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State of Washington  
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No. 354989-III

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

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**Paul Cardwell, Respondent**

v.

**Regan Cardwell, Appellant**

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**REPLY BRIEF OF REGAN CARDWELL**

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<b><u>TABLE OF CONTENTS</u></b>	<b><u>Page</u></b>
<b>I. Summary of the Reply Brief of Regan Cardwell</b>	<b>1</b>
<b>II. Standard of Review Revisited</b>	<b>4</b>
<b>III. The Structure of Paul Cardwell's Argument</b>	<b>6</b>
<b>A. Paul's Conflation of the Petition to Modify and the Possible Emergency Motion on Placement Due to Incarceration</b>	<b>6</b>
<b>B. Paul Cardwell's Insufficient Citation to the Record</b>	<b>8</b>
<b>C. Paul's Digression on Discovery Matters</b>	<b>9</b>
<b>D. Paul Evades the Facts</b>	<b>10</b>
<b>E. Paul's Request for Fees</b>	<b>11</b>
<b>F. No Cited Argument About the GAL Issue</b>	<b>12</b>
<b>IV. Conclusion: The Trial Court Abused Its Discretion</b>	<b>12</b>

**TABLE OF AUTHORITIES:**

**Page**

**Statutes:**

<b>RCW 26.09.260</b>	<b>1-2, 4, 8, 10, 20-21, 26</b>
<b>RCW 26.09.270</b>	<b>1, 3, 8, 10, 17, 20-21</b>
<b>RCW 26.10.030</b>	<b>22</b>
<b>RCW 26.12.175(1)(a)</b>	<b>25</b>

**Cases:**

<i>Brandli v. Talley</i> , 98 Wn.App. 521, 523, 991 P.2d 94 (1999).	<b>3</b>
<i>Council House, Inc. v. Hawk</i> , 136 Wash. App. 153, 147 P.3d 1305 (2006).	<b>5</b>
<i>Diel v. Beekman</i> , 7 Wash.App. 139, 499 P.2d 37 (1972).	<b>18</b>
<i>Estate of Treadwell ex rel. Neil v. Wright</i> , 115 Wash. App. 238, 61 P.3d 1214 (2003).	<b>6</b>
<i>Ferree v. Doric Co.</i> , 62 Wash.2d 561, 383 P.2d 900 (1963).	<b>18-19</b>
<i>Grieco v. Wilson</i> , 144 Wash. App. 865, 184 P.3d 668 (2008), <i>aff'd sub nom. In re Custody of E.A.T.W.</i> , 168 Wash. 2d 335, 227 P.3d 1284 (2010) (internal citations omitted).	<b>21</b>
<i>In re Dependency of A.G.</i> , 93 Wash. App. 268, 968 P.2d 424 (1998), <i>as amended on reconsideration</i> (Feb. 1, 1999)	<b>24-25</b>
<i>In re Marriage of Fahey</i> , 164 Wash.App. 42, 262 P.3d 128 (2011).	<b>22</b>
<i>In re Marriage of Kinnan</i> , 131 Wash.App. 738, 129 P.3d 807 (2006).	<b>22</b>
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).	<b>3</b>

