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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION I

In re the Marriage of

Jonathan J. Arras
Petitioner Below & Respondent on Appeal

and

Laura G. McCabe (formerly Arras)

Petitioner on Appeal & Respondent Below

Appeal from Order Granting Petition to Modify Parenting Plan

King County Case No. 09-3-04793-0

The Hon. Laura Inveen

Laura G. McCabe, Appellant, Pro Se
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CONTENTS

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

A. AUTHORITIES CITED

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

Federal Cases

Other States' Cases

Washington Statutes (RCW)

Washington Court Rules

Treatises

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

B. ASSIGNMENTS OF ERROR

1. The following "Findings of Fact" are unsupported by the record:

Appellant's partner's musicianship affected the children's welfare.

The children had an unusual number of tardies.

The tardiness affected the children's academic performance.

Appellant's conduct or conditions in her home caused fluctuations in child's school reports.

Appellant's anger greatly exceeds the father's.

Appellant inappropriately managed relationships and issues.

Appellant's son suffers from "extreme mental health issues."

Appellant's son is a safety risk to himself or others.

Appellant's son required a school "safety plan."

Neutral witnesses endorsed calling 911 and going to ER over a child's tantrum. RP 685.

There is medical support for controlling a child by sitting on his chest. RP 685.

There is no evidence the father is still sitting on the boy's chest. RP 685.

The piano teacher is a neutral witness.

The mother has problems with relationship issues.

Preponderance of the evidence supports a finding a substantial change of circumstances. RP 686.

Commuting to Bellevue takes "much longer" from West Seattle than from Seattle's Central District. RP 689.

The 6.9 mile change in the drive affected the children's school performance. RP 689.

The father maintains a more predictable and appropriate schedule for children. RP 690.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

Appellant put her boyfriend's scheduling needs above those of her children. RP 690.

Appellant is self-employed. RP 690. (immaterial).

Appellant lives with an entertainer. (immaterial) RP 690.

2. The court did not meet the legal standard for modifying a parenting plan.

3. The record does not show the essential elements for modification, nor did the court find them.

4. The judge announced the operative findings and instructed counsel to prepare them.

5. The record does not support the findings of fact.

6. The findings do not support modification.

7. The court abused its discretion by disregarding the recommendations of the GAL.

8. The court erroneously deemed courtroom demeanor as evidence of parental fitness.

9. The court's hearsay rulings do not conform to the Rules of Evidence.

10. The court erroneously denied Appellant's motion to amend.

11. The court erroneously denied attorney fees.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

C. Issues Pertaining to Assignments of Error

1. Are the court's essential findings based on sufficient evidence?

2. Did the trial court apply the correct legal standard for modification of a permanent parenting plan?

3. Does the evidence establish the essential elements for modification?

4. When the written findings submitted by the prevailing party do not match the findings delivered from the bench in a post-trial hearing convened solely for the purpose of delivering the court's decision, do the court's findings govern?

5. Are the court's key findings (oral or written) supported by the evidence?

6. Are the findings sufficient to support the conclusions and to empower the court to modify an existing permanent parenting plan?

7. Where the GAL's recommendation to deny modification is compelled by the independent experts' evaluations, may the trial court disregard the GAL's report?\

8. May the court consider the parties' courtroom demeanor when determining the modification factors?

9. Did the court's erroneous evidentiary rulings prejudice Appellant by subjecting her to multiple hearsay?

10. Where Appellant's motion to amend her response was based solely on the evidence developed pretrial and did not prejudice the other party, do the court rules and principles of judicial economy require the court to grant the motion?

11. Did the court erroneously deny Appellant's attorney fees without considering the inordinate difference between Appellant's need and the father's ability to pay?

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

D. STATEMENT OF THE CASE

Laura McCabe and Jonathan Arras married in 2002 and separated in 2009. RP 22, 25 [1]. On May 6, 2010, the court entered a permanent parenting plan for their children, Jared (born July 10, 2003), and Allegra (born June 26, 2006). Ex.1. The father did not appeal the parenting plan. On March 2, 2012, the children's school principal called Child Protective Services (CPS) to report suspicions she shared with the school psychologist that the father was abusing Jared.[2] RP 428. After CPS interviewed both children, the father began documenting abuse allegations against the mother. RP 35, 36, 37, 38, 40, 41, 42, 46.

In August, 2012, the father petitioned for a major modification of the 2010 parenting plan. CP 1-4. He alleged that new, unforeseen circumstances were jeopardizing the children's health and welfare. *Id.* Specifically, he alleged that Ms. McCabe had physically abused and neglected their children because she had become domestically violent, drug-addicted, and mentally ill. CP 1-4; RP 11-12.

When he filed the petition, Mr. Arras appeared before the ex parte bench and requested an immediateTemporary Restraining Order (TRO) to protect the children from their mother. [Ex. 7; RP 288] The commissioner granted the TRO on Thursday, August 2, 2012 at 2:10 pm. *Id.* Then, he did nothing for five days: the children remained with their mother untilAugust

[1] The Report of Proceedings is in four continuously numbered volumes designated RP.

[2] The father believed the mother made the CPS report (Ex. 120, RP 431), but she had nothing to do with it. RP 535.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

6 at 8:00 pm, when he finally picked up the kids and served her the court documents. Ex. 7 [3]

Ms. McCabe denied all allegations. CP 11-12; CP 16-22; Sub. 154 [Supp. CP].

