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NO: 71152-1-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

In re the Marriage of:

Jonathan J. Arras, Respondent,

and

Laura G. Arras (nka McCabe), Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE LAURA INVEEN
KING COUNTY NO: 09-3-04793-0

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

STATEMENT OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

I. RESTATEMENT OF FACTS

A) Procedural & Factual Background

i. *2009 Dissolution of Marriage Proceedings*

Mr. Jonathan Arras and Ms. Laura McCabe (formerly known as Mrs. Arras) were married on August 6, 2002. VRP 22. Two children were born of their marriage, a son Jared (now age 10) and a daughter Allegra (now age 7). VRP 22.

Mr. Arras filed for dissolution of the parties' marriage on July 15, 2009, and on May 6, 2010 the parties entered an agreed parenting plan. Ex. 1. The parenting plan designated Mr. Arras as the primary parent, with Ms. McCabe to have parenting time every Tuesday after school until 7:30 p.m., every Thursday after school until Friday return to school, and alternating weekends from Friday after school until return to school on Monday. Ex. 1.

ii. Pre-Parenting Plan Modification Events[1]

Ms. McCabe began to abuse and neglect the parties' children. She was physically and verbally abusive to them, she was neglecting their basic hygiene, she was repeatedly moving her residence and

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[1] Exhibit and witness testimony citations to support the following two paragraphs are provided in sections I(A)(iii) and II(B)(b)-(e).

uprooting the children, she was keeping the children up late and then failing to get them to school on roughly 20% of the days she was responsible for their transportation, she was hindering their engagement in extracurricular activities, and the parties' son's behavior as a result of the abuse and neglect was worsening to the point that he was becoming a danger to himself and others and he was having terrible trouble at school. It was unclear if this was the result of Ms. McCabe having drug or mental health issues, or if it was simply horrific parenting, but it was clear to Mr. Arras and family (including Ms. McCabe's own father and stepmother) that something had to be done.

Compounding the situation, Ms. McCabe put up repeated roadblocks to the parties' children medical and mental health care, refusing to work with Mr. Arras regarding really any joint decision making issues. Mr. Arras sought to get Jared medical and counseling help, but it took months for he and Jared's school counselor and principal to obtain Ms. McCabe's signature on a consent form for Jared to get counseling. Ms. McCabe's own father offered to pay for any out of pocket expenses, and Mr. Arras broadly suggested that Ms. McCabe choose any doctor she wished, but still Ms. McCabe

prevented Jared from getting the medical care he needed.

iii. *2012 Modification Proceedings*

Mr. Arras filed a petition for modification of the parties' parenting plan on August 2, 2012. CP 1-4. That same day the court entered restraining orders against Ms. McCabe to protect the children. CP 8-10. Ms. McCabe appealed these orders, which the court denied on August 13, 2012. CP 13.

On August 27th the court on the family law motions calendar found Mr. Arras' petition to have proper adequate cause, the court granted Mr. Arras sole decision making over the children, a guardian ad litem (GAL) was appointed on behalf of the children to investigate the issues, and Ms. McCabe's parenting time was ordered to be supervised and limited to Tuesdays and Thursdays from 3:30 p.m. to 7:30 p.m., and Saturdays from noon until 4:00 p.m. CP 23-28, Ex. 13.

Ms. McCabe filed a motion for revision of the August 27th orders (i.e. appeal from the family law commissioner's decision for review by the assigned trial court judge), with the court denying Ms. McCabe's appeal. Ex. 17.

On October 10, 2012, the GAL issued a 37 page report following her initial investigation. CP 229-267. The GAL's report

found, among other things, the following:

- Jared and Allegra both reported to Jared's counselor (Jan Harter), as well as to the GAL directly, that Ms. McCabe physically abused Jared, and that Mr. Arras was supportive of getting Jared medical help while Ms. McCabe was unsupportive (pages 4, 5, 10, 11, 12, 13).

- Ms. McCabe's own stepmother (Sharon Tani-McCabe) noted Ms. McCabe's history of abusive conduct, neglect of the children's sleep and schooling, the children's reporting of abuse by their mother, and Ms. McCabe's blocking of Jared's counseling (pages 18-22).

- The piano teacher (Charlotte Harris) reported that Mr. Arras was supportive of Jared's lessons while Ms. McCabe was unsupportive, that Ms. McCabe was volatile, and that Jared reported being yelled at by his mother (pg. 26-27).

The GAL then concluded that the parties were unable to do joint decision making, Jared was having serious school issues, Ms. McCabe was overwhelmed and not making choices "with regard to the best interest of the kids", and that her investigation had confirmed that Ms. McCabe "has hit and slapped Jared on, at least, one occasion each as well as yelled, screamed and called him names." (pgs. 33-34). The GAL then recommended that Ms. McCabe's parenting time continue to be supervised (8 hours on Saturdays and 8 hours every other Sunday), and that Mr. Arras continue to have sole decision making authority for the children,

On October 16, 2012, the Court reviewed the GAL's interim

report and agreed that Ms. McCabe visitations should continue to be supervised, with Mr. Arras to have continued sole decision making and for both children to continue with counseling. Ex. 18.

On December 21, 2012 a status conference was held pursuant to the Case Schedule. The court's Order on Status Conference noted that Ms. McCabe had refused to sign a joint Confirmation of Issues or even appear at the conference, and thus she was fined $1,250. Ex. 21.

On May 15, 2013 the GAL issued her final report. CP 291-299. In her report the GAL continued to recommend sole decision making authority by Mr. Arras, confirmed the reports of Ms. McCabe's abuse of Jared, and noted that Jared's behavior had markedly improved over the previous year.

From July 8, 2013 through July 11, 2013 the parties engaged in a four day trial regarding Mr. Arras' petition for modification of the parties' 2010 parenting plan. Ms. McCabe was represented by counsel (she is also an attorney). Ms. McCabe's counsel withdrew shortly before she filed the present appeal.

