

No. 63162-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

KAHLIN MARIE JEFFERSON (nka/MISH),

Respondent/Cross-Appellant,

v.

PETER BIGELOW JEFFERSON,

Appellant/Cross-Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE MONICA BENTON

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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## I. INTRODUCTION

The parties' marriage ended after the father viciously assaulted the mother while she held their infant son, leaving the mother with permanent injuries to her eye and hand. As a result of the father's history of domestic violence, the father has supervised residential time with the parties' son. The father has twice sought to modify the parenting plan to significantly increase his residential time with the child and to lift the supervision requirement. Most recently, the parenting evaluator recommended that supervision continue because of the father's "psychological limitations, and lack of insight, empathy and accountability," his continued use of physical force to gain compliance, his history of physical abuse that extends beyond the mother, and ongoing safety and neglect issues. These concerns mirror those expressed by two previous guardian ad litem who investigated the family for the original parenting plan in 2003, and when the father sought to modify the parenting plan in 2006.

Because the father indisputably failed to meet his burden under RCW 26.09.260(1) and (2) to warrant modification of the parenting plan, the trial court did not abuse its discretion in refusing

the father's requested modification, which was not in the child's best interests. However, the trial court did err in failing to award the mother her attorney fees in the trial court because there was no factual basis for the father to pursue a major modification of the parenting plan and because the father has the ability to pay and the mother has the need for her attorney fees to be paid. This court should affirm the trial court's decision on the father's appeal, reverse the trial court's denial of the mother's request for attorney fees, and award the mother her attorney fees on appeal.

## **II. RESTATEMENT OF ISSUES**

1. The parties' original 2003 parenting plan contemplated a "review" of the parenting plan under RCW 26.09.187, as it provided no residential time for the father. The parties subsequently modified the parenting plan in March 2007, formalizing a schedule for the father's supervised residential time with the child. The parties replaced the review provision in the original parenting plan with a provision allowing either parent to petition to modify the parenting plan and waiving the adequate cause requirement. The father filed a petition for modification seven months later. Did the trial court abuse its discretion in applying the

standards of RCW 26.09.260 to the father's petition for modification?

2. After the trial court denied the father's requested modification of the residential schedule because he failed to meet his burden under RCW 26.09.260 (1) and (2), did the trial court abuse its discretion in supplementing and clarifying the non-residential provisions of the parenting plan in the child's best interests in a manner that did not reduce or expand either parent's existing rights under the parenting plan?

### III. RESTATEMENT OF FACTS

**A. During The Marriage The Father Assaulted The Mother, Resulting In Permanent Loss Of Vision In Her Left Eye And Permanent Loss Of Mobility In Her Right Hand. The Father Was Incarcerated For Three Months For This Assault.**

Respondent Kahlin Marie Mish and appellant Peter Jefferson were married on June 13, 2000. (2/03 RP 46) Peter has two adult daughters from an earlier marriage. (2/03 RP 46) The parties' son Luke was born on November 10, 2000. (2/03 RP 52)

Peter physically abused Kahlin several times during their short marriage. Peter, who is 5'11 and 160 pounds, described an early attack in the marriage when he slapped Kahlin, who is 5'0 and

95 pounds, “two or three times ... just to try to get some peace and quiet.” (2/04 RP 40; Ex. 110)

According to hospital records, Kahlin visited her doctor on May 21, 2001 and reported that Peter had grabbed her upper arms, pushed her on the ground, and punched her in the stomach on the day before her visit. (Ex. 106) The doctor noted bruises on both of Kahlin’s upper arms, abrasions on both elbows, a bruise on her left upper anterior chest, and tender lumps over her right ear on the side of her head. (Ex. 106)

Peter described another incident when he squeezed Kahlin’s hand so hard that it damaged her wedding ring. (2/04 RP 45-46) According to a repair estimate, the ring had an “extremely damaged ring shank...extreme force caused a diamond to fall out.” (Ex. 131)

The final incident of domestic violence, which ended the parties’ marriage, occurred in August 2001. Peter testified that during this attack his frustration was “boiling over” and he became “explosive.” (2/04 RP 49)

Kahlin suspected Peter of cheating after he returned home late one evening smelling of perfume. (Ex. 112) Peter went

“crazy,” and punched Kahlin repeatedly in the face and stomach, and banged her head against the floor and bed frame:

I set the baby down for just a minute and when I did he went just crazy on me. He grabbed me and I fell to the floor. He was punching me with his fists and banging my head against the floor and the bed frame. He punched me in the face and in the stomach.

(Ex. 112)

Once Peter stopped punching Kahlin, she picked up Luke, who was then nine months old, and left the house. Peter chased Kahlin down the street, pulled her hair, and started to suffocate her with his hand as he dragged both her and Luke back into the house. Once inside, Peter let go of Kahlin and she ran back out of the house to her neighbor’s home for help:

He did stop and I grabbed Luke and ran out the door and started to walk up the street [Peter] ran up and grabbed me again.... he covered my mouth and nose really hard with his hand while he was pulling my head back by my hair. I felt like I was suffocating, I could not breathe... I was really afraid he was going to kill me just out of his terrible anger... He started move his hand so that I could breathe again and I was begging him to stop, that I would be good. [Peter] then pulled me in the house. I still had Luke in my arms... He was not holding onto me anymore so I ran out the front door to my neighbors.”

(Ex. 112)

The deputy who met with Kahlin immediately after the attack described two swollen areas on her face and a bloody left eye “consistent with head trauma”:

I looked at her and saw that she had two large swollen areas on her face that with discolored with bruising and her left eye had blood on it. All consistent with significant head trauma....

(Ex. 110; *see also* Ex. 104 (photos of injuries)) The deputy also noted that an injury to Kahlin’s right hand prevented her from signing any paperwork, and required immediate surgery:

It should be noted that Kahlin’s right hand was badly injured by Peter. She was unable to sign any of the necessary paperwork, therefore she authorized me to sign for her on her behalf. As I was leaving the hospital a specialist Surgeon was seeing Kahlin. They were preparing to take her to surgery for her hand. I heard the Surgeon explain that they were going to have to put her to sleep to perform the required corrective surgery to her hand.

