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Division III
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No. 354989-III

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

Paul Cardwell, Respondent

v.

Regan Cardwell, Appellant

OPENING BRIEF OF REGAN CARDWELL

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I. Introduction

The trial court commissioner properly found adequate cause to modify the parenting plan on 2/3/17, based upon the mother's petition which showed a substantial change of circumstances in the father's home, and which showed detriment to the children in the father's home. This finding of adequate cause was not revised or appealed.

The trial court judge then abused his discretion when he denied the appointment of a Guardian ad Litem on 6/2/17, and the trial court judge committed errors of law and abused his discretion when he vacated the finding of adequate cause on 9/15/17.

The father's multiple crimes and acts of domestic violence, the father's abandonment of the children, as well as his attempts to interfere with the mother's relationship with the children, are more than sufficient to meet the adequate cause requirements of RCW 26.09.260/.270. The trial court committed error of law, and abused its discretion, not to allow the petition to modify to proceed. Also, on the unique facts of this case, failure to appoint a GAL was unreasonable and was not in the best interests of the children.

II. Assignments of Error and Related Issues

Error No.1: The trial court abused its discretion by the Order of 9/15/17 (CP: 818-19) when it vacated the 2/3/17 order that established adequate

cause (CP: 461-65), and when it denied reconsideration of that decision on 10/2/17 (CP: 829).

Issue No. 1A, Pertaining to Error No.1: Had the mother, Regan Cardwell, met the adequate cause threshold required by RCW 26.09.260/270 and its case law? Answer: Yes. The mother submitted “more than a prima facie case” that the father had engaged in abusive behavior, violent and criminal acts, and other actions detrimental to the children, and that bad behavior by the father was not only indicative of a substantial change in circumstance, but it was also probative of her assertions as to detriment in the father’s home, including the detriment of the father interfering with the mother’s relationship with the children. This decision was both untenable on the facts, and it was an error of law.

Issue No. 1B, Pertaining to Error No. 1: Was Error No.1 due to an error of law? Answer: Yes, the trial court did not apply the proper legal standard when it vacated the 2/3/17 Order Finding Adequate Cause.

Error No. 2: The trial court abused its discretion in not appointing a Guardian ad Litem, by its order of 6/2/17, which adopted the findings of the commissioner as its own on motion to revise (CP: 620-21).

Issue No.2, Pertaining to Error No. 2: Given the facts of this case, was it unreasonable of the court not to appoint a Guardian ad Litem? Answer: Yes, as the father had been extremely secretive, and he is

assisted by his parents in keeping information from the mother; a GAL is necessary to serve the best interests of the children.

III. Standard of Review: Abuse of Discretion

The standards of review are presented, below:

A. Adequate Cause: Abuse of Discretion Standard

A trial court's adequate cause determination for a proposed parenting plan modification is reviewed for abuse of discretion. *In re Parentage of Jannot*, 149 Wn.2d 123, 128, 65 P.3d 664 (2003). In general, a party moving to modify a parenting plan must show adequate cause for modification before the court will permit a full hearing on the matter. RCW 26.09.270. Discretion is abused if the court's decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). See, e.g., *In re Marriage of Parker*, 135 Wn.App. 465, 471, 145 P.3d 383 (2006) (denial of adequate cause reversed for abuse of discretion).

B. Untenable Grounds (Errors of Law) and Untenable Reasons (including Lack of Substantial Evidence or an Unreasonable Decision)

In addition, the appellate court must determine if the findings of fact are supported by substantial evidence and whether the court made an error of law. *Brandli v. Talley*, 98 Wn.App. 521, 523, 991 P.2d 94 (1999). Substantial evidence is defined as:

If the record contains evidence of “sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise”, substantial evidence exists. *In re Snyder*, 85 Wash.2d 182, 185–86, 532 P.2d 278 (1975).

In re Marriage of Stern, 57 Wash. App. 707, 717, 789 P.2d 807, 813 (1990).

In the *Parker* case, the father had presented evidence of his girlfriend’s (Andrea’s) sobriety, which the trial court had rejected as a substantial change of circumstances. In reversing the trial court’s denial of adequate cause, the appellate court stated:

To establish adequate cause, the petitioner has the burden of showing a substantial change of circumstances. The determination of a substantial change must be grounded on facts that “have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan”. RCW 26.09.260(1). Unknown facts include those facts that were not anticipated by the court at the time of the prior decree or plan. *Marriage of Hoseth*, 115 Wash.App. 563, 569–71, 63 P.3d 164 (2003).

