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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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Robert W. Parrish, Jr,  
RESPONDENT,

vs.

Alaxandria M. von Hell,  
APPELLANT.

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BRIEF OF APPELLANT

Alaxandria M. von Hell

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## A. ASSIGNMENTS OF ERROR

1. By way of entry of “Stipulated Order Registering Out of State Custody Determination Pursuant to RCW 26.27.441 dated December 16, 2014, the superior court of Benton/Franklin County, State of Washington (hereafter superior court) erred in exercising subject matter jurisdiction. CP 1–13.

2. The superior court further erred in entering that part of its Judgment on December 16, 2014 which states:

“The Respondent hereby waives service of notice and is in agreement with the registered determination. The Superior Court for the State of Alaska Third Judicial District at Anchorage no longer has exclusive, continuing jurisdiction under RCW 26.27.211 and Benton County Superior Court is a more convenient forum under RCW 26.27.261.” CP 1-2

3. By way of “Final Order and Findings on Petition to Change Parenting Plan, Residential schedule or custody order” dated December 13, 2016, the superior court erred in exercising subject matter jurisdiction which section 2. Jurisdiction states:

“The court **can** decide this case because: Home State Jurisdiction Washington is the child’s home state because: TIERNAN PARRISH lived in Washington with a parent or a person acting as a parent for at least 6 months just before the case was filed, or if the child is less than 6 months old when the case was filed, they have lived in Washington with a parent or someone acting as a parent since birth.” CP 74.

4. By way of “Amended” Order on Adequate Cause to Change a Parenting/Custody Order dated June 9, 2017 the superior court erred in exercising subject matter jurisdiction, by stating:

“The court has jurisdiction over this case. The court retained jurisdiction over the final parenting plan in this matter. to determine whether this matter would continue forward with an amended order on

adequate cause.” CP 374. b. By way of “Order on Reconsideration” of February 23, 2017 the superior court erred in exercising subject matter jurisdiction.” CP 132-134.

5. The superior court further erred in exercising subject matter jurisdiction when it vacated the Final Parenting Plan it entered December 13, 2016 and order on reconsideration entered February 23, 2017 and made those orders into temporary parenting plans on June 9, 2017. CP 375.

6. The superior court erred in entering orders “striking show cause contempt hearing, granting motion for temporary parenting plan and granting motion for continuance” on August 11, 2017 without subject matter jurisdiction. CP 255-258

7. The superior court likewise erred on September 19, 2017 in entering a 3<sup>rd</sup> modified temporary custody order based on a contempt finding of the 12/13/2016 order that had been vacated on June 9, 2017. The September 19, 2017 3<sup>rd</sup> modified temporary custody orders CP 49-52 were entered after a 2<sup>nd</sup> modified temporary order changing custody, dated August 11, 2017 was stayed by the Court of Appeals on September 5, 2017 which states:

“at section 4 “The parenting/custody order was not obeyed. Alexandria von Hell did not obey the following parts of the parenting/custody order signed by the court on 12/13/2016....Allowing father his skype and reasonable telephone calls and texts at section 14. Relocation with notice under section 13...” Respondent has not allowed Skype and telephone calls or texts between father and child since August 20. . .” at **section 5. Restraining Order or Other Order “Does not apply. This contempt hearing did not cover any restraining order or**

**any other orders”** at section 9. Make-Up Parenting time “does not apply” and at section 11. Contempt can be corrected (purged) if: Respondent starts allowing Skype, telephone calls and texts between father and child.” CP 34-37.

8. The superior court simultaneously erred in exercising subject matter jurisdiction entering that part of its September 19, 2017, ex- parte order, at section 2. Findings, which states:

“The Petitioner made a Motion for Temporary Family Law Order . . . and the court finds there is a reason to approve this order. Specific findings: On September 18, 2017, the court is making a finding that mother has refused to allow Skype calls between father and child as previously ordered by the court. The new evidence before this court supports a finding that mother has absconded with the child to Wisconsin. This was an unauthorized relocation of the child from Washington State.” CP 49-52.

9. With respect to the May 24, 2016, Order Appointing Guardian Ad Litem the Superior Court erred by:

- a) Appointing the GAL for lack of subject matter jurisdiction. CP 450-455.
- b) Appointing the GAL per RCW 26.09 Dissolution. CP 450.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR RE:**

**SUBJECT MATTER JURISDICTION**

1. Whether, as a matter of law, the superior court had subject matter jurisdiction at the commencement of the proceedings to make rulings concerning the minor child and subsequently to proceed to trial twice? Assignments of Error number 1-10.

2. Whether, as a matter of law, the superior court subsequently acquired subject matter jurisdiction to make rulings concerning the minor child and subsequently proceed to two separate trials? Assignments of Error numbers 1-10.
3. Whether the superior court, abused its discretion, by entry of the court's opinion, Findings, Conclusions, Judgment and Residential Schedules, for Temporary and Final Orders? Assignments of Error numbers 1-10.
4. Whether, the superior court, abused its discretion, by failing to comply with the Uniform Child Custody Jurisdiction Enforcement Act and the Parental Kidnapping Prevention Act? Assignments of Error numbers 1-10

### **C. STATEMENT OF THE CASE**

Factual Background: This modification action was commenced by Mr. Parrish in superior court case number 14-3- 50267-9 in July, 2014. A domestic case scheduling order was entered August 4, 2014. CP 114. The case was consolidated to case number 14-3-00847-4. The party's child, Tiernan Adric Parrish was 5 years old. CP 93-95. When the case was tried on July 27 to August 4, 2016, Tiernan was 7 years old. At second trial on October 17, 2017 Tiernan was 9 years old. CP 474-489.

Both parties lived separately in Alaska and Tiernan resided solely with his mother until the mother and child relocated for a time, so that mother could attend college. CP 119, EX 62-63.

As reflected in the Alaska Superior Court Orders “Order RE: Motion to Modify Custody and Visitation” dated January 10, 2013 and the “Findings of Fact and Conclusions of Law” entered on January 11, 2013:

"A hearing was held on Plaintiff's Motion to Modify Custody... Defendant (hereinafter "Mother") relocated to the state of Washington with the parties' minor child. Plaintiff (hereinafter "Father") moves to change custody and visitation previously set out by the parties... Father moves for primary physical and sole legal custody of the parties' son, Tiernan Parrish (DOB 08/09/2009).

Mother opposes the motion. **IT IS HEREBY ORDERED** that the Motion to Modify physical and legal custody of the parties' minor son is **DENIED**. Mother will continue her status as the primary physical and legal custodian of Tiernan... III. Other Communications Skype. . . It is based on a use it or lose it rule. . . IV. Other Visits. Father cannot go over 109 overnights per year. V. No Contact Order, A No Contact Order is in effect." CP 1-13

Tiernan continued to live with his mother in WA, who was his sole custodian per the Alaska Child Custody Decree. CP 1-13. The WA superior Court issued a Temporary Order Changing Custody on September 19, 2017 when Tiernan was 9 years old, until then he had lived only with his mother. It is undisputed that the child was enrolled in school and sports and in a six day trial, teachers, coaches, witnesses testified the mother was very involved that was excelling in both. EX 31-36. Ms. Von Hell also attended to all of her son's medical needs. When the child

contracted Lyme disease while visiting the father, it was the mother that sought medical care and treatment for him. EX 44-45.

Mr. Parrish continued active litigation in the Alaska Superior Court and the Alaska Supreme Courts, while simultaneously filing modification actions in WA superior courts.

Procedural History: On February 4, 2011, the Alaska Superior Court in Anchorage issued a Final Parenting Plan and Child Custody Decree. The order addressed the residential provisions for the minor child, Tiernan Adric Parrish and placed him in his mother's "primary custody." The order also gave mother "sole decision making" and ordered Mr. Parrish to have "Supervised visits, Attend a 12-week Anger Management program, Parenting Classes" EX 27

Mr. Parrish moved to modify the February 4, 2011 order in September, 2012. Ms. Von Hell cross-petitioned to relocate to Washington State to attend college. On January 10, 2013 after a four day modification trial the Anchorage, Alaska Superior Court denied the father's modification petition and granted the mother permission to relocate to Washington State with Tiernan. Mr. Parrish remained in Alaska. EX 27, 47 and CP 88-90 .The order also specified future limited visitation for Mr. Parrish and the court entered a no contact order under "part V. No Contact Order".

