No. 45235-9-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

KAREN THIEL,

Respondent,

v.

BRIAN MASSINGHAM,

Appellant.

BRIAN MASSINGHAM'S REPLY BRIEF

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A. *Russell* and *Cooper* are Still Good Law

Respondent cannot distinguish either *Russell* or *Cooper* from this case. She concedes that *Russell* holds a contempt proceeding is a separate proceeding from the underlying action.[1] She argues that in *Russell* the alleged contemnors established actual prejudice and that Appellant did not show actual prejudice in his change-of-judge motion.[2] Assuming this is true, it is of no moment. RCW 4.12.040 makes clear that actual prejudice need not be shown. The trial judge's prejudice is exclusively established once the appropriate motion and declaration are filed. "No showing of actual prejudice is required."[3] There is no meaningful distinction between this case and *Russell* on an actual prejudice showing.

Respondent cannot meaningfully distinguish *Cooper*. She misstates the procedural facts in *Cooper* and argues the contempt proceeding here is distinguishable because it was commenced by serving a motion and order to show cause.[4] In *Cooper* a party moved to vacate a divorce decree based upon fraud, but it did not commence the proceeding by serving a summons and complaint as Respondent states in her brief; rather, the proceeding was "commenced by service of a copy of the petition and service of notice *in*

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[1] *See* Br. of Resp't. at 2, citing *State ex. rel. Russell*, 77 Wash. 631, 138 P. 291 (1914).
[2] *Id.*
[3] State v. Waters, 93 Wn. App. 969, 974, 971 P.2d 538, 541 (1999)
[4] Br. of Resp't. at 2-3

the nature of a summons as required by the provisions of the abovementioned statute and the filing of the petition."[5] Today, motions to vacate a judgment based on fraud are under CR 60(b)(4) and must be commenced by obtaining an order to show cause and then personally serving the motion to vacate, supporting affidavit, and order to show cause on the opposing party.[6] This is the procedure Respondent used to have her contempt proceeding determined. There is no meaningful distinction between this case and *Cooper*.

B. A Child Relocation Proceeding is not the Same Proceeding as a Parenting Plan Modification Proceeding if the Children's Relocation is not a Contested Issue Because the Grounds and Relief Requested are Completely Different.

The grounds to modify a parenting plan in a child relocation proceeding are completely different than in a parenting plan modification proceeding. First, the Child Relocation Act (RCW 26.09.405 *et seq.*) (CRA) "shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child *and the relocating person*."[7] In fact, it is error to only consider the children's best interests.[8] In parenting

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[5] Cooper v. Cooper, 83 Wash. 85, 86, 145 P. 66, 67 (1914).
[6] CR 60(e)(1)-(3). A show cause order is an order that the accused must appear to answer the charge of disobedience of the court's order. Burlingame v. Consol. Mines & Smelting Co., Ltd., 106 Wash. 2d 328, 334-35, 722 P.2d 67, 71 (1986) and is required in a contempt proceeding. State ex rel. Gardner v. Superior Court for King Cnty., 186 Wash. 134, 141-42, 56 P.2d 1315, 1318 (1936)
[7] In re Marriage of Horner, 151 Wash. 2d 884, 887 and 894, 93 P.3d 124, 126-27 (2004) *citing* RCW 26.09.520.
[8] Horner, 151 Wash. 2d 886-90

plan modifications, on the other hand, the focus is entirely on the children's, and neither parent's, best interests.[9]

Under the CRA "courts have the authority to allow or disallow relocation of the child."[10] Historically, this was not the case. In *In re Marriage of Littlefield,* the Washington Supreme Court made clear that Washington's Parenting Act (prior to the CRA being enacted) did not permit a court to restrict a parent moving away with a child absent a RCW 26.09.191 factor (not present here).[11] Prior to the CRA, a parent had to petition for minor modification of the parenting plan and meet the modification factors to relocate with a child.[12] In parenting plan modification actions courts can modify a parenting plan, but only after finding adequate cause and finding that the modification is in the children's best interests and the modification will serve those interests.[13]

The legislature superseded *Littlefield* and *Pape* by enacting the CRA and altered the legal and factual analysis in a child relocation proceeding so that it became substantially different than the analysis in a parenting plan modification.[14] Now, the CRA requires courts to consider

