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

No. 316335

**COURT OF APPEALS, DIVISION III,  
FOR THE STATE OF WASHINGTON**

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**James MacKenzie**, Respondent

v.

**Rebecca and Dave (JD) Rodriguez**, Appellants  
(And Craig Mason, Counsel, Appellant on  
Undifferentiated Sanction of 4/26/13)

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**APPELLANTS' REPLY BRIEF**

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## **I. REPLY BRIEF OF APPELLANTS**

### **A. The Trial at Issue Should Be Open to Major Modification**

Mr. James MacKenzie, Respondent, is the kind of abusive person that our legal system finds very difficult to deal with adequately, except when he tips his hand by over-reaching which exposes his true pattern of behavior, as he did here, with his domestic violence with a gun, against his domestic partner, in front of the children, followed by enlisting the children in hiding his crime, and involving them in the litigation, while also systematically sabotaging the reconciliation of the children he had with Rebecca Rodriguez with their step-father, J.D. Rodriguez.

The Opening Brief is incorporated and re-alleged herein, but a few factual highpoints are recapped, below:

After 2005, James MacKenzie and his ex-wife, Rebecca Rodriguez, had a 50/50 parenting plan. Then, in 2011, Mr. MacKenzie manipulated the children into interpreting a few hyperbolic comments of J.D. Rodriguez such that a sort of "crisis" erupted, that was resolved by an agreement to seek a "long-run resolution" of the relationship between J.D. and the three children of James and Rebecca. Agreed orders in pursuit of this "long-run resolution" were entered on 12/13/11. CP: 550-61.

The agreed parenting plan of 12/13/11 had no RCW 26.09.191 findings against Mr. or Mrs. Rodriguez. As resolution, the parties agreed

that a court "could" (or could not) find that Mr. Rodriguez's comments had been detrimental to the children, and so the agreed parenting plan was entered "in pursuit of long-run resolution." CP: 551. The order also reads that the "Mother shall continue to take children to counseling with Carol Thomas as recommended by Ms. Thomas and follow her recommendations." CP: 553. Section 4.3 states, "...there are no limiting factors against mother in paragraphs 2.1 and 2.2 above." CP: 555. The Order on Modification states in Section 2.7, "It is not in the best interests of the children at this time to have any contact with the mother's husband who resides with mother, except on terms recommended by Carol Thomas...." CP: 560. Section III states "Once Carol Thomas or another professional handling reconciliation counseling recommends contact between kids and Mr. Rodriguez, this matter will be brought to the family law commissioner if agreement cannot be reached between the parties to implement the recommendation." CP: 560.

Any reasonable interpretation of the context and the agreed orders of 12/13/11 would show that good faith in entering this agreement was reasonably expected on each side. However, only the Appellants entered this agreement in good faith. Mr. MacKenzie was operating in bad faith the entire time in 2011 before and after the agreed orders, and subsequently in 2012. CP: 277-96. The Appellants have shown how

they were fraudulently induced into this agreement, as they pled in their Motion to Vacate. CP: 357-74.

Mr. MacKenzie's pre-agreement subversion of the reconciliation of J.D. with the children, and the post-agreement subversion of the reconciliation counseling of the children, were unknown to J.D. and Rebecca until the Carol Thomas Report and notes were provided on 2/13/13. CP: 277-96. Mr. MacKenzie had fraudulently induced the agreed orders. CP: 357-74 and CP: 277-96. "But for" Mr. MacKenzie's domestic violence with a gun on 9/19/12, which exposed his bad behavior, this aggression and sabotage of reconciliation by Mr. MacKenzie would have remained a stealth action, while the Appellants could only vaguely wonder why more progress was not being made.

"There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett v. Security State Bank*, 116 Wash.2d 563, 569, 807 P.2d 356 (1991). Mr. MacKenzie violated this duty in inducing the agreed orders of 12/13/11 in absolute bad faith before and after the agreement.

