of judgment, not upon receipt of the judgment by movant. Metz v. Sarandos, 91 Wn. App 357, 957 P.2d 795 (Div II 1998). Under Metz, it is clear that the trial court has no discretionary authority to extend the time period for filing a motion for reconsideration. (Id.). Petitioner failed to file his motion for reconsideration within the mandatory 10 days pursuant to CR 59, therefore, his motion should have been dismissed and not heard but was most properly denied.

Appellant based his motion on alleged newly discovered evidence; however, Appellant had cited no case law that his “evidence” was newly discovered. Furthermore, Appellant’s “evidence” was almost entirely hearsay. A party seeking reconsideration of a trial court decision on the basis of newly discovered evidence under CR 59(a) has the burden of showing that the result of the trial would probably have been different had such evidence been known. Herron v. McClanahan, 28 Wn. App 552, 625 P.2d 707 (1981). Appellant’s Motion was another attempt to change the trial evidence and take another shot at trying to change the decision that was based on the careful consideration of extensive evidence produced at trial. The trial court could have denied to hear Appellant’s motion as untimely; however, the trial court properly denied the Motion.

In the alternative, Appellant had requested that his motion be considered under CR 60. This argument fails as Appellant did not comply with the procedural requirements of CR 60(e)(1)(2) and (3). Appellant’s arguments were essentially the same arguments he made at trial. Those arguments were denied by the court at trial and at the motion for reconsideration. Additionally, a change in facts<sup>3</sup> occurring after entry of judgment is not grounds for modification or vacation of the judgment under CR 60 (b)(11). State v. Dorosky, 28 Wn. App 128, 622 P.2d 402 (Div I 1981). Therefore, the court properly denied Appellant’s Motion.

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<sup>3</sup> Respondent vehemently denied any change in facts. (CP 869-871, 872-873, and 874-876).

**C. Attorney's fees should be awarded to the Respondent.**

RAP 18.1 allows a party to request attorney's fees and expenses if applicable law grants the party the right to recover reasonable attorney's fees or expenses on review before the Court of Appeals. The applicable statute is RCW 26.09.140, which states:

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

Under the applicable section of RCW 26.09.140, the financial situation of the parties need not be considered. The award of attorney's fees is in the sound discretion of the Appellate Court.

Furthermore, RAP 18.9 authorizes an award of compensatory damages against any party who files a frivolous appeal. An appeal is frivolous if "there is no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." Streater v. White, 26 Wn. App. 430, 434-35, 613 P.2d 187 (Div. I 1980).

An award of attorney's fees to Appellee for having to defend this Appeal is appropriate in this case. Appellant has appealed a discretionary ruling of the trial court and has misstated facts to support his assertion that the trial court made improper findings. The facts and the records do not support Appellant's claims. As stated above, there is no abuse of

discretion by the trial court particularly where the court has broad discretionary powers when assessing the credibility of witnesses or determining what is in the best interest of the children. Substantial evidence supports the trial court's findings and there really are no debatable issues under the facts of this case. Therefore, this Appeal is frivolous and devoid of merit which mandates that an award of attorney's fees should be granted under both RCW 26.09.140 and RAP 18.9.

### **CONCLUSION**

The substantial evidence presented at trial supports the trial court's finding that the mother, who has no domestic violence history, no alcohol issues and has a strong and healthy bonding with the children, is the more stable parent and the Court's finding that the best interest of the children is served by being in the primary care of their mother.

Appellant's Motion for Consideration was untimely under CR 59, did not meet the requirements under CR 60, and did not show any "newly discovered evidence." Therefore, that Motion was properly denied.

Appellant's Appeal is baseless and is not based on tenable grounds. Appellant is appealing a discretionary ruling by the trial court. The trial court's decision was based on substantial evidence and applied the applicable statutory factors. The decision of the trial court was reasonable and based on the evidence produced at trial. Therefore, an

award of attorney's fees and costs for defending against this frivolous appeal is both authorized and warranted.

Submitted January 31, 2013, by:

A handwritten signature in black ink, appearing to read 'Julie Twyford', written over a horizontal line.

JULIE TWYFORD, WSBA #9497  
ATTORNEY FOR RESPONDENT

**FILED**

JAN 31 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**Court of Appeals  
Division III  
Of the State of Washington**

In re the Marriage of:

TOBIAS M. LYNN,

Appellant,

and

AMANDA S. LYNN,

Respondent.

No. 30866-9

**Return of Service**

***I Declare:***

1. I am over the age of 18 years, and I am not a party to this action.
2. I served the following documents to Thomas Webster
  - o Respondent's Amended Brief

3. The date, time and place of service were (if by mail refer to Paragraph 4 below):

Date: January 31, 2013

Time: 12:38 p.m.

4. Service was made:

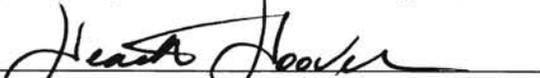
Email upon agreement of the parties. Email address tom@websterlawoffice.net and barb@websterlawoffice.net

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[X] A copy was also deposited in the US Mail addressed to Tom Webster at 116 N Main Street,  
Colville, WA 99114.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is  
true and correct.

Signed at Spokane, WA on January 31, 2013

  
Heather Hoover, WSBA 43184