A family court commissioner ordered a Guardian Ad Litem (GAL) investigation. RP 294. The court entered temporary orders eliminating the children's overnight stays with their mother, and assigned a visitation supervisor to monitor the mother's custody. *Id.* The court ordered an independent psychiatric examination, drug testing, and domestic violence assessments for Ms. McCabe, and the matter was set for trial. Ex.19. Ms. McCabe cooperated fully with these evaluations and restrictions [4]. *Id.*

A bench trial was held July 18 – 20, 2013. The expert evaluators unanimously and unambiguously agreed that all allegations (drug use, mental illness, child abuse, neglect, and domestic violence) against Ms. McCabe were wholly unfounded. Ex. 16, 22; Ex. 25 at 3, 237; RP 310. Supporting a comprehensive report by an independent psychiatrist[5], Dr. Dean Ishiki MD testified that he had treated Ms. McCabe for depression since 2009, and that she kept a regular patient schedule and unfailingly took medication as prescribed. RP 418, 421. Dr. Ishiki testified that he was

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[3] August 6, 2012 was the parties' defunct 10th wedding anniversary, and also Ms. McCabe's 40th birthday. CP 11-12

[4] Ms. McCabe was required to pay out-of-pocket for the domestic violence and psychiatric assessments performed by experts selected by the GAL.RP 21. A full hair-follicle drug scan was performed. RP 237

[5] Tye Hunter, MD, selected by the Guardian ad Litem, performed the independent exam.

never concerned about Ms. McCabe's ability to parent, and would have promptly reported any concerns to CPS, had they ever arisen. RP 420-21.

The GAL's interim report stated that the children very much wanted to be with their mother, and recommended that the residential schedule set forth in the original parenting plan should be resumed during the modification challenge. Ex.19; RP 234. In her final report, the GAL recommended that the residential provisions of the existing parenting plan should not be modified. Ex. 25; RP 235. The father conceded on the record that the GAL recommended maintaining the residential provisions of the 2010 plan. RP16; *See,* Ex. 25.

Because conflict rendered joint decision-making impractical, the GAL recommended the father as sole decision-maker. [6] Ex. 25. The GAL did not address whether the father had created conflict by filing (and maintaining) an action based upon false allegations. RP 245. The GAL did not question the label of "combativeness" the father's attorney gave the mother for challenging false accusations through due process. CP 192.

On July 19, 2013, after a four-day trial, the court announced its findings of fact and conclusions of law. RP 683. The court found that Ms. McCabe clearly loved her children and was bonded to them. RP 684. Mr. Arras had not established any of the prerequisite factors for modifying a

[6] Evidence emerged at trial that the GAL engaged in ex parte communication with the father's lawyer, but not with the mother's. RP 234.

long-standing parenting plan, and the court found no statutory basis for restricting the mother's custody. *Id.*

Nevertheless, the court concluded that a preponderance of evidence supported a finding of a "substantial change of circumstances" - not based upon the debunked allegations that underpinned the father's petition - but rather when the mother and her long-term boyfriend moved from the Central District to West Seattle in July, 2010. RP 691.

Moving forward with a modification, the court ignored the GAL's recommendations and changed both the residential and decision-making provisions of the original plan. RP 691; CP 193-201. The court gave all authority over the children's healthcare, education, and extra-curricular activities to the father, and reduced the mother's overnight visits from ten per month to four. RP 671; CP 193-201. The court cited excessive tardiness as its rationale for eliminating 70 of the children's overnight visits with their mother per year.[7] RP 671.

The court instructed counsel to prepare written orders reflecting the bench findings. RP 683. After the prevailing party delayed for several months, the Findings of Fact and Conclusions of Law were finalized on October16, 2013. CP 187-192; RP 683.

The mother filed this timely appeal. CP 202-18.

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[7] The record showed that the children had been tardy to school only once the previous semester. There was no record of concern or comment by school administrators or teachers regarding tardiness or absenteeism. RP 606

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

E. ARGUMENTS

1. THE LEGAL STANDARD FOR MODIFYING A PARENTING PLAN WAS UNMET.

This Court reviews the rulings underlying a permanent parenting plan for abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997); *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Review of a trial court's interpretation of a statute is de novo. *In re Marriage of Watson*, 132 Wn. App.222, 230, 130 P.3d 915 (2006).

The court's subject matter jurisdiction over parenting plan modifications is statutory; it derives solely from the Dissolution of Marriage Act, RCW 26.09. *In re Marriage of Moody*, 137 Wn.2d 979, 987, 976 P.2d 1240 (1999). Modification of a parenting plan is statutorily prescribed by RCW 26.09.260, and "compliance with the statute is mandatory." *In re Marriage of Tomsovic*, 118 Wn. App. 96, 103, 74 P.3d 692 (2003)(citing *Bower v. Reich*, 89 Wn. App. 9, 14, 964 P.2d 359 (1997).

RCW 26.09.260(1) is unambiguous:

> "Except as otherwise provided [in inapplicable subsections [8]], the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interests of the child and is necessary to serve the best interest of the child."