(Ex. 110) According to her medical records, Kahlin had “an irreducible fracture-dislocation of the right thumb with a rotary deformity.” (Ex. 106)

The injuries from this assault left Kahlin with “permanent loss of vision in her left eye.” (CP 171; *see also* Ex. 1 at 2) Kahlin’s ophthalmologist reported that the scar tissue and vitreous

detachment in her left eye was likely caused by a blunt injury to the eye. (Ex. 102 at 12)

The injury to Kahlin's hand "caused a permanent loss of mobility in her [right] hand." (CP 172; see *also* Ex. 1 at 2) As a result of this injury, Kahlin was unable to work in her field as a dental hygienist. She eventually was able to retrain using her non-dominant left hand. (See Ex. 1 at 4; CP 172)

After a criminal trial, Peter was found guilty of unlawful imprisonment and assault in the fourth degree. (Ex. 105 at 2; Ex. 107) Peter also pled guilty to a reduced charge of assault in the third degree for domestic violence. (Ex. 105 at 2)

On October 11, 2002, Peter was sentenced to three months in jail for his assault on Kahlin. (Ex. 105 at 15) Peter was also ordered to participate in domestic violence batterer's treatment through Dr. Roland Maiuro. (Ex. 105 at 17) A criminal no-contact order was entered and later extended through 2012, pursuant to the recommendation of the guardian ad litem. (Ex. 101 at 26; Ex. 105 at 16; Ex. 107; Ex. 108; Ex. 109 at 3)

Judge Laura Gene Middaugh, who presided over Peter's criminal trial, described the assault as "horrendous" and unjustified:

What occurred here was horrendous, and it was not the victim's fault in no way, shape, or form. And that his family still blames her indicates to me that Mr. Jefferson has probably not sat down and taken responsibility for it.

(Ex. 105 at 17-18) Judge Middaugh also believed that it was "clear that [Peter] has not taken responsibility for his actions, and [is] blaming the victim." (Ex. 105 at 17)

**B. In 2003, The Parties Agreed That The Father Would Have No Contact With The Parties' Son Until The Guardian Ad Litem Recommended That Supervised Visitation Was Appropriate.**

Dr. Teri Hastings was appointed as guardian ad litem for the parties' son, Luke, then age 1, in their dissolution action. In July 2003, Dr. Hastings issued a report recommending no contact between Peter and Luke because "Peter has not made sufficient progress in domestic violence treatment for visitation with his son to resume." (Ex. 102 at 14) Dr. Hastings expressed concern, similar to Judge Middaugh's, that "Peter fails to take responsibility for his behavior, and continues to minimize and blame the victim." (Ex. 102 at 13) Dr. Hastings believed that "[g]iven Peter's low frustration tolerance, his resentment of Kahlin, the incident where he assaulted his teenage daughter, and his disregard for Luke's

welfare during his assault on Kahlin, there is significant risk to the child.” (Ex. 102 at 14)

The parties dissolved their marriage in October 2003, entering into an agreed parenting plan based on the recommendations of the guardian ad litem that imposed limitations on Peter’s residential time pursuant to RCW 26.09.091(1) and (2), based on his history of acts of domestic violence, and pursuant to RCW 26.09.191(3), based on his abusive use of conflict. (Ex. 13 at 2) Following the recommendations of Dr. Hastings, the parenting plan required that Peter continue domestic violence treatment with Dr. Roland Maiuro, and that the guardian ad litem should make further recommendations about additional therapy for Peter after he completes his domestic violence treatment. (Ex. 13 at 4-5)

The parenting plan provided for no contact between Peter and Luke until the guardian ad litem, with significant input from Dr. Maiuro, decided that professionally supervised visitation is appropriate. (Ex. 13 at 5) The plan provided that “anytime after six months from the entry of this Order either party may seek a review of the parenting plan pursuant to RCW 26.09.187.” (Ex. 13 at 9)

**C. In 2006, The Father Sought To Expand His Residential Time After Supervised Visitation Was Implemented. The New Guardian Ad Litem Recommended That Supervised Visitation Continue Because The Father's Behavior Had Not Changed And He Continued To Minimize His Role In His Assault On The Mother.**

Supervised visitation between Peter and Luke began in August 2004. (See Ex. 15) In 2006, Peter initiated a review of the parenting plan under RCW 26.09.187, as provided in the 2003 parenting plan, to expand his residential time with Luke. (CP 171) After Dr. Hastings resigned, Rosie Anderson was appointed as the guardian ad litem. (CP 171) Ms. Anderson issued her report on August 24, 2006, recommending that supervised visitation continue based on Peter's lack of progress. (CP 195; Ex. 101 at 26)

Ms. Anderson expressed concern that even after domestic violence treatment and individual therapy, Peter "continues to blame the mother and minimize his own behavior." (CP 195) Accordingly, Ms. Anderson questioned whether Peter was "amenable to treatment." (CP 195) Ms. Anderson also expressed concern over Peter's impulse control, based on an incident during a supervised visit when Peter "grabbed Luke by the neck causing the child to yell that he was hurting him." (CP 195)

On March 1, 2007, the parties agreed to make certain changes to the October 2003 parenting plan pursuant to the recommendation of the guardian ad litem. (Ex. 7) The parties established a schedule for Peter's supervised visitation with Luke on alternate Saturdays for up to six hours. (Ex. 7 at 3) The parties also agreed to appointment of Don Layton as a case manager to help develop a visitation plan and assist in resolving minor disputes between the parties. (Ex. 7 at 3)

The parties agreed to delete the provision from the October 2003 plan that would have allowed a future review of the parenting plan under RCW 26.09.187. (Ex. 7 at 5) Instead, they added a new provision that provided that "either party shall have the right to petition the Court to modify the father's visitation schedule [after October 1, 2007], if either the Case Manager or the Guardian ad Litem so recommends. In this event, the parties agree to waive a finding of adequate cause and a new parenting evaluator will be appointed by the Court at that time." (Ex. 7 at 4)