**TABLE OF CASES, CONT.**

	<b>Page</b>
<i>In re Marriage of Parker</i> , 135 Wn.App. 465, 145 P.3d 383 (2006).	<b>3-5, 21</b>
<i>In re Marriage of Stern</i> , 57 Wash. App. 707, 789 P.2d 807 (1990).	<b>4</b>
<i>In re Marriage of Tang</i> , 57 Wash.App. 648, 653, 789 P.2d 118 (1990).	<b>6</b>
<i>In re Marriage of Timmons v. Timmons</i> , 94 Wash.2d 594, 617 P.2d 1032 (1980).	<b>26</b>
<i>In re Marriage of Wehr</i> , 165 Wash. App. 610, 267 P.3d 1045, 1047 (2011).	<b>26</b>
<i>In re Marriage of Zigler &amp; Sidwell</i> , 154 Wash. App. 803, 226 P.3d 202, 206 (2010).	<b>26-27</b>
<i>In re Parentage of Jannot</i> , 149 Wn.2d 123, 128, 65 P.3d 664 (2003).	<b>3, 13, 21</b>
<i>In re Snyder</i> , 85 Wash.2d 182, 532 P.2d 278 (1975).	<b>4</b>
<i>In re Waggener's Marriage</i> , 13 Wash. App. 911, 538 P.2d 845 (1975).	<b>23</b>
<i>Lindgren v. Lindgren</i> , 58 Wash.App. 588, 794 P.2d 526 (1990), <i>review denied</i> , 116 Wash.2d 1009, 805 P.2d 813 (1991).	<b>6</b>
<i>Link v. Link</i> , 165 Wash. App. 268, 268 P.3d 963, 967 (2011).	<b>6</b>
<i>Marriage of Hoseth</i> , 115 Wash.App. 563, 63 P.3d 164 (2003).	<b>26</b>
<i>Shellenbarger v. Brigman</i> , 101 Wash. App. 339, 3 P.3d 211 (2000).	<b>19</b>
<i>State ex rel. J.V.G. v. Van Guilder</i> , 137 Wn.App. 417, 154 P.3d 243 (2007).	<b>6-7, 17</b>
<i>State v. Dailey</i> , 93 Wash. 2d 454, 610 P.2d 357 (1980).	<b>18</b>

**TABLE OF CASES, CONT.**

**Page**

<i>State v. Eppens</i> , 30 Wash.App. 119, 126, 633 P.2d 92 (1981).	<b>19</b>
<i>State v. Mallory</i> , 69 Wash. 2d 532, 419 P.2d 324 (1966).	<b>19</b>
<i>State v. Skuza</i> , 156 Wash. App. 886, 235 P.3d 842 (2010), <i>as amended</i> (July 20, 2010).	<b>19</b>
<i>Steel v. Johnson</i> , 9 Wn.2d 347 (1941).	<b>13</b>
<i>Thompson v. Thompson</i> , 9 Wash.App. 930, 515 P.2d 1004 (1973).	<b>18</b>
<i>Vandercook v. Reece</i> , 120 Wash.App. 647, 86 P.3d 206 (2004).	<b>13</b>
<i>Wildermuth v. Wildermuth</i> , 14 Wn.App. 442, 542 P.2d 463 (1975).	<b>21-23</b>

## **I. Summary of the Reply Brief of Regan Cardwell**

Paul Cardwell does not refute, or even address, the extensive facts in the file that were not known to the court at the time that the final parenting plan (based upon a trial from earlier in 2012) was signed by the court on 3/15/13.

Regan Cardwell's Petition to Modify (CP: 11-16) summarizes these facts and they were presented in detail in the opening brief, and in the referenced clerk's papers. (Including CP: 58-111, 425-36, and 494-500.) The guilty pleas and convictions after appeal included multiple criminal law violations, including Paul Cardwell threatening others with his "two shotguns." (CP; 494-500.) There were allegations of domestic violence, including threats of self-harm, as well as harm to others and property (CP: 65-70 and 136-40), and the order of protection was granted against Paul Cardwell by Judge Runge in Benton County, WA (CP: 60-64). These acts not only support a Petition to Modify on their own, but they are probative of Ms. Cardwell's extensive evidence of Mr. Cardwell behaving abusively toward her, and of Paul trying to disrupt Regan's relationship with her girls.

Under the current legal standards (see Opening Brief), adequate cause should have been granted, and a GAL should have been appointed.

Instead, Mr. Cardwell again tried to mislead the court that the only basis of Ms. Cardwell's Petition to Modify, and Motion for Adequate Cause, was Paul's possible incarceration in Idaho, as he was subject to 180 days of incarceration at the discretion of the Idaho court. Paul Cardwell is misleading the court as to the basis of Regan Carwell's Petition to Modify.

