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No. 69426-0  
69820-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re

MICHELLE KING  
Respondent

And

MITCHELL KING  
Appellant

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*Filed  
5-16-13  
SST*

REVIEW FROM THE SUPERIOR COURT  
FOR KING COUNTY  
The Honorable Deborah Fleck

APPELLANT'S OPENING BRIEF

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ORIGINAL

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## I. INTRODUCTION

This is a case about a 10-year old child, Kaelin King, who has had to endure continuous chaos and instability in her mother's household since entry of the final Decree of Dissolution and parenting plan on September 17, 2010 in Grant County.

The case has now been pending in King County Superior Court for 1.5 years beginning with an enforcement proceeding initiated by the father (Mr. King) in October, 2011, after the mother (Ms. King) had violated the parenting plan by withholding residential time with the child from Mr. King.

This appeal addresses several trial court errors, which were made during a trial held July 31, 2012 through August 8, 2012, as well as errors made during post-trial enforcement proceedings brought by the father for continued violations of the parenting plan by the mother during October 2012 through December 2013.

Father, the appellant here, expects the court to reverse many of the trial court's rulings and remand the case for findings that the best interests of the child are served by following the GAL recommendations including returning the child to Moses Lake with sharing of custody only if the mother relocates there and naming the father primary parent if mother does not, and finding that the mother acted in bad faith and was in contempt on two different petitions for willfully withholding the child from her father.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred, requiring reversal, when it modified the final parenting plan based on an improper consideration of the non-custodial parent's (father's) circumstances contrary to the RCW 26.09.260 instruction to consider only changes in the custodial mother's circumstances.

CP 183. CP 181; pg. 272-297

2. The trial court erred by substantially modifying the father's residential time in nature and character by directing him to either move his residence closer to the child or resume visitation in the home of other family member, which in effect reduced said residential time by 50%.

CP 183.

3. The trial court erred by failing to address the substantial evidence presented at trial regarding the mother's conduct and involvement with others that had an adverse effect on the child's best interests under RCW 26.09.191(3).

CP 181; CP 182; CP 183.

4. The trial court erred by denying father's motion to exclude the testimony of the child's therapist (Dr. Kinney) when said therapist was not designated as a forensic expert, was appointed only for therapeutic purposes, and was not disclosed by the mother as a witness until the day of trial.

P 181; pg. 291-292; Ins. 22 and Ins.1-2.

5. The trial court erred by admitting evidence of the child's counselor's observations of the mother, through the GAL report, that Dr. Kinney saw "no signs of bipolar disorder or affect, despite several phone calls with her when she was under stress..." despite the fact that she was not treating Michelle King directly and was not qualified as an expert in adult mental health.

CP 181; pg. 288; Ins. 11-13.

6. The trial court erred by granting mother's untimely objection and not admitting into evidence father's offered Trial Exhibit 101 (the CPS/DLR report), which was filed under ER 904 several months before trial on January 23, 2012.

VRP at 84 (July 31, 2012) Ins. 6-25 and VRP at 85 (July 31, 2012) Ins. 1-23.

7. The trial court erred in post-trial contempt proceedings under RCW 26.09.160(2)(b) by failing to hold the mother in contempt despite several violations for failing to provide the child for the father's residential time and by creating a new standard of providing verbal warnings and admonishments during court proceedings.

VRP at pgs. 58-61 (September 24, 2013); Ins. 20-25; 1-25; 1-25, 1-5.

8. The trial court erred during post-trial contempt proceedings by admitting (and accepting) into evidence child hearsay and double child hearsay under ER 803(a)(3), and reasoning that it was being considered by the court merely under the a state of mind exception under ER 803(a)(3), not for the truth of the matter asserted (but then later used such evidence substantively when weighing father's and other adults' version of events).

VRP at 130 (December 10, 2012); Ins. 24-25 and at 131; Ins. 1-16.

9. The trial court erred by ruling that "Judge Fleck retains jurisdiction" and then broadening the scope of that ruling to encompass post-trial contempt proceedings, which are required to be heard as separate proceeding in the family law department under LFLR 5 and LFLR 13.

CP 182; pg. 301 and VRP at 171 (December 10, 2012); Ins. 13-21.

10. The trial court erred when it did not enter contempt findings against the mother for withholding the child on several weekends designated as father's residential time (August 28<sup>th</sup> to 30<sup>th</sup>, September 17<sup>th</sup> and October 7<sup>th</sup>-9<sup>th</sup>) by erroneously reasoning that the child's hearsay statements created a reasonable excuse for mother's noncompliance.

VRP at 137 (December 10, 2012); Ins. 25; at 138; Ins 1-25; at 139; Ins 1-25.

VRP at 144 (December 10, 2012); Ins. 9-16.

11. The trial court erred when it did not enter contempt findings against the mother erroneously considering the repercussions of a finding of contempt under RCW 26.09.260(2)(d) and advising the of this legal consequence (i.e., "two contempt findings constitute a change of circumstances permitting a new modification proceeding as a matter of law.")

CP 304; pgs. 1-7

12. The trial court erred when it did not reallocate the GAL fees to the mother in accordance with a valid court order which dictated that these fees be split with the term "shall," by creating an additional post-trial standard of submitting new financial information under LFLR 10, which neither party timely and fully complied with.

CP 312; pgs. 998-990.

13. The trial court erred in granting Michelle an anti-harrasment protection order when Mitch was not properly notified of the hearing and made no required findings of conduct constituting harassment.

CP 199

14. The trial court erred in permitting Michelle to relocate to an undisclosed address with the minor child after it ordered that it would not do that in a previous hearing.

VRP at 15 (September 24, 2012); Ins. 9-16.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err when it modified the final parenting plan based on consideration of the non-custodial father's circumstances contrary to the directive of the statute? YES
2. Did the trial court err in reducing the father's residential time without making any finding of actual detriment to the child in doing so? YES
3. Did the trial court err by failing to rule on disputed facts presented by both Petitioner and Respondent in trial? YES
4. Did the trial court err when it allowed testimony, over the father's timely objection, of a therapist that was not designated as a forensic expert, was appointed only for therapeutic purposes, and was not disclosed by the mother as a witness until the day of trial? YES
5. Did the trial court err when it relied on the GAL report to make a finding regarding the mental health of the Petitioner when the GAL was clearly not qualified to make any mental health diagnosis? YES

6. Did the trial court err in refusing to admit a trial exhibit properly filed under ER 904 in which there was no timely objection made? YES
7. Did the trial court err when it established that Respondent could not be held in contempt without multiple prior warnings from the court?
8. Did the trial court err when it admitted into evidence statements made by the child to a third party to establish the truth of the matter asserted? YES
9. Did the trial court err in failing to distinguish contempt proceedings as separate proceedings from the trial and failing to rule based on applicable statutes and court rules to determine whether contempt applied to the facts presented? YES
10. Did the trial court err in failing to find contempt for the mother's willful failure to follow the parenting plan the weekends of August 28th to 30th, September 17th and October 7th-9th? YES
11. Did the trial court err when it failed to find contempt after erroneously considering the repercussions of a finding of contempt under RCW 26.09.260(2)(d) and advising the of this legal consequence? YES
12. Did the trial court err in failing to uphold a valid court order instructing the parties to split the fees for a GAL? YES
13. Did the trial court err in granting an anti-harassment protection order in which the Respondent was not given proper notice? YES
14. Did the trial court err in permitting Petitioner to relocate with the child to an undisclosed address? YES

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

The parties, Mitchell King (Mitch) and Michelle King were married on April 7, 2001. VRP at 371 (August 2, 2012) In. 9. They had a child together on February 21, 2002. VRP at 371 (August 2, 2012) In. 11. Kaelin and her parents resided in Moses Lake, WA from 2003 until 2009. VRP at 375 (August 2, 2012) Ins. 1-4 and

VRP at 380 (August 2, 2012) Ins. 1-5. Mitch sought a dissolution, and at separation in 2009 the mother had in her household three children – an older sibling from a prior relationship of Michelle's; his name is Colton (now age 14), and a foster child named Jacqueline. TE (Trial Exhibit) 9; pg. 1.