**D. In 2007, The Father Once Again Sought To Modify The Parenting Plan To “Normalize” His Residential Time And To Lift The Supervision Requirement.**

On September 22, 2007, the case manager Don Layton submitted a report expressing concern over Kahlin’s “long-maintained victim’s role,” and commenting on how Kahlin has “handled her victimization and the potential affects [sic] this has or will have on Luke.” (CP 272, 273) Mr. Layton recommended, “based not on any intensive investigative efforts,” that “consideration should be given to phasing out professional supervision, then all supervision, over the next six to eight months.” (CP 272-73)

On October 12, 2007, Peter sought to modify the parenting plan under RCW 26.09.260(1) and (2), filing and serving a petition for “major modification.” (CP 30, 32) Peter did not allege any specific substantial change in circumstance to warrant modification. (CP 32) Instead, he relied solely on the provision in the March 1, 2007 order allowing for modification “without the necessity of establishing adequate cause” if the “case manager or the guardian ad litem so recommends.” (Ex. 7 at 4; CP 32-33)

Kahlin objected to Peter's petition and asked the court to deny Peter's motion for an order establishing adequate cause. (CP 316) On November 17, 2007, the court found that "adequate cause for hearing the petition has been established per terms of 3/1/07 order." (CP 283) On December 7, 2007, Kelly Shanks, M.Ed., LHMC was appointed as the parenting evaluator. (CP 287)

**E. The Parenting Evaluator Expressed Concern That The Father Had Still Not Addressed His Domestic Violence Issues And Recommended Continued Supervised Visitation.**

Ms. Shanks issued her report in December 2008. (Ex. 1) After an eight-month investigation, Ms. Shanks recommended that Peter's residential time with Luke continue to be professionally supervised and suggested a treatment plan to assist Peter in meeting some of the deficiencies that she noted in her evaluation. (Ex. 1 at 34)

Like the two guardian ad litem before her, Ms. Shanks expressed concern that Peter was still unable to take full responsibility for his actions:

Although Peter says that he has taken responsibility for his actions, he was consistently unable to discuss his responsibility for the violence without making a corresponding statement that blamed Kahlin, minimized his role in the assault or portrayed himself

as the victim. . . . The persistence of Peter's minimization and lack of empathy despite highly skilled intervention suggest that Peter's deficits in this area may be more characterological in nature and therefore resistant to future therapeutic intervention.

(Ex. 1 at 28)

Peter's propensity to blame Kahlin for the abuse was evident at trial. When asked if Kahlin was a "significant cause" of the assault that caused permanent injury to her, Peter testified: "I mean yes, its absolutely a matter of fact... that yes, she was a part of it." (2/04 RP 47-48) Ms. Shanks expressed concern that "[i]f Peter has not made progress in accepting responsibility without justification, minimization, blame and distortion it becomes hard to leave the issue of domestic violence within the marriage behind." (Ex. 1 at 26)

Ms. Shanks interviewed Dr. Maiuro, who reported that although Peter "graduated" from his domestic violence treatment program, it was only because "we felt we had done all we could but we felt that he still had work to do and it had to be individualized." (Ex. 1 at 18) Dr. Cahn, who individually treated Peter, reported: "Peter has at times been able to genuinely acknowledge with

appropriate affect his responsibility for the violence toward Kahlin, but the duration of his acknowledgment is very short.” (Ex. 1 at 20)

Ms. Shanks noted that “Peter blames Kahlin for the continued supervised visitation. . . . This is a further manifestation of his tendency to shift the focus from his own behavior and failure to make psychological progress. I have some concern that he would present this perspective to Luke.” (Ex. 1 at 29) Dr. Cahn also reported to Ms. Shanks that he agreed that there is a “risk Peter might attempt to influence Luke’s view of his mother. This would be psychologically damaging to Luke and may complicate or harm Luke’s relationship with his mother.” (Ex. 1 at 29)

Ms. Shanks also expressed concern over Peter’s boundary issues with Luke. “Peter’s push for a specific type of physical affection with Luke is a manifestation of Peter’s inability to respect boundaries.” (Ex. 1 at 29) For example, the visitation supervisor reported that Peter insists that Luke kiss him or Peter kiss Luke despite Luke’s resistance to such physical affection. (Ex. 1 at 30) Ms. Shanks described Peter’s wounded attitude as a result of Luke’s preference and Peter’s insistence “about what he feels a father should be able to do,” as a “manifestation of Peter’s lack of

regard for another person's perspective." (Ex. 1 at 29, 30) At trial, Don Layton, the case manager, agreed that Peter has boundary issues that might "warrant some level of supervision," but testified they were not "intensely problematic boundary issues." (2/03 RP 128-29)

Ms. Shanks also expressed concern with "Peter's occasional use of physical force to gain compliance from Luke." (Ex. 1 at 30) At trial, Peter described Luke as showing "substantially oppositional behavior" at times, similar to Peter's description of Kahlin as "stubbornly oppositional." (2/04 RP 60) Peter admitted that during his supervised visitations there were times when he physically struggled with Luke over a stick, a camera, and coins. (2/04 RP 61) Ms. Shanks reported that "this concern needs to be examined in the context of the domestic violence history. Without the history of severe domestic violence, Peter's occasional use of physical force would not be ideal but would not present as much concern and would not lead to a recommendation for continued supervision." (Ex. 1 at 30) Dr. Cahn agreed that "any time Peter uses physical force to try to manage Luke" it is a concern, even

though it does not rise to the level of mandatory reporting. (2/04 RP 118)

Dr. Cahn diagnosed Peter with “intermittent explosive disorder” and an “acute adjustment disorder with mixed emotions.” (2/04 RP 99) Dr. Cahn described that people who “overcontrol [and] hold their anger in and tend to be pretty passive, pretty avoidant, unassertive, and their anger comes out in what we call intermittent explosive episodes every once in a while.” (2/04 RP 97) Dr. Cahn testified that this is likely what occurred when Peter assaulted Kahlin, resulting in Kahlin’s permanent injury to her left eye and permanent disability in her right hand. (2/04 RP 99)