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[9] RCW 26.09.260(1); and In re Custody of Halls, 126 Wn. App. 599, 607, 109 P.3d 15, 20 (2005)
[10] RCW 26.09.420; and In re Custody of Osborne, 119 Wash. App. 133, 140, 79 P.3d 465, 469 (2003)
[11] In re Marriage of Littlefield, 133 Wn.2d 39, 56, 940 P.2d 1362, 1371 (1997)
[12] In re Marriage of Pape, 139 Wn.2d 694, 716, 989 P.2d 1120, 1132 (1999)
[13] Halls, 126 Wn. App. at 607
[14] In re Marriage of Grigsby, 112 Wn. App. 1, 7, 57 P.3d 1166 (2002).

10 equally weighted factors and not the modification requirements.[15] The intended relocation is presumed and the burden is on the objecting parent to show detriment to the children caused by relocation outweighs the benefits to both the children and the relocating parent.[16] Prior, the burden was on the relocating parent to establish the grounds for a modification.[17] The legislature also bifurcated a child relocation proceeding. The first issue is whether the children should be allowed to relocate. Only after that determination may a trial court determine a request to modify a parenting plan pursuant to relocation.

> The court may order adjustments to the residential aspects of a parenting plan pursuant to a *proceeding* to permit or restrain a relocation of the child...The court *shall first determine whether to permit or restrain the relocation of the child* using the procedures and standards provided in RCW 26.09.405 through 26.09.560. *Following that determination*, the court shall determine what *modification pursuant to relocation* should be made, if any, to the parenting plan or custody order or visitation order.[18]

The legislature expressly referred to the process to determine child relocation as a "*proceeding*." The same term Appellant applies to that process in his Opening Brief. Finally, under the CRA, adequate cause is

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[15] Horner, 151 Wash. 2d at 887

[16] RCW 2.09.520; and Grigsby, 112 Wn. App. at 7-8

[17] Pape, 139 Wash. 2d at 716. The substantial change of circumstances threshold is the same for both a major and a minor parenting plan modification proceeding. In re Marriage of Tomsovic, 118 Wash. App. 96, 105-06, 74 P.3d 692, 696 (2003)

[18] *Id.* RCW 26.09.260(6) distinguishes a parenting plan modification that is made during a child relocation proceeding from a traditional parenting plan modification action by calling it a different term – "*modification pursuant to relocation*" In addition, RCW 26.09.480(1) refers to a parenting plan modification request in a child relocation proceedings as a "petition for modification of the parenting plan *pursuant to relocation*."

no longer required to be shown prior to adjusting a parenting plan's residential provisions so long as the children's relocation is an issue.[19]

If, however, the children's relocation is no longer an issue, then a parent desiring to modify a parenting plan must meet the modification standards, including adequate cause, to proceed.[20] Appellant's objection to relocation shows the difference between a traditional parenting plan modification proceeding and a modification pursuant to relocation proceeding. In his objection to relocation, he specifically referred to his objection as a "petition for modification of custody decree/parenting plan/residential schedule *pursuant to relocation*."[21] In paragraph 3.2 he stated adequate cause was not necessary because the relocation was being pursued, but "[e]ven if relocation is not being pursued, then there is adequate cause to adjust the *non-residential* provisions of the parenting plan."[22] Appellant did not originally seek to establish adequate cause to modify the parenting plan's residential provisions if the children's relocation was no longer an issue.

When Appellant subsequently abandoned his right to try to restrain the children's intended relocation, he brought the only action he was allowed to: a traditional parenting plan modification that required adequate cause

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[19] RCW 26.09.260(6)
[20] Grigsby, 112 Wash. App. at 16
[21] Objection, ¶3.1 CP 516.
[22] CP 516 (emphasis added).

as well as meeting the RCW 26.09.260(1) requirements. Once Appellant conceded Respondent and the children could relocate to Olympia, the relocation was no longer an issue and therefore, was not being pursued. Accordingly, the exemption from adequate cause in RCW 26.09.260(6) no longer applied.[23] Respondent was, therefore, limited to a traditional parenting plan modification proceeding if he wanted to change the residential schedule.