The Appellant's requested relief of vacating the orders of 12/13/11, because Mr. MacKenzie fraudulently induced the agreement by promising that that he was participating in a "long-run resolution," is just and

appropriate. The absolute core of the benefit-of-the-bargain was denied to Dave (J.D.) and Rebecca Rodriguez.

From a practical viewpoint, ordering that the trial in this matter (set for 7/21/14) be scoped as a major modification is an equitable remedy for James MacKenzie's fraud of 2011, and for his subsequent subversion of reconciliation. A major modification would "re-set" the baseline of possible outcomes at trial to include a return to the 2005 plan, or even to change placement of the children to be placed primarily with Rebecca.

The other practical question is whether the 2005 parenting plan should be the effective parenting plan, if the 12/13/11 orders are vacated, or whether the court should put in place a temporary order requiring the parties to follow the recommendations of Carol Thomas. The latter would be an improved temporary relief for the Appellants.

In any event, on this appeal, J.D. and Rebecca request that the minor modification ordered on 2/15/13 instead be scoped as a major modification for the 7/21/14 trial. There is clear detriment to the children from James MacKenzie's actions, and most of those facts appeared after the 12/20/12 Petition to Modify was filed; these facts present by the forensic report of Carol Thomas are relevant under RCW 26.09.260(1)&(2).

An alternative basis to have a new, full, hearing on temporary orders, and to have a major modification available at trial, is the court's

power to order equitable remedies rooted in Mr. MacKenzie's misbehavior. *In the Parentage of L.B.*, the court summarized its equitable powers in the de facto parent context, but referenced all parenting and visitation matters (emphasis added):

Prior to any statutory governance, Washington courts relied solely on their equity jurisdiction to determine custody disputes affecting children. *See, e.g., Borenback v. Borenback*, 34 Wash.2d 172, 178–79, 208 P.2d 635 (1949). In *Borenback*, absent a controlling statute, this court addressed a dispute of a minor's custody based on the “paramount and controlling consideration [of] the welfare of the child.” *Id.* at 178, 208 P.2d 635 (citing *Brookshire v. Brookshire*, 29 Wash.2d 783, 189 P.2d 636 (1948); *Allen v. Allen*, 28 Wash.2d 219, 182 P.2d 23 (1947); *Mitchell v. Mitchell*, 24 Wash.2d 701, 166 P.2d 938 (1946); *Lindblom v. Lindblom*, 22 Wash.2d 291, 155 P.2d 790 (1945); *Flagg v. Flagg*, 192 Wash. 679, 74 P.2d 189 (1937); *Wixson v. Wixson*, 172 Wash. 151, 19 P.2d 912 (1933)). The *Borenback* court additionally recognized that in such actions “the superior court has large power and discretion regarding the custody of minor children.” *Id.* (citing *Aubry v. Aubry*, 26 Wash.2d 69, 173 P.2d 121 (1946); *Pardee v. Pardee*, 21 Wash.2d 25, 149 P.2d 522 (1944); \*698 *Eliason v. Eliason*, 10 Wash.2d 719, 118 P.2d 170 (1941); *Peterson v. Peterson*, 164 Wash. 573, 3 P.2d 1007 (1931)). As this power was not statutorily granted, it necessarily follows that the “large power and discretion,” *id.*, resting with the superior courts over such matters, arises out of common law jurisprudence. *See also Beezley v. Beezley*, 71 Wash.2d 382, 383, 427 P.2d 1015 (1967) (per curiam) (determinations regarding modification of visitation rights within the equitable judicial discretion of courts); *Klettke v. Klettke*, 48 Wash.2d 502, 506, 294 P.2d 938 (1956) (“trial courts are vested with broad judicial discretion in determining the matter of the custody of a minor child”); *Lundin v. Lundin*, 42 Wash.2d 186, 187, 254 P.2d 460 (1953) (“The court in the making of an award of custody of a minor child must do so in furtherance of its best welfare and necessarily is vested with a wide latitude of judicial discretion.”); *Cooper v. Cooper*, 83 Wash. 85, 90, 145 P. 66 (1914) (noting

trial courts may exercise equitable powers, *apart from statutory proceedings*, in modifying custody of children and citing numerous cases in support thereof).<sup>FN18</sup> \*\*172 In addition, this court has established the controlling interest behind such considerations, stating,