Mr. Parrish then filed an appeal in the Alaska Supreme Court under cause number S15048 on February 12, 2013. He then simultaneously filed a new petition concerning custody of the child in Kittitas County superior court, on April 16, 2013, under cause number 13-3-00062-4. His petition opined that Alaska had not entered a parenting plan and referred to the Alaska decree, as “parentage” orders as stated:

Under section 2.1 **“The court entered a judgement and order establishing parentage** on (date) September 5<sup>th</sup>, 2012 at (county and state) Alaska Superior Court under the cause number 3AN-10-10173CI **and did not enter a parenting plan or Residential Schedule at the same time.”** [CP 78] Under section 2.4 Jurisdiction and venue “The requesting party/parties reside(s) in . . . Anchorage, Alaska [CP 71] under 2.13 “Currently, Melissa Parrish and Tiernan Parrish have lived in Washington for 9 months. The petitioner respectfully requests the inclusion of the Alaska motion to modify custody in Washington Superior Court.” (Emphasis added)

A four day trial was held in Anchorage, AK on Mr. Parrish’s Alaska modification petition on August 30 to September 5, 2012 and the petition was denied. The Alaska Supreme Court dismissed Mr. Parrish’s appeal on April 22, 2013 and ordered the case back to the AK trial court.

On May 13, 2013 the Alaska Superior Court enters an order in response to Mr. Parrish’s recently filed Washington state petition:

“the WA filing is futile, because Alaska has clear continuing and exclusive jurisdiction over custody pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, AS 25.30.310”. (Emphasis added)CP 99.

## UCCJEA Section 203. Jurisdiction to Modify Determination

“Except as otherwise provided in Section 204, a court of this state may not modify a child-custody determination made by a court of another State unless a court of this State has jurisdiction to make an initial determination . . . The modification state is not authorized to determine that the original decree State has lost its jurisdiction.”

Contemporaneously Mr. Parrish filed an affidavit with the Alaska Supreme Court stating:

“At the May 24, 2013 hearing addressing the issues of summer visitation the child, Judge Suddock reiterated on the record that Alaska retains continuing jurisdiction. . . I do not know whether Judge Suddock has notified the Washington Court of his position with regard to jurisdiction, however, I have not pursued the matter in Washington based on Judge Suddock’s position on the matter.” (Emphasis added) CP 99

Mr. Parrish had in fact “pursued the matter in Washington,” whereas on June 3, 2013 he appeared in person in a Washington superior, court adequate cause hearing he requested to argue his petition. The father continued to engage in abusive use of litigation and jurisdiction was his newest weapon.

Uniform Child-Custody Jurisdiction and Enforcement Act  
(UCCJEA)[Article] 1 General Provisions Section 101. Short Title

Section 1 of the UCCJA statement of the purposes of the Act. Although extensively cited by courts, it was eliminated because Uniform Acts no longer contain such a section. Nonetheless, this Act should be interpreted according to its purposes which are to:

- 1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
- 2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
- 3) Discourage the use of the interstate system for continuing controversies over child custody;
- 4) Deter abductions of children;
- 5) Avoid re-litigation of custody decisions of other States in this State;
- 6) Facilitate the enforcement of custody decrees of other States. . .”

Unhappy with the outcome of the Washington superior court adequate cause hearing on his petition, Mr. Parrish filed on August 2, 2013, to reinstate the Alaska Supreme Court Appeal (Case # S 15048) Appendix page 48, Ex. 27. In another contemporaneously filed affidavit, the father stated:

“I contacted the clerk of court in Washington and was told that if the case was opened in Washington, jurisdiction would “automatically transfer” to Washington because of the length of time that the child lived there.” Ex. 27

Mr. Parrish then filed another motion to modify the parenting plan in Alaska on September 20, 2013. Further, on December 9, 2013 he files to “amend or correct” his Alaska appeal brief. In response to the September 20, 2013 petition for modification, the Alaska superior court then issues an order on January 10, 2014 for a status conference to address the modification filing. CP 101-102. On June 5, 2014 the father requests the

Alaska Supreme Court to accept a late brief in his Alaska appeal, and on July 11, 2014, he requested an extension of time to file his appellate brief. CP 109-110.

Four days later on July 15, 2014, the Washington state superior court petition was dismissed after a year. Nineteen days after the father filed motions in the Alaska courts and fourteen days after the WA state superior court petition was dismissed- Mr. Parrish simultaneously with the Alaska proceedings, files another new petition to modify child custody in WA on July 30, 2014. CP 93-94. Two days later on August 1, 2014 he filed a motion in the Alaska Supreme Court to accept an over length brief. CP 108.

UCCJEA Section 202. Exclusive, Continuing Jurisdiction states that Jurisdiction attaches at the commencement of a proceeding:

“If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 207 Simultaneous Proceedings . . .” UCCJEA Comment (2).

One day prior to the fathers’ motion to the Alaska Supreme Court he had filed yet another action to modify the Alaska parenting plan in a WA court on July 30, 2014. CP 95 and EX 46. The WA superior court issued a domestic case scheduling order on August 4, 2014 in response to the father’s newest petition. CP 114. The very next day on August 5, 2014, he

files a declaration in support of his latest attempt to modify the Alaska parenting plan in WA and declares:

“Subsequent to the finalization of our dissolution action **both** parties and the child relocated to WA State.” CP 84.

Mr. Parrish has never lived in Washington State. (Emphasis added).

The father filed repeated modification actions that resulted in ongoing, simultaneous proceedings in both the Alaska and Washington courts concerning the child. On August 28, 2014 in response to Mr. Parrish’s WA petition to modify the Alaska parenting plan/custody decree in the mother filed a declaration in WA affirmatively stating that there were simultaneous proceedings in Alaska and Alaska had jurisdiction over the parenting plan/child custody case.

“I contend Alaska is the appropriate forum and that Washington State [does] not [have] subject matter jurisdiction to modify any provision of the Alaska orders. I understand that Washington may have the authority to enforce, but to preserve any objections/defenses, I affirmatively assert I do not concede that issue whatsoever. “He will continue this harassment, no matter which state, if he is allowed to continue.” CP 121-125.

On September 30<sup>th</sup>, Ms. Von Hell declared a second time that Washington did not have jurisdiction over the matter.

UCCJEA SECTION 206 [RCW 26.27.251] SIMULTANEOUS PROCEEDINGS.

(1) Except as otherwise provided in RCW 26.27.231, a court of this state may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under RCW 26.27.261.” (See also UCCJEA Section 207). “As an initial matter, we note that both parties discuss the UCCJEA’s use of the term “jurisdiction” as though it were a matter of subject matter jurisdiction. As the parties frame it, either the Washington courts have subject matter jurisdiction over the dispute or the Kansas courts have subject matter jurisdiction over the dispute. To the contrary, this dispute involves a statute (the UCCJEA) that restricts, in some instances, a court’s exercise of its subject matter jurisdiction. The UCCJEA, as adopted by the Washington legislature, does not — and cannot — divest a superior court of subject matter jurisdiction.” *In re Marriage of McDermott*, 307 P. 3d 717 - Wash: Court of Appeals, 1st Div. 201

The WA superior court was required to address the issue of simultaneous proceedings and it did not. If there is a State of exclusive, continuing jurisdiction, there cannot be another State with concurrent jurisdiction and, therefore, no simultaneous proceedings. The superior court was notified of the simultaneous proceedings in Alaska when the WA petition to modify custody was first served and commenced in WA.

The WA court did not communicate with the AK courts as required before entering temporary orders. Furthermore, the WA court did not assume temporary emergency jurisdiction in the case. These provisions are to be interpreted in light of the legislative purpose of the UCCJEA as a

whole. *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 151 Wash.App. 954, 963, 214 P.3d 954 (2009), *affd*, 170 Wash.2d 768, 246 P.3d 785 (2011) ("The primary goal of statutory construction is to discern and carry out the legislature's intent.").