Ms. Shanks recommended replacing Don Layton, the parties’ case manager, with a guardian ad litem. Ms. Shanks expressed concern about “Mr. Layton’s focus on Kahlin’s ‘victim issues’ rather than Peter’s continued minimization and blame.” (Ex. 1 at 34) Ms. Shanks expressed concern that “Mr. Layton’s statements to Peter about Kahlin have not helped Peter make progress in this area.” (Ex. 1 at 34)

Ms. Shanks also recommended six to nine months of “targeted intervention” for Peter with a therapist skilled in domestic

violence treatment. (Ex. 1 at 34) Over the same time period, Ms. Shank recommended that Lynn Tienken work with Peter specifically on parenting issues. (Ex. 1 at 34) “There should be communication between the new GAL, Ms. Eisen [visitation supervisor], Ms Tienken and Peter’s therapist with the goal of assisting Peter in meeting the behavioral markers noted below. If Peter is successful in meeting those behavioral markers within that timeline, the GAL should implement a **very** gradual removal of the supervision within the same residential time schedule.” (Ex. 1 at 34, emphasis in original)

Finally, Ms. Shanks recommended the court consider placing “some restriction on the frequency of modification actions unless Peter is able to demonstrate marked progress.” (Ex. 1 at 34) Ms. Shanks noted that “[w]ith each modification action, there is an impact on Luke’s quality of life, stress, and exposure to conflict.” (Ex. 1 at 34)

**F. The Trial Court Denied The Father’s Petition, Finding That The Facts Do Not Support A Major Modification Under The Statute.**

On February 3, 2009, the parties appeared before King County Superior Court Judge Monica Benton for trial on Peter’s

modification action. Peter presented testimony from himself, Don Layton, one of his two adult daughters from a prior marriage, his first wife, his therapist, and Terry Hastings, the original guardian ad litem whose last contact with the case was in 2005. In addition, to these witnesses, the trial court considered the parties' agreed exhibits, which included the most recent report of parenting evaluator Kelly Shanks. (see CP 301-02)

At the conclusion of Peter's case in chief, Kahlin moved to dismiss the modification action because Peter failed to prove any basis under RCW 26.09.260 to modify the residential schedule of the parenting plan, and especially not under RCW 26.09.260 (1) and (2), on which Peter's petition was based. (2/09 RP 93-94) The trial court agreed, finding that "none of the testimony presented squarely addressed a showing that the Petitioner who provides the primary residence for the child, Luke, was detrimental," which is required for a major modification of a parenting plan. (CP 303) The trial court found that there was no basis for a major modification of the residential schedule in the parenting plan.

Peter had not sought modification under RCW 26.09.260(7), which would have allowed for a "minor modification" of the

residential schedule and has a lower standard than RCW 26.09.260 (1) and (2). (See CP 32-33) Peter's counsel explained that he specifically chose not to seek a minor modification because Peter was pursuing more than 24 additional days and 90 overnights. (2/03 RP 31, 40-41) Nevertheless, the trial court also considered the evidence in the context of RCW 26.09.260(7), which requires a finding that (1) "a parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation," and (2) it is "in the best interest of the child to increase residential time with the parent" is required. (CP 303)

The trial court found that the evidence failed to provide "any clear indication that the best interests of the child are served by unsupervised visits." (CP 303) The trial court noted that after reviewing the evidence it was "pretty clear that everyone was saying they really weren't entirely sure that Luke was safe from all risk. And it wasn't just risk of explosive anger but risk of neglect due to [the father]'s preoccupation with his own depression, depressive thoughts as well as just neglect of, you know, attention to certain kinds of hazards while they were on outdoor visits." (2/09 RP 109)

The trial court noted that none of the father's witnesses testified "they believed that it would be in the best interests of Luke to increase residential time or make the visits unsupervised. It didn't appear that Luke was asking for unsupervised time, it didn't appear that Luke was asking to have more time. It appeared that he was comfortable with the existing circumstances." (2/09 RP 109-10) The trial court stated it was "really not satisfied" that unsupervised visitation is "advantageous to the child." "[Most of] the testimony I heard was it was better for [the father] but not necessarily better for the child." (2/09 RP 109)

Further, the trial court found that there was no substantial change in circumstance specifically related to the basis of the limitation in the father's residential time. (CP 303) The trial court stated that it was "persuaded by the 2008 parenting evaluator's report which pointed out and recommended that Respondent continues to need ongoing resolution of domestic violence issues," and that this demonstrated that there has been no substantial change related to the limitations set because of the father's history of domestic violence. (CP 303) Accordingly, the trial court found

there was no basis for a minor modification of the residential schedule under RCW 26.09.260(7).

**G. The Court Adjusted Certain Non-Residential Provisions Of The Parenting Plan.**

The mother had not cross-petitioned for modification of the parenting plan. She proposed a parenting plan that incorporated some of the parenting evaluator's recommendations, but that did not affect any of the residential provisions of the parenting plan. (Ex. 133) The trial court inquired whether it could make adjustments to the parenting plan to incorporate some of the parenting evaluator's recommendations, including "intensifying psychological treatment" for the father, which the trial court found "make sense overall." (2/09 RP 111) The father's counsel responded, "I think the court could among other things consider that, if I'm understanding the question, as part of a larger, you know, case." (2/09 RP 111) The mother's counsel noted that the court had discretion under RCW 26.09.260(10) to make changes to the non-residential provisions of the parenting plan as long as it "doesn't impact [the father's] time or access" and those changes "serve the best interests of the child." (2/09 RP 113-14)

Relying in part on the parenting evaluator's report, the trial court found that the father "continues to need ongoing resolution of domestic violence issues." (CP 303) The trial court noted that Dr. Maiuro reported that the father "was very much out of touch with the level of damage he had done in the relationship." (CP 304) Dr. Maiuro opined that "no amount of insight or talk therapy will allow for him to behave the way [the father] needs to." (CP 304) Dr. Maiuro suggested parenting coaching as a compliment to on-going therapy. (CP 304) The trial court pointed out that both Dr. Maiuro and the father's current therapist assessed the father's "ability to process emotional information and experience empathy 'is' blunted." (CP 304)