His subsequently-filed traditional parenting plan modification also alleges different relief and facts supporting the relief requested. In his relocation objection, Appellant requested a change in the children's primary residential parent and also alleged there was adequate cause apart from the proposed relocation to adjust only the *non-residential* aspects of the parenting plan. To the contrary, in his subsequently filed traditional petition to modify the parenting plan, Appellant alleged there was adequate cause for the proposed modification.[24] Appellant sought only a minor parenting plan modification that would not change the children's primary residential parent, and he alleged the Mother's and children's relocation was a substantial change of circumstances that occurred after the original parenting plan was entered, that the minor modification would

[23] Grigsby, 112 Wash. App. at 16
[24] *See* February 13, 2013 Thurston County Petition for Modification, ¶2.2 CP 191.

be in the children's best interests.[25] Finally, in his description of the substantial change of circumstances he conceded Respondent had relocated herself and the children to Olympia.[26] Under these circumstances, Appellant's subsequently filed traditional petition to modify the parenting plan was a completely different proceeding than the previous child relocation proceeding because the traditional modification proceeding involved different facts (best interest of children and not involving the advantages relocation offered to the Respondent), different grounds (RCW 26.09.260(1) and (5) versus the ten factors in the CRA), and different relief (minor modification that does not change the primary residential parent versus a modification on relocation that would have changed the primary residential parent and adjustments to the parenting plan's non-residential provisions).

At least one case recognizes the fundamental differences between child relocation proceedings and traditional parenting plan modification proceedings. In *In re Marriage of Pennamen*[27] the father objected to the mother relocating the children to Texas and he also brought a traditional parenting plan modification proceeding. The family law commissioner considered two declarations produced by father showing mother and her

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[25] See February 13, 2013 Thurston County Petition for Modification, ¶2.10 CP 193.
[26] See February 13, 2013 Thurston County Petition for Modification, ¶2.13 CP 193.
[27] 135 Wash. App. 790, 146 P.3d 466 (2006)

fiancé used methamphetamine and that fiancé was also domestically violent. The commissioner found father had not established adequate cause because there was no "nexus" between mother's and her fiancé's behaviors and the children's present environment and dismissed father's traditional parenting plan modification proceeding.[28] At the relocation trial, father introduced the same evidence as to mother's and her fiancé's behavior, and the trial court denied the children's relocation based, in part, on a conclusion that those behaviors constituted a basis for a RCW 26.09.191(3) discretionary limitation, which is a factor that must be considered in a relocation proceeding.[29]

The mother in *Pennamen* appealed. She argued that father was precluded from raising her or her fiancé's drug use or domestic violence in the relocation proceeding.[30] The Appellate Court disagreed because mother's drug use in the traditional parenting plan proceeding was a different issue when used in the child relocation proceeding.

> [Mother]'s argument fails because the issues were not identical. The commissioner found no nexus between [mother]'s drug use and the statutory requirements in RCW 26.09.260 for modification. In contrast, the trial court found there was a nexus between the mother's drug use and her ability to parent the children in the context of whether to allow relocation under RCW 26.09.520. *These are two different issues*. RCW 26.09.260 limits the circumstances in which a court may modify a parenting plan. The

[28] In re Marriage of Pennamen, 135 Wash. App. 790, 806, 146 P.3d 466 (2006).
[29] *Id.* at 804-05.
[30] *Id.* at 805.

> key issue for the commissioner was whether the children's present environment was so detrimental to their well-being that the benefit of a change in the parenting plan would outweigh the harm from moving the children out of the mother's home. (Citation Omitted). *This is different from a relocation proceeding, where the key issue is whether the future detrimental effects of allowing relocation outweigh the benefits of the move.* (Citation Omitted). In one case, the court is changing custody. In the other, custody remains the same. This is a significant difference.

Similar to the contempt proceedings initiated by Respondent, Appellant's traditional parenting plan modification action involved different grounds, relief requested, and was a separate proceeding from the previously-filed relocation proceeding, entitling both parties to require judicial recusal pursuant to RCW 4.12.050.

C. The Trial Court Impermissibly Modified the Parenting Plan When it Allowed Respondent Sole Decision-Making Over the Parties' Children Without Finding Adequate Cause or Making the Findings Required Under RCW 26.09.260.