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[8] RCW 26.09.101 applies *unless* the modification does not reduce residential time by more that 24 days per year; or the change of residence makes permanent plan impractical; or the non-moving parent has not exercised existing residential rights. RCW 26.09.260 (4), (5), (6) and (8). Here the mother lost 70 overnights per year; her relocation was under 7 miles, and fully exercised her parenting rights. Thus, RCW 26.09.101 applies.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

Unambiguous statutory language must be enforced in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *State v. Marohl*, 170 Wn.2d 691, 699, 246 P.3d 177 (2010). The Separation of Powers doctrine precludes the courts from ignoring the legislative dictates of a statute without first finding that the statute is unconstitutional. *Robertson v. Robertson*, 113 Wn. App. 711, 715, 54 P.3d 708 (2002). RCW 26.09.260 is not an exception to the principles of statutory construction. *Tomsovic*, 118 Wn. App. 96, 106.

At one time, Washington courts relied solely on their equity jurisdiction to determine the "best interests" of the child. *In re Parentage of L.B.*, 155 Wn.2d 679, 701, n.18, 122 P.3d 161 (2005)(citing authorities). However, the Legislature clarified Dissolution of Marriage Act to state,

> "[T]he best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." RCW 26.09.002. [9]

Only after making the essential finding of changed circumstances may the court exercise its discretion to decide how much the change affects the children's welfare and opt to modify the plan, accordingly. *Klettke v. Klettke*, 48 Wn.2d 502, 506, 294 P.2d 938 (1956). The court may consider only conditions that affect the children's welfare. *Schuster v. Schuster*, 90 Wn.2d 626, 630, 585 P.2d 130 (1978)(quoting RCW

[9] Effective date Jan. 1, 1988. RCW 26.09.912.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

26.09). Modification of a plan's non-residential provisions (e.g. decision making) also requires a change of circumstances. RCW 26.09.260(10).

The statutorily prescribed procedures to modify a parenting plan are mandatory. *In re Marriage of Shryock*, 76 Wn. App. 848, 852, 888 P.2d 750 (1995); *In re Marriage of Stern*, 57 Wn. App. 707, 711, 789 P.2d 807, *review denied*, 115 Wn.2d 1013, 797 P.2d 513 (1990). Failure to make findings on each relevant factor is error. *Id.* (citing *Shryock* at 852).

Like Mr. Arras, the father in *Shryock* petitioned for a change in residential placement under RCW 26.09.260(2)(b), but the court found he had not met his burden. *Shryock*, 76 Wn. App. at 849-50. As the court did here, instead of dismissing the petition, the *Shryock* Court went ahead and modified the plan anyway. *Id.* at 852. On appeal, Division Three held that the court lacked authority to make these changes after finding there was no statutory basis for modifying the parenting plan under RCW 26.09.260. *Shryock*, 76 Wn. App. at 851-52.

A court has abused its discretion where its decision (i) is outside the range of acceptable choices, given the evidentiary facts and the applicable legal standard; (ii) relies on findings unsupported by the record, or (iii) is based on untenable reasons, an incorrect standard, or the facts do not meet the requirements of the correct standard. *Littlefield*, 133 Wn.2d at 47. All three of these apply, here.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

By misrepresenting the legal standard for modification as (i) the best interests of the children and (ii) changed circumstances, Mr. Arras may have misled the court by exaggerating and misstating the court's discretion. RP 18. Whatever the reason, the court has erred: it failed to apply the applicable legal standard, abused its discretion, and made changes outside the range of acceptable choices, given the facts.

2. THE RECORD DOES NOT SHOW THE ESSENTIAL ELEMENTS FOR A MODIFICATION, NOR DID THE COURT FIND THEM

(a) Substantial Change of Circumstances.

The court has discretion to modify a parenting plan only where there are substantially changed circumstances, but it may not consider conditions that do not directly affect the children's welfare. *Schuster*, 90 Wn.2d at 630; RCW 26.09.260(1). Residential circumstances are relevant solely to the extent that they "directly and significantly" affect the children's welfare. *Klettke*, 48 Wn.2d at 506. Specifically, the court must find that the present environment is "*detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.*" RCW 26.09.260(2)(c); *Schuster*, 90 Wn.2d at 630. Stability of children's environment is of utmost concern. *Id.*at 628.

Even a substantial change is not material unless it adversely affects the children. *Tomsovic*, 118 Wn. App. at 107, discussing *Selivanoff v. Selivanoff*, 12 Wn. App 253, 529 P.2d 486 (1974). The court needs

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

evidence upon which to conclude that the children's environment under a parenting plan is detrimental to their welfare, and that the benefits of undermining the stability of their parental relations outweigh the alleged harm that will result by preserving the status quo. *In re Marriage of Velickoff*, 95 Wn. App. 346, 353, 968 P2.d 20 (1998).

No evidence was presented that the mother's 2010 move (from a basement apartment in the Central District to a house in West Seattle) adversely affected her children.[10] Yet, after the father's statutory claims evaporated, the court claimed discretion to modify on the basis of a 6.9 mile move. The court also seemed to pin its discretion on the uncontested fact that the mother's long-term live-in boyfriend is a musician.[11] Neither the move, nor the observation about Ms. McCabe's partner, constitutes a substantial, previously unconsidered, or material fact.

Ms. McCabe had no idea and no reasonable notice that a 6.9 mile move could potentially open the door to a loss of significant custodial time, a $70,000 modification trial and the elimination of her decision-making rights over her children's health care and education.

(b) Arising Subsequent to the Existing Plan.

Changes of circumstances must postdate the existing plan. RCW 26.09.260(1); RP 10. Relocation of a parent is a changed circumstance that

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[10] the move did not change the children's school, which is in Bellevue. Ex. 28; Ex 112.