"The Court of Appeals concluded that Montana did not have continuing jurisdiction, but it is Montana's courts that must make this determination. RCW 26.27.221(1). . . . Our conclusion rests not on the PKPA but on current controlling Washington law, which states that "a court of this state may not modify a child custody determination made by a court of another state unless . . . (1) [t]he court of the other state determines it no longer has exclusive, continuing jurisdiction . . . or that a court of this state would be a more convenient forum." RCW 26.27.221 (emphasis added). As Montana has also adopted this provision of the UCCJEA, under both Washington and Montana law, the Nagels must petition Montana and obtain an order that Montana has declined jurisdiction before Washington courts have jurisdiction to modify Montana's custody order." *In re Custody of A.C.*, 165 Wn.2d 568, 200 P.3d 689, 2009 Wash. LEXIS 74, 165 Wn.2d 568, 200 P.3d 689, 2009 Wash. LEXIS 74

Both Washington and Alaska have adopted these provisions of the UCCJEA. Under section 206 of the UCCJEA, a state (i.e. WA) should not exercise jurisdiction if at the time of filing the petition, a proceeding concerning the custody of the child is pending in a court of another state (i.e. Alaska) exercising jurisdiction in substantial conformity with the act.

The UCCJEA was enacted in order to "deal with the problems of competing jurisdictions entering conflicting interstate child custody orders." *A.C.*, 165 Wash.2d at 574, 200 P.3d 689. Thus, its purpose is to "reduce

conflicting orders regarding custody and placement of children." *A.C.*, 165 Wash.2d at 574, 200 P.3d 689.

"The comment to the UCCJEA also states that a party seeking to modify a custody determination must obtain an order from the original state stating that it no longer has jurisdiction. UCCJEA § 202 cmt., 9 pt. IA U.L.A. at 674... We also note that to permit waiver of the jurisdictional provisions of the UCCJEA would undermine the goals of avoiding conflicting proceedings. Cf. UCCJEA § 201 cmt., 9 pt. IA U.L.A. at 673 (an agreement to confer jurisdiction under the UCCJEA statute is not effective)." *In re Custody of A.C.*, 165 Wn.2d 568, 200 P.3d 689, 2009 Wash. 165 Wn.2d 568, 200 P.3d 689, 2009 Wash. LEXIS 74

The provisions of the UCCJEA requiring communication between the courts of different states are clearly intended to further the legislative purpose of reducing conflicting child custody orders. Indeed, RCW 26.27.231(4) requires communication prior to entry of a "child custody determination." Likewise, RCW 26.27.251(2) requires that the court confer with the court of another state "before hearing a child custody proceeding."

Here the Washington superior court should have recognized and determined that the court was not authorized to exercise jurisdiction pursuant to the UCCJEA Section 206 and RCW 26.27.251 and, thus, should not have made a child custody determination involving the child.

UCCJEA Section 207. Inconvenient Forum

“[A]uthorizes courts to decide that another State is in a better position to make the custody determination, taking into consideration the relative circumstances of the parties.”

According to the UCCJEA and RCW 26.27.251 only Alaska NOT Washington could decide if Alaska was an inconvenient forum. In this case Washington had declared itself a more convenient forum which is not permissible under the UCCJEA or Washington Statutes. Washington cannot determine that Alaska is an inconvenient forum and subsequently acquire jurisdiction. The December 16, 2014 order stated in part “and Benton County Superior Court is a more convenient forum under RCW 26.27.261” (Emphasis added). CP 1-13

The issue of inconvenient forum was never raised to the Alaska court. If it was all of the relevant factors would have had to be considered, they were not.

At the commencement of the WA proceedings there was substantial evidence in the Alaska Courts regarding domestic violence. A voluminous amount of evidence had been presented in numerous hearings over the period of several years. All of the evidence relevant to the case was in Alaska. Moreover, in terms of where the substantial evidence concerning the child's care, protection, training, and relationship

lies, it is clear that the majority of said evidence is in Alaska. EX 15, 24, 27, 37, 40, 47-52.

Pursuant to the plain language of the statute, the Washington superior court was required to communicate with the Alaska court in order to determine whether the Washington court had authority to exercise its jurisdiction.

“The UCCJEA does not permit Washington unilaterally to declare itself a more convenient forum and wrest jurisdiction from the home state. Klein must make her argument to the Montana court.” *IN RE PARENTAGE, PARENTING, AND SUPPORT OF ARKK*, 174 P. 3d 160 - Wash: Court of Appeals Division I

On September 5, 2014 Mr. Parrish’s attorney filed a declaration where he attaches:

“a true and correct copy of the Mr. Parrish’s current ID and federal security clearance. . .” CP 86-87.

Appended are copies of the father’s Alaska Driver License that shows Mr. Parrish’s address as 305 Donna Drive, Anchorage, AK. The father was an Alaska resident. CP 87. Later, the father filed paystubs dated May 14, 2015 that were addressed to him at 305 Donna Drive, Anchorage, AK. CP 91-92.

On September 24, 2014 in WA superior court Case# 14-3- 00847-4 the father filed a “Motion for. . . EmergencyJurisdiction” (emphasis added). CP 115. Merely 5 days later on September 29, 2014, Mr. Parrish

filed a motion with the Alaska Supreme Court to accept his late brief in his Alaska appeal, never mentioning any “emergency”. CP 106.

Despite the simultaneous proceedings in Alaska, the Washington superior court on September 24, 2014 continued the fathers modification action under consolidated case number 14-3- 00847-4 and continued his pending motion practice in the WA courts. CP 116- 117. Five days later on September 29, 2014 the father in continued simultaneous litigation, files a motion in the Alaska Supreme Court to accept another late brief in his appeal case. CP106.

On December 16, 2014 a “Stipulated Order Registering out of State Custody Determination Pursuant to RCW 26.27.441” was entered in the superior court, stating:

“The Superior Court for the State of Alaska Third Judicial District at Anchorage no longer has exclusive, continuing jurisdiction under RCW 26.27.211 and the Benton County Superior Court is a more convenient forum under RCW 26.27.261.” CP 1-13

Determination of subject matter jurisdiction to modify the Alaska custody order cannot be a part of an order seeking registration.

Registration of a custody order is a means for enforcement NOT modification. See UCCJEA Section 306. “A court of this State shall recognize and enforce, but may not modify . . .registered child-custody determination of a court of another State.”(Emphasis added). Subject

matter jurisdiction cannot be stipulated, it cannot be waived and it cannot subject to estoppel.

“Since subject matter jurisdiction is an unwaivable sine qua non for the exercise of . . . judicial power. . . And no amount of agreement by the parties can create jurisdiction where none exists.” ER Squidd & sons v. Accident and casualty insurance company, 160 F.3d 925 (2d Cir.1998). "Although a lack of personal jurisdiction to make support or maintenance orders can be cured by stipulation, waiver or even estoppel, child custody jurisdiction is a form of subject matter jurisdiction. The lack of subject matter jurisdiction cannot be cured by waiver, estoppel, agreement or stipulation, and it can be raised at any time. See, e.g., *Rosen v. Celebreeze*, 883 N.E.2d 420 (Ohio, 2008); *Matter of K.U.- S.G.*, 702 S.E.2d 103 (N.C.App., 2010); *In re Jaheim B.*, 87 Cal.Rptr.3d 504 (Cal.App., 2008), *Ruff v. Knickerbocker*, 275 P.3d 1175 (Wash.App.,2012).”

There was never contact between the WA superior court and the Alaska superior courts requesting or otherwise authorizing any type of “emergency jurisdiction, nor did the Alaska courts decline jurisdiction based on “inconvenient forum”. There were continuous and ongoing “simultaneous proceedings,” and the WA superior court did NOT set forth any orders or deadlines for interstate communication with the Alaska courts. The scope of jurisdiction was not addressed in any way.

On February 11, 2015 the father filed a 2<sup>nd</sup> amended petition in the superior court to modify the Alaska parenting plan/custody orders. At section 2.5 of the proposed parenting plan Mr. Parrish stated the court has “Jurisdiction and Venue [:]”

“This state is the home state of the child because Washington was the home state of the child within six months before the commencement of this proceeding and the child is not absent from the state and a parent or person acting as a parent continues to live in this state. . . And at section 2.7 “A Stipulated Order Registering out of State Custody. . . .” Id CP 434-435.