The parties were eventually divorced and a final parenting plan addressing residential time for the parents regarding Kaelin (now age 11) was entered in Grant County Superior September 17, 2010 by Judge Knodell. CP 222; pgs. 593-600. At that time, the mother was designated the majority (or primary) residential parent, but the father enjoyed significant residential time at his home in Moses Lake with Kaelin. TE 7. Prior to entry of the final parenting plan the mother had been allowed to relocate and was living in Puyallup. CP 222 and VRP (August 7, 2012) 678; In 1-5. The Court (Judge Knodell) in a decision letter written August 23, 2010, took special note of the "tie-breaking" factor regarding who should be the primary residential parent, which was that Kaelin had significant relationships with her siblings, which was (and is) a statutory factor under RCW 26.09.187(3)(a)(v). TE 186.

During marriage, a few significant things happened. First, Mitch discovered that his wife, Michelle King, was diagnosed with severe Bi-Polar disorder in 2009. TE 9 at pg. 1. This created a lot of dysfunction and disorder in the marriage, especially with the raising of three (3) children. Next, Mitch suffered an accidental head injury while pheasant hunting that disabled him from working as a pilot, but did not impact his ability to parent. CP 164 at 220;

Ins. 11-18. In fact, being able to stay at home to care for the home and the children were blessings in disguise.

However, issues began to develop with Michelle's mental health. During the marriage, Michelle was arrested by police in Moses Lake and spent the night in jail for domestic violence. VRP at 376-77 (August 2, 2012) Ins 19-25 and Ins. 1-13. In Sumner, police were summoned to their home to respond to suicide threats made by Michelle. VRP at 372 (August 2, 2012) Ins 19-25. Michelle ran up \$85,000 in credit card debt forcing Mitch into bankruptcy. VRP at 380 (August 2, 2012) Ins 19-24.

In September 2009, the Grant County Court allowed Michelle to relocate with the children to Puyallup under temporary orders. VRP at 385 (August 2, 2012) In. 7. The final plan entered after the relocation ordered transportation responsibilities for long-distance transportation to the receiving parent. The plan indicated receiving parent is responsible for transportation unless both parties agree on an alternate arrangement then the exchange would occur in Cle Elum, which was the halfway point between their homes (about 95 miles). TE 7. The mother had custody of Kaelin, Jacqueline (a state foster child) and Colton at the time of the move to Puyallup. VRP 677(August 7, 2012) at In. 16-25. Kaeling lived in Puyallup with her mother, brother, and sister while attending Sunrise Elementary for a year. VRP 678 (August 7, 2012) In. 1-5

Michelle then began causing great turmoil involving all three children by introducing several different men and several

different new home environments to the family. Michelle moved from Puyallup to Bonney Lake in summer 2010 after she met Jay Platt. CP 164; pg. 221; ln 1-4. Michelle's only notice to Mitch of this move was through a phone call. VRP at 385 (August 2, 2012) Ins. 18-25. Michelle lived in Bonney Lake for only two months in the summer of 2010. VRP at 678 (August 7, 2012) Ins. 20-22. Michelle and Jay Platt then move to Kent without notice to the father. VRP at 386 (August 2, 2012) Ins. 3-16. Michelle then married Jay Platt only two weeks after her divorce to Mitch was finalized in September 2010. VRP at 385 (August 2, 2012) Ins. 14-15. Kaelin missed over 15 days of school as noted in her report card during this time period. TE 25.

During the time of Michelle's relationship with Jay Platt, Colton, the mother's oldest child, moved in with his father. VRP 53 (July 31, 2012); Ins. 1-4. Michelle is/was no longer Colton's primary parent and a significant change occurred in Kaelin's household to which Mitch King was never notified. VRP at 411 (August 2, 2012); Ins. 15-16.

During this period of chaos, Colton also exposed himself to Kaelin and a friend on August 20, 2010, while in the mother's home. TE 101; pg. 71. CPS was notified, but Michelle withheld this crucial information from the father. VRP at 411 (August 2, 2012) Ins. 19-21 and VRP at 626 (August 7, 2012) Ins. 11-14. Colton only stayed with his mother on an every other weekend basis after moving in with his father and Kaelin has not lived with

her brother on a full-time basis since sometime after entry of the Grant County final orders. TE 101; pgs. 10, 57, 59.

Michelle King's life continued to unravel and Kaelin was caught in the middle. Kaelin was moved from the school she attended in Puyallup to another school in September 2010. VRP at 679 (August 7, 2012); Ins. 4-5. Michelle never filed the Notice of Intended Relocation for the move from Bonney Lake to Kent, as required by statute, and the child had to change schools again. VRP at 386 (August, 2012); Ins. 2-8. Then, only 7 months into the marriage to Jay Platt, the mother separated from Mr. Platt and moved again. VRP at 47 (July 31, 2012); Ins. 16-17 and VRP at 386 (August, 2012); Ins. 21-24. Michelle then filed for divorce and relocated in to another apartment in Kent in June 2011. VRP at 682 (August 7, 2012); Ins. 21-23 and TE 9; pg. 6. This move subjected Kaelin to another new situation as she was enrolled in Park Orchard Elementary, another school without notice to the father. VRP at 387 (August, 2012); Ins. 11-17 and VRP at 684 (August 7, 2012); Ins. 19-20.

Michelle has admitted her life has been in "chaos" TE 101 at pg 63 (of 100). Soon after separating, Michelle filed for a anti-harassment petition against her third husband, Jay Platt in June 2011. (TE 101 at pg. 59 (100). Jay Platt made reports to CPS about Michelle's care of the children. TE 9; pg 6. An investigation occurred in which it was learned Michelle was involved in drugs (marijuana), was charged with a crime of theft, introduced her children to unapproved people (including some with domestic

violence histories according to DLR/CPS reports), and again she was hospitalized for suicidal thoughts. TE 101 at pgs. 3, 13, 14, 55, 57, 71 (of 100). Mitch filed a Notice of Objection to Relocation for the three moves Michelle made since separating from her third husband, Jay Platt on October 28, 2011. CP 42; pgs. 111-16.

Michelle did not hesitate to introduce Kaelin to virtual strangers, who she would leave in charge of caring for Kaelin, including an under age babysitter, housemates, or men that were as strange, i.e., new, to Michelle as they were to Kaelin. TE 101 at pgs. 6, 11, 12 (of 100) and TE 117 at pg. 10. The State of Washington (through DSHS/CPS/DLR) took notice of Michelle's behavior and started an investigation into her household to determine her eligibility to provide foster care. TE 101 and TE 117 at pg. 10. DSHS took action to remove the youngest foster child because of the exposure of the foster child to various individuals who were deemed inappropriate by Child Protective Services in a Division of Licensing Report for revocation of Michelle's Foster care license on August 19, 2011. TE 101 at pg. 15 (of 100).

The 5 year old foster child was rightfully removed because Michelle was engaging in behaviors the State found detrimental to the foster child on August 2011 including using unlicensed and unapproved daycare providers; advertising on Craigslist for daycare and money, hiring an unlicensed/unscreened 17-year-old to care for the children (who later became an overnight housemate and also brought her teenage boyfriend in to spend the night often). TE 101 at pgs. 8, 9, 10, 12, 56, 57, 58 (of 100).

The teenager, a 17-year-old minor, acting as the "day care" provider, with her boyfriend, Kaelin, Jacqueline, and Colton, on weekends, all lived with Michelle in a 2-bedroom apartment in Kent. TE 101 at pgs. 9, 10, 56, 57 (of 100). CPS noted that it was unclear where Colton would stay even if Skylar and Zach moved out tomorrow as Michelle had suggested. TE 101 at pg. 10 (of 100). Michelle never notified Mitch that she had hired a 17-year-old from Craigslist to care for their child. VRP at 690 (August 7, 2012); Ins. 17-19.