On July 19, 2013, the trial court orally issued its findings and conclusions, granting Mr. Arras' request for modification of the parties' 2010 parenting plan. RP 683 – 694.

At an October 16, 2013 presentation hearing (there was some delay due to Ms. McCabe requesting more time to listen to the oral ruling transcript), the Court entered a new parenting plan, along with findings of fact and conclusions of law ("Order re Modification/Adjustment of Parenting Plan") which set out the various legal basis for the modification as well as the findings in support. CP 193 – 201, and 187 – 192.

II. ARGUMENT

A. Standard of Review

Trial court decisions made with respect to modification or adjustment of a parenting plan are discretionary, with the court on appeal applying the abuse of discretion standard. In re Marriage of McDole, 122 Wn.2d 604, 859 P.2d 1239 (1993). The family law statutes confer a great deal of discretion upon trial courts, with the trial court simply required to 1) determine the legally relevant factors upon which to make a discretionary decision, 2) find facts relevant to the legally relevant factors, and then 3) exercise discretion based upon its findings. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The appellate court will not overturn the trial court's findings of

fact that are supported by substantial evidence; that is "evidence sufficient to persuade a rational fair-minded person that a finding is true." Casterline v. Roberts, 168 Wn. App. 376, 381, 284 P.3d 743 (2012); see also Beeson v. Atlantic-Richfield Co., 88 Wn.2d 499, 503, 563 P.2d 822 (1977) (an appellate court will not ordinarily substitute its judgment for that of the trial court even if it might have resolved the factual dispute differently). Even if there are errors, the appellate court won't reverse a trial court decision unless the error materially affected the outcome or involved an important issue of procedural justice. Capen v. Wester, 58 Wn.2d 900, 902, 365 P.2d 326 (1961); see also In re Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) (trial court decisions in dissolution actions are affirmed unless no reasonable judge would have reached the same conclusion).

B. The Trial Court Properly Met the Legal Standard for Modifying a Parenting Plan by Determining the Legally Relevant Factors Upon Which to Make its Decision, Finding the Relevant Facts, and Then Exercising its Discretion Based Upon its Findings (response to Ms. McCabe's arguments 1, 2, and 6).

Ms. McCabe contends in her brief that "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." Page 16. There was no claim in this case under RCW 26.09.260(2)(b).

The claim was under RCW 26.09.260(1), RCW 26.09.260(2)(c), RCW 26.09.260(4), RCW 26.09.260(5), and RCW 26.09.260(10), as will be discussed one at a time in the sections below. Moreover, contrary to the second argument section of Ms. McCabe's Appellate Brief, all of the extensive discussion by the trial court in its ruling, and the supportive court record, showed facts indicating a "substantial change of circumstances" that had "arisen since entry of the 2010 parenting plan", and the changes were "material" and impactful on the "children's welfare". Again, the following sections will discuss each of the statutory factors relevant to Mr. Arras' petition for modification of the parties' 2010 parenting plan, as well as the extensive evidentiary support provided at trial for the trial court's findings and conclusions.

a. The Statutory Framework of RCW 26.09.260

RCW 26.09.260 provides a number of statutory bases upon which the Court may modify or adjust a parenting plan. For example, RCW 26.09.260(1) provides for modification whenever there is "a substantial change of circumstances" and a modification is "necessary to serve the best interests of the child." In applying this standard, the Court considers if "the child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to

be caused by a change of environment is outweighed by the advantage of a change to the child".

Next, RCW 26.09.260(4) provides that the court may "reduce or restrict contact" between a child and the non-primary parent if it finds that the reduction or restriction would protect the best interests of the child per RCW 26.09.191.

Next, RCW 26.09.260(5) provides that the court may adjust a parenting schedule upon a showing of a substantial change of circumstances of either parent or of the child if the change is only a minor change in the residential schedule that doesn't chance the residence that the child is scheduled to reside the majority of the time, and the change is based on the non-primary parent's change of residence.

Last (at least as is relevant to these proceedings), RCW 26.09.260(10) provides that a trial court may modify "non-residential provisions" of a parenting plan (e.g. dispute resolution requirements, allocation of decision making authority, etc) if there has been a substantial change of circumstances of either parent or a child, and the adjustment is in the best interest of a child.

The trial court properly determined the legal framework and

relevant factors it was to consider in making its parenting plan modification decision. It issued lengthy findings of fact and conclusions of law as part of its October 16, 2013 Order re Modification/Adjustment of Parenting Plan, and as part of this Order it expressly discussed and analyzed all of the above legal standards. CP 187 – 192. The trial court actually set out five separate headings under which each relevant subsection of the parenting plan modification statute (RCW 26.09.260 et al) was analyzed and findings were made, as will be discussed below.

b. RCW 26.09.260(1) and (2).

First, the trial court discussed RCW 26.09.260(1) and (2)(c) in section 2.2 of the Order re Modification/Adjustment of Parenting Plan, and it then applied the statute to its subsequent findings in this section. Specifically, the court held:

> The parties' parenting plan should be modified because a substantial change of circumstances has occurred in the circumstances of the children or the non-moving party (Respondent) and the modification is in the best interest of the children and is necessary to serve the children's best interests. The children's environment under the current Parenting Plan is detrimental to their physical, mental, or emotional health, and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children.

CP 187 – 192. The trial court therefore properly noted and followed

the statutory language for a parenting plan modification under RCW 26.09.260(1) and (2)(c).

Following its holding in section 2.2 that Mr. Arras had met his burden under RCW 26.09.260(1) and (2)(c), the trial court issued two pages of facts supporting modification. In the first paragraph, the trial court noted that Ms. McCabe's repeated moves (ultimately ending in West Seattle) had created a longer drive to transport the children to each parent's home and to school in Bellevue, that the children's attendance (and performance) was being significantly affected on days Ms. McCabe was supposed to bring them to school, and that Ms. McCabe was not credible in her excuses about West Seattle bridge problems or how hard it was to get the children ready in the morning. There was a great deal of documentation and witness testimony provided at trial to support these findings, a sampling of which may be found as follows:

- VRP 226: GAL's testimony that her investigation had found that after living in Bellevue (where the children reside and go to school), Ms. McCabe had moved to three different residences in Seattle, with her present residence being in West Seattle.