In re Parker, 135 Wash. App. 465, 471, 145 P.3d 383, 385 (2006).

C. *In re Parker* as an Exemplar of an Untenable Decision

Continuing a discussion of the *Parker* case, *supra*, to define the standard of review, the appellate court laid out the key facts:

The trial court rejected the argument that Andrea's additional two years of sobriety amounted to a substantial change of circumstances. The rationale is reflected in the oral ruling: “There wasn't something in the parenting plan saying if she gets treated and stays sober for some particular length of time, that the parenting plan would change or be reviewed.” But the fact that

the Parker parenting plan did not anticipate the possibility of Andrea successfully completing treatment for drug abuse supports Dennis's position. In March 2004 when the parenting plan was entered, Andrea was still under significant restriction with respect to visiting her own children. The hearing in which this restriction would be lifted was still six months in the future. The record shows that "Loss of custody of her own children" was the major basis for precluding Andrea's contact with the Parker children. Because no one could have known at the time that Andrea would remain sober long enough to regain her right to have unsupervised visitation with her own children, this fact was "unknown". If she has indeed done so, the major reason for the no-contact order in the Parker parenting plan is no longer present. Absent proof that Andrea is unsafe to be around the Parker children, it is in their best interest to be able to visit their father in the company of Andrea and their new half-brother. We conclude there is no tenable basis for denying Dennis the opportunity to proceed to a show cause hearing on whether the no-contact order should be lifted.

In re Parker, 135 Wash. App. 465, 471–72, 145 P.3d 383, 385–86 (2006)

(emphasis added).

D. "Untenable Decisions" Can Also Be Errors of Law

An abuse of discretion includes errors of law:

A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.

Untenable reasons include errors of law.

Council House, Inc. v. Hawk, 136 Wash. App. 153, 159, 147 P.3d 1305, 1307 (2006) (footnotes omitted).

E. Order to Vacate Review for Abuse of Discretion

An abuse of discretion standard also applies to motions to vacate:

A trial court's decision to grant or deny a motion to vacate under CR 60(b) will not be overturned on appeal absent an abuse of discretion. *Lindgren v. Lindgren*, 58 Wash.App. 588, 594–95, 794 P.2d 526 (1990), *review denied*, 116 Wash.2d 1009, 805 P.2d 813 (1991). Discretion is abused if it is exercised on untenable grounds for untenable reasons. *In re Marriage of Tang*, 57 Wash.App. 648, 653, 789 P.2d 118 (1990).

Estate of Treadwell ex rel. Neil v. Wright, 115 Wash. App. 238, 249, 61 P.3d 1214, 1219 (2003).

The primary decision for the appellate court in this (Cardwell) case is actually just one: *Was it an abuse of discretion for the trial court to deny [at any phase] that there is adequate cause to proceed with Regan Cardwell's petition to modify the parenting plan?* (Answer: Yes.)

F. Standard of Review of Revisions

The decisions at issue include several denials of motions to revise, and so the applicable law is presented, below:

[W]hen the superior court denies a motion for revision, it adopts the commissioner's findings, conclusions, and rulings as its own.

State ex rel. J.V.G. v. Van Guilders, 137 Wn.App. 417, 423, 154 P.3d 243 (2007). This standard is restated in more context, below:

Generally, we review the superior court's ruling, not the commissioner's. But when the superior court denies a motion for revision, it adopts the commissioner's findings, conclusions, and rulings as its own.

State ex rel. J.V.G. v. Van Guilder, 137 Wash. App. 417, 423, 154 P.3d 243, 246 (2007), *as amended* (Mar. 15, 2007), *as amended on reconsideration* (May 29, 2007) (footnotes omitted).

G. Summary of the Standard of Review

The standard of review can be applied, as restated, as follows:

Assignment of Error No. 1: Have the new facts, that were unknown to the court when the final parenting plan was adopted, provided a sufficient substantial change in circumstances to provide adequate cause to proceed with a full hearing on a parenting plan modification such that it would be an abuse of discretion, in matters of evidence and of law, not to grant adequate cause? (Regan Cardwell again answers, “Yes, it was an abuse of discretion to vacate the finding of adequate cause, thereby denying that adequate cause exists in this case.”)

Assignment of Error No. 2: Was it an abuse of discretion on these facts not to have appointed a GAL. (Again, Regan Cardwell answers, “Yes.”)

The decisions of the trial court were abuses of discretion.

IV. Statement of the Case

Paul and Regan Cardwell divorced in Grant County, Washington, and following a trial that was held in the summer of 2012, a final parenting plan was entered on 3/15/13 (CP: 1-8). In that plan, Paul

Cardwell was given primary placement in Moses Lake, and Regan Cardwell was provided with substantial visitation in Spokane (CP: 1-8).