[11] The undisputed facts in the record showed that both their co-habitation and and his musicianship were established before the original parenting plan was drafted.

may justify a minor modification, but only if the original parenting plan did not anticipate relocation. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 106, 74 P.3d 692 (2003); *Hoseth*, 115 Wn. App. at 572-73. Here, as in *Tomsovic*, a change of residence within King County did not make the residential plan impractical to follow. *See*, 118 Wn. App. at 107 Here, the mother's move from a small apartment to a larger single-family home, six weeks after her divorce, child support, and custody were finalized, could be reasonably anticipated by the father and the original court.

A finalized residential plan is res judicata regarding all issues as determined upon conditions then existing. *Sweeny v. Sweeny*, 48 Wn.2d 872, 876, 297 P.2d 610 (1956) (custody order). It remains binding unless and until a material change in circumstances justifies a modification in the interest of the children's welfare, "*subsequent* to the entry of the last custody order." *Brim v. Struthers*, 44 Wn.2d 833, 835, 271 P.2d 441 (1954).

Children have a strong interest in finality. *In re Parentage of Jannot*, 149 Wn.2d 123, 127-28, 65 P.3d 664 (2003). Because the "emotional and financial interests affected by such decisions are best served by finality," the challenger bears the heavy burden of showing a manifest abuse of discretion. *In re Marriage of Landry*, 103 Wn.2d 807 699 P.2d 214 (1985), 103 Wn.2d at 809. Children have the right to have their interests "definitely and finally determined in the decree which

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

dissolves the marriage." *Little v. Little*, 96 Wn.2d 194

634 P.2d 498 (1981).

Accordingly, a trial court "does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment." *In re Marriage of Thompson*, 97 Wn. App. 873, 878, 988 P. 2d 499 (1999) (emphasis added) citing RCW 26.09.170. The courts maintain a strong presumption against modifying permanent parenting plans because changes in the residential provisions are so highly disruptive to children. *Halls*, 126 Wn. App. at 607.

Mr. Arras testified that the concerns in his petition predate the dissolution. RP 9. Regarding his alleged concerns that Ms. McCabe was harming their children in 2009-2010, the judge interrupted to confirm that, "this was all prior to the dissolution, right?" then dismissed it as immaterial ("we shouldn't be focusing on that"). RP 9-10.

Mr. Arras conceded at the outset of the trial that the psychological evaluation, drug testing, and the GAL's evaluation all refuted the "problems" he had alleged. RP 11. He conceded that whatever mental incapacity he alleged appeared "at this time to be adequately treated and managed." CP 190, para. 2.3. He was consistently unclear whether he was accusing Ms. McCabe of *newly developed* problems (e.g. drug abuse, mental health problems, and violent tendencies), or if he was alleging ongoing, *pre-dissolution* conditions. RP 10, 11. Either way, none of the

experts or professionals whose reports, evaluations, emails, and testimony comprised the record [12], shared his concerns.

The court erred by modifying without a substantial or material change in circumstances that occurred after the original plan was entered.

3. THE JUDGE ANNOUNCED THE OPERATIVE FINDINGS ORALLY AND INSTRUCTED COUNSEL TO PREPARE THEM.

When a court enters its Findings of Fact and Conclusions of Law, review is limited to determining if the findings are supported by substantial evidence, and if they support the conclusions. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing. Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000). If the findings are inconsistent with the conclusions, the findings control. *Kane v. Klos*, 50 Wn.2d 778, 789, 314 P.2d 672 (1957).

Only when it is clear what questions the trial court decided (and how it decided them) can the appellate court effectively review a case, because the Court of Appeals relies on the original findings as to the ultimate and decisive issues of a case. *See* e.g., *In re Marriage of Horner*, 151 Wn.2d 884, 896, 93 P. 3d 124 (2004).

The trial court here convened a separate hearing for the sole purpose of delivering itemized findings on the relevant factors. RP 683, et seq. However, the written findings (as submitted by the prevailing party

[12] e.g. pediatricians, psychiatrists, a domestic violence evaluator, an anger management assessor, children's mental health specialists, drug testing laboratory technicians, teachers, school administrators, licensed childcare providers, school psychologist, a GAL, etc.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

and signed by the judge several months after the trial) are not itemized, do not correspond to the court's announced findings, and include the father's narrative litany of allegations. CP 189-90.

Although the judge signed off on these findings, they are less authoritative than the bench findings because 90 days elapsed between the ruling on July 19, 2013 and the requested written findings on October 17.

4. THE FINDINGS ARE NOT SUFFICIENT AND DO NOT SUPPORT MODIFICATION

On review, the Court asks, (i): did the trial court enter specific findings of fact on each statutory factor? (ii), does the record support each finding? and (3), do the court's findings and oral opinion show that it considered each factor? *Shryrock* at 896. Rambling narrative findings are not conducive to effective review, and failure to make a specific finding on each modification factor is error. *Stern*, 57 Wn. App. at 711, citing *Shryock*, 76 Wn. App. at 852.

The court may not consider conditions that do not directly affect the children's welfare. *Schuster*, 90 Wn.2d at 630. Therefore, it is immaterial that Ms. McCabe moved to West Seattle two years before the father's petition. The record is silent as to whether her live-in partner's musical "lifestyle" has"affected the children."