- VRP 52-53: Mr. Arras' testimony that Ms. McCabe's parenting time resulted in 9 unexcused tardies, or 20% of the time she had them overnight and was responsible for transportation.

- VRP 128: Ms. McCabe's own father's (Michael McCabe) testimony on Mr. Arras' behalf that the children had only been tardy one time since temporary orders had restricted Ms. McCabe's parenting time.

- Exhibit 28: Jared's 3rd grade report card shows 4 absences and 8 tardies while 4th grade report card (after restriction of Ms. McCabe's parenting time) shows 0 absences and 1 tardy): See also VRP 282-283, Mr. Arras' testimony confirming numbers.

- VRP 606: Ms. McCabe's testimony confirming 4 tardies in the first semester, but seeking to excuse them due to the West Seattle Bridge's "irregular schedule".

In the next paragraph, the trial court next found that Mr. Arras is better able to maintain a more predictable and appropriate schedule for the children than Ms. McCabe. As part of this, the court noted that Ms. McCabe doesn't keep traditional work or sleep hours, her partner has late hours due to his work in the entertainment business that she found important to accommodate, and that these late hours affected the parties' young children and their schooling. There was a great deal of documentation and witness testimony provided at trial to support these findings as well, a sampling of which may be found as follows:

- VRP 52: Mr. Arras' testimony that he attended Jared's school conferences, teach conferences, and curriculum nights but that Ms. McCabe rarely attended, or she showed up very late with an excuse of traffic.

- VRP 195: Testimony by James' Arras (Mr. Arras' father) that the children are doing much better due to greater stability with

Mr. Arras.

- VRP 201: James' Arras' testimony that the children were kept in bed by Ms. McCabe until 10 or 11:00 a.m.

- VRP 275: GAL's testimony that Ms. McCabe's parenting time was organized around her boyfriend (Richard Miller)'s late work schedule as a musician in the theater and night clubs.

- VRP 490-491: Testimony by Richard Miller (Ms. McCabe's boyfriend) that he gets home from work around 2 or 2:30 a.m.

- VRP 648-49: Ms. McCabe's acknowledgment that she sleeps beyond 11:00 a.m., and that she attends Mr. Miller's late work events.

- VRP 49: Mr. Arras' testimony regarding his volunteering in the children's classes and how exhausted the children were after they stayed overnight at Ms. McCabe's home, which was causing their schooling to suffer (dropping grades and Allegra struggling with reading).

- VRP 278-79: Mr. Arras' testimony about Jared's improvement in his grades in 4th grade versus 3rd grade, after his residential time with his mother was reduced. See also Exhibit 28.

The trial court next found that since the parties have been following the parenting schedule ordered on the family law motions calendar (a schedule wherein Ms. McCabe had much less time with the children), the children's behavior had substantially improved, as had their attendance at school and their grades, with Jared's improvement in particular being "extraordinary". There was a great deal of documentation and witness testimony provided at trial to support these

findings as well, some of which was itemized in the previous paragraph, but an additional sampling of which may be found as follows:

- VRP 85: Testimony by Janette Harter (therapist) regarding Jared's reduced anger, reduced aggressions towards peers, and improved regulation of his emotions.

- VRP 105-106: Testimony by Jenna Genzale (therapist) regarding the family's "transformation" over the previous year, and Jared and Allegra's improvements.

- VRP 128: Testimony by Michael McCabe (Ms. McCabe's own father) regarding the children doing "so much better" when they have stayed overnight at Mr. Arras' house before school days.

- VRP 150-152: Testimony by Sharon Tani-McCabe (Ms. McCabe's own stepmother) regarding the great improvement in the children in the year following reduction in Ms. McCabe's parenting time.

- VRP 183-184: Testimony by Cynthia Arras (Mr. Arras' mother) regarding Jared's improved success in school over the last year being due to better consistency of schedule with Mr. Arras).

- VRP 195: Testimony by James Arras regarding Jared's marked improvement over that last year.

- VRP 279-80: Testimony by Mr. Arras regarding Jared's improved grades and communication skills since having less time at Ms. McCabe's home.

- VRP 303: Testimony by Mr. Arras regarding Jared's improved behavior, reduced principal office visits, and how his counseling as well as improved rest, nutrition, and consistency with Mr. Arras have contributed to this improvement.

- VRP 349: Testimony by Charlene Harris (DSHS employee and family friend) noting Jared's impressive improvement in his behavior.

- VRP 396-397: Testimony by Mary Miller-Baldwin (family neighbor) regarding how much Jared's behavior has improved.

The trial court next found that, while there were allegations of anger and yelling by both parents, the evidence at trial was clear that Ms. McCabe's improper parenting was far in excess of Mr. Arras'. The court noted witness testimony, Ms. McCabe's demeanor in court and inappropriate escalating anger while testifying that demonstrated that she needs get her own way, and evidence that Ms. McCabe inappropriately manages relationships and issues such that she's been estranged from her own father and mother. There was a great deal of witness testimony provided at trial to support these findings as well, some of which was itemized in the previous paragraphs, but an additional sampling of which may be found as follows:

- VRP 38: Testimony by Mr. Arras that Ms. McCabe slapped a full plate of foot out of Jared's hands, shattering it at his feet and spraying food all over him, followed by screaming at him that she wished he was dead and had never been born.

- VRP 45: Testimony by Mr. Arras that Ms. McCabe grabbed a bag of chips out of Jared's hands, threw it out the window of their moving car, and slapped him in the face a couple times, and her acknowledgement of having slapped Jared before. See

also VRP 83-84 for testimony by therapist Janette Harter verifying that Allegra reported this incident to her as well.

