

NO. 316335

**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By .....

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

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JAMES MACKENZIE, Respondent

v.

REBECCA MACKENZIE, Appellant

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RESPONSE BRIEF OF RESPONDENT

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## II. INTRODUCTION

Appellants Mr. and Mrs. Rodriguez and their attorney have filed numerous motions and this appeal setting forth every fact and pleading they believe will tempt this court to reverse the decisions of four experienced family law superior court judicial officers who **denied** mother Mrs. Rodriguez's requested relief - to punish father Mr. Mackenzie by taking the three children from his primary and sole overnight custody and have the children placed in her parent's primary care. She refused to consider the children's best interests or the children's therapist's and judicial officers' recommendations. Sanctions were awarded.

The judicial officers did not abuse their discretion in denying her requested relief or awarding sanctions. She filed frivolous and numerous motions surrounding the same set of facts in an effort to change custody, including a Motion to Vacate based on fraud, but failed to provide or prove any evidence supporting the 9 elements of fraud.

Prior to February 2011, the parents shared custody 50/50 following a 2005 trial. On December 13, 2011, an Order on Modification and Final Parenting Plan were entered by the court, signed by Mr. Rodriguez, Mrs. Rodriguez, their attorney Mr. Craig Mason, Mr. Mackenzie and his attorney. The final orders conformed to the protections ordered earlier in the year eliminating Mrs. Rodriguez's overnight visitation and Mr.

Rodriguez's contacts with the children and Mr. Mackenzie. Mr. Mackenzie had filed a Petition for Modification in February, 2011, relating to Mr. Rodriguez's abuse of the children, Mrs. Rodriguez's failure to protect her children from his abuse and threats against Mr. Mackenzie. The children and Mrs. Rodriguez had been in counseling with therapist Carol Thomas during 2011, which continued in 2012 with the occasional addition of Mr. Rodriguez.

On Thursday, December 20, 2012, Mrs. Rodriguez filed a Petition for Modification and motions seeking emergency restraining orders in Ex Parte to change custody of the children to her parents and restrict Mr. Mackenzie to supervised visits. She based her requests for relief on an incident 3 months earlier where Mr. Mackenzie demanded his former girlfriend leave his home and cocked an unloaded gun, not pointed at her, to get his point across. He is remorseful for his actions. A domestic violence order was entered between him and his former girlfriend, he submitted to the requirements of the District Court regarding possession of guns and use of alcohol and has been in counseling.

On December 20, 2012, a Court Commissioner denied Mrs. Rodriguez's requests for emergency restraining orders and a Superior Court Judge denied her Motion for Emergency Revision. The court denied her December 24, 2012, Motion for Emergency Reconsideration of

denial of emergency revision and December 31, 2012, Motion for Reconsideration.

On February 15, 2012, Commissioner Moe entered an order denying adequate cause for Mrs. Rodriguez to proceed with a major modification (change of custody) action. On March 15, 2013, Judge Plese denied revision of that order and on April 10, 2013, denied reconsideration of her denial of revision.

On April 26, 2013, Commissioner Moe denied Mrs. Rodriguez's motions for contempt and to vacate the December 13, 2011, final orders based on fraud. He also awarded sanctions against Mrs. Rodriguez and her attorney. On May 17, 2013, Judge Plese denied all motions for revision, reconsideration and clarification.

Respondent respectfully requests that this court affirm the decisions and orders entered in Spokane County Superior Court in this matter.

### **III. ASSIGNMENTS OF ERROR**

1. The trial court did not abuse its discretion by denying an ex parte emergency restraining order on 12/20/12 changing custody of the children to Mrs. Rodriguez's parents based on an event 3 months earlier, because it was not in the best interests of the children, there was no irreparable harm and there was no emergency.
2. The trial court did not abuse its discretion by denying granting an emergency revision on 12/20/12 changing custody of the children to Mrs. Rodriguez's parents based on an event 3 months earlier,

because it was not in the best interests of the children, there was no irreparable harm and there was no emergency.