In August of 2011, Michelle King was hospitalized for a prescription overdose that was originally characterized as intentional but later claimed to be accidental. TE 101 at pgs. 18, 71, 80, 90, 92, 93, 94 (of 100). Mitch was never notified of this hospitalization and according to the CPS report, Michelle had no idea who was caring for her two children, Kaelin and Jacqueline, in aftermath of her crisis. TE 101 at pgs. 92 and 93 (of 100)

During the summer months of 2011 Michelle met and became involved with Lawrence Moore. CP 48; pg. 121, ln. 5-6. Lawrence Moore had an extensive criminal history and was providing care for Kaelin and the foster child while Michelle King was working. TE 9; pg 22. Mr. Moore has a separate CPS file documenting investigation of his parenting of his own children. TE 9; pg 22.

The CPS report stated that the foster child called Michelle's new boyfriend Lawrence Moore 'daddy.' TE 101 at 19 (of 100). Michelle had people caring for and signing daycare

attendance sheets for the foster child Jacqueline despite there being no clearance of these individuals as required by CPS. TE 101 at pgs. 21, 82, 94, 95, and 96 (of 100).

In the CPS report Michelle told the investigator that she and Lawrence planned to marry soon. TE 101 at pg. 62 and 96 (of 100). The report described behaviors that were inconsistent with a primary parent who was acting in the best interests of her children. TE 101. After the completion of CPS's investigation, the foster child was removed from Michelle's care and the only child remaining in the household was Kaelin. VRP at 700 (August 7, 2012; Ins. 10-14. Michelle had Kaelin stay with her grandmother sometime in the summer of 2011 because Michelle described to CPS that at the time "my life is too crazy right now." TE 101 at pg. 19 (of 100).

In August 2011, Michelle put Kaelin on a flight to Eastern Washington without notice to the father. VRP at 416 (August 2, 2012) In 6-11 and TE 9; pg 24. Notifications were made to CPS of the flight issue on August 8, 2011. VRP at 178 (July 31, 2012); In. 1-11.

Michelle moved again in September 2011. VRP at 386-87 (August 2, 2012) In. 23-25; In. 1-9. The child had 14 absences attending the Kent schools during that period. VRP 388 (August 2, 2012) In. 19. The child was enrolled in another school, Emerald Park and attended that school for 4 weeks. VRP at 392 (August 2, 2012); In. 21 and VRP at 394 (August 2, 2012) at In.

19. The child had 7 absences in the 4-week period. VRP at 394 (August 2, 2012) at ln. 21.

Mitch filed an action in King County to enforce his parenting plan and sought modification based upon substantial change in circumstances. CP 4 pg 4-5; Ins. 14-25 and Ins. 1-15 . The modification request was denied because the Commissioner stated Mitch had to have prima facie evidence of a substantial change in circumstances of the mother's household. VRP 24 (October 13, 2011) Ins. 2-7. A motion for revision was filed and set to be heard December 9, 2011, but was stricken when temporary custody of the child was awarded to the father on November 24, 2011. CP 76A; Pgs. 174-182.

In violation of the parenting plan, Michelle withheld the child from Mitch for his visitations scheduled for August 28<sup>th</sup> to 30<sup>th</sup>, September 17<sup>th</sup> and October 7<sup>th</sup>-9<sup>th</sup>, 2011. CP 38; pg. 76; Ins. 4-12. Michelle failed to appear for the hearing and a warrant was issued. CP 41.

One month after the start of school in 2011, Michelle was evicted from an apartment in Kent and moved yet again to Federal Way. CP 48; pg. 120; Ins. 18-20. This eviction was based upon failure to pay rent despite getting \$1165 to \$1235 a month in Social Security benefits and earning an additional \$1500 a month. VRP at 1283 (August 1, 2012); Ins. 18-22 and VRP at 414 (August 2, 2012); Ins. 9-26 and VRP at 641 (August 7, 2012); Ins. 20-23. Mitch was again not given proper notification of the move. CP 48; pg. 120; Ins. 18-20. Mitch offered to pay the rent to the apartment

manager so his daughter would not have to move again. VRP at 1283 (August 1, 2012); 10-17. Michelle willfully withheld visitation and another contempt was filed on October 25, 2011, with the hearing set for November 15, 2011. CP 33 and CP 35. The child was withheld from October 21<sup>st</sup>-23<sup>rd</sup> and taken to a counselor without a joint agreement to do so, as well as, moved and enrolled in two different schools without the required notice to Mitch. CP 22; pg. 21; Ins. 8-15.

An Objection to Relocation was filed on October 28, 2011, by Mitch. CP 42. A motion to restrain the relocation and adopt the father's proposed parenting plan was filed with the objection on October 28, 2011. CP 46.

Kaelin was then enrolled in Wildwood Elementary by her mother again without notice to the father. VRP at 406 (August 2, 2012) at Ins. 24-25. During this time period Michelle repeatedly denied Mitch visitation and there were two total months of missed visitation with phone contact between Kaelin and Mitch's family also severally limited in stark contrast to the contact Mitch had prior to May 2011. CP 33 and CP 38.

Michelle King then filed a Petition to Modify the Parenting Plan on November 4, 2011. CP 56. A response to the Petition with a Counter-Claim requiring Mitch paying a \$56.00 filing fee was entered on January 27, 2012. CP 109. Michelle King, through counsel, agreed to adequate cause for a major modification on January 30, 2012 prior to any revision hearing or decision made by Judge Fleck on February 3, 2012. CP 117.

At the Contempt and temporary orders hearing of November 21, 2011, Commissioner Loudon found Michelle in contempt and Mitch was awarded custody based upon the instability of the mother and her many moves under the Relocation Statute and contempt findings. CP 76; pgs. 168-172. The court also awarded \$1000 in attorney fees and \$250 in costs. CP 76; pg. 168. Kaelin moved to Moses Lake and attended Park Orchard Elementary in Moses Lake from December 2011 until February 2012 (while in father's primary care). VRP at 407 (August 2, 2012) at Ins. 1-3.

Michelle filed for a Motion for Revision and was granted custody of Kaelin by Judge Fleck on February 3, 2012 because the Court ruled that the relocation order was inadequate per state law. CP 105. Kaelin was required to attend Wildwood Elementary in Federal Way but only went there one week because Michelle moved again. VRP at 407 (August 2, 2012) at Ins. 3-4. Michelle filed a third Notice of Relocation on February 8, 2012, under seal, asking to move from Federal Way to Puyallup. CP 118.

An ex parte hearing was set that allowed the relocation and orders were entered on February 9, 2012. TE 8. This was the fourth relocation since September, and Michelle was ordered not to move again, to provide background checks on anyone spending nights at her home, and was required to assure Kaelin's attendance at school unless sick based upon the many documented unexcused absences. VRP at 407 (August 2, 2012) at Ins. 10-15 and TE 8 and TE 169.

A trial was held in front of the Honorable Deborah Fleck starting on July 31, 2012. VRP at 2-8 (July 31, 2012). During trial the father filed several motions including reconsideration of the objection to the child's counselor testifying as an expert as she was never disclosed as required 21 days prior to trial by either party under KCLR 4(J), KCLR 26(k)(1) and its subparts (2)(3)(A)(B)(C). CP 172 and VRP at 732 (August 8, 2012); Ins. 14-19. The Trial Court allowed Dr. Kinney to be called by the mother as an expert witness contrary to KCLR 26(k)(4) and objections. VRP at 775-779 (August 8, 2012); Ins. 17-25; Ins. 1-25; Ins. 1-25; Ins. 1-25. Despite denying the father's objections and permitting the testimony of the child's counselor, the Court bizarrely struck most of the testimony in her written ruling. CP 181; pg. 291-292; Ins. 22 and Ins.1-2.

The Court entered a final ruling in this matter on September 4, 2012, and the order required Mitch King to move to Western Washington in 90 days or have visits in Eastern Washington only once per month and the remaining time at a hotel or relatives near Puyallup. CP 181; CP 182; CP 183; CP 184. In the Memorandum of Decision the Court required a Financial declaration be filed by September 14, 2012 to seek reimbursement of the GAL fee. CP 181; pg. 297; Ins. 5-10. The GAL order stated the fee "must be" reallocated between the parties. CP 306; pg. 957; Ins. 17-18.