- VRP 151: Testimony by Ms. McCabe's own step-mother regarding Ms. McCabe being mean, angry, and vindictive.

- VRP 202-203: Testimony by James Arras of verbal abuse of Jared by Ms. McCabe.

- VRP 216: Testimony by the GAL that her investigation had confirmed that Ms. McCabe had hit and slapped Jared, as well as yelled, screamed, and called him names.

- VRP 128: Testimony by Ms. McCabe's own father, Michael McCabe, that Ms. McCabe decision making is usually selfish rather than in the children's best interests.

- VRP 225-26, and 344: Testimony by the GAL that in her investigation she found Ms. McCabe to be selfish rather than focused on the children's best interests, and that Ms. McCabe is relentless in needing to have things her way.

- VRP 344: Testimony by Charlene Harris about Ms. McCabe having a threatening personality.

- VRP 118-119, 123, and 126: Testimony by Ms. McCabe's own father, Michael McCabe, regarding how he was testifying on Mr. Arras' behalf out of concern for his grandchildren, his poor relationship with Ms. McCabe, incidents where Ms. McCabe had ranted and been delusional, and incidents where Ms. McCabe and her mother had serious altercations.

- VRP 142-143: Testimony by Ms. McCabe's step-mother regarding their estranged relationship.

- VRP 342 and 345: Testimony by Charlene Harris regarding Ms. McCabe having an argumentative and childish relationship with Jared and Allegra, and how Ms. McCabe was intimidating to other people and got in their face.

- VRP 354: Testimony by Jennifer Sikavi describing Ms. McCabe and her mother having an uncomfortable altercation at a public pool.

- VRP 425-26: Testimony by Dean Ishiki (Ms. McCabe's own therapist), about Ms. McCabe and her mother not having a good relationship, including periods of not speaking to each other.

The trial court next found that Mr. Arras and Ms. McCabe are unable to make joint decisions, noting that Jared was suffering from such extreme mental health and behavioral issues that he was a safety risk to himself and others, but that Mr. Arras was unable to get Jared treatment for over 18 months due to Ms. McCabe's instigating conflicts and putting up roadblocks to prevent treatment for both children. The court noted testimony from neutral witnesses in this regard, including by Ms. McCabe's own father, as well as clear evidence that Mr. Arras was the parent more receptive to input from professionals regarding parenting strategies and counseling for the children and that he also better followed through. Ms. McCabe's testimony on these issues wasn't credible. In total, the court found that the evidence on these issues was so clear and compelling that if this had been a criminal case the Court would have found beyond a reasonable doubt. In the next paragraph the court went on to discuss how some credibility determinations were necessary in this case and that Mr. Arras was more

credible and his testimony was corroborated by other witnesses that one wouldn't expect to be biased towards him (e.g. Ms. McCabe's own father and step-mother, the piano teacher, and the children's counselors). The court also found Mr. Arras' testimony to be more credible than Ms. McCabe's given observations of their respective demeanor in court, with Ms. McCabe being obfuscating and evasive during testimony, including claiming that she didn't even understand simple questions. There was a great deal of witness testimony provided at trial to support these findings as well, some of which was itemized in the previous paragraphs, but an additional sampling of which may be found as follows:

- VRP 69: Mr. Arras' testimony regarding not being able to get a response from Ms. McCabe to his multiple requests for Jared to be able to see a counselor, and the school principal having to beg Ms. McCabe to sign paperwork so Jared could get help.

- VRP 82: Testimony by Jared's therapist Janette Harter that Mr. Arras was eager to get Jared into counseling but that Ms. McCabe tried to inhibit the counseling and wasn't cooperative about setting up the appointment.

- VRP 121 - 122: Testimony by Ms. McCabe's father, Michael McCabe, that Ms. McCabe was resistant to Jared getting counseling, cancelling appointments, and making rescheduling impossible.

- VRP 152: Testimony of Ms. McCabe's stepmother, Sharon Tani-McCabe, regarding Ms. McCabe preventing Mr. Arras for

9 months from getting Jared into therapy.

- VRP 219-220: Testimony by the GAL regarding Mr. Arras desperately trying for a year and half to get Jared mental health care and counseling, but Ms. McCabe blocking these efforts and not being able to focus on Jared's issues.

- VRP 345-346: Testimony by Charlene Harris about her working with Mr. Arras to investigate mental health resources for Jared.

- VRP 472-474: Testimony by Mr. Arras regarding roadblocks by Ms. McCabe over many months to get help for Jared despite his willingness to agree to anyone Ms. McCabe would choose.

- VRP 79 – 80, 83, 97: Testimony of Jared's therapist, Janette Harter, regarding 1) Mr. Arras meeting with her immediately but Ms. McCabe refusing to meet with her for six months until being ordered by the court; 2) Mr. Arras being very involved and supportive of her work, and his also being receptive to her feedback, while Ms. McCabe was not; 3) Mr. Arras bringing Jared to all of the counseling sessions; and 4) Mr. Arras being receptive to her advice about restraining Jared.

- VRP 103-104: Testimony of Allegra's therapist Jenna Genzale regarding Ms. McCabe not having any contact with her despite her having invited Ms. McCabe to be involved.

The trial court is generally free to believe or disbelieve a witness in reaching factual determinations. State v. Chapman, 78 wn.2d 160, 162, 469 P.2d 883 (1970). In fact, if there is an articulable reason the trial court may even disbelieve uncontradicted testimony. Meeker v. Howard, 7 Wn. App. 169, 171, 499 P.2d 53 (1972).

c. RCW 26.09.260(4)

In section 2.3 of the Order re Modification/Adjustment of Parenting Plan, the trial court discussed RCW 26.09.260(4), holding:

> While evidence at trial raised concerns about the Respondent's abuse (slapping and yelling) and neglect of the children (bad hygiene and improper clothing), much of this may have been due to the mother's mental health issues that were being untreated or erratically managed but which at this time appear to be adequately treated and managed. There was no evidence of drug use. The evidence does not support imposition of RCW 26.09.191 restrictions against the Respondent at this time.