3. The trial court did not abuse its discretion on 2/15/13 by denying adequate cause for a major modification or further requirements or restraints against Mr. Mackenzie because it was not in the best interests of the children.
4. The trial court did not abuse its discretion on 3/15/13 by denying revision of the court commissioner's 2/15/13 decision because it was not in the best interests of the children.
5. The trial court did not abuse its discretion on 4/10/13 by denying reconsideration of its denial of revision of the court commissioner's 2/15/13 decision because it stood by its prior order and reconsideration was not in the best interests of the children.
6. The trial court did not abuse its discretion on 4/26/13 by denying contempt and vacating the 12/13/12 agreed orders because Mrs. Rodriguez failed to meet her burden of proof regarding fraud and contempt and it was not in the best interests of the children.
7. The trial court did not abuse its discretion on 4/26/13 by denying finding Mrs. Rodriguez had met her burden of proof for elements of contempt and fraud or vacating the 12/13/12 orders by relying on children's counselor's records containing summaries of children's statements.
8. The trial court did not abuse its discretion on 4/26/13 by denying finding Mrs. Rodriguez had met her burden of proof for elements of contempt and fraud or vacating the 12/13/12 orders by relying on children's counselor's records containing summaries of children's statements.

#### **IV. STATEMENT OF THE CASE**

##### **A. BACKGROUND PRIOR TO 2012**

The history of the parents' litigation and involvement with the

children's day-to-day care are significant in evaluating whether the four judicial officers abused their discretion in their rulings from December 20, 2012 through May 2013. Mrs. Rodriguez first filed for divorce in 2001 making allegations similar to those that have been made over the past year. After a temporary orders hearing where the court denied her requests for restrictions and placed the children in Mr. Mackenzie's care, her attorney withdrew and the case was dismissed. In 2004, the Mackenzie's filed for divorce and went through a difficult divorce and trial before Spokane County Superior Court Judge Price, resulting in a 7/28/05 Final Parenting Plan. Judge Price awarded Mr. Mackenzie primary custody and denied Petitioner's request for a restricted Parenting Plan and restraining order. They were represented by counsel. Their children were 2, 5 and 6. CP 442.

Since 2005, Mrs. Rodriguez, her three attorneys and her family have tried to undo Judge Price's decisions. On July 29, 2005 – the day after the Final Parenting Plan was entered – Mrs. Rodriguez made a CPS claim alleging sexual abuse. After investigation, CPS ruled the case was “Unfounded” and closed it on 10/19/05. In 2006, she filed actions based on child and other hearsay. She was represented by counsel and the Parenting Plan was not modified. In October 2006, Mr. Mackenzie had to obtain an Order for Protection From Civil Harassment against her self-

described “bodyguard” as a result of his behavior during exchanges and other times. CP 442-43.

In 2008, Mrs. Rodriguez filed 6 separate contempt motions and was sanctioned \$500 for her frivolous actions. Commissioner Triplett awarded sanctions because “these are the most meritless contempt motions I’ve seen in family law. Besides the time bar, the hearsay rules, the fact that temporary orders were voided, I think these are pushing the envelope on CR 11 and I think Ms. Rodriguez brought these in bad faith.” Still, Respondent filed motions for reconsideration and revision, which were denied. She was represented by counsel. CP 443.

On December 13, 2011, the court entered an Order on Modification (CP 558-61) and Final Parenting Plan (CP 550-57) confirming what they had been doing the entire prior year and made it permanent. Specifically, Mrs. Rodriguez’s residential time was restricted because her husband JD had engaged in a “pattern of emotional abuse of a child.” CP 551. Since February 2011 – over 2 years before Commissioner Moe’s orders - Mrs. Rodriguez’s time had been limited to 3 afterschool visits a week year round, with an extra after school visit if she gave notice. CP 97-99. Since then, she had almost always exercised only 3 afterschool visits per week. She was not allowed any overnight visits. Her husband was prohibited from any contact with the children without

court order or agreement. No restrictions were placed on Mr. Mackenzie. She signed the orders and was represented by counsel. CP 550-557; 443.

Mrs. Rodriguez has attempted to minimize her and her husband's conduct that led to the Final Parenting Plan. Mr. Mackenzie's Modification and Protection Order action was started in February 2011, after being notified by the school counselor that the 3 children had credibly reported that Respondent's husband made threats to the kids and specific threats against Mr. Mackenzie. CP 443-44.

In February, 2011, Mrs. Rodriguez, her husband and her family denied any concerns with Mrs. Rodriguez's husband. CP 54-58, 59-81, 85-86, 87-89, 90-93. Mrs. Rodriguez filed numerous pleadings, including an inadmissible polygraph test<sup>1</sup>, making the same allegations against Mr. Mackenzie that she made before the 2005 trial, at trial, during her 2006 modification and protection order actions, during her 2008 motions for contempt and all that she has made in the last year, with the exception of the 9/22/12 incident. The inadmissible lie detector test discussed her allegations of acts that allegedly occurred prior the 2005 dissolution trial, which she continues to rely on. CP 444; CP 29-33.