Based on these findings, the trial court entered an order both supplementing and clarifying certain non-residential provisions of the parties' parenting plan. This order was based on the parenting evaluator's recommendations. The trial court ordered that the case manager Don Layton, who it found was "discredited," be replaced with a long-term guardian ad litem. (CP 304-05) The trial court also clarified the role and duties of the new guardian ad litem. (CP 305) The trial noted that the "parties appear to have agreed to the

employment of . . . a parenting coach.” (CP 305) The trial court ordered the father to continue with his therapeutic treatment. (CP 305) Finally, the trial court ordered that any future modification action must be brought in compliance with the statute, including establishing adequate cause. (CP 306) The trial court denied the father’s motion for reconsideration. (CP 307-08)

**H. The Trial Court Denied The Mother’s Request For Attorney’s Fees.**

After the trial court’s decision, the mother sought an award of attorney fees based on the parties’ March 2007 stipulation that “in the event the petition [for modification] is found to be frivolous, the Court shall award reasonable, actual attorney’s fees and costs to the non-moving party.” (Exhibit 7 at 4, CP 387, 390) The mother also sought attorney fees based on her need and the father’s ability to pay. (CP 390) The mother’s monthly net income is \$1,845. (CP 365) The father’s monthly net income is \$6,363.36. (CP 435)

The trial court denied the mother’s request for fees, finding that the petition for modification was “not frivolous as defined by law.” (CP 314) The trial court also found that the disparity in the parties’ financial circumstances was “not so great as to be inequitable given the petitioner’s financial assets and obligations.”

(CP 314) Finally, the trial court held that “intransigence of one party requires more than filing motions, but rather requires action which this Court views as more harmful, such as failure to respond to litigation.” (CP 314-15)

The father appeals the trial court’s decision on his petition for modification. (CP 299) The mother cross-appeals the trial court’s denial of her request for attorney fees. (CP 311)

#### IV. ARGUMENT

**A. The Trial Court Properly Considered The Father’s Petition For Modification Under The Standards Of RCW 26.09.260.**

**1. The Parties’ Agreement To Waive “Adequate Cause” Did Not Waive The Trial Court’s Obligation To Consider The Statutory Factors Of RCW 26.09.260 Before It Could Modify The Parenting Plan.**

The provision in the parties’ March 2007 order, which provided that in the event either parent sought to modify the parenting plan, the other parent “agree[s] to waive adequate cause,” (Ex. 7 at 4) did not absolve the trial court from its obligation to consider the criteria set forth in RCW 26.09.260 before it could modify the parenting plan. Regardless of the parties’ stipulation to *adequate cause*, unless the parties agree to the terms of the *modification*, the trial court is still required to comply with RCW

26.09.260 before modifying a parenting plan. **Marriage of Adler**, 131 Wn. App. 717, 129 P.3d 293 (2006), *rev. denied*, 158 Wn.2d 1026 (2007). That is exactly what the trial court did here. After finding that the evidence presented did not meet the statutory factors for a major modification under RCW 26.09.260 (1) and (2), the trial court properly denied the father's petition for a major modification of the parenting plan. (CP 302-03)

The father is wrong when he claims that a parties' stipulation to waive adequate cause "necessarily means that the requirements of RCW 26.09.260 (1) and (2) . . . are also waived." (App. Br. 26) **Marriage of Adler**, 131 Wn. App. 717, 129 P.2d 293 (2006) cited by the father (App. Br. 25-26, 27-29), does not support this proposition. Instead, the **Adler** court holds the opposite – while parties may waive the adequate cause requirement, the best interests of the children must still "remain protected by the standards in RCW 26.09.260 as applied by the court in the modification proceeding." 131 Wn. App. at 724, ¶ 12.

In other words, a stipulation on adequate cause only guarantees a parent a hearing on his modification action. The moving party must still meet the standards under RCW 26.09.260

before the court may modify the parenting plan. See ***Marriage of Taddeo-Smith/Smith***, 127 Wn. App. 400, 403, 404, ¶¶ 3, 7, 110 P.3d 1192 (2005) (the trial court was required to comply with RCW 26.09.260 before modifying a parenting plan even though the parties stipulated to adequate cause). The father misrepresents ***Adler*** by claiming that this court ruled “that the trial court was not required to find that the current plan was detrimental to the children because the parties had stipulated to adequate cause.” (App. Br. 28)

In ***Adler***, the mother claimed that the trial court could not have modified the parenting plan because a commissioner denied the father’s request for a temporary order after finding that there was no showing the current plan was detrimental to the children. This court rejected the mother’s assertion, holding that a “temporary order is not a prerequisite to setting a trial date for modification.” ***Adler***, 131 Wn. App. at 727, ¶ 21. This court held that the “trial court was not required to find that the current plan was detrimental to the children *at this stage in the proceedings* in this case because the parties had stipulated to adequate cause.” ***Adler***, 131 Wn. App. at 727, ¶ 21 (emphasis added). However, at

trial on the modification action, the trial court was required to consider the factors under RCW 26.09.260 before it could modify the parenting plan. See **Adler**, 131 Wn. App. at 724, ¶ 12.

In **Adler**, the trial court modified the parenting plan only after it found that the “children’s environment under the current plan was detrimental to them and that the harm likely to be caused by a change in the environment is outweighed by the advantage of the change.” 131 Wn. App. at 721, ¶ 6. The trial court further found that “the current residential schedule and [the mother]’s decision-making power had engendered conflict between the parents.” **Adler**, 131 Wn. App. at 721-22, ¶ 6. Here, while the parties’ stipulation to “waive” adequate cause provided the father a hearing on his modification petition, the trial court could not modify the parenting plan, unless, as in **Adler**, the father could present evidence that modification was warranted after consideration of the factors under RCW 26.09.260. Because the father failed to meet this burden, the trial court properly denied the father’s requested relief.