Respondent provides neither authority nor argument to negate RCW 26.09.270's provision that requires courts to find adequate cause, find a modification is in the children's best interest, and find that the modification would serve the children's best interests. Instead, she argues that the trial court's order was "to handle the 'contemptuous' interference with a previously-ordered counselor."[31] Parenting plan violations, however, cannot be considered as a basis to modify a parenting plan

[31] Br. of Resp't. at 8.

absent the required best interests finding.[32] Even assuming, arguendo, Appellant's actions were contemptuous, a trial court still may not modify a parenting plan without complying with RCW 26.09.070 and the case law cited in Appellant's Opening Brief.

Next, Respondent argues the trial court's order was part of the traditional ongoing parenting plan modification proceeding Appellant instituted in Thurston County. Her argument is incorrect. First, Decision making was not an issue in Appellant's traditional parenting plan modification proceeding. Appellant did not request any adjustments to the non-residential aspects of the existing parenting plan,[33] and Respondent did not file a counter-petition.

Respondent next argues the trial court's order changing decision making for the children's counseling was a temporary order. It is not. It is of indefinite duration. The American Heritage Dictionary defines permanent as "Fixed and changeless, *lasting or meant to last indefinitely*."[34] Because the trial court's order, on its face, shows it is to last indefinitely, it is a permanent order.

D. The Judge Judge Should Have Recused Himself for Cause Because he Acted With an Appearance of Impropriety and not with an Appearance of Fairness.

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[32] *Id.*
[33] *See* February 13, 2013 Thurston County Petition for Modification, ¶2.12 CP 193.
[34] American Heritage Dictionary (1982) at 976.

The trial judge went beyond assessing credibility, and his demeanor crossed the line into perceived impropriety and unfairness. Respondent tries to justify the trial judge's actions by arguing they are part of determining credibility. She fails to address the trial judge stating in open court he was going to refer Appellant's counsel to the Washington State Bar Association (WSBA). She does not mention that when the attorney corrected the trial court and stated the two hour commute was for a round-trip that it justified the trial judge saying that statement threw Appellant's and his attorney's credibility out the window. She does not address the trial judge stating in open court that Appellant's counsel's sworn declaration was "a lie." These comments go beyond a credibility determination and show an appearance of impropriety or unfairness.

E. The trial court abused its discretion by modifying the May 2012 permanent parenting plan by giving Respondent sole decision making for children's counseling without following the required procedures in RCW 26.09.260 and .270.

1. The standard of review to determine parenting plan provisions is abuse of discretion.

Parenting plan provisions are reviewed for abuse of discretion.[35] Here, Appellant seeks review of a provision re-allocating decision making over the children's counseling. It is, therefore, a parenting plan provision and should be reviewed under the abuse of discretion standard.

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[35] *In re Custody of Halls*, 126 Wn. App. 599, 606, 109 P.3d 15, 19 (2005).

A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.[36] A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices.[37]

Despite using an abuse of discretion standard, a trial court's discretion has been expressly limited by the legislature.[38] The legislature allows a court to modify a parenting plan or custody decree pursuant only to RCW 26.09.260 and .270. RCW 26.09.260(1).[39] RCW 26.09.260 sets forth the procedures and criteria to modify a parenting plan. These procedures and criteria limit a court's range of discretion.[40] Accordingly, a court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria.[41]

2. The trial court did not follow the requirements set forth in RCW 26.09.260 and .270.

The trial court did not follow the statutory requirements to modify the parties' May 2012 agreed permanent parenting plan's non-emergency health care provisions. A permanent parenting plan may be changed in three ways: by agreement, by petition to modify, and by temporary

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[36] *Halls*, 126 Wn. App. at 606
[37] *Id.*
[38] *Id.*
[39] *In re C.M.F.*, 314 P.3d 1109, 1112 (Wash. 2013)
[40] *Halls*, 126 Wn. App. at 606, *citing, In re Marriage of Hoseth,* 115 Wn.App. 563, 569, 63 P.3d 164 (2003)(citing *In re Marriage of Shryock,* 76 Wn.App. 848, 852, 888 P.2d 750 (1995), *review denied,* 150 Wn.2d 1011, 79 P.3d 445 (2003)).
[41] *Halls*, 126 Wash. App. at 606 *citing Hoseth,* 115 Wn.App. at 569, 63 P.3d 164

order.[42] Here, it not disputed the parties never agreed to a change in the decision making provisions of the May 2012 permanent parenting plan. Moreover, it is similarly not disputed the May 2012 permanent parenting plan was not a temporary order.