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<sup>1</sup> "Polygraph evidence is normally not admissible at trial unless the parties have stipulated to its use." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn.App. 457, 466, 232 P.3d 591 (Wash.App. Div. 3 2010)(citing *State v. Justesen*, 121 Wash.App. 83, 86, 86 P.3d 1259, review denied, 152 Wash.2d 1033, 103 P.3d 202 (2004)). There was no stipulation in this case.

Despite Mrs. Rodriguez's denials and protests, in 2011, the children attended counseling with Carol Thomas and Mrs. Rodriguez, the allegations were confirmed and the December 13, 2011 Order on Modification and Final Parenting Plan were entered, incorporating protections for Mr. Mackenzie and his children. Mrs. Rodriguez signed the final pleadings and was represented by counsel throughout. CP 444.

Prior to the orders that are the subject of this appeal, Mr. Mackenzie had been the sole overnight caregiver for their children for over two years. Before that, he was the primary caregiver, but it was close to a 50/50 Parenting Plan. Their oldest, Julie, was a 14-year-old, straight-A 8<sup>th</sup> grader who had only been late to 2 classes the prior school year. Their middle child, Joseph, was a 7<sup>th</sup> grader who had a B average and had also only been late to 2 classes the prior school year. Their youngest, Jordan, had only missed 3 days of school the prior year and 3.5 the year before. This is compared to 10, 12, 9.5 and 18 days missed the prior years when Mrs. Rodriguez was responsible for getting the kids to school. CP 444.

During the year before Mrs. Rodriguez filed the present motions, Mr. Mackenzie had arranged tutoring for Joseph and Jordan and for Julie to go on a once and a lifetime school trip to New York and Washington DC through her school. He also obtained scholarships and transported the

children to week-long camps. Mrs. Rodriguez initially fought all of these attempts including after school activities that might interfere with her visitation. Mr. Mackenzie opened up a secondhand collectibles shop on Garland so he could be near the kids' school and be available for their care whenever they needed. Before that, he had been a hotel bartender working hours that did not conflict with his time with the kids. CP 444-45.

**B. DECEMBER 2012 MOTIONS FOR EMERGENCY CHANGE OF CUSTODY AND RESTRAINTS**

On Thursday afternoon, December 20, 2012, just before Christmas, Mrs. Rodriguez filed numerous pleadings in an attempt to get restraining and other orders modifying the December 13, 2012, Parenting Plan to have her parents be primary caregivers, caring for the kids at a home they will move to which was outside the kids' current school boundaries. CP 644; CP 577. She asked the court to substitute "time with her parents" for what had been Mr. Mackenzie's time – primary custody every overnight – and she would have her usual visitation 3 afternoons per week. *Id.*

The court denied Mrs. Rodriguez's motions for emergency restraining orders following oral argument (CP 658) and the presiding superior court judge denied emergency revision. CP 105. It was not an emergency, so revision had to be brought as a motion for revision before the assigned judge and a copy of the transcript provided.

In support of her emergency motions and later request for major modification, the ONLY incident that Mrs. Rodriguez alleged happened after the December 13, 2011 final orders was an incident on September 19, 2012. CP 642-46; 651-57. Mr. Mackenzie admitted he made a mistake when he was holding an unloaded gun to get his then girlfriend to leave his house after she wouldn't leave. He explained that refused to leave before and he was tired of it. He broke up with her, she wouldn't leave and he didn't want to call the police. He did not point the gun at her and did not shove her. She was scaring him and his children and he needed her to leave. She did. He surrendered the gun and has not had any guns in his house since then. CP 163-64.

Mr. Mackenzie has no desire to have any future contact with his ex-girlfriend, a DV Order was entered and he is prohibited from possessing firearms for 2 years. The criminal charge for displaying a weapon was dismissed because he had a statutory right to display a weapon in his own home and did not point it at her. The other charge was pending, but he passed a drug/alcohol evaluation and at the time of the adequate cause hearing believed the other charge would be dismissed as long as he does not violate the law for the next 12 months. CP 163-64.