Paul Cardwell makes light of his marijuana charge in Idaho. (Respondent's Brief at the bottom of p.2, and top of page 3.) For example, he states "and a recent Idaho arrest and charge for possession of marijuana, in an amount which is legal for him to possess in Washington, where he resides, but not in Idaho where he had traveled."

Again, this is misleading. First, that something is legal in Washington does not mean that breaking the law of another state is trivial. It would not be a defense to a prostitution charge in Washington State to say, "Well, it is legal in parts of Nevada." Second, Paul Cardwell pled guilty to "possession in excess of three ounces." (CP: 426) That is illegal in Washington, also.

Contrary to Mr. Cardwell's representation to the court, RCW 69.50.360(2) and (3) reads, in relevant part, that the following are not crimes:

(2) Possession of quantities of marijuana concentrates, useable marijuana, or marijuana-infused products that do not exceed the

maximum amounts established by the state liquor and cannabis board under RCW69.50.345(5);

(3) Delivery, distribution, and sale, on the premises of the retail outlet, of any combination of the following amounts of marijuana concentrates, useable marijuana, or marijuana-infused product to any person twenty-one years of age or older:

(a) One ounce of useable marijuana;

Then RCW 60.50.4013 applies the one-ounce standard to individual use and possession, including in RCW 60.50.4013(3)(a):

(3)(a) The possession, by a person twenty-one years of age or older, of useable marijuana, marijuana concentrates, or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law.

Contrary to Paul Cardwell’s minimization of his detrimental and criminal behavior, Regan Cardwell’s Petition to Modify (CP: 11-16), Regan’s Motion for Adequate Cause (CP: 38-39), Regan’s Memo of Law in Support of Adequate Cause (CP: 40-44), and all of its incorporated documents, more than met the criteria of *Lemke* to grant adequate cause and to proceed to trial.

This Reply Brief will be concise and will mainly rely upon the Opening Brief, but the following succinct summary of the law of adequate cause bears repeating (emphasis added):

The primary purpose of the threshold adequate cause requirement is to prevent a useless hearing. *In re Marriage of Lemke*, 120 Wash.App. 536, 540, 85 P.3d 966 (2004).

“Adequate cause” has been defined as

“ ‘something more than prima facie allegations, which, if proven, might permit inferences sufficient to establish grounds for a custody charge.’ ” *Mangiola*, 46 Wash.App. at 577, 732 P.2d 163 (quoting *In re Marriage of Roorda*, 25 Wash.App. 849, 852, 611 P.2d 794 (1980), *Jannot*, 149 Wash.2d at 126–27, 65 P.3d 664).

As in RCW 26.10.032, RCW 26.09.270 requires a petitioner to submit affidavits with specific factual allegations that, if proved, would permit a court to modify the parenting plan under RCW 26.09.260.

*Grieco v. Wilson*, 144 Wash. App. 865, 875, 184 P.3d 668, 673

(2008), *aff'd sub nom. In re Custody of E.A.T.W.*, 168 Wash. 2d 335, 227 P.3d 1284 (2010).

Regan Cardwell’s facts are “more than prima facie allegations.”

The trial court abused its discretion to vacate its prior finding of adequate cause. The *Parker* case cited in the Opening Brief remains applicable. *In re Parker*, 135 Wash. App. 465, 471, 145 P.3d 383, 385 (2006). There are the facts, sufficiently pled and supported, to justify a trial on Regan’s Petition to Modify the Parenting Plan.

## **II. Standard of Review Revisited**

Adequate cause exists if Regan Cardwell has “more than mere allegations,” and she does. As *Grieco v. Wilson*, quoted above says, Regan need only provide the court with (emphasis added) “affidavits with specific factual allegations that, if proved, would permit a court to modify the parenting plan under RCW 26.09.260.”

Regan Cardwell did provide many, many declarations with specific factual allegations, which, if proved, would permit modification of the parenting plan.

The trial court's decision was either the result of the application of the wrong standard of law, or clearly contrary to the facts in the file.