Regan Cardwell filed a summons and petition to modify the parenting plan on 10/28/16, requesting a major modification of the plan (CP: 9-16). Regan's petition (also supplemented by declarations and exhibits) included the following recitation of the substantial change in circumstances under RCW 26.09.270 and .260(1)&(2):

There is a substantial change in circumstances since the final order was entered, under RCW 26.09.260(1), and there is detriment to the children in the father's home, under RCW 26.09.260(2)(b). It would be in the children's best interests to change the parenting/custody order.

Paul Cardwell, the children's father, is absent the majority of the time and regularly engages in criminal activity, often during his custodial time with the children (see criminal history as submitted, and as summarized below). In addition, his parents are left to act as primary physical custodians for the children in his absence, and this is causing harm to the relationship between the children and me, as Paul's parents disparage me to the children, and the children's interests would be best served in my care.

Paul is not physically or personally providing daily care for the children; his parents provide for all of their daily primary physical care. Paul is rarely present at home, yet he does not transfer them to me for visitation; also, he does not attend most of the children's school and extracurricular events.

I am suffering a constitutional detriment in that I am a fit parent, but the children's paternal grandparents are receiving priority of visitation and primary care of the children over me, and I ask that my right to parent be respected, and that Paul's criminal activity and indifference to his parental duties provide the basis of a major modification and a change of placement

The Final Parenting Plan was entered on 3/15/13. Since then Mr. Cardwell has accumulated a significant criminal history, detailed below:

Unbeknownst to the court at the time of entry of final orders, Mr. Cardwell had an existing Protection Order on file against him involving a minor child, filed on 12/28/2012, **Benton County Case #12-2-03141-7.**

On 3/13/13 he was charged with Harassment and Obstruction of Justice (during his custodial time), **Grant County Case # G130319CC.** This conviction is currently on a stay sentence pending appeal under the stipulation that he is not to commit any further criminal law violations, **Grant County Case #14-1-00714-3.** Paul has committed further criminal law violations (see below) and additional incarceration is expected.

Further Charges Occurred as Follows:

4/17/14 - Fishing Without a License and Lying to an Officer (a criminal law violation that occurred during his custodial time), **Grant County Case # 100065979/ C00065831.**

10/20/14, Driving While Intoxicated (a criminal law violation that occurred during his custodial time), **Grant County Case # 4Z1073292.**

4/27/16 - Possession of a Controlled Substance, in Canyon County Idaho, (a **Felony Charge** that occurred during his custodial time with the children), **Idaho Case # CR-2016-0007652-C.** Sentencing in this matter is coming up on 11/7/16 for a Felony count of Possession of Greater Than 3 Ounces. Mr. Cardwell has Pled Guilty to this charge in return for an agreement to drop the paraphernalia charge against him.

5/24/16 - Despite his recent arrest and upcoming sentencing in Idaho, Paul committed yet another criminal violation of Fishing with a Treble Hook and Failure to Submit Gear (during his custodial time with the children) **Grant County Case # 100982181/C00086835.**

Greater Unavailability of Paul Cardwell: While Paul is already absent on all but a few occasions, Paul is very likely to be completely unavailable to care for the children while serving his sentences in Idaho and Washington. His criminal and negligent behavior is a detriment to the children, and his attempts to hide his failings behind his parents should not be allowed to continue.

Developmental Needs of the Girls: As the girls develop, they need more time with their mother. Their desire and need to have more time with me is obvious to any reasonable observer during our visitation. It is detrimental to their long term emotional health and overall development to deny that time with

me to them. The girls deserve to have their mother's guidance and influence during these critical years in their growth, and development into young women.

Alienation Tactics of Paul and His Agents – His Parents:

The children's schedules are kept very full and are arranged and manipulated by Paul and his parents so as to erode their visitation time with me. The children's paternal Grandmother calls and texts the children repeatedly during their visitation time with me, then threatens to punish the girls later if they do not respond and stay in constant, daily communication with her. Paul's parents also disparage me in front of the children, and his mother throws erratic fits of rage which frighten the children so that they beg me not to confront her or say anything for fear of reprisal when they return to her care.

Conclusion: In closing, I am a fit parent with constitutional rights superior to those of the paternal grandparents, and it is in the best interests of the children to be placed in my care and custody. I believe a change of placement is appropriate in this case.