The record does not support a finding that the children had "many" tardies, that the number of tardies was unusual or unreasonable, or that the

tardies affected academic performance. No evidence was presented about Allegra's school performance whatsoever.[13]

The only evidence regarding school performance related to Jared. *See* Exhibit 112. However, no evidence before the court attributed any fluctuation in Jared's report cards to the mother's conduct or care. His counselor testified that Jared became markedly more relaxed and less angry after the court removed the requirment that his mother's visitation be supervised. RP 94.

The finding that the mother "exhibited anger" that was "far in excess" of the father's was not supported by independent evidence and was contradicted by the expert evaluations and testimony[14].

The court's vague finding that the mother "inappropriately manages relationships and issues" is confusing and unsupported by the record. The only negative "relationships" mentioned in the record are between Ms. McCabe and (i) her ex-husband, (ii) his immediate family and lawyer, and (iii) her long-estranged father and stepmother. These relationships were well-established before the first parenting plan.

The record contains no evidence that Jared suffered from "extreme mental health issues," or has ever been "a safety risk to himself and others." Jared's mental health counselors *explicitly testified to the*

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[13] Allegra was barely mentioned in the proceedings, as her lack of problems belied the petition's narrative.The record was uncontroverted that Allegra did not exhibit "severe emotional distress" or require counseling until August 2012, after she was prevented from seeing her mother. RP 115.

[14] e.g. the court-mandated anger assessment of Mr. Arras, the domestic violence evaluation and psychiatric evaluations of of Ms. McCabe, the GAL and both children's mental health counselors.

opposite: that he did not need psychiatric care, and that they found no evidence he was likely to harm himself or others. RP 88-99, 109. No evidence in the record indicated that Jared ever required "a school safety plan." His principal once mentioned a safety plan as a possible option, but never mentioned it again or implemented one. RP 220, 687.

5. THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

The court explicitly held there was no evidence to support RCW 26.09.191 restrictions (e.g. abuse, neglect, mental health problems, or drug use), here. RP 684. Mr. Arras presented no compelling evidence to support his claims of inadequate hygiene, dirty clothing, or grossly irrregular meals and bedtimes. RP 684. Moreover, the record contains no evidence that the children's eating or sleeping schedule at their mother's was not perfectly regular.[15]

However, many of the court's Findings are unsupported by the record, irrelevant to the matter at hand, or both. CP 189-90.

The court found that "neutral witnesses" endorsed Mr. Arras' parenting methods when, faced with a seven-year-old son's bedtime tantrum, he called 9-1-1, then took the child to an emergency room for a medical exam and police interview[16]. RP 685.The court was wrong: there

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[15] Mr. Arras and his witnesses could not testify to personal knowledge about Ms. McCabe's habits or daily life since the parties' 2009 separation. Her stepmother testified that as a teen, Laura often slept late (RP 142). Her ex mother-in-law said Laura hid in her bedroom (169, 174) but this was before original parenting plan.

[16] then sending the boy to school the next day, as usual.

were no such witnesses, and no evidence in the record supported this finding. Mr. Arras' lawyer claimed the GAL said Jared's counselor supported Mr. Arras' actions, but attorney's statements are not evidence. The GAL *did not testify to this*, and the counselor said she did not recall ever saying that. RP 83. Even the father testified that, if a similar incident recurred, he would not call 911. RP 436.

The court erroneously found *medical support* for Mr. Arras' method of sitting on a small boy's chest to control him. RP 685. The court based this finding solely upon unattributed hearsay from the GAL, who said merely, "there are health professionals out there who support that type of discipline, I guess," and, "there is a line of thought out there that supports doing that." RP 229. This is not expert or scientific evidence upon which a fact-finder may reasonably rely.

The GAL testified that sitting on a child's chest constitutes child abuse under Washington statute. RP 258. She testified that the father had done this to Jared multiple times, beginning when the boy was seven-years-old, and that she had reason to believe the father was still doing it as recently as January or February, 2013. RP 258. The GAL admitted that she neither reported this abuse to CPS[17], nor informed the school principal who had previously reported concerns about the father to CPS. RP 260. The GAL testified that she told Mr. Arras to stop sitting on Jared's chest,

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[17] even though she is a mandatory reporter to CPS, and she acknowledged that restraining a child's breathing, as here, is child abuse.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

and that he agreed. RP 230. The court incorrectly stated that no evidence suggested Mr. Arras is still sitting on his son's chest. RP 685.

The court mischaracterized the children's piano teacher as a "neutral" witness, but the record showed that (a) Ms. Harris is married to Mr. Arras' close friend, (b) her husband has worked under Mr. Arras at T-Mobile, (c) she socializes with Mr. Arras, but (d) has not spoken to Ms. McCabe since the parties separated in 2009, and (e) she was hired and paid by Mr. Arras to give piano lessons, which (f) were discontinued more than 3 years before the trial. RP 341, 350.

The findings reference nonexistent trial evidence - specifically, that Ms. McCabe needs treatment for "inappropriately managing" relationship issues. On the witness stand, the GAL agreed that she got this wrong because she misread the DV expert's suggestion that *both* parents might benefit from optional counseling to reduce conflict between them. RP 331; Ex. 102. The only suggestions of inappropriateness (or any problems) with the mother's relationships, in the years since the first parenting plan was enacted, were made by the father. CP 189-90.

The court erred by holding that a preponderance of the evidence supported a finding of a substantial change of circumstances. RP 686. The court found that the high degree of conflict which had developed between the parents since the dissolution was itself a significant change. RP 687. However, the record shows that parties' conflict was always extremely

high, ever since Ms. McCabe left Mr. Arras (before their dissolution and the original parenting plan). If "conflict" means "litigation," it naturally escalated when Mr. Arras filed his modification petition.