FN18. It is well recognized, both in Washington and nationally, that child custody and visitation orders may be established by reliance on courts' equity powers and the common law. *See* 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.3, at 484 (2d ed.1987) (noting “equity has inherent power to award custody,” and as such “custody awards may be made regardless of statutory language” provided jurisdiction exists); *see also id.* § 20.9, at 547 (same principles apply to modifications). This fact is exemplified in Washington, and elsewhere, by the historic availability of the common law writ of habeas corpus in child custody proceedings. *See, e.g., In re Application of Day*, 189 Wash. 368, 371, 65 P.2d 1049 (1937); *In re Application of Allen*, 139 Wash. at 130–31, 245 P. 919; *see also Atwood v. Atwood*, 229 Minn. 333, 336, 39 N.W.2d 103 (1949). In sum, the common law nature of custody awards cannot be disputed. *See also* 4 JOHN NORTON POMEROY LL.D., A TREATISE ON EQUITY JURISPRUDENCE §§ 1303–04, 1307 (Spencer W. Symons, 5th ed.1941).

[t]he principle that the welfare of the child is the paramount consideration has been recognized and followed by this court in many cases. The two principles, then, the welfare of the child and the right of the parent, must be considered together, the former being the more weighty.

*In re Application of Day*, 189 Wash. 368, 382, 65 P.2d 1049 (1937) (citations omitted). In sum, historically, with the \*699 paramount considerations of the child properly at the center of such disputes, Washington courts have not hesitated to exercise their common law equitable powers to award custody of minor children, at times making such awards to persons not biologically related to the child, but who nevertheless have unequivocally “parented” them. *See In re Application of Allen*, 139 Wash. 130,

130–31, 245 P. 919 (1926); *In re Custody of Stell*, 56 Wash.App. at 369–71, 783 P.2d 615; *In re Marriage of Allen*, 28 Wash.App. at 647–48, 626 P.2d 16. Equally important, there is no indication, in its enactments on the subject, that our legislature intended to provide the sole means of obtaining child custody, and our state's jurisprudence strongly suggests the continued viability of common law custodial actions.

*In re Parentage of L.B.* , 155 Wash.2d 679, 697-99, 122 P.3d 161 (2005).

No matter by what procedural route, a full trial, with possible change of placement of the children from James MacKenzie to Rebecca Rodriguez, is requested to be ordered, on remand, as the scope of the 7/21/14 trial.

The transcript of the adequate cause and temporary order hearing which lead to one of the orders on appeal (the order of 2/15/13) can be found at CP: 320-338. At the outset of the hearing, Commissioner Moe admitted that he had not read everything. He said: "Counsel, I will indicate that I have read much, but not necessarily 100% of all the material I've been given but I've got a pretty fair idea of what's been going on so...don't assume I've read a particular point but I've read most of it." CP: 321. This matter is so serious that a full exploration of facts and remedies should be provided to J.D. and Rebecca.

A full trial -- a major modification, with the full range of possible relief, once all the facts are before the court -- should be ordered for the trial set on 7/21/14.

### **B. The Motion to Vacate Was a Distinct Action**

A motion to revise the Commissioner's Ruling of 2/15/13 was held on 3/14/13 before Judge Plese. The transcript is at CP: 522-549.

At that hearing, it was understood by both parties and Judge Plese that no Motion to Vacate had been before the court on 2/15/13. Mr.