(CP: 12-14) (Ms. Cardwell also submitted many other supporting documents, discussed, infra, that further stated her evidence in support of the elements of RCW 26.09.260/.270.)

Regan Cardwell submitted a proposed parenting plan (CP: 17-25) and the informational form in support of her plan (CP: 26-30). Because the father had pending sentencing in Idaho (CP: 33-35), the mother brought a motion seeking temporary change of placement (CP: 31-32), along with her motion for adequate cause (CP: 38-42), accompanied by a supporting memorandum (CP: 41-44), originally noted to be heard on 11/4/16 (CP: 36).

The matter was moved repeatedly, finally being heard on 12/7/16 (CP: 461), as is documented in, for example, the 8/31/17 ruling (CP: 793).

By the time of the hearing of 12/7/16, Paul Cardwell's Idaho judgment and sentence had been filed with the trial court (CP: 425-36).

Note: No oral record was made of the 12/7/16 hearing before Commissioner Harry Ries; only the written order documents the adequate cause ruling at CP: 461-65.

As for other evidence before the court on 12/7/16, for example, on 11/10/16, Regan filed a further explication of her position in her petition (CP: 45-57), and she filed supporting exhibits (CP: 58-111).

Exhibit A (CP: 59-71) is a granted domestic violence order of protection against Paul Cardwell from Benton County, with Sherie Johnson, a romantic partner, as Paul's RCW 26.50 victim. This order was not known to the court at the time the parenting plan was signed, and was not known to Regan Cardwell for a substantial period of time thereafter, even though it issued on 1/11/13 (CP: 60-64).

Sherie Johnson's sworn DV Petition (CP: 65-70) includes the sworn allegations that Paul Cardwell (CP: 68): (a) "came to my residence 12.27.12 stold [sic] my car & cell phone." (b) "Threatened family members on Christmas Eve." (c) "said he was going to burn my grandma's house down." (d) "Brused [sic] my arm as I was trying to keep

him from stealing my cell phone.” And on CP: 69: (e) “told me he regrets not punching me in my face.” (f) “Said he would pistol whip my son if he ever sees him.” And her petition includes other mistreatment that Paul inflicted upon her, or her family (CP: 69-70).

The remainder of the exhibits (CP: 71-111) also presented facts not known to the court at the time the parenting plan was entered. The same applies to the supplemental criminal history of Paul Cardwell (CP: 141-192), also filed 11/10/16, that included other criminal behavior of Paul, including his threatening someone that he would come back “with two shotguns in his car” (CP: 175 and passim).

Regan submitted many lay declarations on her behalf (e.g., CP: 112-140). Most significant of those was the declaration of Tesa Kuhn (CP: 136-139) who testified about Paul Cardwell’s abusing and stalking her. Tesa also testified about Paul living in Spokane (with her) without his girls (who were left with Gale and Frank Cardwell, with no notice to Regan), instead of living in Moses Lake with his girls (esp. CP: 137). Scott Dennison corroborated that Paul lived in Spokane (CP: 118-22).

Regan Cardwell also took a drug test and submitted a clean UA (CP: 195-199). Ms. Cardwell also submitted text messages in support of her position (CP: 205-241 with Paul’s mother, Gale, and 242-254, with Paul’s father, Frank, and with Paul, CP: 255-295). Regan’s grandmother

(CP: 296-99) and father (CP: 300-304) also filed additional statements in support of Regan.

Paul Cardwell filed a memorandum in opposition to adequate cause (CP: 305-311), his own declaration (CP: 312-329) and extensive declarations on his behalf (CP: 330-378), and numerous documents (hearsay objections not waived) at CP: 379-424.

The Order Granting Adequate Cause was signed by Commissioner Ries on 2/3/17 (CP: 461-65), and it was not revised or appealed.

The Order finds adequate cause (CP: 461) and states, in relevant part, in “other findings” (CP: 461-62) (emphasis added):

- (a) The mother conceded at hearing, prior to decision, that any temporary modification of the parenting plan should be reserved.
- (b) The father’s judgment and sentence from Idaho was properly before the court under ER 201(f) which allows judicial notice to be taken at any time in a proceeding, and under cited case law, e.g., *Steel v. Johnson*, 9 Wn.2d 347 (1941) and *Vandercook v. Reece*, 120 Wash.App. 647, 651, 86 P.3d 206, 209 (2004).
- (c) That the father is susceptible to re-incarceration for up to 180 days at the discretion of the Idaho probation officer was one of the decisive factors in finding adequate cause.
- (d) Any conflicts between mother and the paternal grandparents are not relevant.
- (e) All facts not known to the court when then the final parenting plan was entered on 3/15/2013 were considered.
- (f) Both parties agreed that the *Jannot* case presented the applicable legal standard. See *In re Jannot*, 110 Wash. App. 16, 24–25, 37 P.3d 1265, 1269 (2002), aff’d sub nom. *In re Parentage of Jannot*, 149 Wash. 2d 123, 65 P.3d 664 (2003), as amended (Apr. 30, 2003).