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**C. 2013 MOTIONS FOR MAJOR MODIFICATION, VACATE AND CONTEMPT**

Mrs. Rodriguez's hearing to determine whether adequate cause existed for the major modification was not until February 15, 2013, almost 2 months after her "emergency" restraint and custody change requests. CP 310-12. In a well-reasoned opinion, Commissioner Moe denied a major modification, i.e. custody change. *Id.*; CP 332-37. He did order that an order be entered prohibiting Mr. Mackenzie from any acts of domestic violence toward the children, prohibited Mr. Mackenzie from consuming alcohol while the children were present and required 4 months of counseling for him and the children to address their counselor's concerns. CP 307-08.

Mrs. Rodriguez sought revision of the commissioner's orders, but Judge Plese denied revision in a well-reasoned opinion on March 14, 2013. CP 347; 545-48. On March 22, 2013, Mrs. Rodriguez filed a Motion for Reconsideration of Denial of Revision. CP 351-54. On April 10, 2013, Judge Plese denied reconsideration (CP 404) and sent a letter to counsel advising of the denial and noting that there was an upcoming show cause hearing "with almost identical issues being raised that has previously been heard twice by the court." CP 405. On April 17, 2013, Mrs. Rodriguez filed a Motion for Reconsideration (Clarification) of

Denial of Reconsideration of Denial of Revision. CP 397-402. On May 17, 2013, Judge Plese, in a very clear letter to counsel, denied all of Mrs. Rodriguez's various motions to reconsider, revise and clarify based on essentially the same set of facts. CP 503-04.

On March 22, 2013, Mrs. Rodriguez filed a Motion and Declaration for Order to Show Cause re: Contempt, alleging Mr. Mackenzie violated the 12/13/11 Parenting Plan by making disparaging remarks about Mr. Rodriguez in the presence of the children, subverting reconciliation counseling ordered in the 12/13/11 Parenting Plan and refusing to sign the DV Order ordered by the court on 2/15/13. CP 349-50.

Because Mrs. Rodriguez could not get the court change custody from the 12/13/11 orders based on what happened AFTER they were entered, on April 9, 2013, she filed a Motion to Vacate, asking the court to vacate the 12/13/11 orders based on alleged facts going back BEFORE the orders were entered, as well as the same facts allegedly occurring AFTER the orders included in the prior motions. CP 368-74. It was essentially the same motion as the modification – she claimed Mr. Mackenzie's alleged bad acts should be reason to throw out the prior orders. She failed to bring a CR 60 motion to vacate during the 1 year after the 12/13/12 orders, so

she could not rely on the basis such as mistakes, excusable neglect, or newly discovered evidence under CR 60(b). Instead, the facts she alleged tried to combine mistakes, excusable neglect, or newly discovered evidence but rename them “fraud” and “other reasons” to get around the one year requirement. Id.

Although Mrs. Rodriguez claimed Mr. Mackenzie’s fraud was enough to vacate the 12/13/12 Parenting Plan, she did not allege or prove specific facts supporting all of the 9 elements of fraud – 1) a representation or misrepresentation by Mr. Mackenzie of an existing fact, 2) the fact was material, 3) the fact was false, 4) Mr. Mackenzie knew it was false, 5) Mr. Mackenzie intended Mrs. Mackenzie to rely on the false representation, 6) Mrs. Rodriguez did not know the representation was false, 7) Mrs. Rodriguez reasonably relied on Mr. Mackenzie’s false representation, 8) Mrs. Rodriguez had a right to rely on the representation and 9) Mrs. Rodriguez was damaged as a result. Id. She did not allege ANY representation by Mr. Mackenzie that was false or that she could have reasonably relied upon. Id.

On April 26, 2013, Commissioner Moe denied contempt, denied vacating the 12/13/12 Parenting Plan and awarded sanctions. CP 490. He explained his rulings very clearly in his oral findings and opinion. CP 517-20.

## V. ARGUMENT

### A. Standard of Review – Abuse of Discretion.

Mrs. Rodriguez has not met her burden to show manifest abuse of discretion in the trial court's numerous decisions denying her relief and awarding sanctions.

Trial court decisions in a dissolution action will seldom be changed upon appeal—the spouse who challenges such decisions bears the heavy burden of showing a **manifest abuse of discretion** on the part of the trial court. *In re Marriage of Landry*, 103 Wash.2d 807, 809-10, 699 P.2d 214 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Id.* at 47, 940 P.2d 1362.

*In re Marriage of Bowen*, 168 Wn.App. 581, 586-87, 279 P.3d 885 (Wash.App. Div. 3 2012)(emphasis added).