Mason stated to the court on 3/14/13: "A Motion to Vacate for the basis of fraud has no time limit and has not been filed." CP: 545. Previously, Mr. Mason had said: "That [motion to vacate] isn't the motion. Right." CP: 545. Judge Plese responded: "I understand that." Id. At that juncture, the discovery of Mr. MacKenzie's bad faith, as revealed in the Carol Thomas Report of 2/5/13 and Notes, filed 2/13/13, was at issue in support of requesting a major modification. CP: 544.

To put the Motion to Vacate at issue, a second hearing had to be subsequently noted and held on that topic. The Motion to Vacate was not before the court on 2/15/13, because the facts revealing the basis of the Motion to Vacate were unknown to the Appellants before 2/13/13. CP: 277-96, and CP: 357-74. It was not part of the 2/15/13 adequate cause hearing, and therefore could not be considered on a Motion for Revision from that hearing. It was separately and subsequently noted for hearing.

The Appellants admit that the practical difference between granting the major modification on appeal, and granting the motion to vacate on

appeal are minimal going forward, as they are two routes to open the case for full relief at trial; however, they have a backward-looking impact on temporary orders -- what orders should be in place? 2005 parenting plan? Carol Thomas recommendation? And, the distinction is relevant for the sanctions brought upon the Appellants for bringing the Motion to Vacate, when the commissioner and trial judge decided that the matters were "identical."

Restated: (1) If the major modification is granted on appeal, then the trial of 7/21/14 will have the full range of modification of the parenting plan available to the court. (2) If the motion to vacate the orders of 12/13/11 is granted on appeal, then the parties will be back to the 50/50 plan of 2005, or this court will need to direct that a new hearing on temporary orders be held in light of the 12/13/11 orders being vacated, and in light of the major modification going forward.

### **C. Sanctions Were Not Appropriate**

The case law on sanctions was summarized in the opening brief, and is re-asserted here. Sanctions should only be imposed if the filing is (a) baseless, and, (b) has no chance of success. *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004). The Motion to Vacate, brought by the Appellants, was not "baseless." Under CR 60(b) a motion to vacate due to fraud must be filed "within a reasonable time." Rebecca and J.D. filed the

motion as soon as practicable after discovering the fraud on 2/13/11 from the Carol Thomas notes and report.

Given the traumatic discoveries of Mr. MacKenzie's misbehavior, it was reasonable of the Appellants to seek every available legal option for remedy. In reversing CR 11 sanctions as an abuse of discretion, the *Dutch Village* court cited the long-standing principle that CR 11 sanctions should not "chill" representation. *Dutch Village Mall v. Pelletti*, 162 Wn.App. 531, 256 P.3d 1251 (2011), citing *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn.App. 195, 208, 211 P.3d 430 (2009).

The Appellants should not be chilled in their zeal to protect the children, either. It was an abuse of discretion for the court to sanction the Appellants and their counsel.

It is requested that the sanctions be reversed. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992).

#### **D. Other Issues Are a Matter of Regulation of the Courts**

There are other questions of general importance to decide in this case.

Assignment of Error No. 1: Is domestic violence with a gun an exigent matter upon the discovery that it occurred, or only if court action is taken immediately after it occurs, and should the law allow the perpetrator to evade that consequence by hiding the crime? In short, is Mr. MacKenzie's

involvement of the children in hiding his domestic violence for three months, CP: 277-296, a basis to deprive Rebecca Rodriguez of immediate relief after she learns of the crime and of James involving the children in hiding that crime?