Some additional abuse of discretion law is presented, below:

A court abuses its discretion when an “ ‘order is manifestly unreasonable or based on untenable grounds.’ ” *In re Pers. Restraint of Rhome*, 172 Wash.2d 654, 668, 260 P.3d 874 (2011) (internal quotation marks omitted) (quoting *State v. Rafay*, 167 Wash.2d 644, 655, 222 P.3d 86 (2009)). A discretionary decision is “ ‘manifestly unreasonable’ ” or “ ‘based on untenable grounds’ ” if it results from applying the wrong legal standard or is unsupported by the record. *Id.* (internal quotation marks omitted) (quoting *Rafay*, 167 Wash.2d at 655, 222 P.3d 86).

*State v. Salgado-Mendoza*, 189 Wash. 2d 420, 427, 403 P.3d 45, 49 (2017).

**Application of *State v. Salgado-Mendoza*:** The record more than supports a finding of adequate cause under the *Lemke-Grieco* line of cases. The trial court clearly applied the wrong legal standard, as the facts are more than sufficient to merit trial.

To the extent that the appellate court is reviewing the trial court's legal theories, the review is *de novo*:

We review questions of statutory interpretation *de novo* to give effect to the legislature's intentions. *Dep't of Ecology v. Campbell*

*& Gwinn, LLC*, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002).

*Rodriguez v. Zavala*, 188 Wash. 2d 586, 591, 398 P.3d 1071, 1073–74 (2017). And any application of the wrong legal standard, is also reviewed on appeal *de novo*:

We review *de novo* alleged errors of law to determine the correct legal standard. *In re Marriage of Fahey*, 164 Wash.App. 42, 262 P.3d 128, 134 (2011); *In re Marriage of Kinnan*, 131 Wash.App. 738, 751, 129 P.3d 807 (2006).

*In re Marriage of Wehr*, 165 Wash. App. 610, 613, 267 P.3d 1045, 1047 (2011).

There is adequate cause to proceed to trial, and the court is asked to remand for trial on the parenting plan modification.

### **III. The Structure of Paul Cardwell's Argument**

The structure of Paul Cardwell's argument is presented, and refuted, below.

#### **A. Paul's Conflation of the Petition to Modify and the Possible Emergency Motion on Placement Due to Incarceration**

Paul Cardwell's Responsive Brief, as noted above, mis-states the record, and claims that the mother's possible emergency motion about Paul's possible pending incarceration, which Regan abandoned before the adequate cause hearing, was also the basis of her adequate cause motion.

(Again, her Petition and all of its supporting documents and declarations contradict this proposition.)

Next, Mr. Cardwell tells the court, on page 6, that he did not supplement the record to challenge Ms. Cardwell's facts because the appellate court "is not asked to review the trial court's credibility determinations." And then Paul Cardwell returns to this theme of "credibility determinations" on page 9. (See Brief of Respondent at pp. 6 and 9.)

**Reply on "Credibility Determinations":** Of course, the "credibility" of items like Paul Cardwell's guilty plea for possession in excess of three ounces of marijuana in Idaho, supra, is not in doubt, nor is it in doubt that his harassment conviction was upheld (CP: 494), nor is the protection order granted against him in doubt as a public record (CP: 60-64). The trial court simply chose to ignore these facts, and more, and the trial court chose to ignore the probative value of these absolutely certain facts as to Regan's other allegations of Paul's detrimental behavior and his disruption of Regan's relationship with her daughters. All of these allegations were supported by documents and/or declarations of other witnesses.

There is no "credibility" to challenge, in that the burden on Ms. Cardwell on adequate cause is to present sufficient allegations, "if proved," that could justify modifying the parenting plan.

In sum, the legal standard for adequate cause is more akin to summary judgment. To repeat with a portion of the *Grieco* quote, provided above (emphasis added):

As in RCW 26.10.032, RCW 26.09.270 requires a petitioner to submit affidavits with specific factual allegations that, if proved, would permit a court to modify the parenting plan under RCW 26.09.260.