A proper Motion for Reconsideration of the trial decision was filed on August 10, 2012. CP 186. An objection to late

documents was presented to the Court for the responsive documents of Respondent and her documents were not considered. CP 193. The Court issued a written ruling denying the reconsideration request on September 24, 2012. CP 202A.

After trial on September 11, 2012, Michelle King requested entry of another anti-harassment order against Mitch. CP 189. Mr. King was not served with the petition for an anti-harassment order until two court days before the hearing. CP 196 and CP 197. A request for a continuance and an objection was filed but the hearing was held on September 24, 2012 despite these objections. CP 195. A new anti-harassment order was entered without any findings as to whether three distinct events occurred to warrant a renewal. CP 199. At an exchange of the child on September 21, 2012, the mother requested that the father blow in the child's face because she said "his eyes looked funny" and she wanted to see if he had been drinking. CP 222; pg. 587; ln. 20-24.

The Notice of Appeal was filed and served on October 8, 2012. CP 207. Not two days after being served with the Notice of Appeal on October 11, 2012, Michelle King filed over 156 pages requesting relief for maintenance, contempt with no accompanying order to show cause, relocation to an undisclosed address, adjustment of child support and other requests. CP 206; CP 210; CP 211; Cp 212; CP 213; CP 214; CP 216.

An objection was filed on October 12, 2012, notifying the Court that mother served Mr. King with one motion but not his attorneys and then served the attorneys on the second motion but

did not get show cause order signed as required by law. CP 217. The father was never supplied with the Intended Notice of Relocation. CP 215. The mother then moves to an undisclosed address without a court order. CP 224; pg. 629; paragraph 5.

Michelle King willfully withheld visitation for the weekend of October 19, 2012, by sending Mitch an email at 2:07 a.m. that morning notifying the father she would not be sending the child. CP 222; pg. 604 and CP 222; pg. 587; Ins.1-3. In response, Mitch filed a contempt motion and order to show cause on October 22, 2012. CP 222; pg. 585-621 and CP 223. Mitch set the hearing on the Commissioner's calendar as required by Court rules for November 9, 2012. CP 223.

A hearing was held on October 26, 2012, and the Court entered into negotiations with the parties and then entered an order denying the mother's motions. CP 228. Michelle King was pro se when she filed all the motions that were denied and the Court advised her to get a lawyer in saying, "I want you to really consider the effect of representing yourself, especially when you have two capable counsel on the other side." VRP at 59 (October 26, 2012); Ins. 19-22. The Court then cited an old case Betts v. Betts, stating that it allowed any information coming from a child that is based upon the child being distressed or upset to be admitted under a state of mind exception to hearsay. VRP at 29 (October 26, 2012); Ins. 7-18. Mitch objected to all child hearsay statements as they essentially constituted self serving double-hearsay. VRP at 27 (October 26, 2012); In. 18; pg. 28; Ins. 7-8;

pg. 29; Ins. 19-21; pg. 30; Ins. 22-23; pg. 31; In. 23. The Court then required Mitch to show precisely where he denied the mother's allegations stemming from the child's hearsay when he denied anything the mother reported that he had said to the child. VRP at 46 (October 26, 2012); Ins. 14-15 and Ins. 16-19. The allegations of Michelle were based upon child hearsay statements but Mitch could not respond to them because all the accusations were put in a reply declaration for the first contempt charge alleged. CP 224 and VRP at 54-55 (October 26, 2012); Ins. 18-25 and In. 1.

A contempt hearing for the first withholding of the child was held on October 19-21, 2012 before the Honorable Judge Fleck on November 9, 2012. CP 222 and CP 223; VRP 83-108 (November 9, 2012). The mother admitted to the withholding in her declaration when she stated, "After thinking long and hard... I decided not to send to Kaelin on her weekend visit [to] Moses Lake..." without any other valid reason for the withholding. CP 224; pg 631; paragraph 3. The Court questioned which "element of bad faith that you are asserting here needs to be specifically found under the cases?" VRP at 85 (November 9, 2012); Ins. 14-17. Michelle admitted to moving to another address and to date has not disclosed where she lives since the move. VRP at 91-92 (November 9, 2012); Ins. 24-25 and 1-8.

The Court was misinformed by Michelle that she was held in contempt last year only as a result of taking the child to a counselor when it was actually for intentionally withholding the

child. VRP at 92 (November 9, 2012); Ins. 18-19. The mother told the Court that she withheld the child because she was “not comfortable sending her, and that’s why I chose not to...” VRP at 92 (November 9, 2012); Ins. 23-25. The Court would not find contempt and instead reserved it until a GAL, at the cost of the moving party and non-contemptor, could determine if the mother was acting in bad faith. CP 243; pgs. 720-23. The order, written and filed on November 9, 2013, reserved a finding of contempt because the Court reserved a finding bad faith but awarded make-up residential time. CP 243; pg. 721; Ins. 6-15. Mitch King objected to “any non-finding or reservation of contempt determining bad faith.” VRP at 106 (November 9, 2012); Ins. 12-21.

Michelle King again withheld the child for Mitch’s weekend prior to the hearing and was served with the new show cause order and contempt motion on November 9, 2012. CP 232. This motion was for the missed visitation on November 2, 2012. CP 232; pg. 673; Ins. 4-8. It was set for November 26, 2012 but heard on December 10, 2012. VRP at 138 (December 10, 2012); Ins. 1-4.

The Court, at the November 9<sup>th</sup> hearing, told Michelle King that if she had concerns about drinking, “then the obligation will be on you to take her all the way to Moses Lake and pick her up on the next three weekends that I am indentifying here. And until further order of the Court.” VRP at 103 (November 9, 2012); Ins.1-17. The three make-up weekends were the weekends of

November 9<sup>th</sup>, November 16<sup>th</sup> and Thanksgiving weekend. CP 243; pg.721-22; Ins. 21-25 and In. 1. Prior to the December 10<sup>th</sup> hearing and after being warned not to withhold the child on November 9, 2013 hearing Michelle withheld the child for the weekend of Thanksgiving. CP 269; CP 270; CP 271.

Michelle, then again withheld visitation for the weekend of November 30, 2012. CP 289; CP 290; CP 290A. The Court was notified on December 10, 2012, that Michelle had withheld the child for the court ordered make-up visitation of Thanksgiving and the regular visitation weekend of November 30, 2012. VRP at 110-111 (December 10, 2012); Ins. 24-5 and Ins. 1-9.

During the time period prior to any hearings on contempt the Court required the father to file a financial declaration in order for it to make a decision on reallocating GAL fees. CP 181; pg. 297; Ins. 8-9. The father timely followed the Court's request and filed his financial declaration on September 11, 2012. CP 229; pg. 670; Ins. 19. The Court, in its memorandum only required a financial declaration to reapportion the fees. CP 181; pg. 297; Ins. 8-9. The Court then issued another order extending time to submit documents and then ordered the father to supply additional documentation. CP 229. At the same time the mother was seeking modification of child support filed on October 12, 2012, and then again in November 13, 2012. CP 211.

On November 28, 2012, Mitch filed a Motion to Change Judge for the Contempt Motions and set it to be heard without oral argument on December 10, 2012. CP 279. Mitch argued that

each new motion for contempt was an independent action allowing for recusal of a Judge and that the proper procedure under King County Court rules was for the contempt to be heard on the family law motions calendar. VRP at 111 (December 10, 2012); Ins. 3-9.

Michelle was served with another order to show cause and contempt motion on December 10, 2012, with the court hearing all three new withholdings and contempts pleaded on January 25, 2013. CP 290 and CP 290A.

The father submitted his financial information for the December 10, 2012, hearing and the GAL fee request on November 29, 2012, but they do not appear in the record until December 5, 2012. CP 312; pg. 989; paragraph 4 and CP 290B. There was no objection to the late submissions regarding the GAL fee request and the Court entered an order on December 3, 2012, but it was filed and mailed on December 4, 2012, denying reallocation. CP 306; pgs. 929-30. The father timely filed his Motion for Reconsideration for Reallocation on December 13, 2012. CP 306. The motion focused on the terms in the GAL order that the court "must" reallocate the fees and that Mitch complied with the Memorandum requiring only a financial declaration. CP 306.