CP 187 – 192.

While the trial court noted in its findings that there was evidence of Ms. McCabe's abuse and neglect of the children, it felt that this might have been due to mental health issues that appeared, as of trial at least, to finally be adequately treated and managed. Accordingly, the court didn't base its reduction of Ms. McCabe's parenting time on RCW 26.09.260(4), which provides for a reduction of a parent's parenting time if there are abuse issues (i.e. RCW 26.09.191 issues) for which a reduction or restriction would protect the children's best interests. There actually was significant evidence of abuse and neglect by Ms. McCabe of the children that would have supported the trial court modifying the parties' parenting plan under

RCW 26.09.260(4) however, contrary to Ms. McCabe's arguments in section 5 of her brief, and on appeal the appellate court could so find as well. See RAP 2.5(a) (a correct decision will be affirmed upon any theory established by the pleadings and proof). The following is some of the evidence presented at trial of RCW 26.09.191 abuse of the children by Ms. McCabe, some of which was previously discussed above:

- VRP 38: Testimony by Mr. Arras that the children confirmed to him that Ms. McCabe slapped a full plate of foot out of Jared's hands, shattering it at his feet and spraying food all over him, followed by screaming at him that she wished he was dead and had never been born.

- VRP 45: Testimony by Mr. Arras that the children confirmed to him that Ms. McCabe grabbed a bag of chips out of Jared's hands, threw it out the window of their moving car, and slapped him in the face a couple times, and her acknowledgement of having slapped Jared before. See also VRP 83-84 for testimony by therapist Janette Harter verifying that Allegra reported this incident to her as well.

- VRP 202-203: Testimony by James Arras of the children confirming to him verbal abuse of Jared by Ms. McCabe.

- VRP 216: Testimony by the GAL that her investigation had confirmed that Ms. McCabe had hit and slapped Jared, as well as yelled, screamed, and called him names.

- VRP 43-44: Testimony by Mr. Arras of Ms. McCabe returning the children to him in dirty underpants and clothing that was too small (underpants that were tight and pinching, shirts that cut into their armpits, shoes that gave blisters).

- VRP 45: Testimony by Mr. Arras regarding Ms. McCabe returning the children to school with feet fungal issues, dirty hair and stained clothes, to the point that other children started to make fun of them.

- VRP 146-147: Testimony by Ms. McCabe's stepmother, Sharon Tani-McCabe, regarding Ms. McCabe's messy house, the children's poor clothing, and Allegra getting a yeast infection.

- VRP 170, and 185-186: Testimony by Cynthia Arras regarding the children not having proper clothing from Ms. McCabe, and their being dirty and having infections.

- VRP 320: Testimony of Dr. Dale Todd regarding Ms. McCabe having major depression with agitation and anxiety.

- VRP 415 – 416: Testimony by Dr. Dean Ishiki regarding trying to find medications that would help Ms. McCabe with her depression, attention deficit disorder, and premenstrual syndrome.

- VRP 574: Testimony by Ms. McCabe's own witness, her friend Meghan Darling, that she and her husband felt very strongly that Ms. McCabe needed mental health help, and that she was being medicated in an erratic way such that she was having sleep, focus, and emotional difficulties.

d. RCW 26.09.260(5)

In section 2.4 of the Order re Modification/Adjustment of Parenting Plan, the trial court discussed the legal standard of RCW 26.09.260(5). Pursuant to RCW 26.09.260(5), the trial court held:

> The Parenting Plan should be adjusted because substantial change in circumstances of either parent or of a child has

> occurred and the proposed modification to the Parenting Plan is in the best interest of the children. It is a minor modification in the residential schedule that does not change the residence at which the children are scheduled to reside the majority of the time and is based on a change of residence of the parent with whom the child does not reside a majority of the time.

CP 187-192. For factual support of this finding, the trial court referred to the lengthy discussion in section 2.2 of the order, rather than restating again all of that same information.

Application of this section of RCW 26.09.260 was appropriate. Since Mr. Arras was already the primary parent under the parties' 2010 parenting plan, he wasn't requesting that the court "change the residence at which the children are scheduled to reside the majority of the time." He was simply requesting a reduction of Ms. McCabe's parenting time, modification of the joint decision making provisions, and to change the dispute resolution provisions. Given the extensive exhibits and witness testimony, itemized already above, it was clear to the court that Mr. Arras' requested modification was "in the best interest of the children", as required by RCW 26.09.260(5).

e. RCW 26.09.260(10)

In section 2.6 of the Order re Modification/Adjustment of Parenting Plan, the trial court discussed the legal standard of RCW

26.09.260(10). Pursuant to RCW 26.09.260(10), the trial court held that the dispute resolution and decision making sections of the parties' parenting plan, nonresidential aspects of the plan, should be adjusted because of "a substantial change of circumstances of either party or of the children" and because such an adjustment was "in the best interest of the children." The trial court then referred to the lengthy discussion in section 2.2 of the order as factual support for this finding, rather than restating again all of that same information.

Application of this section of RCW 26.09.260 was appropriate given, again, the extensive exhibits and witness testimony itemized above regarding the substantial change of circumstances in Ms. McCabe's life as well as the children's, the parties' well documented complete inability to make joint decisions, and with adjustments to the dispute resolution and decision making sections of the parties' parenting plan being in the children's "best interests".

C. The Court Properly Entered Written Findings (Argument 3)

It is unclear Ms. McCabe's argument in the third section of her Appellate Brief, but she appears to be contesting in total the trial court's October 17, 2013 written findings as "less authoritative" than the July 19, 2013 bench findings.