The father also misplaces his reliance on **Marriage of Possinger**, 105 Wn. App. 326, 19 P.3d 1109, *rev. denied*, 145

Wn.2d 1008 (2001) for his claim that the trial court was required to consider RCW 26.09.187, the factors for an initial parenting plan, instead of RCW 26.09.260. (App. Br. 25-27, 28-29) In ***Possinger***, the parties' parenting plan established only a short-term schedule, and the judge who entered the parenting plan "reserve[d]" its final decision on a long-term plan and ordered that the parties return to court after one-year for a "review." 105 Wn. App. at 330. This court held that the trial court properly "reviewed" the parenting plan under RCW 26.09.187, instead of RCW 26.09.260, because the court's decision on the residential schedule after one-year was part of "its initial decision in that regard, not a modification of its prior decision." ***Possinger***, 105 Wn. App. at 332.

Here, the March 2007 provision stating that "either party shall have the right to petition the Court to *modify* the father's visitation schedule [after October 1, 2007] . . . In this event, the parties agree to waive a finding of adequate cause," (Ex. 7 at 4, emphasis added) did not call for a "review" of the parenting plan, but instead by its terms contemplated a modification of the

parenting plan.<sup>1</sup> This provision is more like the one in **Adler** than the one in **Possinger**. As the court in **Adler** noted, “it appears that the parties and the trial court contemplated that the review would occur not under the criteria of RCW 26.09.187, but under the criteria of RCW 26.09.260. This is because the original order refers to and eliminates the threshold requirement of a substantial change in circumstances.” 131 Wn. App. at 725, ¶ 17. Accordingly, the trial court properly considered the factors of RCW 26.09.260 in denying the father’s petition for modification.

**2. The Trial Court Properly Applied The Factors Of RCW 26.09.260 To Find That There Was No Basis To Modify The Parenting Plan To Increase The Father’s Residential Time And Lift The Supervision Requirements.**

Below and in this appeal, the father concedes that his petition for modification sought only a “major” modification of the parenting plan under RCW 26.09.260 (1) and (2), as he sought a change of more than 90 overnights in a calendar year. (App. Br. 31-32; 2/03 RP 31, 40) RCW 26.09.260(5) (a), (c) (modification is “minor” as long as the change does not exceed twenty-four full

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<sup>1</sup> While the parties’ initial October 2003 parenting plan specifically called for a “review of the Parenting Plan pursuant to RCW 26.09.187” (Ex. 13 at 9), the parties deleted this provision in their March 2007 order: “the second paragraph of section “VI” of the October 3, 2003 parenting plan is deleted.” (Ex. 7 at 5)

days in a calendar year or does not result in a schedule that exceeds ninety overnights per year in total). Under the relevant provisions of RCW 26.09.260 (1) and (2), the trial court could only modify the parenting plan as requested by the father if the father could prove: (1) a substantial change in the circumstances of the child or mother; (2) the modification is necessary to serve the best interests of the child; and (3) the child's present environment is detrimental to the child's and the harm likely to be caused by a change of the environment is outweighed by the advantage of the change.

The father does not challenge the manner in which the trial court considered the evidence in relation to the factors of RCW 26.09.260 (1) and (2). Instead, his argument is solely that the statute is "inapplicable." (See App. Br. 24-30) The father does not challenge the trial court's finding that he failed to show that the child's present environment is detrimental. Nor does the father challenge the trial court's finding that "the record [ ] does not give any clear indication that the best interests of the child are served by unsupervised visits." (App. Br. 4 (Assignments of Error); CP 303) Accordingly, the trial court's findings are verities on appeal,

and the father has waived any challenge to the trial court's decision under RCW 26.09.260 (1) and (2). **Marriage of Brewer**, 137 Wn.2d 756, 766, 976 P.2d 102 (1999) (unchallenged findings are verities on appeal); **Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2**, 117 Wn. App. 183, 190 n. 4, 69 P.3d 895 (2003) ("It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error ... precludes appellate consideration of an alleged error.").

Even if the father had challenged the trial court's factual decision, his appeal must fail. There was no evidence that there was a "substantial change in the circumstances" of either the child or the mother. There was also no evidence that the child's "present environment was detrimental." Further, the father's requested modification was not in the best interests of the child.

The father points to the testimony of Don Layton, the case manager, and Dr. Teri Hastings, the original guardian ad litem, whom he asserts saw "no benefit to continued supervision." (App. Br. 33) But the trial court found that the testimony of Mr. Layton and Dr. Hastings were both "discredited." (CP 303) **Marriage of**

*Thier*, 67 Wn. App. 940, 948-49, 841 P.2d 794 (1992) (it is the trial court's role to weigh the evidence and the credibility of the witnesses), *rev. denied*, 121 Wn.2d 1021 (1993).

The trial court disagreed with Mr. Layton's assessment that the current schedule is "contrived" based on Mr. Layton's assertion that the mother "has not done her personal work." (CP 304) The trial court found that Mr. Layton's assessment of the mother as "paranoid" and a "victim" was contradicted by the mother's therapist's report on her therapeutic progress to the parenting evaluator. (CP 304) The trial court also did not put much weight on Dr. Hastings' testimony, since she had not been involved in the case for more than three years and is "unfamiliar[ ] with the entire five-year record." (CP 304) Instead, the trial court was more "persuaded" by the current parenting evaluator's report and her recommendation that the supervision requirement not be lifted at this time. (CP 303-04)

This court is in no position to reverse those factual determinations by the trial court. The role of the appellate court is not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses. *Marriage of Rich*, 80 Wn.

App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030 (1996). The trial court properly based its decision on the father's petition for a modification of the parenting plan under RCW 26.09.260. Because the father failed to meet the standards under RCW 26.09.260 (1) and (2) to modify a parenting plan, the trial court properly denied the father's petition.