The Court issued a ruling denying the reconsideration and noted that an "unsigned order" indicated 50/50 reallocation and does not take into account the GAL actually stated the fee "must" be reallocated. CP 306; pg. 990 and CP 306; pgs. 957; In. 17.

The unsigned order was presented as an exhibit to the motion to show reallocation was agreed to by Michelle and her counsel. CP 306; pgs. 936-940 and 947-950. Michelle's attorney sent over a GAL order where they agreed to a judgment of \$4000 but then changed her mind. CP 306; pg. 947; ln.15 and pg. 952. The fee was not reallocated. CP 312; pg.990.

At the December 10, 2012, hearing Michelle King presented hearsay evidence through a self-serving police report based on the minor child's supposed hand written statement taken on November 7, 2012, well after withholding the child. Mitch maintains this writing was forged and not the writing of this child and was done in order to support Michelle's withholding of the child. CP 302; pg 910. The allegations of Michelle even went so far as to the have the Grant County Sheriff show up at a visit with Mitch to review an email account of the child because Michelle filed a report stating it proves her basis for withholding. CP 295; pg. 881; paragraph 1. The child could not open the account as the password had changed and was upset by the experience. CP 321; pg. 1059; Ins. 11-16. The email was admitted under a hearsay exception and used by the Court. CP 304; pg. 921 and CP 317; pg. 1011.

The Court did not find the mother acted in bad faith because of "the information I have from Kaelin's declaration." VRP at 144 (December 10, 2012) ln. 10 and CP 304; pg. 921. The Court also denied the recusal motion as the Court stated it was allowed to "make reasonable accommodations to ensure pro

se litigants the opportunity to have their matters fairly heard". VRP at 118 (December 10, 2012) Ins. 14-21.

The Court on December 10, 2012, made several other rulings on hearsay and state of mind exceptions. The Court overruled Mitch when he objected to the child hearsay statements made by the mother for the purposes of withholding the child based upon Michelle King's state of mind. VRP at 131 (December 10, 2012); Ins. 5-23. Mitch objected to the reliability of the child's statement to the Puyallup police because "Kaelin was too fearful to say anything." VRP at 196 (December 9, 2012) Ins. 2-25. The court ruled no "bad faith" by the mother because it said there was a "hearsay exception" which allowed a child's declaration to contradict statements from Mitch and other adults. VRP at 146 (December 10, 2012); Ins. 2-12. The Court ordered make-up time "because the father has gone so long, in my view, inappropriately without seeing Kaelin" despite not finding the mother withheld the child in bad faith. VRP at 153 (December 10, 2012); Ins. 15-16 and VRP at 146 (December 10, 2012); Ins. 2-12.

Mitch renewed his motion for Recusal and filed an objection to all of Michelle King's motions including contempt. CP 297 and CP 298. The contempt motions set for December 13<sup>th</sup> and December 27, 2012, were changed to January 25, 2013. CP 269 and VRP at 159 (December 10, 2012); Ins. 7-8. The Father is not appealing the decision on any contempts heard on January 25, 2013.

## V. ARGUMENT

### A. MODIFICATION TRIAL

#### 1. Standard of Review in Applying Statutory Law

[Under] the provisions of the Uniform Parentage Act, [a] court must read the statute in a manner consistent with its purpose and the intent of the legislature. *In re Parentage of Calcaterra*, 114 Wn. App. 127, 56 P.3d 1003 (2002) citing *Gonzales v. Cowen*, 76 Wn. App. 277, 281, 884 P.2d 19 (1994). A statute's language must be "susceptible to more than one reasonable interpretation' before it will be considered ambiguous, *In re Parentage of L.B.*, 121 Wn. App. 460, 473, 89 P.3d 271 (2004) citing *Harmon v. D.S.H.S.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998) and only when a statute is determined to be ambiguous can the appellate court look to the rules of statutory interpretation in order to ascertain and give effect to the intent and purpose of the Legislature. *In re L.B.*, 121 Wn. App. at 473; *Harmon*, 134 Wn.2d at 530, 951 P.2d 770, citing *State v. Bash*, 130 Wn.2d 594, 601-02, 925 P.2d 978 (1996); *State v. Hennings*, 129 Wn.2d 512, 522, 919 P.2d 580 (1996). Unambiguous statutes are not open to judicial interpretation. *Harmon v. D.S.H.S.*, 134 Wash. 2d 523, 530, 951 P.2d 770 (1998).

"If the language of the statute is clear and unequivocal, the court must apply the language as written." *State v. Olson*, 148 Wn. App. 238, 243, 198 P.3d 1061 (2009). The court must also combine all related provisions together so as to "achieve a

harmonious and unified statutory scheme that maintains the integrity of the respective statutes." *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000); *State v. Tejada*, 93 Wn. App. 907, 911, 971 P.2d 79 (1999). When interrupting a statute this court must do so in a way that best advances the legislature's intent and avoiding a strained or unrealistic interpretation. *Id.*

RCW 26.09 is very clear on what the Court was to consider when it deciding on a major modification. It is not allowed to modify the parenting in consideration of the circumstances of a non-custodial parent, such that, Mitch must move to ensure and enjoy all of his residential time. The court modified the plan impermissibly and as such this court should vacate the requirement that Mitch to move.

## **2. Modification of the Final Parenting Plan**

RCW 26.09.260 (1) instructs that a 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 parenting plan entered by Judge Knodell in this case clearly contemplated the distance between the Michelle and Mitch. CP 222; pgs. 593-600. There was no substantial change in circumstance justifying a deviation from the prior parenting plan

regarding the circumstances of Mitch, the non-custodial parent, but there was sufficient evidence presented to modify the plan in consideration of Michelle's circumstances.

Case law clearly defines which circumstances are to be considered by a court in modification cases. In determining whether changed circumstances for a *major* modification have occurred, the court must look *only* at the circumstances of the child or custodial parent, not the non-custodial parent. George v. Helliar, 62 Wn. App. 378, 814 P.2d 238 (1991)(emphasis added). Changed circumstances *shall not include* circumstances considered by a trial court at the time the original parenting plan was adjudicated. RCW 26.09.260(1). *See also In re Parentage of Jannot*, 110 Wn. App. 16, 25, 37 P.3d 1265 (2002); In re Marriage of Roorda, 25 Wn. App. 849, 853, 611 P.2d 794 (1980). (emphasis added).

This Court ruled on Ms. Platt's petition for modification clearly taking into consideration Mr. King's location. CP 181. This ruling is certainly beyond the scope of allowable basis for modification as Mr. King has remained in Grant County since the filing of dissolution in April 2009. The Court even noted that once an initial custody determination is made with the entry of a final parenting plan, there is a strong presumption in favor of custodial continuity and against modification. CP 181; pg. 284; In 15-17. Despite its own statement the Court modified the parenting plan without identifying the basis that overcome this presumption of continuity.

It is also clear from statutory and case law that a minor modification against the non-custodial parent is not allowed especially in a case where the Court does not find sufficient evidence to modify the parenting plan against the custodial parent. The threshold finding of a substantial change in circumstances is the same for both the major and minor modification of a residential schedule; except that in minor modifications the substantial change in circumstances can be based on the moving parent, not just the child or the non-moving parent as in major modifications. *In re Marriage of Parker*, 135 Wn. App. 465, 145 P.3d 383 (2006). There have been no changes, substantial or not, to the father's household since entry of the final parenting plan in Grant County.

The trial court in Grant County already made a decision concerning relocation from Moses Lake to Puyallup in September 2009. RP 385; In. 4-11. This means the Grant County Court knew and anticipated the long-distance travel. The final plan entered in September 17, 2011, reflects that move with long-distance transportation spelled out for each party. This Court is requiring the father to move his residence closer to a woman who has not even maintained a stable residence for any length of time, or lose residential time with his daughter. This is a modification as "any extension or reduction of a parent's rights beyond those originally intended by the parenting plan is a modification, not a clarification. *In re Marriage of Christel*, 101 Wn. App. 13, 22, 1 P.3d 600 (2000).