- B. Commissioner Moe did not abuse his discretion when he properly denied Mrs. Rodriguez's Motion to Vacate the 12/13/12 agreed final orders she and her attorney signed because she did not meet her burden of proof under CR 60 for the 9 elements of fraud and it was in the best interests of the children.

The trial court did not clearly abuse its discretion when denying

Mrs. Rodriguez's Motion to Vacate. "Motions for vacation or relief of a judgment under CR 60(b) are within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *Flannagan v. Flannagan*, 42 Wn.App. 214, 223, 709 P.2d 1247 (1985), citing *Morgan v. Burks*, 17 Wash.App. 193, 197, 563 P.2d 1260 (1977).

Mrs. Rodriguez did not file a CR 60(b) Motion to Vacate the final Parenting Plan and Order of Modification within one year of their entry, so she was barred from seeking relief under CR 60 (b)(1) – (3). Instead, she relied on Mr. Mackenzie's alleged fraud and bad faith conduct to support her motion. However, she did not allege or prove the necessary elements required to succeed. Significantly, Mrs. Rodriguez, her attorney and her husband signed the 12/13/11 Order on Modification and Final Parenting Plan.

First, the motion to vacate must be timely. CR60(b). The restrictions and limited visitation had been in effect over 2 years and the final orders had been in effect for over 1 year before she filed her Motion to Vacate. Needless to say, the parties and children were used to the restrictions and limitations.

Second, in order to vacate a final order, the petitioning party must demonstrate a "meritorious defense" (i.e. a substantial potential for

prevailing on the merits) and present “extraordinary circumstances” to justify requiring the parties to resume litigation. *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 303, 976 P.2d 1240 (1999); *Flannagan v. Flannagan*, 42 Wn. App. 214, 224, 709 P.2d 1247 (1985).

Mrs. Rodriguez did not demonstrate a meritorious defense or extraordinary circumstances. She has never alleged any facts to support a defense to the 2011 Petition for Modification; that she might have succeeded in eliminating the restrictions and limitations placed on her visitation. In February 2011, she denied any problems between Mr. Rodriguez, filed numerous declarations of friends and family and an inadmissible lie detector test attempting to prove Mr. Mackenzie was a bad character. Yet, she continued to be subject to temporary orders limiting her visitation until the December 2011 orders finalized this limitation. If she had any meritorious defense, she wouldn't have done that. Instead, based on her counseling with the children and actual knowledge, she, her husband and her attorney signed the 12/13/11 Order on Modification and Final Parenting Plan.

Third, Mrs. Rodriguez alleges “Fraud” as a reason to vacate. She cites *Stiley v. Block* for “a listing of the nine elements of fraud.” Appellant's Brief p. 25. However, she does not list them in her Brief and

never has in her prior pleadings, let alone alleged and proven facts by clear, cogent and convincing evidence to support them. For the court's ease of reference, they are included as follows:

Each element of fraud must be established by "clear, cogent and convincing evidence." The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

*Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

Mrs. Rodriguez does not allege, let alone prove, any statement, representation or misrepresentation Mr. Mackenzie or her attorney made to her to force her, her attorney and her husband to sign the 12/13/11 orders. She hasn't alleged or proven that anything said was false. She can't because they didn't make any such statements.

Mrs. Rodriguez asks this court to believe that Mr. Mackenzie somehow tricked her in 2011 and failed to let her know he was fighting for custody to remain with him and her visits reduced. She had full access to the pleadings and counseling records, even the counselor; she attended counseling with the children.

Mrs. Rodriguez has not alleged or proven that she reasonably

relied on anything Mr. Mackenzie said or did. She has a long history of litigation with Mr. Mackenzie regarding their children, where she has alleged that he is an abusive, mean, violent, lying, disreputable scoundrel who cannot be trusted. Yet, she argues that in December 2011, after at first denying any problems between Mr. Rodriguez and her children, losing visitation with her children, while she was attending counseling with the children and hearing all their concerns about Mr. Rodriguez, having full access to the children's records, while being represented by an attorney, Mr. Mackenzie somehow tricked her, her husband and their attorney into signing the Final Parenting Plan and Order on Modification. It defies belief.