*Grieco v. Wilson*, 144 Wash. App. 865, 875, 184 P.3d 668, 673 (2008), *aff'd sub nom. In re Custody of E.A.T.W.*, 168 Wash. 2d 335, 227 P.3d 1284 (2010).

The standard for adequate cause is submitted evidence that would provide a modification if proved at trial.

Under the governing case law, Regan Cardwell has provided sufficient evidence to proceed to trial. It is an error of law, or an abuse of discretion, to deny adequate cause on these facts.

#### **B. Paul Cardwell's Insufficient Citation to the Record**

Paul Cardwell presents extensive argumentation without citation to the record. RAP 10.3(a)(5) reads, in relevant part:

Reference to the record must be included for each factual statement.

RAP 10.3(b) reads, in relevant part:

(b) Brief of Respondent. The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner.

**Application of RAP 10.3(a)(5) and (b):** The un-cited, narrative, factual allegations of Paul Cardwell, especially from pages 2-4 and pages 8-11, should not be considered. These allegations are also irrelevant under ER 401-403, as the legal question is whether Regan Cardwell has presented sufficient evidence of allegations, which, if proven at trial, would justify a modification of the parenting plan.

### **C. Paul's Digression on Discovery Matters**

On Respondent's Brief, on page 7, Paul Cardwell seeks to raise discovery matters. First, the discovery issues are not germane to the appeal issues, which are: (a) adequate cause, and (b) appointment of a guardian-ad-litem.

Second, Mr. Cardwell states that his protective order "was granted by the court. CP 782-784." However, an order of the commissioner is not a final order of the superior court until 10 days have passed and the order is not revised. RCW 2.24.050.

The Superior Court Order on Revision of 9/15/17 (CP: 818-819) specifically vacated the order that Paul Cardwell would tell the court was "granted." The Superior Court Order states: "The August 23, 2017 Judgment and Order (sub# 320) is vacated and the underlying motion for protective order is denied." (CP: 818.)

Although this issue is digressive, to further clarify the record, it was clear from Mr. Mason's 8/23/17 declaration (CP: 776-780) that Paul Cardwell's counsel, Barbara Black, had agreed to answer the interrogatories without objection. Additionally, Paul Cardwell's Interrogatories to Regan (CP: 679-713) had the same kind of wide-ranging scope. Examples would be: ROGS 4 and 5 on CP: 683, about every related and unrelated person who had lived with Regan since the final parenting plan was entered, and whether she had "ever been treated by a psychiatrist or been in patient in a mental institution..." (ROG#9 at CP: 684) (emphasis added).

In short, Paul is raising a one-sided version of an irrelevant discovery dispute, and he obscured the fact that the Superior Court denied his request for a protective order. (CP: 818.)

#### **D. Paul Evades the Facts**

By page 11 of the Respondent's Brief, there is a return to narration without citation to the record, because the record is damning about Paul's behavior in his own life, and it supports an inference of detriment to the children from his behavior (e.g., CP: 494-500, CP: 112-140, esp. Tesa Kuhn (CP: 136-139) and the cases and instances provided by Regan (CP: 45-57 and 58-111). The mother's petition and materials cited in her Opening Brief also show that Paul was abandoning the children and

working to alienate the children from Regan, and to disrupt her visitation with them. Each of these categories of facts independently support a finding of adequate cause.

It is an abuse of discretion not to find adequate cause to proceed to trial on Regan Cardwell's Petition to Modify the Parenting Plan.

**E. Paul's Request for Fees**

Paul Cardwell makes a RAP 18.1 request for fees, apparently on the basis of motions made in the trial court. Paul's theory of "over-litigation" has no basis in the record, and his motion for a protective order was, in fact, denied. (CP: 818.)

Instead, Ms. Cardwell has faced the Respondent's Brief that did not cite to the record, and in which Paul Cardwell mis-stated the record. The court is asked to consider an award of fees to Regan Cardwell.

The law is clear on frivolous appeals:

"An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal."

*Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007).

Regan Cardwell's appeal is well-grounded in fact and law.