“Under the terms of the Parenting Act, a trial judge has no authority, in entering an initial parenting plan, to limit or restrict a parent's choice of residence, unless the restriction falls within the scope of RCW 26.09.191. Littlefield v. Littlefield, 133 Wn.2d 39, 55, 940 P.2d 1362 (1997).

The Littlefield court held:

Where justified by the facts, RCW 26.09.191(3)(f) or (g) permits a trial court to find that the primary residential parent's relocation would harm the child. We interpret RCW 26.09.191(3) [139 Wn.2d 713] to require more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships which predictably result from a dissolution of marriage. Littlefield, 133 Wash.2d at 55, 940 P.2d1362.

In this matter the trial court erred in modifying the plan to the father and as such violated RCW 26.09.260. This Court should remand for a new trial.

The Court was presented with evidence that showed a major modification including a change of custodial parent was warranted in this matter. Under In re Custody of C.C.M. placement of a child under any RCW 26.09 family law matter is “according to his or her best interests [as] determined by a preponderance of evidence. The least stringent evidentiary standard is appropriate there because chapter 26.09 RCW is designed to facilitate a placement choice between ... the natural parents.” In re Custody of C.C.M., 149 Wash. App. 184, 204, 202 P.3d 971 (2009). In this matter the evidence presented was sufficient to warrant the adoption of the GAL recommendations for the child to be moved to Moses Lake based upon the instability

and chaos of the mother's household. The Court erred in not modifying the parenting plan to adopt the GAL recommendations based upon the substantial change in circumstances of the mother and her instability and this Court should remand for a new trial.

#### **VI. Discretionary Standard of Review**

The standard of review for a court's discretionary decisions not dictated by any applicable statute is abuse of discretion. *In re Marriage of Horner*, 114 Wn. App. 495, 501 n. 30, 58 P.3d 317 (2002), review granted, 149 Wn.2d 1027, 78 P.3d 656 (2003). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). See also *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Ricketts*, 111 Wn. App. 168, 171, 43 P.3d 1258 (2002). A court acts on untenable grounds if its factual findings are unsupported by the record; a court acts for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; and a court acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003 (1996).

In this matter, the Court acted unreasonably and on untenable grounds by entirely failing to rule on substantial evidence presented at trial regarding the mother's conduct and involvement with others that had an adverse effect on the child's

best interest under RCW 26.09.191(3). The court erred in not finding Michelle's home to be detrimental to the child despite overwhelming evidence supporting this finding presented by Respondent and even by Petitioner's own admissions of the chaos in her life.

The court further erred in failing to admit the CPS/DLR report that had been properly admitted under ER904 and had not been timely objected to. This report was crucial to establishing the detrimental environment of Michelle's home to this minor child and should have been properly admitted in its entirety.

The trial Court's discretion was abused in considering the testimony of the child's therapist, Dr. Kinney, despite the fact that she was not properly disclosed as a witness prior to trial and only appointed for the child's therapeutic treatment and never intended for the production of expert forensic testimony. The trial court further erred in admitting hearsay provided to the GAL by Dr. Kinney advising on the mental health diagnosis of Michelle even though this was well beyond the scope of Dr. Kinney's professional role in solely treating the minor child.

### **3. Exclusion of Properly Admitted Evidence**

The only proper objection to ER 904 documents that were never timely objected under court rules is relevance. Under Miller v. Artic Alaska Fisheries, Corp., if an opponent makes no objections (except relevance), all evidentiary objections are deemed waived and the document is admissible at trial. Miller v. Artic Alaska Fisheries, Corp., 133 Wash. 2d 250, 944 P.2d 1005 (1997).

The CPS/DLR report was offered under ER 904 with no objections given by the respondent. VRP at 83 (July 31, 2012) Ins. 8-22. The objection for the properly submitted ER 904 submission was double hearsay and relevance. VRP at 83 (July 31, 2012) Ins. 18-22. The rules were then cited as 801, 803, 805, 401, 402, 403. VRP at 83-84 (July 31, 2012) Ins. 23-25 and 1-5). Er 904 is completely applicable to the CPS/DLR report as it was relevant and relied upon by the GAL. It had material facts to the mother's actions with her children and under the rule was a trustworthy document as it was created by a State Agency which determined this mother was not fit to be a foster parent. This error was material to this matter and the Appellant is seeking remand to a new trial judge to consider all relevant factors to this modification.

#### **4. Failure to Rule on Evidence Presented**

In our case, the Court had the ability, but abused its discretion by not addressing any of the evidence presented regarding the mother's lack of parenting under RCW 26.09.191. That is, the father here, Mitch King, had the right to raise what are often called "191 restrictions" and the trial court failed to address any of those in this modification proceeding, such as:

Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions (this applies only to parents, not to a person who resides with a parent).

Physical, sexual or a pattern of emotional abuse of a child. A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

Neglect or substantial nonperformance of parenting functions.

A long-term emotional or physical impairment which interferes with the performance of parenting functions as defined in RCW 26.09.004.

A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions.

The absence or substantial impairment of emotional ties between the parent and child.

The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development.

A parent has withheld from the other parent access to the child for a protracted period without good cause.

The court failed to rule on Michelle's ability to perform parenting functions appropriately in allowing felons and unqualified care takers to care for the minor child and exposing her to multiple partners, failed to rule on the impact of her mental health on her relationship with the minor child, and failed to address any abusive use of conflict generated by Michelle. The Appellant is seeking remand to a new trial judge so that all issues will be properly addressed.

#### **5. Granting Relief Beyond That Requested**

Under Washington case law it is very clear that "no Court has ... jurisdiction to grant relief beyond that sought in the complaint. To grant such relief without notice and an opportunity to be heard denies procedural due process. *Conner v. Universal Utils.*, 105 Wash.2d 168, 172-73, 712 P.2d 849 (1986); *Watson v. Washington Preferred Life Ins. Co.*, 81 Wash.2d 403, 408, 502 P.2d 1016 (1972); *Ware v. Phillips*, 77 Wash.2d 879, 884, 468 P.2d 444 (1970).

By the Court's own assessment Ms. Platt filed a petition to modify the parenting plan on November 4, 2011, but did not clearly identify the relief she was requesting. CP 181; pg. 282; In 15-19. This Court held a trial and entered relief beyond what was requested in the petition or was known to the father at the time of trial. It is clear from the record that Ms. Platt never filed a proposed parenting plan to accompany her petition for modification in accordance with LFLR 13(a)(1) and therefore Mr. King could not have known what relief Ms. Platt was seeking and now this court has effectively granted relief beyond what Ms. Platt even requested and that is an abuse of discretion.

**A. POST TRIAL RULINGS**

**1. Contempt**

**a. Standard of Review**

A trial court's decision in a contempt proceeding is reviewed based upon an abuse of discretion. *In re Marriage of James*, 79 Wash.App. 436, 440, 903 P.2d 470 (1995). A trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons. *James*, 79 Wash.App. at 440, 903 P.2d 470. We review the trial court's factual findings for substantial evidence. *In re Marriage of Myers*, 123 Wash.App. 889, 893, 99 P.3d 398 (2004). We do not review credibility determinations on appeal. *In re Marriage of Rideout*, 150 Wash.2d 337, 352, 77 P.3d 1174 (2003).

In reviewing contempt violations concerning parenting plans, the Court is to strictly construe the parenting plan to see

whether the alleged conduct constitutes "a plain violation" of the plan. *In re Marriage of Humphreys*, 79 Wash.App. 596, 599, 903 P.2d 1012 (1995).

In *Rideout*, the Supreme Court upheld a willful finding of contempt for failing to provide the 13-year old after she had been ordered to turn the child over by a Court of Law. In *Rideout*, as here, the mother overly involved the child in the dispute by having her write a declaration. CP 302; pg. 910. In the Court's Memorandum of Decision, there is no information concerning the contempt and withholding of the child that occurred. CP 181.