(g) Based upon the foregoing, there has been a substantial change of circumstances in the home of the non-moving party, and there is sufficient concern for detriment to the children, and sufficient evidence regarding the best interests of the children, such that adequate cause should be granted, and mediation ordered, with a trial date to be determined.

(h) Both parties waived a court record on this [12/7/16] hearing, as recording equipment was not available for the telephonic hearing necessitated by the father's counsel having been unable to attend the special set in the regular courtroom on the date of 12/7/16.

(i) These findings are sufficient to provide good cause to enter this order.

Regan Cardwell filed a motion for a Guardian ad Litem and other relief on 4/27/17 (CP: 466-493). In the text messages between Paul and Regan, attached to the motion, Mr. Cardwell makes threatening comments toward Regan's counsel, Mr. Mason. (CP: 479). Paul Cardwell's affirmed conviction for harassment (the shotgun incident) was filed on the same date (CP: 494-500).

The commissioner, on 5/5/17 denied the request for temporary placement, for psychological evaluation of Paul Cardwell, and for the appointment of a Guardian ad Litem (CP: 539-42). On 6/2/17, Ms. Cardwell's motion to revise was denied (CP: 620-21), and the court wrote: "Findings of Comm. are adopted as this court's" (CP: 620).

The issue on appeal from those orders is only the appointment of the Guardian ad Litem, and exception is taken to the written finding made in the 5/5/17 Order, which was: "There is no evidence before the court that

raises concern that the children are in any danger or that the environment in the father's home is detrimental to the children that would provide a basis for appointment of a Guardian ad Litem" (CP: 540). (Error is specifically assigned to this finding; the other applicable "findings" are en passim to which specific objection can be taken as RAP 10.3(g) might envision. This "finding" will also be discussed as an error of law, below.)

The transcripts of the 5/5/17 (CP: 600-18) and 6/2/17 (PR: 4-27) hearings have also been provided.

On 8/11/17, Paul Cardwell brought a motion to vacate adequate cause on the basis that the sole reason adequate cause had been granted was that he might go to jail in Idaho, and that since Paul was not being jailed, there was no adequate cause (CP: 722-28).

The motion to vacate was heard on 8/25/17 (PR: 40-51), a letter ruling issued on 8/31/17, granting the motion to vacate (CP: 793-94). In the letter ruling, the commissioner indicates (emphasis added): "This matter was taken under advisement so that the Court could review the transcript of a hearing held on December 7, 2016, wherein the Court made a finding of adequate cause..." (CP: 793).

The order vacating adequate cause was entered on 9/13/17 (CP: 808-811).

The Order Granting Adequate Cause of 2/3/17 explicitly states that there was no record of any kind created on 12/7/16, as the court recording system was not available, as the Letter Ruling of 8/31/17 also admits.

Ms. Black (counsel for Paul) had sent the court commissioner, via email, an unofficial recording of the 12/7/16 hearing. The email informing Mr. Mason of this transmission of the recording was sent to him on 9/1/17 (CP: 796); however, that same email of 9/1/17 implies that the recording was earlier given to the commissioner via the court administrator, and the Letter Ruling of 8/31/17 also implies that the commissioner reviewed the recording even before Mr. Mason was informed of its transmission.

Once Mr. Mason (counsel for Regan) had been copied on this email transmission, he promptly objected to this irregularity (CP: 795-799). This objection was sent with his authorities on his motion for revision of the motion to vacate (CP: 800-11), as was Mr. Mason's memorandum of authorities on written orders superseding contrary oral rulings (CP: 785-792).

Revision of the order vacating adequate cause was denied on 9/15/17 (CP: 818) and reconsideration was denied on 10/2/17 (CP: 829). This appeal timely followed.

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V. Argument

The argument will first address adequate cause and then the GAL issue.

A. Adequate Cause Was Properly Granted on 2/3/17

First, to clarify procedural posture: The Order of 9/13/17 (CP: 808-11) -- that vacated the 2/3/17 Order Granting Adequate Cause -- incorporated by reference the commissioner's letter ruling of 8/31/17 (attached at CP: 810-11, and found at CP: 793-94).