The court found that driving to Bellevue takes "much longer" from West Seattle than from the Central District. RP 689. No one testified or presented evidence about how the 6.9 mile difference may have impacted Ms. McCabe's commute. With no basis in the record, the court also found that the difference affected the children on school days. RP 689.

Although the record is silent about the children's schedule with either parent. the court found the father maintains "a more predictable and appropriate schedule for the children." RP 690. As petitioner, the father did not disclose the details of his home life, while the mother had to show her household was predictable and appropriate. The court found,"the mother is self-employed and resides with an entertainer." RP 690. These facts were neither disputed nor relevant. Ms. McCabe's boyfriend, Rick Miller, testified that he keeps a full-time day-job and also occasionally works as a musician. RP 490. However, no one presented evidence that his artistic endeavors ever impacted the children's schedule.

The court stated that Ms. McCabe made it clear that it was important for her to accommodate Mr. Miller's schedule. RP 690. This mischaracterizes the mother's request that the GAL consider Mr. Miller's schedule when setting visitation hours: at the time, Mr. Miller was the

court's appointed visitation supervisor. Further, he has been part of the children's family since 2009. There is no evidence that Mr. Miller's schedule ever took precedence over the needs of the children.

6. THE FINDINGS ARE INSUFFICIENT TO SUPPORT MODIFICATION OF AN ESTABLISHED PARENTING PLAN.

RCW 26.09.260 limits a court's range of discretion, so the court abuses its discretion if it fails to follow the statutory procedures or modifies a permanent parenting plan for reasons other than the statutory criteria. *In re Marriage of Hoseth*, 115 Wn .App. 563, 569, 63 P.3d 164 (citing *Shryock*, 76 Wn. App. at 852).

The petitioner must overcome a strong presumption against modification, because residential changes are highly disruptive to children. *Schroeder*, 106 Wn. App. at 350, 22 P.3d 1280 (citing *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993)). Thus, the moving party must prove that a modification is appropriate. *Schroeder*, 106 Wn. App. at 350 (citing *George v. Helliar*, 62 Wn. App. 378, 383-84, 814 P.2d 238 (1991)). Because changes in the residential provisions are highly disruptive to children, the courts employ a strong presumption against modification of a parenting plan. *In re Custody of Halls*, 126 Wn. App. 599, 607, 109 P.3d 15 (2005).

Without a substantial change to satisfy RCW 26.09.260, the court may limit parenting plan provisions only where it finds parenting

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

functions are impaired. RCW 26.09.191(3). Here, the court unequivocally found that this was not the case.

An unremarkable number of tardies[18] is not an "overriding and clearly compelling consideration," such that the children's "present environment is detrimental to [their] physical, mental, or emotional health," as contemplated by the legislators who enacted RCW 26.09.260(2)(c). Nor is "the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." *Id.* Here, the benefits to the children of being cared for by their mother outweighs any disadvantages contemplated by the court.

The court has limited Ms.McCabe's custodial and decision-making rights[19] on the sole ground that it takes 15-20 minutes longer to reach the children's school from her house than from their father's.

7. THE COURT ABUSED ITS DISCRETION BY DISREGARDING THE GAL'S RECOMMENDATION.

A court reviews a decision to disregard the recommendation of GAL for abuse of discretion. *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997). Generally, a court should consider an evaluator's report, but is not bound by it. *In re Custody of Brown*, 153 Wn. 2d 646, 655 n.5, 105 P.3d 991 (2005). The court may disregard a GAL's

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[18] "unremarkable" here meaning "unremarked upon" by the school administration, teachers, staff, or the children's father. prior to his modification petition.

[19] and also the children's ability to be with their mother, which all expert witnesses agreed was both their wish and in their best interests.

recommendations only if other evidence does not support the GAL or if the court finds other testimony more convincing. *Nieswandt*, 87 Wn. App. at 107, 108 (the court abused its discretion by accepting a GAL recommendation contrary to other expert witness' opinions). Here, the GAL's recommendation was wholly consistent with the experts' evaluations, so it was an abuse of discretion to disregard her final report.

8. THE COURT GAVE UNDUE WEIGHT TO COURTROOM DEMEANOR.

A parent's behavior on the witness stand is not a valid ground for modifying residential arrangements. *Andersen v. Andersen*, 75 Wn.2d 779, 782, 453 P.2d 856 (1969), citing *Malfait v. Malfait*, 54 Wn.2d 413, 341 P. 2d 154 (1959). A court's erroneous consideration of courtroom demeanor constitutes reversible prejudice if the appellant shows that the trial outcome was materially affected by the error. *State v. Barry*, ___ Wn. App. ___, 317 P.3d 528, 532 (2014), citing *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012).

Here, the court *specifically cited* the mother's undisguised dislike and mistrust of the father's lawyer during cross exam as a significant factor in the outcome. RP 689. The court compared the courtroom demeanor of the father and the mother in determining their relative credibility. RP 688. It is neither relevant to her abilities as a parent nor surprising that the Respondent could not conceal her antipathy and distrust

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

for opposing counsel during his cross-exam. As the court presented this fact as a decisive factor, it is clear that the trial outcome was materially affected by the court's erroneous consideration of courtroom demeanor, and thus created reversible prejudice.