Mrs. Rodriguez attempts a "Hail Mary" request to vacate under CR 60(b)(11), but it also fails. Vacating a final order under CR 60(b)(11) requires extraordinary circumstances, but such circumstance must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings. *In re Marriage of Knutson*, 114 Wn. App. 866, 873, 60 P.3d 681 (2003); *Hammack v. Hammack*, 114 Wn. App. 805, 810, 60 P.3d 663 (2003); *In re Marriage of Jennings*, 138 Wn.2d 612, 625, 980 P.2d 1248 (1999). Mrs. Rodriguez has filed numerous pleadings throwing out any fact, true or false, that she believes will tempt the court to give her custody. She has not alleged or proven

enough and the trial court did not abuse its discretion in denying her relief.

Sanctions were appropriate against Mrs. Rodriguez and her attorney when they filed numerous motions, especially the Motion to Vacate based on Fraud, and failed to allege or prove the necessary elements. Their conduct throughout this case violated CR11. The Motion to Vacate was not well grounded in fact and was brought for the improper purpose of harassing Mr. Mackenzie and his attorney, cause unnecessary delay and needlessly increase the costs of litigation. Mrs. Rodriguez and her attorney continued their conduct despite rulings and advice of judicial officers, filing motions for revision, reconsideration, clarification and appeal.

Finally, Mrs. Rodriguez claims that Commissioner Moe retroactively excluded the notes of Carol Thomas in his consideration of the motions to vacate and for contempt. Appellant's Brief, p. 25-26. In the hearings regarding adequate cause for a major modification, the court considered the notes and children's statements as part of his evaluation of the children's counselor's recommendations and what the children were going through. He did not exclude them. He did not believe they were admissible or sufficient to prove the elements necessary to vacate or find Mr. Mackenzie in contempt. He explained that under ER 803, the

statements were admissible to reveal what the children said in therapy for purposes of reviewing the counselor's recommendations, but it did not mean what they said was true. CP 517.

C. Commissioner Moe did not abuse his discretion when he properly denied Mrs. Rodriguez's Motion for Contempt because she did not meet her burden of proof of an intentional violation of a court order in bad faith.

Mrs. Rodriguez did not meet her burden of proof and the trial court did not abuse its discretion in denying contempt. She relied solely on the children's counselor's notes to prove that Mr. Mackenzie intentionally violated the court's 12/13/11 orders in bad faith, i.e. the counselor's notes reported the kids said Mr. Mackenzie said something, so it is proven that he said or did it. Mr. Mackenzie denied or explained the statements and placed them in context. Furthermore, Commissioner Moe even noted as follows:

**Assuming the statements are true**, I think dad has offered his explanation. He was trying to basically make sure the kids made those comments to Carol Thomas because those are some of the issues that he felt they needed to work on. Whether they were true or not is – is irrelevant and – even if they were true, I'm – I'm looking for a nexus between dad's statements to the kids, to the therapist, how that's got anything to do with the Agreed Plan.

CP 517-18 (emphasis added).

Mrs. Rodriguez cites *In re Marriage of Farr*, 87 Wn.App. 177, 180-84, 940 P.2d 679 (1997), to support or position that Mr. Mackenzie

“clearly was in contempt of court.” Appellant’s Brief, p.26. However, in *Farr*, the court found contempt based on the proof in father’s numerous statements in recorded messages, the arbitrator’s testimony that he refused to cooperate with the arbitrator, and his admission that he unilaterally selected the child’s counselor and testimony of people who witnessed him making disparaging remarks clearly in violation of the court’s orders. *Id.* at 181-82.

Mrs. Rodriguez did not meet her burden of proof regarding contempt so the trial court did not abuse its discretion in denying her motion.

D. Commissioner Moe did not abuse his discretion when he properly awarded sanctions for frivolous motions Mrs. Rodriguez and her attorney filed that failed to include proof of all the necessary elements necessary for the relief sought.

The trial court did not abuse its discretion in awarding \$1,250 in sanctions against Mrs. Rodriguez, her attorney and husband. If anything, the sanctions were insufficient to address the pleadings filed by them in this matter. Mrs. Rodriguez filed a Motion to Vacate based on fraud without alleging or offering any proof of the elements required. *Infra* 16-18. They filed a Motion for Contempt alleging violations of the 12/13/11 orders that were specifically addressed to Mrs. Rodriguez and her husband and did not submit admissible evidence to support the motion. *Infra* 20-

21.

Commissioner Moe set forth the basis for his award of sanctions in his oral ruling, incorporated into his order. CP 517-20; 489-90.

- E. Commissioner Moe and Judge Plese did not abuse their discretion when they properly denied Mrs. Rodriguez's various motions and requests for relief as she had not met her burden of proof, submitted sufficient allegations and it was in the best interests of the children.