The trial court's Order re Modification/Adjustment of Parenting Plan provided proper findings, and there is no support to find otherwise. The trial court's oral opinion, while usable as a reference in interpretation of findings of fact, is not itself the finding of fact. State v. Kingman, 77 Wn.2d 551, 552, 463 P.2d 638 (1970); In re Marriage of Lawrence, 105 Wn. App. 683, 686, 20 P.3d 972 (2001) (inadequate written findings may be supplemented by the court's oral statements). The court's oral decision is not final or binding unless formally incorporated into findings, conclusions, and judgment. Wagner v. Wagner, 1 Wn. App. 328, 331, 461 P.2d 577 (1969).

D. The Trial Court Entered Sufficient Findings that Supported Modification, and the Findings are Supported by the Record (arguments 4 and 5)

In sections 4 and 5 of her Appellate Brief, Ms. McCabe challenges the sufficiency of the trial court's findings, and she also seeks to parse out specific findings which she believes were erroneously made and thus somehow sink the court's findings.

First of all, a court need not enter findings regarding every item of evidence introduced. Ford v. Bellingham-Whatcom County Dist. Board of Health, 16 Wn. App. 709, 717, 558 P.2d 821 (1977). All that is required is that the findings be sufficient to inform the appellate

court, on each material issue, what questions the trial court decided and the manner in which they were decided. Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 707, 592 P.2d 631 (1979). Moreover, one or more findings of fact that are defective or unsupported by evidence will not invalidate conclusions of law and judgment, if the conclusions and judgment are supported by the findings taken as a whole. Johnson v. Safeway Stores, Inc., 1 Wn. App. 380, 385, 461 P.2d 890 (1969). Judgment will not be reversed for failure of trial court to make findings of fact where no prejudice resulted. Ferrell v. Cronrath, 67 Wn.2d 642, 644-45, 409 P.2d 472 (1965).

There was a large amount of testimony and exhibit evidence in this case, and it would have been impossible for the trial court to go through the record and itemize every bit of evidence to support its findings and conclusions. Mr. Arras has attempted to do this quite a bit in his response brief, but it would be impossible (at least within reasonable time and cost constraints) to do this perfectly as Ms. McCabe seems to believe is required. Regardless, the trial court provided quite extensive findings in its order, all specifically tailored to the various statutory requirements under RCW 26.09.260.

As for specific findings, Ms. McCabe first contends that the

trial court erred by considering her move to West Seattle. The trial court may in fact consider a parent's move as a basis for a parenting plan modification, with RCW 26.09.260(5) specifically providing such a statutory basis "based on a change of residence of the parent with whom the child does not reside a majority of the time."

Ms. McCabe next contends that there was no evidence that her partner's work lifestyle affected the children. There in fact was extensive testimony in this regard. See e.g. VRP 275 (GAL's testimony that Ms. McCabe's parenting time was organized around her boyfriend (Richard Miller)'s late work schedule as a musician in the theater and night clubs); VRP 490-491 (testimony by Richard Miller that he gets home from work around 2 or 2:30 a.m.); VRP 648-49 (Ms. McCabe's acknowledgment that she sleeps beyond 11:00 a.m., and that she attends Mr. Miller's late work events).

Ms. McCabe next contends that the record didn't support a finding regarding the children's school tardies. There was in fact a great deal of testimony and documentation provided at trial in this regard. See e.g. Exhibit 28 (Jared's 3rd grade report card shows 4 absences and 8 tardies while 4th grade report card, after restriction of Ms. McCabe's parenting time, shows 0 absences and 1 tardy); VRP

282-283 (Mr. Arras' testimony confirming report card tardy numbers; VRP 606 (Ms. McCabe's testimony confirming 4 tardies in the first semester, but seeking to excuse them due to the West Seattle Bridge's "irregular schedule"); VRP 52-53 (Mr. Arras' testimony that Ms. McCabe's parenting time resulted in 9 unexcused tardies, or 20% of the time she had them overnight and was responsible for transportation); VRP 128 (Ms. McCabe's own father's testimony on Mr. Arras' behalf that the children had only been tardy one time since temporary orders had restricted Ms. McCabe's parenting time).

Ms. McCabe next contends that there was no evidence that the tardies affected the children's performance at school. There was in fact lots of testimony and documentation provided at trial in this regard. See e.g. VRP 49 (Mr. Arras' testimony regarding his volunteering in the children's classes and how exhausted the children were after they stayed overnight at Ms. McCabe's home, which was causing their schooling to suffer (dropping grades and Allegra struggling with reading); VRP 85 (testimony by therapist regarding Jared's reduced aggressions towards peers and improved regulation of his emotions; VRP 105-106 (testimony by therapist regarding the family's "transformation" over the previous year, and Jared and Allegra's

improvements; VRP 128 (testimony by Ms. McCabe's own father regarding the children doing "so much better" when they have stayed overnight at Mr. Arras' house before school days; VRP 150-152 (testimony by Ms. McCabe's own stepmother regarding the great improvement in the children in the year following reduction in Ms. McCabe's parenting time) VRP 183-184 (testimony by Cynthia Arras regarding Jared's improved success in school over the last year being due to better consistency of schedule with Mr. Arras); VRP 349 (testimony by Charlene Harris (DSHS employee and family friend) noting Jared's impressive improvement in his behavior); VRP 279-80 (testimony by Mr. Arras regarding Jared's improved grades and communication skills since having less time at Ms. McCabe's home); VRP 303 (testimony by Mr. Arras regarding Jared's improved behavior, reduced principal office visits, and how his counseling as well as improved rest, nutrition, and consistency with Mr. Arras have contributed to this improvement); VRP 278-79 and Exhibits 27-28 (Mr. Arras' testimony about both children's improvement in their grades after their residential time with their mother was reduced).