The "discovery rule" is a long-standing principle by which relief should have been granted to Rebecca and J.D. upon discovery the domestic violence of James MacKenzie, and then, two months later, learning of the rest of his treacheries as revealed by Carol Thomas. For example, the *Crisman* court wrote:

In some instances, however, there is a delay between the injury and the plaintiff's discovery of it. *Allen v. State*, 118 Wash.2d 753, 758, 826 P.2d 200 (1992). If \*\*166 the delay was not caused by the plaintiff sleeping on his rights, the court may apply the discovery rule. The discovery rule operates to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim. *Allen*, 118 Wash.2d at 758, 826 P.2d 200. This rule is a court doctrine designed to balance the policies underlying statutes of limitations against the unfairness of cutting off a valid claim where the plaintiff, due to no fault of her own, could not reasonably have discovered the claim's factual elements until some time after the date of the injury. *Gazija v. Nicholas Jerns Co.*, 86 Wash.2d 215, 220-21, 543 P.2d 338 (1975); *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wash.App. 194, 215-16, 859 P.2d 619 (1993).

*Crisman v. Crisman*, 85 Wash.App. 15, 20, 931 P.2d 163 (1997).

The Appellants believe that this is legal error for the commissioner to have considered Rebecca's claim against James' domestic violence as "stale" since Rebecca acted as soon as she knew of Mr. MacKenzie's domestic violence and involvement of the children. James had hidden the facts from her, and as James had involved the children in hiding the facts. A determination on this issue, on these facts, is requested.

Assignment of Error#2: The next question addresses the Appellant's request for an emergency revision after the ruling, above.

The relevant portion of Spokane County local rule LAR 0.7 reads (emphasis added):

(e) Emergency Motions. If a party can demonstrate exigent circumstances, an emergency motion may be presented to the Presiding Judge, upon reasonable notice to the opposing party, without the necessity of meeting the requirements set forth in the above sections of this rule.

The "requirements" include a transcript of the hearing before the commissioner. LAR 0.7(b).

Mr. MacKenzie went out of his way to misrepresent to Division III that Judge Sypolt's order of 12/20/12 was a substantive ruling that there was no emergency. Response Brief at p. 9.

Instead, the order denying emergency revision, CP: 105, states, in Findings: "Good cause exists to deny motion. No record. Transcription of hearing is required." And the motion is denied. CP: 105.

Is a transcript to be required for emergency revisions? This makes it impossible to have an emergency revision. Must a judge at least rule as to whether or not an emergency exists, or may he issue a ruling without review of the facts? The Appellants suggest that a denial of an emergency revision ought to at least show sufficient findings that the denial of an emergency revision has a basis in the facts of the case.

Assignment of Error#3: This issue turns on whether all of the Carol Thomas recommendations for Mr. MacKenzie should have been ordered regarding remedy for Mr. MacKenzie's behavior. The Carol Thomas Report of 2/5/13 included the following "Concerns":

1. The children's exposure to physical and verbal fighting and conflict between their father and his previous girlfriend, their father's anger, and the inclusion of a gun in the conflict, causing the children emotional distress, including anxiety, fear, and worry,
2. The children's concerns regarding their father's drinking and its effects on his emotional and behavioral states,
3. The effect of negative statements by and pressure from the father, upon the children and reconciliation therapy with their mother and father,
4. The children's continued anxiety and fear regarding their stepfather [which the other notes show MacKenzie is causing],
5. The children's desire for more contact with their mother,
6. The children's justification of their father's behavior, excusing his actions, appearing to protect him regarding his racist statements, his use of a gun in conflict, and his drinking, and
7. The children's feelings that they had to keep highly distressful experience a secret because it would cause a "problem" if they told.

Carol Thomas Report at CP: 283-84.

Carol Thomas then recommended that James MacKenzie engage in "anger management assessment and individual therapy to address anger management issues, following all recommendations." CP: 284. This was not ordered. CP: 307-312. Given the facts, it was an abuse of discretion not to order the anger management treatment.

Carol Thomas then recommended that "Jim MacKenzie participate in weekly individual therapy in an effort to decrease his negative statements to and pressure on his children regarding reconciliation therapy with their mother and stepfather, following all recommendations." CP: 284. Again, this was not ordered. CP: 307-12. The subversion of reconciliation that was revealed by Carol Thomas, CP: 277-96, requires a stronger response from the courts, and it is an abuse of discretion not to order this remedy.