As stated contemporaneously in the findings of fact and conclusions on December 13, 2016 at section 2.5, the Court also concluded it was the home state of the child and in previous and additional orders, the superior court also found:

“The Superior Court for the State of Alaska Third Judicial District at Anchorage no longer has exclusive, continuing jurisdiction under RCW 26.27.211 and the Benton County Superior Court is a more convenient forum under RCW 26.27.261.” (Order dated December 16, 2014 ) CP 1-13. “Final Order and Findings. . .” part 2. Jurisdiction “The court can decide this case because: Exclusive, continuing jurisdiction – A Washington court has already made a parenting plan, residential schedule or custody order for the child, and the court still has authority to make other orders for TIERNAN PARRISH.” Home state jurisdiction – Washington is the home state because: TIERNAN PARRISH lived in Washington with a parent or someone acting as a parent for at least 6 months just before the case was filed. . .” CP 284-287 (order dated October 17, 2017)

The WA superior court then continued to act without jurisdiction when it erroneously believed that WA had somehow acquired jurisdiction as implied when adopting the May 19, 2017 “Amended” Petition for Modification” at section 2.5 -2.7 which stated:

“Washington has previously entered a final parenting plan in this matter. . .During the last 5 years, the child has lived in the following places with the following people: Anchorage, AK . . .” CP 216.

The May 19<sup>th</sup> “Amended Petition” was later stricken on June 9<sup>th</sup> which stated: “The Amended Petition filed on 5/9/17 is stricken.” CP 376.

Prior to the entry of any of these decisions the superior court never communicated with the Alaska courts and Washington never assumed emergency jurisdiction.

#### **D. STANDARD OF REVIEW**

The issues raised herein are governed by the following standards of review. First, a superior court oral or memorandum decision, if included in the record, may be considered on appeal. *Banuelos v. TSA Washington Inc.*, 134 Wn. App. 603, 616, 140 P. 3d 652 (2006).

Second, since this case involves mixed questions of law and fact, such review is treated as a question of law, to be viewed in the light of the facts and evidence presented. *State v. Horrace*, 144 Wn. 2d 386, 392, 28 P.3d 753 (2001).

Third, pure legal errors including, the proper interpretation and application of a statute, court rule, or prior case law are reviewed de novo. *State v. Horrace*, 144 Wn. 2d 386, 392, 28 P.3d 753 (2001). In this vein, whether a court has subject matter jurisdiction, poses a question of law, and is thus reviewed de novo. *Tostado v. Tostado*, 137 Wn. App. 136, 144, 151 P. 3d 1060 (2007), *In re Marriage of Thurston*, 92 Wn. App. 494, 497,

963 P. 2d 947 (1998), *review denied*, 137 Wn. 2d 1023 (1999), *In re Kastanas*, 78 Wn. App. 193, 197, 896 P. 2d 726 (1995).

Fourth, when the reviewing court addresses an alleged abuse of discretion, questions can and should be separated into questions of fact and the conclusions of law based on those facts. *Bartlett v. Betlach*, 136 Wn. App. 8, 19, 146 P. 3d 1235 (2006), *review denied*, 144 Wn. 2d 1004 (2007).

A superior court's discretion is abused when the court has based its decision on untenable grounds or for untenable reasons, or has otherwise failed to abide by the governing law. *Deyoung v. Cenex Ltd.*, 100 Wn. App. 885, 894, 1 P. 3d 587 (2000), *review denied*, 146 Wn. 2d 1016 (2002). As stated *In re Parentage of Jannot*, 110 Wn. App. 16, 22, 37 P. 3d 1265 (2003), *aff'd in part*, 149 Wn 2d 123, 65 P. 3d 664 (2002):

"The abuse of discretion standard is not, of course, unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his . . . discretion if [her] decision is completely unsupported, factually. On the other end of the spectrum, the trial judge abuses [her] discretion if the discretionary decision is contrary to the applicable law. . . ."

Lastly, as stated in *In re Marriage of Major*, 71 Wn. App. 531, 859 P. 2d 1262 (1993):

"a challenge to subject matter jurisdiction can be brought at any time." See also, *Inland Foundry Co. Inc. v. Spokane County Air Pollution*

*Control Authority*, 98 Wn. App. 121, 989 P. 2d 102 (1999), *review denied*, 141 Wn. 2d 1008 (2000); see also, RAP 2.5(a)(1). “This includes prior orders of a court commissioner not designated in the appeal of the final judgment under appeal.” *Hwang v. McMahill*, 103 Wn. App. 945, 15 P. 3d 172 (2000), *review denied*, 144 Wn. 2d 1001 (2001). See also, RAP 2.4. And, “a litigant cannot use post filing facts to create subject matter jurisdiction when it did not first exist.” *In re Marriage of Iernonimakis*, 66 Wn. App. 83, 831 P. 2d 172 (1992), *review denied*, 120 Wn. 2d 1006, 838 P. 2d 1142 (1992).

## **E. ARGUMENT**

1. As a matter of law, the superior court lacked subject matter jurisdiction at the beginning of this case as subject matter jurisdiction was exclusively vested in Alaska and the PKPA and the UCCJEA were not complied with to assert any form of jurisdiction. [Issue No.1-10]

*In re Custody of A.C.*, 165 Wn. 2d 568, 574, 200 P. 3d 689 (2009) it was stated:

“Both Montana and Washington have adopted the UCCJEA, making the act the exclusive basis to determine jurisdiction of this interstate child custody dispute. RCW 26.27.201(2); Mont. Code Ann sec 40-7-201(2) The UCCJEA determines when one state may modify an “initial child custody determination” made by another state. RCW 26.27.201(1), 221 Under the UCCJEA, a Washington court may modify Montana’s initial custody determination only if either Montana declines jurisdiction or all parties have left that state RCW 26.27.221. . . . In essence the UCCJEA provides that unless all of the parties and the child no longer live in the state that made the initial determination sought to be

modified, that state must first decide it does not have jurisdiction or decline jurisdiction. . .

Montana has jurisdiction over this dispute because Montana made the initial child custody determination. . . . [Mr. Knickerbocker] is a person acting as a parent under the act who still resides in Montana, and Montana has not declined jurisdiction. RCW26.27.221.

In *A.C.* it was argued, “there is no current Montana custody decree in effect so there is no initial determination to be modified.” *In re the Custody of A.C.*, at 575, as should be the case here, such an argument should fail.

“[s]ince the trial court’s action in this case occurred after Montana’s prior determination concerning custody it was a modification of Montana’s initial determination.” *In re the Custody of A.C.*, at 575.

“Similarly, it is the Montana court which must make the jurisdictional determination.” *In re the Custody of A.C.*, at 576 RCW26.27.221(1)

The comments to the UCCJEA make clear the intent to limit subject matter jurisdiction:

"It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective." UCCJEA § 201 cmt, 9 pt. IA U.L.A. at 673. The Washington Supreme Court endorsed this comment in *A.C.* with the statement: "that to permit waiver of the jurisdictional provisions of the UCCJEA would undermine the goals of avoiding conflicting proceedings." *A.C.* 165 Wash.2d at 577 n. 8, 200 P.3d 689 (citing UCCJEA § 201 cmt., 9 pt. IA U.L.A. at 673).

2. As a matter of law, the superior court lacked jurisdiction over the subject matter as no emergency existed. Issue No. 1-10.

“In general, subject matter jurisdiction is an elementary pre-requisite to the exercise of judicial authority. *In re Leland*, 115 Wn. App. 517, 526, 61 P. 3d 357 (2003), overruled on other grounds, *In re PRP of Higgins*, 152 Wn.2d 155, 95 P. 3d 330 (2004). Where a court has no subject matter jurisdiction the proceeding is void. *Id.* A court’s lack of subject matter jurisdiction may be raised by a party, or the court, at any time in a legal proceeding. . . . *Id.* The UCCJEA is consistent with 28 U.S.C. sec 1738 A, the Parental Kidnapping Prevention Act of 1980 (PKPA).” *In re Marriage of Hamilton*, 120 Wn. App. 147, 150, 884 P. 3d 259 (2004).