Ms. McCabe next contests the finding that her anger was in excess of the fathers, and that she "inappropriately manages

relationships and issues". There was in fact lots of testimony and documentation provided at trial in this regard, including the trial court's own observations of Ms. McCabe in the courtroom. See also VRP 151 (testimony by Ms. McCabe's own stepmother regarding Ms. McCabe being mean, angry, and vindictive; VRP 202-203 testimony by James Arras of verbal abuse of Jared by Ms. McCabe; VRP 216 (testimony by the GAL that her investigation had confirmed that Ms. McCabe had hit and slapped Jared, as well as yelled, screamed, and called him names); VRP 342- 345 (testimony by Charlene Harris about Ms. McCabe having a threatening personality); VRP 118-119, 123, and 126 (testimony by Ms. McCabe's own father regarding incidents where Ms. McCabe had ranted and been delusional and had serious altercations; VRP 425-26: Testimony by Ms. McCabe's own therapist about Ms. McCabe and her mother not having a good relationship, including periods of not speaking to each other).

Ms. McCabe contends that there was no evidence that Jared suffered from mental health issues or had ever been a safety risk to himself or others. There was in fact lots of testimony and documentation provided at trial in this regard. See e.g. VRP 85 (testimony by therapist regarding Jared's reduced aggressions towards

peers and improved regulation of his emotions); VRP 105-106 (testimony by therapist regarding the family's "transformation" over the previous year, and Jared and Allegra's improvements; VRP 303 (testimony by Mr. Arras regarding Jared's improved behavior and reduced principal office visits).

In section 5 of her Appellate Brief Ms. McCabe continues to challenge specific findings of fact. First she challenges the evidence that the children's eating or sleeping schedule at her home wasn't "perfectly regular". The evidence in this regard was already addressed in this brief, above, and won't be repeated. She then repeats a number of issues (e.g. the impact of her move to West Seattle, her work and sleep schedule, her partner's work schedule, etc), and she seeks to argue (and provide new evidence) regarding a whole host of new issues (e.g. whether Mr. Arras' properly sat on Jared to control his anger issues, whether the children's piano teacher was a properly neutral witness, whether the parties have always had a lot of conflict, etc). All of these issues have been addressed ad nauseum above or are not germane.

E. The Trial Court Properly Considered the GAL's Recommendations (argument 7).

In this section Ms. McCabe contends that the trial court abused its discretion by disregarding the GAL's investigation. As discussed

many times above, the GAL's interim and final reports were both entered into the court record and her investigation and testimony at trial was very important to the trial court's ultimate decisions.

Even if the GAL had recommended against a parenting plan modification, which she didn't (she recommended the modification), the trial court is authorized to disregard a GAL report. In re Marriage of Magnuson, 141 Wn. App. 346, 350-51, 170 P.3d 65 (2007). While GALs are appointed to make "recommendations", the trial court itself is to independently conduct its inquiry rather than simply delegating this responsibility to the GAL. In re Parentage of Schroeder, 106 Wn. App. 343, 352, 22 P.3d 1280 (2001). But again, the GAL recommended the modification in her initial report, and then in her testimony at trial. See VRP 228-229 (discussing how much better the children have been doing since the temporary parenting plan restricted Ms. McCabe's parenting time, and verbally modifying her final report's recommendation by stating that that recommendation had been based a provision for court review in 6 months (with the GAL to stay on board) but without those two things the children's interests were best served by "reduced time with the mother".

F. The Court Properly Considered Courtroom Demeanor (argument 8).

Ms. McCabe next contends that the trial court improperly considered her courtroom demeanor. There is no prohibition against a trial court considering witness credibility. Appellate courts on the other hand are not to make credibility determinations or weigh evidence. In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). In sections 2.2 of the Order the court noted that some credibility determinations were necessary, and that where the parties had contrary assertions Mr. Arras was deemed more credible because his testimony was corroborated by other witnesses that one wouldn't expect to be biased towards him (e.g. Ms. McCabe's own father and step-mother, the piano teacher, and the children's counselors). The Court also found Mr. Arras more credible than Ms. McCabe given observations of their respective demeanor in court, with Ms. McCabe being obfuscating and evasive during testimony, including claiming that she didn't even understand simple questions. Furthermore, the Court noted that testimony by witnesses, as well as Ms. McCabe's own demeanor in court and inappropriate escalating anger while testifying, demonstrated that she needs to get her own way. This was all well within the trial court's authority.

G. The Trial Court Properly Followed the Evidentiary Rules (argument 9).

In this section Ms. McCabe contends that the trial court improperly let in child hearsay. At trial there was testimony from multiple witnesses that the children had told them about the physical and verbal abuse being heaped upon them by Ms. McCabe. Since the trial court didn't make a finding under RCW 26.09.191, and thus RCW 26.09.260(4) wasn't utilized as a basis for its modification of the parties' parenting plan, this issue isn't relevant. However, if the court had chosen to utilize those statements of abuse, as is argued by Mr. Arras on appeal (per RAP 2.5(a), which allows affirming a decision upon any theory established by the pleadings and proof), it very well could have per In re Dependency of M.P., 76 Wn. App. 87, 882 P.2d 1180 (1994), which provides an exception to the hearsay rule where statements are made to a therapist. Allegra confirmed the abuse to her therapist. VRP 83-84. The GAL also spoke with both children and they both confirmed the abuse to her. Additionally, ER 1101(c)(4) provides that trial courts are not required to abide by the rules of evidence (including hearsay rules) in domestic violence proceedings. Last, as Ms. McCabe notes, the trial court also considered the child hearsay based on the "state of mind" exception of ER 803(a)(3). On appeal Ms.

McCabe seeks further argument regarding this exception, but she provides no evidence on appeal that her attorney properly preserved this objection for appeal.

H. The Trial Court Properly Denied Ms. McCabe's Motion to Amend her Response to Mr. Arras' Petition for Modification (argument 10)

Mr. Arras filed his Petition for modification of the parties' parenting plan on August 2, 2012. CP 1-4. On July 3, 2013 Ms. McCabe filed a "Motion to Amend Response to Include Counterclaim". CP 89 - 94. Ms. McCabe wished to state a counterclaim asking the court to modify the parties' parenting plan to make her the primary parent, and on appeal she contends that the trial court's denial of her request to file an amended response was an abuse of discretion.