**3. The Father Failed To Meet His Burden To Prove That Even A Minor Modification Of The Residential Schedule Is Warranted Under RCW 26.09.260(7).**

The father could have brought his petition to modify the parenting plan as a "minor" modification (i.e. less than 90 overnights or less than 24 full days), but concedes that he did not. (App. Br. 31-32) Had he chosen to pursue a minor modification, he would have first had to "demonstrate [ ] a substantial change in circumstances specifically related to the basis for the limitation [under RCW 26.09.191]" and prove that any modification was in the child's best interests. RCW 26.09.260(7). Instead, he chose to pursue a "major" modification, seeking not only unsupervised residential time, but significantly greater residential time than he has ever had with the child. In other words, despite having had no overnights since the child was nine months old, and only 6 hours of

supervised residential time with the child every two weeks for the last three years, the father insisted upon the extraordinary relief of unsupervised overnight residential time. (See Ex. 10)

The father persisted in seeking only this relief even after the trial court, and opposing counsel, pointed out that RCW 26.09.260(5)(c) might be available if the standards of RCW 26.09.260(7) could be met. (2/3 RP 21, 40) The father's insistence on pursuing his petition as a major modification is evidence of the lack of insight noted by the various professionals in this case. (See Exhibit 1 at 28)

In any event, the trial court did consider whether a modification would be warranted under the lower standard for a minor modification. After weighing the evidence, the trial court found that the father did not meet his burden under the statute even for a minor modification of the residential schedule. (CP 303)

The trial court noted that there has been no "substantial change in circumstances" because the same issues regarding the father's inability to take responsibility for his role as a perpetrator of domestic violence that was evident when the original parenting plan was entered remains today. (CP 303-04) The trial court also

noted that the father's current therapist reported that the father is "completely out of touch with the impact of his behavior on others." (CP 304) Because the father failed to meet his burden to prove that circumstances warranted even a minor modification of the residential schedule, the trial court properly denied the father's petition. ***Parentage of Schroeder***, 106 Wn. App. 343, 350, 22 P.3d 1280 (2001) ("it is the moving party's burden to prove a modification is appropriate").

**B. The Trial Court Did Not Abuse Its Discretion By Entering Its Order Supplementing And Clarifying The Non-Residential Provisions Of The Parenting Plan.**

The trial court's order was not a modification of the parenting plan. A "modification" occurs when a party's rights are either extended beyond or reduced from those originally intended in the parenting plan. ***Marriage of Christel/Blanchard***, 101 Wn. App. 13, 22, 1 P.3d 600 (2000), citing ***Marriage of Rivard***, 75 Wn.2d 415, 418, 451 P.2d 677 (1969). A "clarification" of a dissolution decree is merely "a definition of the rights which have already been given and these rights may be completely spelled out if necessary." ***Rivard***, 75 Wn.2d at 418.

In **Rivard**, our Supreme Court affirmed a trial court order setting forth a specific visitation schedule for the non-custodial parent when the original order only provided for “reasonable visitation.” 75 Wn.2d at 419. The Court held that this action neither extended nor reduced the parents’ already existing rights, rather it merely defined or explained the parents’ existing rights. **Rivard**, 75 Wn.2d at 418.

Here, the trial court’s order affected only non-residential provisions of the parenting plan, and neither expanded nor reduced either parent’s rights under the parenting plan. This case thus is distinguishable from **Marriage of Shryock**, 76 Wn. App. 848, 888 P.2d 750 (1995) and **Marriage of Watson**, 132 Wn. App. 222, 130 P.3d 915 (2006) (App. Br. 34-36). In both those cases, the trial court improperly modified the parenting plan by reducing one parent’s residential time, without proper consideration of RCW 26.09.260. Here, the trial court’s order did not reduce either parent’s rights. Instead, the order more specifically defined the role of the case manager/guardian ad litem by directing that part of their role was to ensure the father’s compliance with therapy and requiring them to keep the court informed of the father’s

compliance on a bi-annual basis. (See CP 305-06) This did not “modify” the parenting plan because it did not substantively affect either parent’s rights under the existing parenting plan.

Even if the trial court’s order modified the parenting plan, it was well within the trial court’s discretion to enter its order under RCW 26.09.260(10), which allows adjustments in the non-residential aspects of a parenting plan on a substantial change in circumstances of either parent or child, when in the best interest of the child. The mother was not required to cross-petition for modification in order for the trial court to make appropriate adjustments to the parenting plan if a basis is warranted and it is in the children’s best interests in the non-residential aspects of the parenting plan. It would be against the stated policy of the Parenting Act if the court were not allowed to act in the children’s best interests. See RCW 26.09.002 (“In any proceeding between parents under this chapter, the best interests of the child shall be standard by which the court determines and allocates the parties’ parental responsibilities”); *Cf. Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 171-172, 34 P.3d 877 (2001), *rev. denied*, 147 Wn.2d 1026 (2002) (child support order may be modified in any

respect, including granting relief requested by the respondent, once a basis for modifying child support is established).

Here, the trial court expressed concern that after all this time the father “continues to need ongoing resolution of domestic violence issues.” (CP 303) The trial court recognized that the father required continued assistance from professionals to correct behaviors and attitudes that were the basis for the father’s inability thus far to move beyond supervised visitation. The trial court’s order was fashioned with idea that with the professionals’ help the father could progress to a point where increased residential time with the child would be possible. The trial court’s order was intended to ensure that the father continued with his existing therapy and received assistance from a parenting coach. (CP 305)

The parenting evaluator had expressed concern about the “repeated disruption caused for any family and child exposed to repeated court actions. With each modification action, there is an impact on Luke’s quality of life, stress and exposure to conflict.” (Ex. 1 at 34); see also ***Marriage of Taddeo-Smith and Smith***, 127 Wn. App. 400, 404, ¶ 6, 110 P.3d 1192 (2005) (strong presumption against modification). Accordingly, the trial court ordered that any

future modification should comply with RCW 26.09.260, including the adequate cause requirement.

The trial court's order was made within its discretion in light of the parenting evaluator's recommendations of the child's best interests and the standards under RCW 26.09.260. This court should affirm.