Thus explicitly, and by operation of the case law on a denied revision, the letter ruling of 8/31/17 is the substantive decision being appealed. See above, *State ex rel. J.V.G. v. Van Guilder*, 137 Wn.App. 417, 423, 154 P.3d 243 (2007). However, it was error of the trial judge not to make findings about the propriety/impropriety of the informal oral record superseding the written order, per Regan Cardwell's objections (CP: 785-792 and 795-799).

Essentially, this order vacating adequate cause was a decision that Regan's evidence in support of her allegations had not created adequate cause under RCW 26.09.270. This was an abuse of discretion.

(1) Letter Ruling of 8/31/17: The third paragraph of the letter ruling acknowledges that there was no record for the 12/7/16 hearing, and the commissioner states he relies upon his "recollection" that the sole basis of

adequate cause was Paul's possible 180-day incarceration in Idaho. Then the 8/31/17 letter ruling states, in the first paragraph, that the court took time to "review the transcript" of the hearing. (Before admitting in the third paragraph that there was no record, and therefore certainly was no "transcript.")

As was noted, above, Regan Cardwell's counsel had objected to Paul Cardwell's counsel emailing of an unofficial recording to the commissioner (apparently first through the court administrator) that apparently became the basis of his "recollection " (CP: 795-799).

The law of Washington is clear that the written order controls, as these exemplars show:

We have previously stated that a trial court's oral statements are "no more than a verbal expression of (its) informal opinion at that time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." *Ferree v. Doric Co.*, 62 Wash.2d 561, 567, 383 P.2d 900, 904 (1963). Even a trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law, and judgment. *Ferree v. Doric Co.*, *supra* at 567, 383 P.2d at 900 *Clifford v. State*, 20 Wash.2d 527, 148 P.2d 302 (1944); *Seidler v. Hansen*, 14 Wash.App. 915, 547 P.2d 917 (1976). The written decision of a trial court is considered the court's "ultimate understanding" of the issue presented. *Diel v. Beekman*, 7 Wash.App. 139, 499 P.2d 37 (1972). See also *Thompson v. Thompson*, 9 Wash.App. 930, 934, 515 P.2d 1004 (1973).

State v. Dailey, 93 Wash. 2d 454, 458–59, 610 P.2d 357, 360 (1980).

And a written order controls over any apparent inconsistency with the court's earlier oral ruling. *State v. Eppens*, 30 Wash.App. 119, 126, 633 P.2d 92 (1981).

Shellenbarger v. Brigman, 101 Wash. App. 339, 346, 3 P.3d 211, 214 (2000)

A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment. See *Ferree v. Doric Co.*, 62 Wash.2d 561, 383 P.2d 900 (1963); *Clifford v. State*, 20 Wash.2d 527, 148 P.2d 302 (1944).

State v. Mallory, 69 Wash. 2d 532, 533–34, 419 P.2d 324, 325 (1966).

And *State v. Skuza* is quoted below with emphasis added to reinforce the relevant point:

To the extent its oral rulings conflict with its written order, a written order controls over any apparent inconsistency with the court's earlier oral ruling. *State v. Mallory*, 69 Wash.2d 532, 533–34, 419 P.2d 324 (1966); *see State v. Eppens*, 30 Wash.App. 119, 126, 633 P.2d 92 (1981).

State v. Skuza, 156 Wash. App. 886, 898, 235 P.3d 842, 848 (2010), *as amended* (July 20, 2010).

That irregularity aside (to which exception is taken), the factual question on an abuse of discretion standard becomes:

(2) Issue No. 1 Restated: Do the rest of Regan's facts (even if there was no possibility of Paul going to jail in Idaho) provide adequate cause to modify the parenting plan? Answer: Yes.

As was summarized above, facts new to the court since the 3/13/15 parenting plan include: (1) Paul's multiple criminal charges and convictions (and family law matters generally turn on a preponderance of evidence standard, and so the charges that did not lead to convictions still have salience in a family law case), and these charges involve serious threats of harm; (2) a domestic violence protection order from Sherie Johnson (CP: 59-71), and testimony about Paul's abusive and stalking behavior from Tesa Kuhn, as well as Paul Cardwell making threats of self-harm (CP: 136-40); (3) Tesa Kuhn and Scott Dennison (CP: 118-22) both testify that Paul was living in a town over 100 miles away from his girls, and, in corroboration, Scott Dennison saw Paul working in Idaho (CP: 119). (4) And Regan Cardwell has produced more than a prima facie case of harm to the girls under RCW 26.09.260(1)&(2) for the matter to proceed to trial. (E.g, CP: 45-111 and the rest of the record, cited above.)