Whether the record shows that the father was more forthcoming under cross-exam than the mother is less clear. *See e.g.* RP 402-10. Demonstrably, the court did not believe the father's denials (under oath) that he ever sat on his son's chest. RP 288, 402. The children's complaints that their father repeatedly used this abusive[20] method of restraint and discipline was corroborated by the GAL, the visitation supervisor, and the school principal, who first reported it to CPS. RP 229-30, 236.

9. HEARSAY RULINGS ARE IRRECONCILABLE WITH THE RULES OF EVIDENCE.

An out-of-court statement cannot be deemed reliable unless a firmly rooted hearsay exception applies under the Rules of Evidence. *In re Tayler F.*, 296 Conn. 524, 554-555, 995 A.2d 611, 632 (2010), citing *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

Here, the bulk of the father's evidence was hearsay: either statements he claimed the children made to him privately, or the identical statements parroted third-hand from his personal witnesses. Throughout the trial, the court's hearsay rulings could not be reconciled with the Rules of Evidence.

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[20] The GAL testified that sitting on a child's chest constitutes child abuse. RP 258.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

For example, the court ruled that Mr. Arras could testify to what a child told him that Ms. McCabe said to the child. The court applied the "state of mind" exception of ER 803(a)(3), without clarifying *whose* state of mind, or the relevance of the state of mind. RP 38, 40. The court allowed Mr. Goddard's erroneous assertion that the child hearsay rules applicable to a criminal prosecution for child abuse were in effect. RP 38. Throughout the trial, the court allowed the father's witnesses to testify to inadmissible hearsay and inadmissible opinion testimony *based* on the inadmissible hearsay. See e.g. RP 128, 130, 133, 151, 152, 154, 158, 160-161, 163, 168, 170, 174, 177, 180, 183, etc.

ER 703 permits experts to base their opinion on facts that are not otherwise admissible if those facts are of a type reasonably relied on by experts in the particular field. *In re Det. of Marshall*, 156 Wn.2d 150, 162, 125 P.3d 111 (2005). The rule allows opinion testimony from experts, based on hearsay that would otherwise be inadmissible in evidence. *Id.* Rules of Evidence give the court discretion to allow an expert to relate hearsay or otherwise inadmissible evidence to explain the expert opinion. *Marshall*, 156 Wn.2d at 163; 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice §705.4; §705.5 (5th ed. 2007).

Here, the court did not apply the rules of evidence so as to ensure the correct outcome, as the father was allowed to repeat biased and false [21] hearsay out of the mouths of one personal witness after another.

10. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND HER RESPONSE.

A parent has a constitutionally protected liberty interest in the integrity of her relationship with her children. *In re Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010). Children have an equally fundamental liberty interest in avoiding unnecessary shifts in the court-imposed rules governing their lives. *In re Dependency of M.S.R.*, 174 Wn. 2d 1, 16, 271 P.3d 234 (2012). A parent defending her family has the right to a proceeding that comports with due process of law. *A.B.*, 168 Wn.2d at 920; *State v. McCuistion*, 174 Wn.2d 369, 392, 275 P.3d 1092 (2012). Whether a proceeding satisfies constitutional due process is a question of law this Court reviews de novo. *Id.*; *In re Welfare of J.M.*, 130 Wn. App. 912, 920, 125 P.3d 245 (2005).

Once a matter is set for trial, the court's permission is required to file an amended pleading. CR 15(a); *Wolfe v. Legg*, 60 Wn. App. 245, 251, 803 P.2d 804 (1991). This rule facilitates proper decisions on the merits and provides parties with adequate notice of the basis for claims and defenses asserted. Pleadings may be amended except where amendment

[21] The record is consistent: during all GAL interviews, CPS interviews, meetings with school administrators, and sessions with counselors, the children either did not repeat or *directly refuted* every statement relating to alleged abuse or neglect by the mother that the father (and his witnesses) attributed to them.

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

would prejudice the opposing party. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999); *Ives v. Ramsden*, 142 Wn. App. 369, 386, 174 P. 3d 1231 (2008).

Leave to amend "shall be freely given when justice so requires." CR 15(a); *Watson v. Emard*, 165 Wn. App. 691, 697, 267 P.3d 1048 (2011), citing CR 15(a) and *Horsley*, 137 Wn.2d at 505. Amendment is favored when to do so will subserve presentation of the action's merits, unless an objecting party demonstrates that the amendment would prejudice him in maintaining his action. *Ramsden*, 142 Wn. App. at 386.

Determining whether to grant leave to amend, the court must consider whether the amendment will cause undue delay, confuse the jury, or confront the opponent with unfair surprise. *Horsley*, 137 Wn.2d at 505-06; *Ramsden*, 142 Wn. App. at 386. The most important consideration is prejudice to the nonmoving party. *Horsley*, 137 Wn.2d at 506. If the other party objects, the court may grant a continuance in order to meet the amended pleading. CR 15(a). But the court will do this only if a continuance is necessary or appropriate to avoid prejudice. *Raffensperger v. Towne*, 59 Wn.2d 731, 737, 370 P.2d 593 (1962).