Despite the claims of Mrs. Rodriguez, all of her motions surrounded the basic premise that Mr. Mackenzie was a bad person who displayed a gun in a threatening manner to someone else while the children were present, so the children who had resided in his primary care for their whole lives, should be uprooted from their home and placed with Mrs. Rodriguez's parents pending Mrs. Rodriguez and her husband's ability to convince a court that the children are not in danger at her home. She attacked this premise from a number of different directions, but failed to support allegations that there was a substantial change in their environment with Mr. Mackenzie causing them detriment. She seemed to ignore these elements, as well as the best interests of the children. As Commissioner Moe noted: "And then more importantly for the last year and a half, the kids have done well under that Parenting Plan. By all accounts, they're good students and there's certainly no detriment." CP 519.

Trial courts are given broad discretion in matters dealing with the welfare of children. *In re Marriage of McDole*, 122 Wash.2d 604, 610, 859 P.2d 1239 (1993); *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Cabalquinto*, 100 Wash.2d 325, 327-28, 669 P.2d 886 (1983). **Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification.** *McDole*, 122 Wash.2d at 610, 859 P.2d 1239.

RCW 26.09.260 provides the threshold for major modifications, in pertinent part:

(1) Except as otherwise provided in subsection (4) of this section, **the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.**

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

....

**(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the**

**harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.**

(Emphasis added). “There are two reasons for this. First, as we have mentioned, litigation is harmful to children. And, second, prior custody arrangements which follow sometimes complex litigation or negotiations should be given great deference.” *In re Jannot*, 110 Wn.App. 16, 23-25, 37 P.3d 1265 (2002). As a result, the adequate cause threshold for major modifications is very high. See, e.g., *In re Parentage of Schroeder*, 106 Wn. App 343, 350, 22 P.3d 1280 (2001).

Judge Plese did not treat the various motions as “identical.” She heard oral argument and decided the various motions for revision, reconsideration and clarification. However, after hearing and reviewing the numerous motions filed by Mrs. Rodriguez, she did deny reconsideration of her denial of revision and then also said: “The Court notes that there is a show cause hearing set on April 19, 2013, with almost identical issues being raised that had previously been heard twice by this court.” CP 405. She later refused to revise or modify any of Commissioner Moe’s Orders as requested by Mrs. Rodriguez. CP 503-04.

F. Commissioner Moe and Judge Plese did not abuse their discretion when they properly set and recognized appropriate protections for the children and denied further domestic violence remedies because this was in the best interests of the children.

The judicial officers who reviewed the file and heard oral arguments did not abuse their discretion in fashioning remedies relating to the one domestic violence incident involving Mr. Mackenzie. Mrs. Rodriguez's attempt to compare the single incident involving Mr. Mackenzie and his former girlfriend with the facts and ruling in *In re Marriage of Stewart* to support a change of custody to her parents is not reasonable:

The permanent parenting plan established [mother] Nichole as the primary residential parent.

Since then, there have been multiple incidents of domestic violence. In February 2002, Nichole picked up R.S. after a school basketball practice. [Father] Wilson is the team's coach. He reached into Nichole's car and smeared chewing gum in her hair, berating her in vulgar terms about her romantic life. Both children were present, and R.S. attempted to call 911 on a cell phone.

Wilson initially denied the incident occurred, but later pleaded guilty to assault in the fourth degree, and was ordered to participate in domestic violence treatment as part of his sentence. A no-contact order was issued, and Nichole also obtained a permanent restraining order prohibiting Wilson from harassing her, stalking her, or entering her home or workplace without her permission. The order provided that all exchanges of the children occur curbside at each party's residence.

Five days later, Wilson violated the order by following Nichole's car in the late evening, leaving messages on her cell phone marking her progress. Nicole contacted police. Wilson denied stalking Nichole or making the calls. After officers listened to the recordings on Nichole's voice mail,

they arrested Wilson for violating the protection order.

In July 2003, the parties amended their parenting plan to require co-parent counseling aimed at reaching agreement on minor modifications to the residential schedule, and adding a Starbucks in Bothell as a location for visitation exchanges.

In March 2004, Wilson completed the domestic violence treatment required by the February 2002 protection order. That same month, during a visitation exchange, he is alleged to have shoved his hand down Nichole's pants and then forced his finger into her mouth, in the presence of S.S. In September 2004, Wilson allegedly barged into Nichole's home, accused her of seeing other men, and, with the children present, ripped the comforter off her bed to examine the sheets for evidence of sex.