Here, by definition, no “emergency” existed when, on September 19, 2017, under the guise of a contempt order entered an ex-parte temporary custody order and again on October 17, 2017 the superior court then entered a 2<sup>nd</sup> “final” custody order and claimed “jurisdiction” because of previous orders *Id.* The court did so by, adopting paragraph 2 of the “Motion for Temporary Family Law Order” dated September 19, 2017 and finding a need for Washington State to enter orders, immediately changing the residence and custody of the child, issuing “final” orders on October 17, 2017 and adopting part 2 jurisdiction “A Washington court has already made a parenting plan . . .”*Id.*

Further, a party cannot consent to subject matter jurisdiction. *Rust v. Western Washington State College*, 11 Wn. App. 410, 419, 524 P. 2d 204 (1974). When Mr. Parrish presented the Washington order for registration of the Alaska Custody Order(s) he misrepresented to the

superior court that subject matter jurisdiction could be stipulated and that Washington had jurisdiction to then modify the custody orders, it did not.

“The parties cannot consent to subject matter jurisdiction nor can they waive objection to it.” *Id.*; *Wampler v. Wampler*, 25 Wash.2d 258, 267, 170 P.2d 316 (1946). (Emphasis Added.) “And most authorities suggest that the UCCJEA's procedural requirements control the court's exercise of its subject matter jurisdiction.” *A.C.*, 165 Wash.2d at 577, 200 P.3d 689; *In re Marriage of Hamilton*, 120 Wash.App. 147, 148-49, 84 P.3d 259 (2004); *In re Marriage of Susan C.*, 114 Wash.App. 766, 60 P.3d 644 (2002); UCCJEA § 201 cmt, 9 pt. IA U.L.A. at 673. We also conclude that it does.” *In re Ruff*, 275 P. 3d 1175 - Wash: Court of Appeals, 3rd Div. 2012.

Alaska had already issued a permanent parenting plan and custody order, as a matter of law, no jurisdiction was available in Washington to address the matter. As stated *In re Marriage of Kastanas*, 78 Wn. App. 193, 199, 896 P. 2d 726 (1995) under the Federal Parental Kidnapping Prevention Act of 1980 (PKPA), jurisdiction outside of emergency jurisdiction was unavailable to the Washington court and Washington never exercised emergency jurisdiction. As therein stated at 28 U.S.C.A. 1738A, Pub. L. sec 8(a) Stat 3569, and as quoted in part in *Kastanas*, at 1999,

“ a court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.”

Under the reasoning and holding in *Kastanas*, Washington could not take jurisdiction consistent with the PKPA or the UCCJEA. See, *In re Marriage of Ieronimakis*, 66 Wn. App. 83, 831 P. 2d 172, *review denied*, 120 Wn. 2d 1006, 838 P. 2d 1142 (1992). When Mr. Parrish commenced his action in the WA superior courts, subject matter jurisdiction had always been vested in Alaska. As a result, no child custody determination regarding the child could be entered in Washington which would be consistent with the UCCJEA or the PKPA under 28 U.S.C. sec 1738A (2)(A- E), see also, RCW26.27.251(1)-(3).

“We conclude then that the UCCJEA's procedural requirements are jurisdictional and Mr. Knickerbocker's consent could not have given Washington jurisdiction. Not only is jurisdiction not something that can be consented to generally, but nowhere in the UCCJEA is there a provision for the parties to waive the jurisdiction of one state in favor of another by their conduct or their agreement. *A.C.*, 165 Wash.2d at 577, 200 P.3d 689.” *In re Ruff*, 275 P. 3d 1175 - Wash: Court of Appeals, 3rd Div.2012.

To permit waiver of the jurisdictional provisions of the UCCJEA would undermine the goals of avoiding conflicting proceedings. Cf. UCCJEA § 201 cmt., 9 pt. 1A U.L.A. at 673 therefore an agreement to confer jurisdiction under the UCCJEA statute is not effective.

3. Alternatively, and additionally, as a matter of law, any request for “emergency jurisdiction” evaporated in October 2014. [IssueNo. 4-8,10]

The failure to comply with the mandates of RCW 26.27.231 illustrate the improper exercise of subject matter jurisdiction in terms of the court's modification orders, ex- parte and temporary orders and total lack of any type of "emergency". As stated in 32 P. Hoff, The ABC's of the UCCJEA, Family Law Quarterly, No. 2 (Summer 1998), under UCCJEA Sec 204, courts have temporary emergency jurisdiction when a child who is in the state and has been abandoned, or an emergency makes it necessary to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. (Emphasis added) The UCCJEA narrows the UCCJA's definition of emergency by excluding neglect cases . . . Section 206(a) makes it clear that a court may exercise emergency jurisdiction under section 204 even if a proceeding has been commenced in another state. However, immediate judicial communication is mandatory when there are simultaneous proceedings. The object is to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. . . . The duration of a temporary emergency order depends upon whether custody has been, or is being, litigated elsewhere. (Emphasis added)

If there is a previous decree or custody proceeding has been commenced in a court having jurisdiction under sections 201-203, the temporary emergency order must specify a period that the court considers

adequate to allow the person to obtain an order from the court of jurisdiction.

How long the order should last is one of several issues to be discussed when the emergency court communicates with the sister state court, at section 204(d) requires it to do. (A court that learns of an emergency proceeding has the reciprocal duty to communicate with the emergency court.) The emergency remains in effect until an order is obtained from the other state within the specified period or the period expires. (Emphasis added).

At the time Mr. Parrish commenced his Washington action and sought to change the Alaska custody order, Alaska alone had subject matter jurisdiction consistent with the UCCJEA. Alaska had issued permanent parenting plan and custody orders and had affirmatively declared that it had retained sole jurisdiction defined by the UCCJEA and the Alaska statutes. Id

When Washington was made aware of the Alaska court jurisdiction, the superior court was required to dismiss the case and or assume emergency jurisdiction. The father requested that Washington assume emergency jurisdiction. CP 115. Thus, an interstate communication between the Washington superior court and the Alaska superior court was

immediately required by the UCCJEA before entry of any order by the superior court per Mr. Parrish's request.

4. As a matter of law, the superior court could not assert "home state jurisdiction" as stated in its findings. [Issues No.1,3,4]

As noted in *leronimakis*, supra., a UCCJA case, jurisdiction cannot be created after the fact. Although the UCCJA has been since amended and replaced with the UCCJEA, *In re Marriage of Hamilton*, supra., the principle is still nonetheless sound for all of the reasons cited in *leronimakis*. At the time this matter was commenced Alaska was exercising exclusive jurisdiction and thus the child's residency for the last six months was irrelevant.

5. As a matter of law, the superior court could not conclude it had home state jurisdiction and declare itself a more convenient forum, and in the same breath also conclude another state also had jurisdiction. [Issues Nos. 1-3,10]

By definition, there can be only one home state of the child. RCW 26.27.021(7). Thus, it makes no sense for the superior court to have entered back to back findings and conclusions wherein it was stated:

"This state is the home state of the child because Washington was the home state of the child within six months before the commencement of this proceeding and the child is not absent from the state and a parent or person acting as a parent continues to live in this state. . . ." CP 434.

And at section 2.7 “A Stipulated Order Registering out of State Custody. . . .” Id CP 435.

“The Superior Court for the State of Alaska Third Judicial District at Anchorage no longer has exclusive, continuing jurisdiction under RCW 26.27.211 and the Benton County Superior Court is a more convenient forum under RCW 26.27.261.” CP 2.

“The court can decide this case because: Exclusive, continuing jurisdiction – A Washington court has already made a parenting plan, residential schedule or custody order for the child, and the court still has authority to make other orders for TIERNAN PARRISH.” Home state jurisdiction – Washington is the home state because: TIERNAN PARRISH lived in Washington with a parent or someone acting as a parent for at least 6 months just before the case was filed. . . .” *Id.* “Washington has previously entered a final parenting plan in this matter.” *Id.*

6. As a matter of law, the superior court was required to immediately speak with Alaska when it became aware of the simultaneous proceedings and Mrt. Parrish asked for emergency jurisdiction, and failed to do so. As such there was no declination of jurisdiction in favor of Washington. Issue No.