Here, the presentation of the merits of the action would have been served by the amendment, and there was no prejudice. There was no jury, no delay, and no unfair surprise: the factual basis for the amendment consisted entirely of the father's own evidence. The proposed amendment

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

neither added to nor altered the facts at issue or the evidence. The amendment would have served the interests of judicial economy by addressing both parties' issues in a single proceeding, because the mother's proposed alternative modification rested on the same evidence presented in the father's motion to modify. CP 89-91

Ms. McCabe could not have filed her counter-petition earlier, because the "significant change in circumstances" was (1) the lack of parental judgment and disregard for the children's well-being evidenced by Mr. Arras' refusal to drop his petition despite the lack of factual support[22]; (2) the abusive use of conflict exhibited by same, and (3) evidence Ms. McCabe only learned through GAL reports and CPS records that Mr. Arras restrained Jared by sitting on his chest. RP 258.

Ms. McCabe was prejudiced by the trial court's erroneous denial of her motion to amend the pleadings to include her cross-complaint.The remedy is to vacate the modification order and reinstate the permanent plan entered on May 6, 2010, or to order a new modification trial based on the mother's counter-petition.

11. THE COURT ERRONEOUSLY DENIED ATTORNEY FEES.

RCW 26.09.140 allows the court to order one party to pay attorney fees and costs to the other for "enforcement or modification proceedings after entry of judgment." *McCauseland v. McCauseland*, 159 Wn.2d 607,

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[22] An initial finding of adequate cause means no more than that the petitioner's affidavits established a prima facie case. RCW 26.09.270; *In re Marriage of Flynn*, 94 Wn. App. 185,189-90, 972 P.2d 500 (1999).

Laura McCabe
5260 18th Ave. SW, Seattle, WA 98106

152 P.3d 1013 (2007). To decide whether a fee award is appropriate, the court considers the parties' relative ability to pay and the arguable merits of the issues raised. *Id.* The statute gives the reviewing court discretion to "order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs," based on the arguable merit of the issues presented on appeal and both parties' financial resources. *In re Marriage of C.M.C.*, 87 Wn. App. 84, 89, 940 P.2d 669 (1997); *Bay v. Jensen*, 147 Wn. App. 641,659, 196 P.3d 753 (2008).

The court may award legal fees where the other party unnecessarily added to the costs of trial. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992). Here, Mr. Arras' lawyer conceded that he had extended the trial by an entire day by presenting "a lot of witnesses going over the same stuff over and over." RP 661.

Mr. Arras's allegations against Ms. McCabe were false, and defending herself was expensive.[23] One by one, each evaluation debunked Mr. Arras' claims; none offered any objective support, yet he persisted. Defending herself (and her children) against this action was not combative, uncompromising, or litigious. See e.g. *In re Marriage of*

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[23] At the time of the trial, Ms. McCabe had borrowed nearly $65,000 for mandated expert assessments (and appearance fees), GAL, court costs, and attorney fees. RP 21, 497, 609

Wright, 78 Wn. App. 230, 239, 896 P.2d 735 (1995) (the highly contested nature of dissolution action alone does not constitute intransigence).[24]

After borrowing more than $60,000 for the trial, Ms. McCabe is pro se on appeal [25], but this Court may still award her fees and costs. *See, e.g., Stiles v. Kearney*, 168 Wn.App. 250, 265, 277 P.3d 9 (2012); *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991), *review denied*, 118 Wn.2d 1022, 827 P.2d 1393 (1992) A pro se attorney may recover justifiable fees, because they must spend the time to prepare and appear just like any other lawyer. *Leen*, 62 Wn. App. at 487.

Where a trial court fails to provide sufficient findings for appellate review of the fee award, the Court should remand for a new hearing to gather adequate information regarding the fee award. *Jensen*, 147 Wn. App. at 659 (citing *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P. 3d 306 (2006)).

Although she appears pro se, the Appellant asks the Court to award her reasonable costs, including the cost of the transcript, Clerk's Papers, and filing fees, for this appeal

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[24] Since Mr. Arras filed his first action in this case, his lawyer has leveled particular insults (e.g. "combative," "difficult," and "argumentative") at Ms. McCabe hundreds of times. Yet, except for a single motion (on which she prevailed) she has always been the respondent. Counsel never produced supporting evidence, though a written record exists of all communications with his client. The family court seems readily influenced by this type of "dog-whistle" sexism, which may indicate a systemic Equal Protection Clause problem for female litigants.

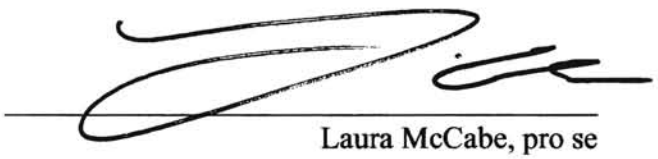
[25] she also has $60,000 of student loan debt, and a fool for a client.

F. CONCLUSION

For the reasons stated, the mother asks the Court to reinstate the permanent parenting plan entered on May 6, 2010, including her decision-making rights.

As the experts, court, and parties have agreed that joint decision-making is not practical, the mother alternately asks the Court to reinstate the original residential provisions and remand for additional fact-finding on the mother's cross-motion to name her sole decision-maker.

Respectfully submitted this 31st day of March, 2014.



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AFFIDAVIT OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that, on this 31st day of March, 2014, I caused to be hand-delivered (by a competent non-party to this action, over the age of 18),

- a copy of this opening brief, and
- four volumes of transcribed proceedings,

to Mr. Brook Goddard, Esq., at his place of business:

Goddard Wetherall Wonder, PSC
155 – 108th Avenue N.E., Suite 700
Bellevue, WA 98004.

Signed on March 31, 2014 in West Seattle, WA,

Laura Grace McCabe