**b. Burden of Proof on Contempt**

RCW 7.21.010(1)(b) defines contempt of court as the intentional "[d]isobedience of any lawful judgment, decree, order, or process of the court." Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal. *In re Pers. Restraint of King*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). The proper standard of review is whether substantial evidence supports the trial court's findings. *In re Marriage of Rideout*, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003); *In re Marriage of Davisson*, 131 Wn.App. 220, 225-26, 713, 126 P.3d 76, *review denied*, 158 Wn.2d 1004 (2006).

A parent seeking a contempt order to compel another parent to comply with a parenting plan must establish the

contemnor's bad faith by a preponderance of the evidence. James, 79 Wash.App. at 442.

If the trial court finds that a parent has, in bad faith, failed to comply with the parenting plan, "the court *shall* find the parent in contempt of court." RCW 26.09.160(2)(b) (emphasis added). "Upon a finding of contempt, the court *shall* order" the contemnor (1) to provide additional visitation time to make up for the missed time, (2) pay the other parent's attorney fees and costs, and (3) pay the other parent a penalty of at least \$100. RCW 26.09.160(2)(b)(i)-(iii) (emphasis added). At its discretion, "the court *may* also order the parent to be imprisoned." RCW 26.09.160(2)(b) (emphasis added). The statute mandates a harsher civil penalty for a second finding of contempt within three years of the first finding. RCW 26.09.160(3).

It has been long settled that when a moving party in a contempt proceeding establishes that the parenting plan has been violated, however, it is the burden on the non-moving party (oftentimes referred to as the "contemnor") to prove she had a justifiable excuse. See Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (quoting In re King, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988);) see also Smith v. Smith, 17 Wn. 430, 432, 50 P. 52 (1897) ("The rule is that the burden of showing inability to comply with an order of this nature is upon the respondent.").

The Court here wrongfully shifted the burden and the expense of the defense to contempt by reason of justifiable excuse to Mitch. The Court appointed the former, previously

discharged, Guardian ad litem (GAL) Dr. Milo, "for the limited purpose of interviewing the child with respect to her observations, experiences and feelings on her last visit of October 4 and 5<sup>th</sup> ... and Dr. Milo will issue a short report by December 3, 2012." CP 243; pg. 721; ln. 7-12.

Respondent was admittedly in violation of the parenting plan, so the burden of proof was hers solely. The Court's appointment of a GAL improperly shifted the burden and expense of developing facts that may have excused respondent's non-compliance with the court's orders on residential time of the moving party.

The Court inexplicably failed to address Petitioner's arguments, instead ignoring the issues presented. It is clear error to shift the burden to the Petitioner when he has demonstrated that the parenting plan has been violated. The burden was properly on Ms. Platt to demonstrate good cause for her violations of the parenting plan and she presented none.

Good cause to withhold this child could never have been established here because Michelle King had been previously warned that withholding the child was contemptuous a year earlier after withholding the child in August, September and October of 2011. CP 38; pg. 76. Commissioner Sassaman warned Michelle King that she could not withhold child based upon hearsay of the child:

"there is a court order in place you have to follow. You have to follow it. Your child doesn't have a choice to go or not go. She has to go. If there is

some sort of thing that's happening that rises to the level of an emergency, and her health, safety and welfare is at risk, then you have to get an order entered suspending visitation or whatever you think needs to happen to protect the safety of your child. But absent some other court order, you can't ignore the court orders that are in place no matter what"

VRP 9 (November 4, 2011) at ln. 13-23.

Michelle King responded with "Okay, I understand." VRP at 9 (November 4, 2011) ln. 24. This warning was very clear and the mother knew at that time if she withheld the child anymore it would be considered willful. VRP at 15 (November 4, 2011) at ln. 1-8.

Michelle King was then found in contempt on November 21, 2011, by Commissioner Loudon for willfully withholding the child after being warned by the Court weeks earlier. CP 76. Michelle King testified at trial she knew "by law I cannot withhold my daughter" VRP at 721 (August 7, 2012) ln. 19-20 but in the very same sentence states "I would have to say I would withhold her again if the same circumstances were before me, yes." *Id.* ln. 21-13. Even after being explained that a parenting plan is a valid court order the Court questioned her "would you still be willing to violate the terms of that Court order if these circumstances arose again?" Michelle answered "I would, to protect my daughter" to the question "...". VRP at 723 (August 7, 2012) ln. 11-17.

It is clear from the court record and trial testimony that Michelle did and would willfully violate any court order for any

reason. Michelle knew in 2011 that she cannot use her daughter's statements as a basis to withhold residential time from Mitch and that absent a court order she was required to send the child.

Michelle King was fully aware her actions to withhold the child after the trial in 2012 were unlawful. Warnings were given to her a year earlier and nothing had changed. The child was withheld from Mitch for the weekend of October 19, 2012. CP 222; pg. 587. Ln. 1-3. The Court ordered make-up days and reserved contempt on November 9, 2012. CP 243. Judge Fleck was aware Michelle had already been "told by Commissioner Sassaman that she needs to follow the court order" a year earlier as noted by the Court in her ruling. VRP at 101 (November 9, 2012) ln. 1-3. The hearing to determine if she was acting in bad faith was set for December 10, 2012. Another withholding occurred prior to the December 10<sup>th</sup> hearing in which Michelle King violated the terms of Judge Fleck's order of November 9, 2012. CP 290.

Michelle did not send the child and even after being told by Judge Fleck on November 9, 2012, that if she (Michelle) believed there is a problem "then the obligation will be on you to take her all the way to Moses Lake and pick her up on the next three weekends that I am indentifying here. And until further order of the Court." VRP at 103 (November 9, 2012); Ins.1-17.

Even after that warning Michelle withheld the child for the make-up Thanksgiving weekend. CP 270. Since Michelle did not seek any court orders and had no basis to withhold the child from

the father it should have been seen as *per se* bad faith but the court erred in not finding contempt by allowing double and triple hearsay of the child under a state of mind exception.

### **c. Jurisdiction**

Whether a particular court has jurisdiction is a question of law. *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999). This court has retained jurisdiction over “this case through 2013.” This appears in practice to mean that the court is keeping control of all post-trial matters. There has been no authority found, nor any authority cited for “retaining jurisdiction.” The court has shifted the burden to petitioner to cite authority that does not permit the court to continue “jurisdiction.” The court has noted that a Petition to Modify a Parenting Plan is a separate proceeding permitting an affidavit of prejudice under RCW 4.12.050, but that the court found no authority for that reasoning or rule to apply to contempt proceedings.

Courts have jurisdiction to the extent that it is provided by law. It may be logical from a policy standpoint for a court to “keep a case” so that the time already spent on the case pre-, post-, and during trial can be utilized to understand the context of a contempt motion. There is no statutory or case law supporting this ruling, however, despite any logic it may have. To the contrary, a superior court judge does not have authority to retain jurisdiction over parties to the exclusion of other courts or judges especially after a Motion to Recusal had and has been filed. *See State v. Caughlan*, 40 Wn.2d 729, 732, 246 P.2d 485 (1952) (holding that a particular judge

cannot retain jurisdiction over a case because a county's superior court judges each have identical authority). By retaining jurisdiction in this case, and requiring an order to Show Cause be returnable to the assigned Judge, the court here has not only violated LCR 5, but has instead erroneously relied on LCR 6. Therefore, instead of depriving a party of his right or remedy under RCW 4.12.050, the court should permit Mr. King to exercise his right of affidavit.

Judges who engaged in, received settlement offers, proposed agreements that are never consummated, and actually preside over a settlement conference at the Judge's initiation, are automatically disqualified from ruling on a proceeding. KCLR 16(b)(5), provides that, "A judge presiding over a settlement conference shall be disqualified from acting as the trial judge in the matter, unless all parties agree in writing that he/she should so act." Here, Judge Fleck is disqualified by function of the rule.