1-10

Here, there was no immediate communication despite the fact the superior court and the Alaska court have only 1 hour difference in the time zones and both are easily accessible by telephone. Nor was there any stay issued. Nor was the matter dismissed in recognition of the Alaska court's valid, certified order. In short, there was no “emergency” the Alaska court could not adequately address and no jurisdiction to proceed in superior court.

7. As a matter of law, the lack of subject matter jurisdiction renders the proceedings of the superior court including GAL and temporary orders void. Issues 1-10

It is well established that a judgment or other decision rendered by a court lacking subject matter jurisdiction is void ab initio and is legally no judgment or decision at all. *Wesley v. Schneckloth*, 55 Wn. 2d 90, 93-94, 346 P. 2d 658 (1959); *State v. Brennan*, 76 Wn. App. 347, 349 n.4, 884 P. 2d 1343 (1994); *Rust v. Western Wash. State College*, 11 Wn. App. 410, 418, 523 P. 2d 204 (1987). Thus, this proceeding and all decisions entered herein by the superior court are void and of no effect. *Id.*

While the father argues on page 2 of his response to Appellants Emergency Motion in Case# 35590-0-III inviting this Court to simply ignore the glaring procedural defects and allow the rulings of the Washington superior court to stand, he cites no authority whatsoever for this broad departure from the accepted rule of law.

Contrary to Mr. Parrish's view, it is clearly incumbent upon a party in a non-initiating state who wishes to file a new proceeding under the provisions of UCCJEA to first have the initiating state removed and dismissed from any further proceeding governing the minor's custody. The orderly system of administration of government as between the states, the

policies and provisions of the PKPA, as well as the policies and provisions of the UCCJEA itself, cannot be interpreted otherwise.

Once the Superior Court chose to act without legal authority under the UCCJEA and PKPA, all acts and proceedings which followed thereafter were void ab initio which followed thereafter were void ab initio.

It is a cardinal rule under *In re Marriage of Ieronimakis*, 66 Wn. App. 83, 831 P.2d 172, review denied, 120 Wn. 2d 1006 (1992), jurisdiction cannot arise or be created after the fact. This is true whether we are speaking of the UCCJEA or its predecessor. *In re Marriage of Hamilton*, 120 Wn. App. 147, 884 P. 3d 259 (2004). Simply put, Mr. Parrish has no license whatsoever to ask this Court to do other than follow the accepted federal and state law and practice governing the exercise of subject matter jurisdiction *Id.*

In sum, and for these stated reasons, the mother maintains the challenged decisions of the superior court, as identified, discussed and outlined in her assignments of error, issues presented and argument, are error and, accordingly, should now be reversed with prejudice.

**F. CONCLUSION OF SUBJECT MATTER JURISDICTION  
ARGUMENT**

Based upon the foregoing points and authorities, Ms. Von Hell, respectfully requests the challenged decisions and proceedings of the

Superior Court which were erroneously entered in this case, and the subject of this appeal, be reversed and this matter be dismissed with prejudice as being void ab initio.

#### **G. TEMPORARY AND FINAL ORDERS MODIFYING THE ALASKA CHILD CUSTODY DECREE AND PARENTING PLAN**

The trial court committed legal and procedural errors of egregious proportions in entering orders that modified a final parenting plan as a sanction for the mother's alleged contempt. No petition for modification was filed and the parenting plan was substantially and permanently changed.

After the mother appealed entry of the modified parenting plan and subsequent temporary orders, the father never filed a petition for modification or an order to show cause for adequate cause.

Days after the court of appeals issued a stay after a 2<sup>nd</sup> temporary modification that was on appeal, the trial court granted the father's 3<sup>rd</sup> petition for temporary parenting plan/custody over the mother's objections.

#### **H. ASSIGNMENTS OF ERROR**

1. The Superior Court erred by entering the Order on Show Cause re Contempt dated August and September 18, 2017, CP 34-37, and the

2<sup>nd</sup> Temporary Parenting Plan on August 11, 2017 and the order dated September 18, 2017.

2. The superior court simultaneously erred on September 19, 2017 in entering the ex-parte 3<sup>rd</sup> temporary custody order CP 49-52 based on a motion and declaration signed on September 6, 2017 ,CP 23-24, and a contempt finding on September 18, 2017. The 3<sup>rd</sup> Temporary orders state:

“[t]he court makes the following Findings, Specific Findings: On September 18, 2017, the court is making a finding that the mother refused to allow Skype calls between the father and the child as previously ordered by the court, The new evidence before this court supports a finding that the mother has absconded with the child to Wisconsin. This was an unauthorized relocation of the child from Washington State. . . . CP 49-51, RP9-18-17.

3. The Superior Court erred by entering the default judgment of the Parenting Plan Order and Order Granting Additional Relief dated October 17, 2017. Supp. CP 262-269
4. The court erred by not giving adequate notice of the 2<sup>nd</sup> trial date in October when in its oral ruling it noted that trial date would be in November 8-9 and in practice set it for October 17, 2017. RP 9/18/2017, page 9, lines 15-25, page 10, lines 6-10, 13-17.

5. The court erred by lifting .191 restrictions off of the father when it entered the final modified parenting plan orders dated December 13, 2016.
6. The court erred by entering .191 restrictions against the mother in the February 23, 2017 and the temporary orders on August 11, 2017, September, 19, 2017 and additional final orders dated October 17, 2017.

**I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR RE:  
TEMPORARY AND FINAL ORDERS MODIFYING THE ALASKA  
CHILD CUSTODY DECREE AND PARENTING PLAN**

1. Whether, as a matter of law, the superior court can modify a final parenting plan absent a petition for modification and application of the criteria of RCW 26.09.260? Assignments of Error 1,2,4,5,7,8
2. Whether, as a matter of law, the superior under RCW 26.09.260 can modify a final parenting plan based on the custodial parent's contempt of court? Assignments of Error 1,2,4,8
3. Whether, as a matter of law, the superior court can enter a permanent restraining order restricting a primary residential parent's residential time and decision-making, that constitutes a modification of a parenting plan governed by RCW 26.09.260 when no basis for modification were found. Assignment of Error 1,4,5,8

4. Whether, as a matter of law, the superior court has the authority to modify a final parenting plan on the basis of contempt findings that were entered in violation of due process and/or by not following the rules and procedures for modification actions. Assignments of Error 1-8

## **J. STATEMENT OF THE CASE**

Factual Background: Robert Parrish commenced simultaneous petitions to modify a parenting plan in superior court (WA) and Alaska. *Id.* Following a trial, the superior court Judge found there was no basis to change primary custody, including the following remarks in his oral decision on August 4<sup>th</sup>, 2016:

“ It’s is a difficult case but I find on this record applying the law as I must that there’s not enough in this record to change custody to overcome the inherent harm caused by a change in environment. ... The attention to detail and the evidentiary rulings by both of your attorneys have been made at the highest order.

They have provided me everything I needed to make my decision they left nothing on the table. Again it’s my decision.” CP 492, 494.

A Final Order and Findings on Petition to Change a Parenting Plan was entered December 13<sup>th</sup>, 2016. CP 62-72. The findings indicate no minor changes were requested and that a major change is denied.

“The reasons (factual basis) for the requested major change do not qualify under the law.” It is ordered that the Petition is denied. Part 11, CP 75 Under part 10, “other findings,” and part 12, “other orders,” the Court indicated it had ordered the psychological evaluation as a condition of Ms. Von Hell being maintained as the primary custodian. CP 62-72.

A “final” parenting plan was entered December 13th, 2016, which includes the provision: 3. Reasons for putting limitations on a parent (under RCW 26.09.191) a. Abandonment, neglect, child abuse, domestic violence, assault, or sex offense.