On Christmas Day 2004, the Stewarts were to do a curbside exchange of the children at Wilson's house. When Nichole arrived to drop off the children, Wilson approached and tried to reach her through the car window. He then spat upon her in front of the children. The children apparently confronted Wilson about this incident later in the day. Nichole testified that S.S. telephoned her several times from Wilson's house, crying and then hanging up because she was afraid Wilson would catch her calling Nichole. Wilson was later charged with assault in the fourth degree and violation of the 2002 restraining order.

After this incident, Nichole sought the chapter 26.50 RCW domestic violence protection order at issue here. A superior court commissioner granted the order on a temporary basis and suspended the parenting plan pending the statutory 14-day hearing.

At the 14-day hearing on January 26, 2005, Nichole presented her declaration and police reports detailing the incidents of domestic violence. Wilson denied Nichole's allegations, and asserted instead that Nichole had initiated sexual encounters with him. It is apparent from his

declaration that Wilson had asked the children about their mother's romantic life. Wilson also acknowledged that the night before the incident, Christmas Eve, he drove past Nichole's house and observed her fiancé's car in the driveway, and that he saw it there again when he drove by at 7:00 a.m. Christmas morning.

The commissioner entered a one-year protection order prohibiting Wilson from contact with Nichole or the children.

133 Wn.App.545, 547-49, 137 P.3d 25 (2006).

In the present case, Mr. Mackenzie is and has always been the primary custodial parent of their children. One incident should not uproot the children from all they have come to rely on and do well in. The remedies the court adopted were sufficient to meet the concerns of the court and maintain the living situation of the children.

G. Commissioner Kim and Judge Sypolt did not abuse their discretion 5 days before Christmas when they refused to enter emergency restraining orders and change custody to Mrs. Rodriguez's parents because it was not an emergency or in the best interests of the children.

The trial court did not abuse its discretion when it denied Mrs. Rodriguez's requests for emergency restraining orders and custody change to her parents without a full hearing and the opportunity to present evidence. The trial court's decisions allowed the children not to be uprooted from their home with their father and placed in the primary care

of Mrs. Rodriguez's parents during Christmas break. The decisions allowed the children's counselor to be involved in therapeutic and forensic counseling and provide recommendations to the court at a full hearing.

This custody case is not like a personal injury case like Mrs. Rodriguez cites, *Crisman v. Crisman*, 85 Wash, App. 15, 20, 931 P.2d 163 (1997). Her failure to discover or Mr. Mackenzie's or the children's failure to disclose a domestic violence incident should not trump the best interests of the children.

Judge Sypolt also recognized that the motions Mrs. Rodriguez was seeking to use as an emergency were not a true emergency by denying emergency revision. Although Spokane County's local rules allow for an emergency motion for revision, "[t]he presiding judge may determine that exigent circumstances do not justify an emergency hearing" and the moving party must follow the regular procedures for revision. LAR 0.7(e). By his order denying emergency revision and requiring a transcript, Judge Sypolt determined that exigent circumstances did not justify an emergency hearing.

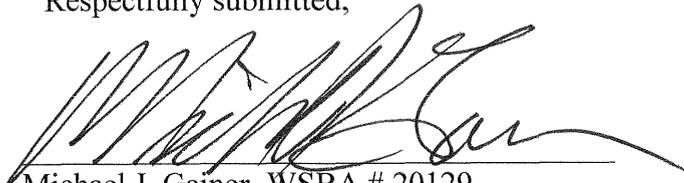
## **VI. RELIEF REQUESTED**

Mr. Mackenzie requests that the trial court's orders be affirmed, Mrs. Rodriguez's appeal be denied and attorneys' fees be awarded for the time spent preparing for and responding to the appeal. CR11; RAP 18.9

(a). Mrs. Rofl driguez's intransigence, filing motions without basis in law or fact, and filing numerous motions for reconsideration, revision, clarification and appeal to harass and unnecessarily increase the costs of litigation should not be rewarded.

Dated: December 2, 2013.

Respectfully submitted,



Michael J. Gainer, WSBA # 20129

Attorney for James Mackenzie

**PROOF OF SERVICE**

I hereby certify that on this date I did personally deliver a true and correct copy of this Response Brief of Respondent to

Craig Mason  
Attorney for Appellant  
W. 1707 Broadway  
Spokane, WA 99201.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and Dated: December 2, 2013.



Michael J. Gainer, WSBA# 20219

Attorney for Respondent