The court essentially ordered the parties to engage in a settlement conference on the record, and went as far as to include each party's proposal in the court file. The court expressly commented on what matters could be agreed upon, and ordered the parties to present an agreed order on the proceedings. The court went as far as to include in the record a head-nod by Petitioner as confirmation that, without the benefit of any discussion or input by counsel, he agreed to alcohol conditions. The motion Even leaving aside the questionable authority for a court to issue such orders or make such findings, this proceeding on the record was tantamount

to a settlement conference. Under KCLR 16(b)(5), Judge Flack is disqualified and should immediately recuse herself from this case.

By retaining jurisdiction, Judge Fleck is depriving Petitioner of his statutory right to seek revision of improperly-decided orders. The right of Mr. King to seek a contempt finding against Ms. Platt is designated exclusively to Family Law commissioners, a procedure mandated by LFLR 5 and LFLR 17. There is no basis or authority to permanently pull a case out of the family law department and put it before a judge.

More importantly, but bypassing family law commissioners, Mr. King loses an important right of revision. This appeal right is statutory. See RCW 2.24.050. This court has nonetheless taken what the legislature intended to be a two-step process and condensed it into a single proceeding. Further, given the court's improper usage of hearsay testimony and improper burden-shifting decisions discussed above, Petitioner has been continually disadvantaged in these proceedings without the benefit of an adequate remedy at law.

In order to obtain a first review of the court's orders, rather than simply seeking a revision, Petitioner will by necessity be forced to either file an appeal or seek a writ of review. Both prospects can be extremely expensive, and are outside of the normal mechanisms for family law resolutions. A superior court reviews a commissioner's decision de novo, examining the evidence and issues before the commissioner. State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). An appeal of a superior court decision on a family law

matter, however, is reviewed for abuse of discretion. *In re the Marriage of Williams*, 156 Wn.App. 22, 27, 232 P.3d 573 (2010).

Thus rather than the benefit of obtaining a new review of the evidence, Mr. King here can only have a first-impression decision reviewed for abuse of discretion. Such is not the intent of the courts or the legislature, and the court here should not erroneously perpetuate the deprivation of Mr. King's rights.

The decision in this matter was an abuse of discretion. Mitch is seeking this Court to invalidate the order of the Court and remand back to a different Judge. This Court should also remand back for a finding of contempt for the visitation withheld from Mitch several weekends.

#### **d. Hearsay**

When hearing the two contempt petitions the father had before the Court in November 2012, the mother involved the child by creating a police report on November 7, 2012, after she has already intentionally withholding the child one month. The report was written only after being served with the two contempt pleadings. CP 302; pg. 910. Mr. King objected to the Police report being admitted as hearsay. RP 130; In. 24-25. The statement of the child was countered by Tyler Smith's declaration that contradicted the child's hearsay statement and the court rejected it despite the statement now becoming the truth of the matter asserted. VRP at 144 (December 10, 2012); Ins.20-25; pg. 145; Ins. 1-21.

The Court erroneously ruled that this hearsay was excepted under the ER 803(a)(3) state of mind exception. RP 131 In. 8-24. Then immediately thereafter, the court used this hearsay as evidence of the truth of the matter asserted, stating words to the effect of, “the father denies these allegations, but that is contradicted by the child’s statements.” RP 140; In. 3-8. If a double (or triple) hearsay statement is not being offered for the truth of the matter asserted, but instead for state of mind, then it cannot be used for the purpose of creating a substantive dispute regarding facts of which Mr. King has personal knowledge. Unfortunately, this is precisely how the Court employed these statements.

Contrary to the Court’s reasoning, “[i]n Rule 803(a)(3), a hearsay exception is made for a declarant’s out of court statement regarding a then-existing mental state or physical condition. The rule concerns only a statement of a mental or physical condition in existence when the statement was made. Statements concerning past states of mind, sensations, physical conditions, and the like are not exempted from the hearsay rule under this provision.” In re Dependency of Penelope B., 104 Wn.2d 643, 658, 709 P.2d 1185 (1985) (quoting K. Tegland, Wash.Prac., emphasis in original). The Penelope court further held,

The record clearly indicates that in making her assertions the child was relating past events and states of mind. The rationale behind the so-called “state of mind” exception to the hearsay rule is that an assertion by a person that describes his or her *then existing feelings* will, in most cases, be more reliable than an attempted description of them, based on memory, sometime later on the witness stand.

In our case, the child's statements under discussion are not within the intendment of that rationale. If the Court's theory, or respondent's rationale, were adopted, then any witness could testify to any intentional assertion the witness heard or saw the child make at any time, any place. Such an interpretation would result in the "state of mind" exception swallowing the hearsay rule. The hearsay testimony in question is not admissible under ER 803(a)(3). *Id.* at 658-59.

Similarly in the case at bar, Ms. Platt repeatedly submitted, over petitioner's objections, evidence including out-of-court statements allegedly made by her ten-year-old daughter. The summary of this evidence admitted and considered by the court has come in this general form:

Mom (Michelle Platt) says Kaelin (10 years old) says Dad said "Kaelin, what is going on at your mother's house.", i.e., Mom claims that "Dad is still grilling the 10 year old daughter."

The Court ignored objections to this hearsay, and erroneously reasoned that such statements might fall under the state of mind exception. Under *Penelope*, this is incorrect, yet this Court's ruling places no limits on the state of mind exception as it relates to a child. This erroneous interpretation should be reversed and all hearsay statements be excluded.

The hearsay evidence tainted the proceedings and the Court erred by not finding the mother acted in bad faith.

"Where the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for

contempt." *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968);  
*accord, In re J.R.H.*, 83 Wn.App. 613, 616, 922 P.2d 206 (1996).

**e. GAL Appointment**

RCW Title 26 provides for limited situations in which a court may appoint and order the expense of a GAL. None of the statutory situations are applicable to a post-trial contempt motion. Further, Petitioner could not locate any other case or statutory authority providing for such an appointment. The Judge in this case nonetheless ruled: "the father shall advance the fee to Dr. Milo." (page 2 of 11/9/12 Order). This is impermissible under the law, and has saddled Petitioner with an unlawful expense when he was already the victim of the contemptuous behavior of the Respondent. The court should correct this error, and either remove the GAL, or alternatively, place the expense on the party who bears the burden of proof as discussed above: Ms. Platt.

**B. Anti-Harassment Order**

RCW 10.14.080(3) compels the Court to issue an anti-harassment protection order only when there is a finding of actual harassment. Mitch was served the anti-harassment order only two days prior to the hearing. VRP at 55 (October 26, 2012); Ins. 18-20. An objection was filed. CP 195. The Court erred when it entered a renewal of the anti-harassment order without articulating the three instances of harassing behavior as required by the statute. VRP at 11-13 (September 24, 2012); Ins. 22-25; Ins. 1-15; Ins. 1-14. This court should vacate the anti-harassment order.

Based on a lack of factual finding of harassing behavior, the Court also erred in permitting Michelle to move to an undisclosed address with the minor child. Mitch has no knowledge of where his daughter is currently residing or if she has been relocated since this last move. Given Michelle's history of failure to maintain a stable home, it is crucial for Mitch to be made aware of each location his daughter resides at absent any lawful restriction on the provision of this information. The Court erred in granting the order and this Court should vacate the order.

**C. Reallocation of GAL Fees**

The final GAL order was entered on February 9, 2012 requiring this court to reallocate the fees. CP 306; pg. 955-958. Under section 3.5 the order states "the Court MUST reallocate fees at trial" with no requirement to submit any financial statements. CP 306; pg. 957; ln. 17-18. The term must requires the court to reallocate fees to the parties.

**VII. CONCLUSION**

The decision in this matter was based upon an abuse of discretion and misapplication of statutory law regarding a major modification under the Parenting Act. Mitch is seeking this Court to invalidate the orders of the trial Court and remand back to a different Judge for a new trial on the major modification of the final parenting plan for this case.

This Court should also remand each contempt hearing back for new findings of contempt before a different Judge.

This Court should also vacate the anti-harassment order entered in this case and remand back for reapportionment of GAL fees as required by the order.

DATED this 16 th day of May 2013 at Bothell, Washington.



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*15/11 Telephonically Agreed*

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Mr. John Stocks, WSBA #  
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