The trial court properly denied Ms. McCabe's motion as it was procedurally inappropriate. A Summons was served upon Ms. McCabe that stated that she was to file a response within 20 days of receipt of Mr. Arras' Petition for modification (see CP 300 – 301), yet she waited 11 months to file her motion. Her motion was filed on the eve of trial, 10 months after the parties' August 27, 2012 Adequate Cause Hearing, eight months after the November 26, 2012 Confirmation of Issues,

seven months after the December 21, 2012 Status Conference, two months after the May 21, 2013 Pretrial Conference, and a month after the June 3, 2013 discovery cutoff. Moreover, Ms. McCabe hadn't actually even filed a Response prior to her motion that could therefore be amended, thus making her motion nonsensical.

As the trial court noted in section 2.7 of the Order on Modification, even if Ms. McCabe's motion to assert a new counterclaim had been allowed the trial court hadn't found any evidence to support her request that she be the primary parent. The trial court specifically noted that Mr. Arras had been and continued to be the parent who provided the greatest continuity in parenting functions (feeding, homework, extracurricular activities, medical treatment, and a regular schedule), with even Ms. McCabe's own father (Michael McCabe) and her own witness (Meaghan Darling) testifying that Mr. Arras was the primary parent and that the children were more bonded to him.

I. The Trial Court did not Abuse Its Discretion by not Awarding Attorney Fees to Ms. McCabe, Nor are They Warranted Now on Appeal (argument 11).

Ms. McCabe contends that Mr. Arras' counsel unnecessarily added to the costs of trial, citing to VRP page 661 for the proposition

that Mr. Arras' counsel "conceded that he had extended the trial by an extra day by presenting 'a lot of witnesses going over the same stuff over and over.'" Review of that page of testimony shows that Ms. McCabe is misstating the record. At the outset of closing argument, counsel for Mr. Arras simply started off by stating that trial had been longer than anticipated by an extra day, and that the court had heard extensive testimony from a lot of witnesses going over a lot of the same information. There was nothing improper by counsel's statements; it is common for trials to go longer than anticipated, and for witnesses to inadvertently provide duplicative testimony.

Ms. McCabe also contends that defending herself against Mr. Arras' false allegations was expensive. The trial court granted Mr. Arras' petition for modification of the parties' parenting plan, so his allegations were not false. If anything Mr. Arras should have been granted attorney fees against Ms. Arras for her intransigence during the proceedings, which the trial court apparently considered but decided against in its final Order, stating:

> While there are some concerns about the Respondent's excessive litigation, in these proceedings as well as peripheral proceedings (e.g. the anti harassment order appealed to the Washington State Supreme Court), the litigation is not found to have reached the level of intransigence requiring her to pay the Petitioner's attorney

fees.

CP 192.

The trial proceedings required seven hearings, due largely to Ms. McCabe appealing nearly every family law commissioner ruling. She also appealed a separate anti-harassment order all the way up to the Washington State Supreme Court. See Exhibit 2-5. Mr. Arras testified at trial about his incurring attorney fees and costs totaling $50,436.80, while Ms. McCabe went through three different attorneys. If anyone should have been granted attorney fees after trial it is Mr. Arras, but the court ruled in section IV of the Order that both parties were to pay their own fees and costs. CP 192.

Also, Ms. McCabe didn't provide any of the required financial documentation to support a request for fees. See KCLFLR 10 (parties required to provide a financial declaration, tax returns, paystubs, account statements for any request for financial relief).

Ms. McCabe also requests attorney fees for the cost of this appeal. First of all this appeal was brought by Ms. McCabe, not Mr. Arras, so the costs caused by these proceedings were brought about by Ms. McCabe herself. Mr. Arras is an unwilling litigant at this point, having to defend the trial court and its decision. Secondly, Ms.

McCabe, chose to proceed pro se on appeal (she had 3 attorneys previously). As she notes in her materials however, she is an attorney, so she is able to adequately pursue this appeal while Mr. Arras has to continue with counsel to defend the trial court's decisions, which foists unnecessary attorney fees solely upon him.

J. Mr. Arras is Entitled to His Fees and Costs on Appeal.

An award of attorney fees is statutorily authorized in appeals in family law proceedings, RCW 26.09.140 providing: "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney fees in addition to statutory costs." In awarding fees under RCW 26.09.140, the appellate court may consider the arguable merit of the issues on appeal. In re Marriage of Booth, 114 Wn.2d 772, 791 P.2d 519 (1990). As noted above, Ms. McCabe, as an attorney proceeding pro se, has foisted great expense upon Mr. Arras as he is forced to defend the trial court's orders. Just as the evidence at trial showed Ms. McCabe to appeal every ruling by a commissioner on the family law motions calendar, requiring seven hearings.

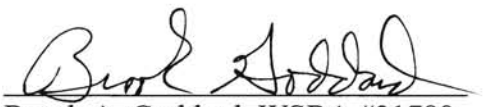
III. CONCLUSION

The court should affirm the trial court's order and award Mr.

Arras his attorney fees and costs in responding to this appeal.

Date: May 2, 2014

Goddard Wetherall Wonder, PSC



Brook A. Goddard, WSBA #31789
Attorney for Respondent

DECLARATION OF MAILING

I, Eileen King, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am a citizen of the United States and resident of the State of Washington, I'm over the age of 18, I'm not a party to the above-entitled action, and I'm competent to be a witness herein; and

2. On the below stated date, I mailed via 1st Class US Mail a true and correct copy of the Respondent's Brief (amended with adjusted margins) to the Appellant at the following address: 5260 18th Avenue SW, Seattle, WA 98106

DATE: May 2, 2014.

Eileen King
Assistant to Brook A. Goddard