“Neither parent has any of these problems.” b. Other problems that may harm the child’s best interests: “Neither parent has any of these problems.” *Id.*

The mother timely moved for reconsideration CP 132-134, which was denied on May 17th, 2017, CP 212-214, and from which a Notice of Appeal was timely filed on June 1st, 2017. CP 246-301. The Superior Court set a trial date in September of 2017 and later changed that date TBD in October 2017, when on August 11, 2017 it ordered “the matter is continued no more than 60 days. Further motions may be heard if the matter is not subject to a stay.” *Id.* The court then ordered temporary custody to the father. On September 5, 2017, this court stayed the August 11, 2017 temporary order modifying custody. Two days later on September 7, 2017, the father filed a 3rd request for temporary custody stating:

“This court granted me temporary custody of Tiernan until a trial in this matter on August 11, 2017. The written decision came out on September 5, 2017 that continued the stay of August 11, 2017 order until we go to trial on September 13, 2017. If the trial is continued (as requested by respondent) this trial court has discretion to issue further orders that can be stayed or confirmed by the court of appeals.” CP 23-24.

But, on August 11, 2017 the superior court had granted Mr. Parrish temporary custody and had already ordered that the trial would be continued until October, 2017. The court of appeals issued a stay of the August 11, 2017 order on September 5, 2017. On September 6, 2017, Mr. Parrish filed a motion for contempt against the mother. *Id.* The motion alleged that Ms. Von Hell had violated the Original Parenting Plan by denying Mr. Parrish Skype calls between August 20, 2017 and September 6, 2017 and by failing to provide statutorily-required notice of relocation to Wisconsin. *Id.* The motion was filed two days after the court of appeals issued a stay on September 5 and sought immediate temporary custody “as a sanction.” *Id.*

On September 13 the trial court conducted a hearing noted as a show cause hearing for contempt and continued that hearing. The mother filed a response to the hearing, CP 38-80, her trial counsel who had filed to withdraw presented argument. Mr. Parrish sought an order finding the mother in contempt of the 1<sup>st</sup> modified then vacated Parenting Plan dated December 13, 2017. Ex-parte the father requested an entry of a 3<sup>rd</sup> temporary parenting plan. Mr. Parrish alleged that Ms. Von Hell had violated the 1<sup>st</sup> now vacated Plan by failing to allow skype calls between August 20 and September, 2017 *Id.* The trial court found mother in

contempt, entered a 3<sup>rd</sup> new temporary parenting plan, and restrained her from any unsupervised contact with her son, through the entitled “temporary order,” the restrictions remained in effect indefinitely. Ms. Von Hell filed an appeal and an emergency motion for a stay and to vacate the 3<sup>rd</sup> Modified Temporary Custody Order dated September 19, 2017 and contempt order dated September 18, 2017. *Id.* On October 13, 2017, the appellate court commissioner issued an order denying the motions. The ruling retroactively granted Mr. Parrish permission to enter the September 19, 2017 order and states:

“Ms. Von Hell has contributed to her own injury when she did not appear for trial on September 18<sup>th</sup> and, instead, sent her lawyer to argue the jurisdiction issue. ... And, any opportunity for the father to present evidence why the court should change permanent custody to him was continued until the new October 16<sup>th</sup> date for trial.” *Id.*

However the trial court had issued orders on August 11, 2017 continuing the trial date for 60 days (which continued the 2<sup>nd</sup> “trial” to a date in October, 2017).

The 2<sup>nd</sup> temporary custody order entered August 11<sup>th</sup>, 2017, finds that the purported violation of a psychological exam condition would *not* be sufficient to change custody, but finds that other allegations are sufficient to do so. *Id.* These “facts” were not previously a basis for the

Court to find adequate cause to proceed with additional modification proceedings.

Mr. Parrish filed the 3<sup>rd</sup> motion for temporary custody, based on Ms. Von Hell moving to Wisconsin during the time that the court had granted the father sole custody and severely restricted mother's visitation. Further Mr. Parrish alleged failure of Ms. Von Hell to provide him with Skype time with the child for a short period of time. *Id.* The superior court granted the motion, and entered an order ex-parte order on September 19<sup>th</sup>, 2017, without permission from the Court of Appeals. On September 18<sup>th</sup>, 2017, the mother, filed a response for the hearing, objecting to the court proceeding because the Alaska Superior court had jurisdiction which has not been relinquished to a Washington Court.

The matter then proceeded to a 2<sup>nd</sup> trial which was the subject of the 1<sup>st</sup> appeal. On October 11, 2017 the mother filed a 3<sup>rd</sup> notice of appeal challenging the contempt order, modified 3<sup>rd</sup> Temporary Parenting Plan Order and Subject Matter Jurisdiction. On March 12, 2018, this courts Commissioner ordered all three appeals consolidated.

## **K. STANDARD OF REVIEW**

The issues raised herein are governed by the following standards of review. First, with respect to issues addressing the exercise of discretion, the standard review is:

“abuse of discretion”. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997) (citing *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993)); *In re Marriage of Wicklund*, 84 Wn.App. 763, 770, 932 P.2d 652 (1996). “A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices. *In re Parentage of Schroeder*, 106 Wn.App. 343, 349, 22 P.3d 1280 (2001) (citing *Littlefield*, 133 Wash.2d at 47, 940 P.2d 1362).”

RCW 26.09.260 sets forth the procedures and criteria to modify a parenting plan. *In re Marriage of Hoseth*, 115 Wn.App. 563, 569, 63 P.3d 164 (citing *In re Marriage of Shryock*, 76 Wn.App. 848, 852, 888 P.2d 750 (1995)), *review denied*, 150 Wn.2d 1011, 79 P.3d 445 (2003).

Accordingly, a court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria. *Hoseth*, 115 Wash.App. at 569, 63 P.3d 164.

## **L. ARGUMENT**

1. The trial court had no authority to enter any modified or temporary parenting plans.

The sole source of authority to change residential provisions of a final parenting plan is RCW 26.09.260. Under subsection (1) of the statute, the court:

“shall not modify a prior custody decree or a parenting plan unless it finds ... a substantial change has occurred in the circumstances of the child or the nonmoving party and that modification is in the best interest of the child and necessary to serve the best interests of the child.”

Subsection (2) directs the court to retain the residential schedule established in the parenting plan unless specific enumerated circumstances support modification (RCW 26.09.260(2)).

“Failure to apply the criteria of RCW 26.09.260 when modifying a final parenting plan is error of law constituting an abuse of discretion. *In re Marriage of Hoseth*, 115 Wn. App. 563, 569, 63 P.3d 164, rev. denied, 150 Wn.2d 1011 (2003), citing *In re Marriage of Shryock*, 76 Wn. App. 848, 852, 888 P.2d 750 (1995). See also *In re Marriage of Tomsovic*, 118 Wn. App. 96, 103, 74 P.3d 692 (2003); *Bower v. Reich*, 89 Wn. App. 9, 14, 964 P.2d 359 (1997).”

“Even in cases of contempt and parental misconduct, authority to modify a final parenting plan derives solely from RCW 26.09.260. Neither the statute governing contempt of parenting plans, RCW 26.09.160, nor a Superior Court’s inherent contempt power conveys authority to modify a final parenting plan as a sanction for contempt. A court’s statutory contempt powers are expressly limited to awarding make-up residential time. . . (RCW 26.09.160(2)). *In Re Marriage of Frasier*, 33 Wn.App 445, 450, 655 P.2d 718 (1982) “Once a court enters a parenting plan and neither party appeals it, the plan can only be modified pursuant to RCW 26.09.260.” *In re Marriage of Schroeder*, 106 Wn. App. 343, 350, 22 P.3d 1280 (2001) (holding that two findings of contempt against custodial parent did not automatically justify modification of final parenting plan and that compliance with statutory criteria of RCW 26.09.260 was mandatory).

Under part 3 of the Final Parenting Plan entered December 13th, 2016, the Superior Court found there were no problems that were “Reasons for putting limitations on a parent (under RCW 26.09.191).” The Final Order and Findings said that as to “Limitations ...” “Does not apply.” *Id.*

The statutory factors for limitations are irrelevant.

“In the absence of substantial evidence establishing a nexus between Watson's ‘involvement or conduct’ and the impairment of his emotional ties with M.R., the trial court erred in imposing visitation restrictions under RCW 26.09.191(3) (d).” *In re Marriage of Watson*, 132 Wn. App. at 234.