Even without the possible incarceration of Paul in Idaho, these facts amount to a substantial change of circumstances that meet the adequate cause requirements of RCW 26.09.270.

(3) Law of Adequate Cause: The authorities in the memoranda cited above are incorporated herein, but the law can be presented concisely (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).

(4) Application of *In re Custody of E.A.T.W.* Clearly, Ms. Cardwell has “more than” mere prima facie allegations; there have been substantial changes of the father’s circumstances, and there is clearly detriment to the girls in the father’s home from his criminal, abusive, and alienating behaviors.

The denial of adequate cause is simply an untenable decision, as either an erroneous standard of law has been applied, or the decision is contrary to any reasonable review of the evidence. *In re Parker*, 135 Wash. App. 465, 471–72, 145 P.3d 383, 385–86 (2006), quoted, above.

To the extent that the order vacating adequate cause (effectively a decision that denied any adequate cause exists) is based in an error of law,

from applying the wrong legal standard, then the appellate review is 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).

(5) Application of *In re Marriage of Wehr*: The trial court did not apply the correct legal standard when it did not consider any other fact to be supportive of adequate cause except the fact of whether or not Paul Cardwell would be unavailable through incarceration. The trial court’s “unavailability” standard, is appropriate for a non-parental action under RCW 26.10.030, but this “unavailability” legal standard is inapt in a parenting plan modification determination.

The appellate court is asked to determine that adequate cause does exist, and this court is asked to remand this modification case for trial setting with proper discovery timelines.

B. Appointment of a GAL

The appointment of a GAL is also subject to an abuse of discretion standard of review. However, it is an abuse of discretion to fail to appoint a GAL when ‘the parties failed to adequately develop, and the trial court

failed to consider, certain relevant factors {and evidence} under the mandate of {RCW 26.09.187(3)(a)}.’ *Wildermuth v. Wildermuth*, 14 Wn.App. 442, 446, 542 P.2d 463 (1975).

(1) *In re Waggener's Marriage*: In the case of *In re Waggener's*

Marriage, the court said (emphasis added):

What then should trigger the exercise of discretion to utilize the tools provided in RCW 26.09.110, RCW 26.09.220 or RCW 26.09.250? Obviously, we cannot here discuss all of the possible circumstances under which these provisions should be utilized. Quite clearly, however, where a serious custody dispute is presented, and where the parties have omitted presenting any evidence on one or more relevant factors specified in RCW 26.09.190, a case is presented where the trial court should act affirmatively to cure the deficiencies in the evidence.

In re Waggener's Marriage, 13 Wash. App. 911, 915–16, 538 P.2d 845, 848 (1975).

(2) Application of *In re Waggener's Marriage*: Here, where Paul and his mother (Gale Cardwell) are so actively hiding the facts, from Regan and from the court, that the court needs a GAL to reach a proper determination, that serves the best interests of the children. It would be an abuse of discretion not to order a GAL. The court is asked to “affirmatively cure the deficiencies in the evidence” so that Paul does not benefit from his obstruction and hiding of necessary information, to the detriment of the children.

(3) A GAL is Necessary to Protect Best Interests of the Children

In *In re Dependency of A.G.*, the court found that the mother had waived her right to request a GAL, but even at the end of a dependency and termination process, the failure to appoint a Guardian ad Litem was an abuse of discretion on the basis of the interests of the children (not of the mother, who had taken too long to make the request):

Here, during the entire dependency and termination process spanning over four years, the record before us shows that no attorney brought up the matter of an appointment of a guardian ad litem to any of the judges or commissioners who made the numerous decisions. No court brought up the matter on its own, and no good cause determination was ever made. While we do not have to reverse for these omissions, the combination of circumstances in this case requires a remand. There is evidence of a close relationship between Grey and her children. Even though Aunt Mary apparently knew where she was, she did not notify Grey of the pending termination. No one was present to investigate the circumstances or speak on behalf of the children. We are not certain that the one-sided story presented to the trial court is ultimately fair to Grey and the children because we cannot be confident that the decision fully serves the best interests of the children when they had no advocate. We therefore remand to the trial court for a hearing to determine whether the children were prejudiced by the failure to appoint a guardian ad litem. If the court determines there was prejudice, it should vacate the judgment, appoint a guardian, and hold another termination hearing. If it determines that the children's interests were not prejudiced, the judgment is affirmed. Because we are mindful of the time that has already passed since these children were placed, the trial court must hold the hearing within 60 days of the mandate.