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#### **F. No Cited Argument About the GAL Issue**

Paul Cardwell apparently is relying upon Division III upholding the dismissal of Regan Cardwell's Petition to Modify, as he does not present any argument about the issue of appointing a Guardian-ad-Litem.

Ms. Cardwell asks the court to appoint a GAL for the children on remand. And the court's interpretation of RCW 26.12.175(1)(a) as applied to these facts is *de novo*. *In re Marriage of Wehr*, 165 Wash. App. 610, 613, 267 P.3d 1045, 1047 (2011). Note: Please compare authorities in the Opening Brief with the Commissioner's ruling on 5/5/17 that states: "I don't need a guardian ad litem to tell me how I should think." (CP: 615). At no point did Ms. Cardwell seek to have a GAL invade the province of the judicial officer.

#### **IV. Conclusion: The Trial Court Abused Its Discretion**

Paul Cardwell does not deny that the facts are new to the court; he only denies that the allegations of the mother support adequate cause.

The submitted facts do indicate a substantial change of circumstance in the father's home, and those new facts support the mother's additional allegation of detriment to the children:

The determinative considerations are whether the facts underlying the substantial change of circumstances existed at the time of entry of the prior or original plan or were unanticipated by the superior court at that time. RCW 26.09.260(1). If the underlying facts did not exist or the prior or original plan did not

anticipate the substantial change in circumstances, the superior court may adjust the parenting plan. RCW 26.09.260(5).

*In re Marriage of Hoseth*, 115 Wash. App. 563, 571, 63 P.3d 164, 168 (2003).

Regan Cardwell has shown Paul Cardwell's abusive and threatening behavior toward her, and Paul detrimentally disrupting her relationship with the girls, which harms the girls and their mother:

*Murphy* establishes that a finding of detriment to the child in his or her present environment need not be based upon the parenting of either party, but may arise from a change in the joint custodial environment. Such is the situation in the instant case. The relationship between the parties decayed so that the children's well-being was at risk. Substantial evidence in the record supports the trial court's determination that the joint custodial arrangement was no longer workable.

*In re Marriage of Stern*, 57 Wash. App. 707, 715, 789 P.2d 807, 812 (1990).

To prevail at trial RCW 26.09.260(1) requires a substantial change in circumstances, and RCW 26.09.260(2), in relevant part, requires for a major modification the following:

(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...

To satisfy RCW 26.09.260(1) what matters is not when the new facts occurred, but whether they were known to the court for purposes of the governing decree. The petition to modify is brought (emphasis added):

on the basis of facts that had arisen since the prior decree or were unknown to the court at the time of the prior decree, that a substantial change had occurred...

*Link v. Link*, 165 Wash. App. 268, 275–76, 268 P.3d 963, 967 (2011).

At this juncture, the legal standard bears a final restatement.

Regan Cardwell does not need to win her trial in advance of an order of adequate cause being granted:

As in RCW 26.10.032, RCW 26.09.270 requires a petitioner to submit affidavits with specific factual allegations that, if proved, would permit a court to modify the parenting plan under RCW 26.09.260.

*Grieco v. Wilson*, 144 Wash. App. 865, 875, 184 P.3d 668, 673 (2008), *aff'd sub nom. In re Custody of E.A.T.W.*, 168 Wash. 2d 335, 227 P.3d 1284 (2010) (emphasis added).

Regan Cardwell has presented “specific factual allegations” that are sufficient to support modifying the parenting plan in this case “if proved” at trial.

It was an abuse of discretion to deny Regan Cardwell adequate cause to proceed to trial, and given the difficulties of obscured evidence and facts, and given the need to determine the best interests of the girls, the appointment of a Guardian ad Litem on remand is requested.

Respectfully submitted on 2/12/18,



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## DECLARATION OF SERVICE

I declare, under penalty of perjury under the laws of the State of Washington, that on the 12<sup>th</sup> day of February, 2018, I provided, via electronic filing, a copy of Ms. Cardwell's Reply Brief to the following:

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## Transmittal Information

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