2. The Trial Court Ignored RCW 26.09.260 When It Entered the 3rd Temporary Order for Custody and the 2nd “Final” Custody Orders.

“The Commencement of a modification action is governed by statute for modification and a supporting affidavit or declaration that sets forth “specific factual allegations, which if proven would permit a court to modify the plan under RCW 26.09.260.” (*Bower v. Reich*, 89 Wn. App. 9, 14, 964 P.2d 359 (1997), citing RCW 26.09.270 and *In re Marriage of Mangiola*, 46 Wn. App. 574, 577, 732 P.2d 163 (1987). (See also Benton County Local Rules).”

Entry of a modified parenting plan absent a petition for modification is an abuse of Discretion (See, e.g., *In re Marriage of Christel and Blanchard*, 101 Wn. App. 13, 23-24, 1 P.3d600 (2000)).

3. The Order for the 2nd and 3rd temporary parenting plans and trial set for a second custody modification trial was based on error of law.

“RCW 26.09.270 Child custody—Temporary custody order, temporary parenting plan, or modification of custody decree— Affidavits required. . . The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits . . .(Emphasis added.)

The trial judge acted on his own, as forbidden *In re Marriage of Watson*, 132 Wn. App. at 233. No adequate cause threshold hearing was held, as required by RCW 26.09.270 and Benton County LCR 94.04W. This shortcut denied the mother, a constitutional right to “a hearing

appropriate to the nature of the case” (*In re C.R.B.*, 62 Wn. App. at 614, citations omitted. See also Washington Constitution, art. I, § 3. ).

Second, proceeding with entry of the Order for Adequate Cause without an adequate cause hearing was a violation of due process, entered in contravention of RAP 7.2(e) and should be vacated. See *In re Leland*, 115 Wn. App. 517, 530, 61 P.3d 357, rev. denied, 149 Wn.2d 1025, 77 P.3d 650 (2003); *State v. Moro*, 117 Wn. App. 913, 924, 73 P.3d 1029 (2003); *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999).

4. The court erred when it removed RCW 26.09.191 restrictions and did not comply with RCW 26.09.260(1), (2)(c), (4), and (10) or RCW 26.09.191(2)(n)

The trial court based its order(s) on the erroneous conclusion that the Court can change the Parenting Plan without further findings. (Consequently, as with the first Modified Parenting Plan, the trial court entered a modified parenting plan despite the fact that there were no findings to modify the original parenting plan, remove the .191 limitations on Mr. Parrish and then place .191 limitations on the mother that did not relate to the mandatory and statutory .191 criteria of RCW 26.09.260.

The Alaska custody orders entered limitations and restrictions to be placed on the father – first, requiring anger management and parenting

classes, then a no contact order, and restricting the amount of overnights a year. The WA superior court had before it, the following orders that had been issued by the State of Alaska: “The Supreme Court of the State of Alaska by Special Order of the Chief Justice Carpeneti in Order No. 6202” Ex. 52, Alaska Superior Court Judge John Suddock’s twelve page Decision and Order that stated:

“Because she had established *prima facie* violations, one of which Robert conceded, and because Ms. [von Hell] requested that the court reopen the domestic violence case...” [page 2, paragraph 4]

“Mr. Parrish agreed to address the pending domestic violence issues. He wished to avoid a domestic violence order because it would result in termination of his military security clearance.” [page 2, paragraph 5] “The court stated it could not ignore the issue, but would allow him to settle if he attended a twelve week domestic violence batterer’s intervention program at the Men’s and Women’s Center...” [page 2, 3 paragraph 5] “Mr. Parrish explained his violation of the court’s order to attend domestic violence classes . . . He substituted an online anger management class. . . .The court found that Mr. Parrish’s substitution of an online course to be controlling behavior, and ordered him to take the domestic violence course... Mr. Parrish denied the existence of the recently imposed no-contact order.” [page 3, paragraph 6] “The court criticized Mr. Parrish for being manipulative and dishonest at times, speculated that this could derive from some sort of personality disorder. The court had before it strong evidence that Mr. Parrish appeared at one or more custody exchanges in violation of court orders, relentlessly disparaged of Ms. [von Hell] in emails, and engaged in manipulative and controlling behaviors...” [page 11 paragraph 24] “over the course of repeated hearings, the court admonished Mr. Parrish to comply with court orders, to recognize Ms. [von Hell’s] autonomy, and move past behavior patterns evocative of the domestic violence batterer’s syndrome. . . . after multiple hearings in this now four-volume high-conflict case...” [Page 11, 12 Paragraph 24]” Ex. 52.

Chief Justice Carpeneti of the Alaska Supreme Court and Superior Court Judge Eric Aarseth both affirmed Superior Court Judge John Suddock's findings and orders stated above.

"The court made no findings of fact or conclusions of law that removing the restriction was in the best interests of the children, as is required under RCW 26.09.260(1), (2)(c), (4), and (10) or RCW 26.09.191(2)(n)." *In re Marriage of Kinnan*, 131 Wn. App. 738, 129 P.3d 807, 2006 Wash. App. LEXIS 255

The WA trial court's findings do not satisfy the mandatory criteria of RCW 26.09.260(1), (2)(c), (4), and (10) or RCW 26.09.191(2)(n) for modification of a final parenting plan. The statute prohibits the court from modifying a parenting plan:

"unless it finds . . . the modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1).

Finding that denial of Skype calls was not in the best interests of the child does not address whether changing the boy's primary residence was in his best interest. Missing a couple of Skype calls, is a far leap from that principle to the finding that would be necessary to uphold modification of the parenting plan: namely, that removal of the child from his mother's care was necessary to serve the child's best interest. Permanent modifications of a final parenting plan entered under the auspices of a temporary order violates RCW 26.09.260.

## 5. The Contempt Orders Are Void.

Whether or not Ms. Von Hell directly appealed each contempt order, she has a clear right to attack them collaterally in this appeal because they were entered in violation of due process and are thus void. See *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975) (holding a final judgment may be vacated during a collateral proceeding by demonstrating that it is void). An order void as a violation of the right to counsel cannot be the predicate of subsequent orders and is subject to collateral attack. *State v. Ponce*, 93 Wn.2d 533, 540, 611 P.2d 407 (1980) (holding that a traffic conviction entered in violation of the constitutional right to counsel cannot be considered in a subsequent habitual traffic offender civil proceeding). Moreover, no future modifications can be based on the void contempt orders and they must be vacated. “Courts have a nondiscretionary duty to vacate void orders.” *In re Dependency of A.G.*, 93 Wn. App. 268, 276, 968 P.2d 424 (1998).

The appellant Alexandria von Hell respectfully requests that the Court of Appeals vacate the orders of contempt entered; and reverse the WA final parenting plans and other orders entered; mother requests immediate return of the child to her care, pursuant to the Alaska final parenting plan and custody orders based on the arguments above.

## **M. REQUEST FOR AWARD OF ATTORNEY’S FEES**

Pursuant to RAP 18.1 and Chapter 26.27 the Child Custody Jurisdiction statute, Ms. Von Hell requests reasonable attorney's fees and expenses. As provided in RCW 26.27.511(1)

"[t]he court shall award the prevailing party . . . necessary and reasonable expenses incurred by or on behalf of the party. . ."

The respondent in this case cannot establish "the award would be clearly inappropriate." RCW 26.27.511(1). In fact, it was Mr. Parrish who wrongfully commenced these proceedings and engaged in continuous and abusive litigation with prolific filings, in an attempt to "forum shop" – all while knowing that he was engaging in simultaneous proceedings he previously commenced in Alaska and using jurisdiction as a weapon.

**N. CONCLUSION OF ARGUMENT RE: TEMPORARY AND FINAL  
ORDERS MODIFYING THE ALASKA CHILD CUSTODY DECREE  
AND PARENTING PLAN**

Ms. Von Hell respectfully requests the challenged decisions of the Superior Court as set forth in the assignments of error and this appeal be reversed and the matter dismissed as void.

Respectfully submitted this 27th day of April, 2018

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**ALAXANDRIA VON HELL - FILING PRO SE**

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