Finally, Carol Thomas also ordered that "Jim MacKenzie participate in family therapy with his children addressing their justification of his behaviors, their attempts to excuse his behaviors and protect him, and their need to keep distressful experiences a 'secret.'" CP: 284. These behaviors of Mr. MacKenzie are so egregious and so detrimental to the children that it was an abuse of discretion not to order more extensive treatment of these issues than was ordered. CP: 307-312.

The other assignments of error rest upon the Opening Brief of the

Appellant.

**E. The Facts of This Case**

This case is difficult, in that Mr. MacKenzie did subvert the reconciliation process between J.D. and the children. This slowness of reconciliation led Commissioner Moe to deny Rebecca the placement of her children on 2/15/13, as overnight visits had not yet occurred. CP: 335-36. In the motion to revise that order, Judge Plese also said, "the fact that they can't go and live with their mom and she's got J.D. there, and they cannot have contact with J.D. makes it impossible for the court to even consider a major modification at this point." CP: 547.

Carol Thomas likely had this concern, too, in not recommending overnight placement of the children with Rebecca on 2/15/13. (However, nothing in the Carol Thomas notes show that she understood Rebecca's proposal to have her parents care for the children in a nearby home, if J.D. was home, too, until further reconciliation could occur.

It was reasonable to assume that once the subversion of reconciliation by Mr. MacKenzie was uncovered on 2/13/13, that there would be a high likelihood of rapid progress in reconciliation between J.D. and the children. A trial on major modification on 7/21/14 could document and address that likely progress, and, upon major modification, could find other solutions to get the children beyond the detrimental grasp

of Mr. MacKenzie.

Admitting that the problems between J.D. and the kids have been successfully inflamed by Mr. MacKenzie, it remains the case that a full trial should be had on the detriment to the children of living with Mr. MacKenzie, and by the means of a major modification there should be the possibility of a change of placement to the children to Rebecca's primary care, at the trial of 7/21/14.

A trial of full scope is requested.

#### **F. Standards Under Potential Harm to Children**

Under the *Burrill* case, even the threat of harm is sufficient to change placement. *Burrill v. Burrill*, 113 Wn.App. 863, 56 P.3d 993 (2002), review denied, *In re Marriage of Burrill*, 149 Wn.2d 1007, 67 P.3d 1096 (2003), cited with approval in *Katara v. Katara*, 175 Wash.2d 23, 283 P.3d 546 (2012). And see *In re Marriage of Stewart*, 133 Wash.App. 545, 551, 137 P.3d 25 (2006).

A court may preclude or limit any provisions of the parenting plan if there is an abusive use of conflict by the parent that creates the danger of serious damage to the child's psychological development. RCW 26.09.191(3)(e). This standard applies in parenting plan modification cases. *In re Marriage of Watson*, 132 Wn.App. 222, 232, 130 P.3d 915 (2006).

The behavior of James MacKenzie, as documented by Carol Thomas, operating in her forensic capacity, shows a profound detriment that could justify changing placement at a full trial. CP: 277-96.

An order that the trial shall be held for a major modification is requested.

#### **G. Guardian Ad Litem**

Commissioner Moe reserved on the issue of a Guardian ad Litem being appointed, and did not appoint one. CP: 14. However, this is a case in which a full investigation is appropriate, and a remand to appoint a guardian ad litem as part of a major modification is requested.

#### **H. Additional Evidence on Review**

As the case has many ongoing issues in the run-up to the currently-scheduled minor modification trial of 7/21/14, additional information has been added to the case file, and it is requested that the court consider it under RAP 9.11. Clerk's Papers page 669 includes the Carol Thomas letter of 1/6/14 in which she states that it is in the best interests of the children that the son, J., return to a 50/50 visitation schedule, and that the daughters visit their mother Wed. to Friday at 8p.m.