## **V. CROSS-APPEAL**

### **A. Assignments Of Error For Cross-Appeal.**

1. The trial court erred in holding that the "Petition for Modification was not frivolous as defined by law." (Finding of Fact (FF) 1, CP 314 (Order on Motion for Fees))

2. The trial court erred in finding that the "disparity [in the parties' financial circumstances] is not so great as to be inequitable given the petitioner's financial assets and obligations." (FF 2, CP 314)

3. The trial court erred in holding that the "intransigence of one party requires more than filing motions, but rather requires action which this Court view as more harmful, such as failure to respond to litigation." (FF 3, CP 314-15)

4. The trial court erred in entering its Order on Motion For Fees. (CP 314-15)

**B. Statement of Issue for Cross-Appeal.**

It is undisputed that there was no factual basis for the father's petition for a major modification of the parenting plan and the mother has less than one-third the income of the father. Did the trial court err in declining to award attorney fees to the mother for having to respond to the father's baseless petition for modification of the parenting plan on the grounds that intransigence requires a failure to *respond* to litigation?

**C. Argument On Cross-Appeal.**

**1. The Trial Court Erred In Declining To Award The Mother Attorney Fees When It Was Undisputed That The Father Could Not Meet The Statutory Requirements For A Major Modification.**

**a. The Petition Was Frivolous.**

There was no factual basis to support the father's petition to modify the parenting plan under RCW 26.09.260 (1) and (2). In fact, the father never even attempted to prove his case under the statutory requirements of RCW 26.09.260. As a result, the mother unnecessarily incurred attorney fees defending against the father's baseless petition. The trial court was wrong when it found that the father's petition was not "frivolous as defined by law." (CP 309)

An action is frivolous “if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit” that there is no reasonable possibility that the moving party will prevail. See **Wagner v. Wheatley**, 111 Wn. App. 9, 18, 44 P.3d 860 (2002). Below and on appeal, the father has essentially conceded that there was no factual basis for modification of the parenting plan under the provision on which he pleaded – RCW 26.09.260 (1) and (2) for a major modification. Typically, the “primary purpose of threshold adequate cause requirements is to prevent movants from harassing non-movants by obtaining a useless hearing.” **Adler**, 131 Wn. App. at 724, ¶ 12. Here, because adequate cause was waived under the parties’ March 2007 agreement, no such protection was provided to the mother and she had no choice but to defend against the petition in a trial. The fact that this might occur was the basis for the parties’ agreement that attorney fees would be warranted to the non-moving party if the petition for modification was proved to be frivolous. (Ex. 7 at 4)

After the parenting evaluator issued her report in December 2008, it was evident that there was no basis to modify the parenting

plan to increase the father's residential time and lift the professional supervision requirement. Nevertheless, the father forced the mother to defend against his modification action at trial. Because there was no factual basis for the father's petition for modification, the trial court should have ordered the father to pay attorney fees to the mother.

**b. The Father Is Intransigent.**

The trial court also erred in failing to award attorney fees to the mother based on the father's intransigence by too narrowly construing the circumstances under which attorney fees can be awarded for the other party's intransigence. The trial court erred in holding that attorney fees for intransigence must be based on "more than filing motions, but rather requires action, which this Court views as more harmful, such as failure to respond to litigation." (CP 314-15) Intransigence can be established by showing that the other party engaged in "foot dragging," "obstruction," "filed repeated motions which were unnecessary," or "when one party made the trial unduly difficult and increased legal costs by his or her actions." ***Marriage of Greenlee***, 65 Wn. App. 703, 708, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992).

Here, the father filed his second petition to modify the parenting plan in less than two years, requiring the mother to unnecessarily incur attorney fees to respond to a modification action with no legal or factual basis. The trial court should have awarded attorney fees to the mother based on the father's intransigence in unnecessarily pursuing this litigation.

**c. The Father Has The Ability To Pay and The Mother Has The Need For Her Attorney Fees To Be Paid.**

The trial court should have also awarded attorney fees to the mother based on her need and the father's ability to pay. By his own account, the father's income is nearly three and one-half times the income of the mother. (*Compare* CP 365 and CP 435) The trial court improperly refused to award attorney fees to the mother because her monthly obligations are less than the father and because she still had proceeds remaining from the parties' marital settlement. (See CP 314: "this disparity is not so great as to be inequitable given the petitioner's financial assets and obligations") But the fact that the mother lives more frugally than the father should not be a basis to deny her requested attorney fees. The mother should not be required to impoverish herself out

of the limited resources available to her when the father's tactics have made litigation more difficult. ***Marriage of Dalthorp***, 23 Wn. App. 904, 912-913, 598 P.2d 788 (1979).

**2. This Court Should Deny The Father's Request For Attorney Fees. Instead, It Should Award Attorney Fees To The Mother Based On Her Need And His Ability To Pay, And The Minimal Merit In The Father's Appeal.**

This court should deny the father's request for attorney under RCW 26.09.140. This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; ***Leslie v. Verhey***, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). Here, the father does not have the need for his attorney fees to be paid, nor does the mother have the ability to pay his fees. Instead, this court should award attorney fees to the wife for having to respond to this appeal based on her own need and the father's ability to pay. RCW 26.09.140; *see also* ***Dalthorp***, 23 Wn. App. at 912-913.

Given the merits of the appeal and cross-appeal and the parties' respective financial conditions, the father should be ordered to bear his own attorney's fees and to pay the mother's

fees on appeal. RAP 18.1; RCW 26.09.140; *Marriage of Davison*,  
112 Wn. App. 251, 259-60, 48 P.3d 358 (2002).

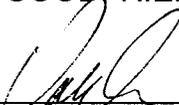
## VI. CONCLUSION

The trial court properly denied the father's requested modification when the father's indisputably failed to meet his burden under RCW 26.09.260 (1) and (2) to warrant a major modification of the residential schedule. The trial court's decision on non-residential provisions of the parenting plan was well within its discretion and in the child's best interests. This court should affirm the trial court's decision on the father's petition for modification, reverse the trial court's order denying attorney fees to the mother, and award the mother her attorney fees on appeal.

DATED this 30<sup>th</sup> day of September, 2009.

By:   
\_\_\_\_\_  
David J. Ordell  
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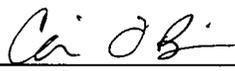
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 30, 2009, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Michael Ditchik Attorney at Law 20415 72nd Avenue So., Suite 270 Kent, WA 98032	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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**DATED** at Seattle, Washington this 30th day of September, 2009.

  
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Carrie O'Brien