At oral argument, counsel for DCFS candidly informed us that trial courts regularly fail to appoint a guardian ad litem in these circumstances or find good cause for not appointing one based on lack of resources. This is unacceptable. The statute is

mandatory, and the children's interests are paramount. We cannot condone ignoring the statutory provision specifically designed to protect them. If resources are insufficient, DCFS should address the problem with the Legislature.

In re Dependency of A.G., 93 Wash. App. 268, 280–81, 968 P.2d 424, 430–31 (1998), *as amended on reconsideration* (Feb. 1, 1999)

(termination not void, but remanded for hearing to determine if prejudice to the girls would indicate the termination should be vacated) (emphasis added).

As was noted, above, when discussing the trial court's "unavailability" standard, a modification of a parenting plan is not a non-parental action (RCW 26.10), nor is it a dependency action (RCW 13.34), but the best interests of the children concerns still make the language from *In re Dependency of A.G.* an apt concern for the court.

A GAL is absolutely necessary in this case to protect the best interests of the girls. RCW 26.12.175(1)(a). And a GAL is absolutely necessary in this case to find the facts that are otherwise simply too actively hidden by Paul and his mother, Gale Cardwell, for the court to be able to serve the best interests of the children. RCW 26.12.175(1)(b).

The trial court abused its discretion not to appoint a GAL on these facts.

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VI. Conclusion and Relief Requested

Adequate cause was properly granted on 2/3/17. The order of 2/3/17 explicitly states that the court allowed in, and considered, all facts unknown to the court at the time the parenting plan of 3/13/15 was signed.

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).

Neither Regan Cardwell, nor the court, knew of Paul's criminal record at the time of the decree, nor of the bad behavior of Paul in the months prior to the decree being entered. These facts "were unknown to the court at the time of the prior decree."

Just to reiterate that point (emphasis in original):

"Unknown" facts *include* those facts that existed before an agreed parenting plan was entered. *In re Marriage of Timmons v. Timmons*, 94 Wash.2d 594, 598–99, 617 P.2d 1032 (1980).

In re Marriage of Zigler & Sidwell, 154 Wash. App. 803, 811, 226 P.3d 202, 206 (2010). And since the decree, Paul has continued to engage in criminal behavior, engage in alienating behaviors, and he supports his mother, Gale, as his agent, in her behaviors that disrupt the relationship between Regan and her girls, as well as engaging in his own alienation.

Since the trial court allowed into evidence all of these new facts, it is untenable for the same trial court to explicitly discount them as it has subsequently done in the letter ruling of 8/31/17, which was incorporated into the order vacating adequate cause of 9/13/17 (sustained on revision on 9/15/17, reconsideration denied on 10/2/17).

In other words, it is untenable for the court to ignore Paul Cardwell's criminal, violent, and abusive behavior, which is not only presumptively probative of a harmful environment in the father's home, but it is also probative of Regan Cardwell's allegations that Paul is engaged in other detrimental abusive and alienating behaviors that would justify adequate cause to modify the parenting plan.

This court is asked to reverse the order vacating adequate cause. And, this court is asked to find that adequate cause exists on the evidence submitted by Regan Cardwell in support of her petition to modify the parenting plan, and a remand for trial on the modification is requested.

Further, the court is asked to find that it is an abuse of discretion
not to appoint a GAL for the girls in this case.

Respectfully submitted on 11/24/17,



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APPENDIX:

RCW 26.09.270: Child custody—Temporary custody order, temporary parenting plan, or modification of custody decree—Affidavits required.

A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his or her motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his or her affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

RCW 26.09.260(Section (1) and (2) only): Modification of parenting plan or custody decree.

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

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

- (a) The parents agree to the modification;
- (b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;
- (c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or
- (d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.....

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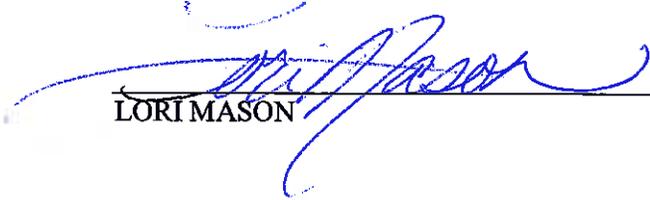
COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

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Respondent)	CERTIFICATE OF SERVICE
)	Opening Brief of Regan Cardwell
Regan Cardwell)	
Appellant)	

I, Lori Mason, declare under penalty of perjury under the laws of the State of Washington, that on November 25, 2017, I provided, via electronic filing, a copy of Ms. Cardwell's Opening Brief to the following:

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