The other letters of Carol Thomas, CP: 659-667, show the graduate expansion of time with the children under the same roof as J.D., which was not possible, yet, as of 2/15/13. Instead, the visitation has expanded

to the point that, by following the recommendations of Carol Thomas, the son, J., was up to visiting at a rate of 104 overnights per year, and the daughters were visiting at a rate of 52 overnights per year. This is far beyond the technical strictures of a minor modification under RCW 26.09.260. The fact that the parties had, by following the recommendations of Carol Thomas, moved beyond a minor modification quantity of change is valuable for the court to fairly resolve the issue on review; the material was not previously available; and it would be inequitable to proceed to decision without taking this information into account.

This information is also vital support for the argument of J.D. and Rebecca Rodriguez that a good faith, "long-run resolution," of returning the visitation to 50/50 was the intention of the parties on 12/13/11. There has been a pattern of practice and performance which verifies the arguments the Appellants made in their motions to vacate the orders of 12/13/11.

## **II. RELIEF REQUESTED**

Here was the relief requested in the opening brief:

Appellants, Mr. and Mrs. Rodriguez, and counsel, Craig Mason, ask the court to reverse the sanction of \$1250 regarding the hearing of 4/26/13.

Dave and Rebecca Rodriguez ask the court to: (1) grant immediate temporary restraints requiring that Mr. MacKenzie's

visits with the children be supervised at his expense, and placing the children in the care of Rebecca Rodriguez, with a hearing set to determine how to handle their proximity to JD, given that nearly another year of reconciliation counseling has passed; (2) remand with instructions to order a major modification, appoint a GAL, and to order a mental health evaluation for Mr. MacKenzie, and to otherwise maintain the restraints on Mr. MacKenzie ordered on 2/15/13; (3) remand with instructions for the hearings of 4/26/13 to be held on a proper basis (the orders of 12/13/11), with the Notes of Carol Thomas deemed as previously admitted evidence.

This phrase is very telling in that opening request: "...with a hearing set to determine how to handle their [the children's] proximity to JD, given that nearly another year of reconciliation counseling has passed..."

A new hearing should be set on temporary orders, after the request that the matter be set for a major modification is granted. The request that the 12/13/11 orders be vacated or that a hearing be held on that issue is renewed. New temporary orders are requested, as is the appointment of a Guardian ad Litem in the case, and the request that the mental health evaluation of James MacKenzie be ordered is also renewed.

Relief from the sanction collectively made against J.D., Rebecca, and Mr. Mason is also requested, as is a clarification of the evidentiary ruling that the forensic findings of Carol Thomas, admitted for the hearing by agreement of the parties on 2/15/13, be deemed to remain admissible in subsequent hearings.

The Appellants reiterate their firm conviction that the trial court did not respond with sufficient concern: (a) to James MacKenzie's domestic violence with a gun in front of the children; (b) to James MacKenzie involving the children in hiding his crime from the police and from their counselor, and from their mother; (c) to James MacKenzie involving the children in "protecting him" from criminal responsibility and from the domestic litigation; (d) to James MacKenzie sabotaging the reconciliation counseling between J.D. and the children; and (e) to James MacKenzie's bad faith before and after the good faith agreement of J.D. and Rebecca in entering the "long-run resolution" orders of 12/13/11.

Relief of a major modification trial on 7/21/14, and the other above-requested relief, is requested.

Respectfully submitted,

2/3/14



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## APPENDIX

### **RCW 26.09.191 (relevant portions)**

#### **Restrictions in temporary or permanent parenting plans.**

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or (iv) the parent has been convicted as an adult of a sex offense under:...

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

(4) In cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties.

**RCW 26.09.260 (in relevant portions)**  
**Modification of parenting plan or custody decree.**

(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. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

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

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(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

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the

residence the child is scheduled to reside in the majority of the time and:

(a) Does not exceed twenty-four full days in a calendar year; or

(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or

(c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

**Court Rules:**

**CR 60(b)&(c) (in relevant part):**

RULE 60  
RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

...

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

...

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1),

(2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

#### **CR 11: SIGNING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS**

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal

memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

#### **LAR 0.7: REVISION OF COURT COMMISSIONER'S ORDER OR JUDGMENT**

(a) Revision by Motion and Notice. Revision shall be initiated by filing a motion on a form approved by the Court, with the Clerk of the Court within 10 days after entry of the order or judgment as provided in RCW 2.24.050. The motion must specify each portion of the Order for which revision is sought. The revision form shall designate a hearing date no later than 30 days after the filing of the motion. The Motion for Revision shall also be noted in accordance with Civil Rules 6 and 7. A copy of the motion for revision shall be served upon the other party, or their counsel, if represented, within 10 days after the entry of the order or

judgment and at least five court days before the hearing date. An additional three days notice shall be required if service is by mail.

Amended effective 3/1/06

(b) Transcript Required. At least two days prior to the hearing on the motion, the moving party shall file a transcript of the oral ruling of the Commissioner. The moving party shall obtain the transcript at their expense. A copy of the transcript shall, at least two days before the hearing, also be served upon the other party and furnished to the Judge who will hear the motion. A transcript will not be required if the matter was decided by letter decision, or if no oral decision was rendered. The transcript shall be double spaced in at least eleven point type. The person preparing the transcript shall certify, under penalty of perjury, that it is an accurate transcription of the record. Failure to comply with these requirements may result in denial of the motion.

Amended effective 3/1/06

(c) Assignment and Procedure. Revision motions in cases that have been assigned, will be heard by the assigned judge. Family Law revision hearings involving non-assigned cases will be heard by the Chief Family Law Judge. Non-Family law revision hearings will be heard by the Presiding Judge. The Juvenile Judge will hear all Juvenile Court revision hearings. A Judge required by this rule to conduct the revision hearing, may, in the efficient administration of justice, assign the matter to another Judge.

Amended effective 9/1/12

(d) Hearing Procedure. Hearings before the Family Law Judges shall be scheduled at 1:30 p.m. on Thursdays. Hearings before other judges shall be set pursuant to motion procedures for each department. The hearing will be on the factual record made before the Commissioner. Argument will be up to 10 minutes per side. The moving party shall confirm with the other party whether they are ready for hearing, or whether a continuance may be requested. The moving party shall notify the Judicial Assistant to the Presiding Family Law Judge by noon, two days before the hearing date, as to the ready status of the motion. Failure to comply with this rule will result in the motion being stricken. The non-moving party may be granted sanctions if they appear at the time set for hearing and the matter is stricken due to non-compliance with the rule by the moving party. The Judge scheduled to conduct the hearing shall approve any order of continuance. If the moving party fails to appear at the time set for hearing, the Court may enter an order denying the

motion. The Juvenile Judge shall determine the setting of motions in that Court. Absent good cause, a party seeking revision shall be deemed to have abandoned the motion if they fail to calendar the case and obtain a hearing within 60 days of the filing of the motion. Multiple orders of continuance shall not be freely granted. The agreement of the parties, standing alone, may not be deemed sufficient basis for a continuance.

Amended effective 3/1/06

(e) Emergency Motions. If a party can demonstrate exigent circumstances, an emergency motion may be presented to the Presiding Judge, upon reasonable notice to the opposing party, without the necessity of meeting the requirements set forth in the above sections of this rule. The Presiding Judge may determine that exigent circumstances do not justify an emergency hearing. In that event, the moving party shall follow the procedures set forth above.

Amended effective 3/1/06

(f) Stay. The filing of a Motion for Revision does not stay the Commissioner's order. The moving party may seek a stay of the order from the Judge expected to conduct the revision hearing as set forth in this rule. A request for stay may also be addressed to the Commissioner who issued the judgment or order.

**RAP 9.11: ADDITIONAL EVIDENCE ON REVIEW**

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

(b) Where Taken. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.