a. The July 2013 Order modified the May 2012 parenting plan

The trial court modified the May 2012 agreed permanent parenting plan's decision making provisions. A modification to a parenting plan occurs "when a party's rights are either extended beyond or reduced from those originally intended in the decree."[43] In *In re Marriage of Christel & Blanchard*,[44] the appellate court held that re-writing a dispute resolution provision so it dealt with how to determine the child's enrollment in school in the future was a modification because it went "beyond explaining the provisions of the existing parenting plan. The language goes beyond filling in procedural details. The order on its face imposes new limits on the rights of the parents."[45]

Judge Hunt also modified the parties' May 2012 agreed permanent parenting plan's decision making provisions that explicitly provides in two places (¶¶ 3.13, 4.2) non-emergency health care decisions are made

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[42] *In re Marriage of Christel and Blanchard*, 101 Wn. App. 13, 23, 1 P.3d 600 (2000).
[43] *In re Marriage of Christel & Blanchard*, 101 Wn. App. 13, 22, 1 P.3d 600, 605-06 (2000), *citing, Rivard v. Rivard,* 75 Wn.2d 415, 418, 451 P.2d 677 (1969).
[44] 101 Wn. App. 13.
[45] *Christel*, 101 Wn. App. at 23

jointly. Judge Hunt's July 12, 2003 Order modifies the parenting plan's non-emergency health care provisions by allowing Respondent "to take either or both children to a counselor or counselors selected by the respondent."[46] This was a modification for four reasons. 1. It limited Appellant's rights under the parenting plan because he no longer had decision making authority over who the children's non-emergency health care provider would be or whether they should participate in counseling. 2. It expanded Respondent's rights to make the children's non-emergency health care decisions on counseling. 3. It was a forward looking provision on counseling yet to occur. 4. It is a permanent order, not a temporary order. There is no duration in the counseling provision. Because it was forward looking and permanent, expanded Respondent's decision making rights, and limited Appellant's decision making rights, it modified the parties' May 2012 agreed permanent parenting plan.

b. Requirements to properly modify a parenting plan

To modify a parenting plan, a court must follow the provisions in RCW 26.09.260 and .270.[47] Modification requires a petition, proper service, a finding of adequate cause, and then a finding that the change is in the children's best interests.[48] RCW 26.09.260(1) states:

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[46] CP 351 at ¶ 1.
[47] *Halls*, 126 Wn. App. At 606
[48] *Id.*

> Except as otherwise provided in subsections (4) ... and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds ... that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

RCW 26.09.270 states:

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

Christel & Blanchard also held that because the trial court modified the dispute resolution provision in the parenting plan, the trial court had to comply with RCW 26.09.260 and .270 (a petition, an adequate cause finding, and a finding that the change was in the children's best interests) when entering the order and that failure to do so was abuse of discretion.[49]

c. Judge Hunt did not follow the requirements to modify a parenting plan

Judge Hunt did not follow the requirements to modify a parenting plan. He did not preliminarily address adequate cause, did not set a subsequent hearing for the modification, and he did not make a finding the modification would be in the children's best interests.

[49] *Christel*, 101 Wn. App. at 23-24.

(i) Failure to preliminarily address adequate cause

Judge Hunt abused his discretion because he never preliminarily addressed or decided whether adequate cause existed for the proposed change prior to setting the matter for hearing on the merits as required by RCW 26.09.270. A "court is required to deny a motion that seeks to modify a parenting plan provision unless the court finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted."[50] While a trial court's adequate cause determination is reviewed for abuse of discretion,[51] Judge Hunt never addressed adequate cause or made an adequate cause finding in his July 2013 Order.

(ii) Modifying the parenting plan without subsequent hearing

Judge Hunt abused his discretion when he modified the parties' May 2012 agreed permanent parenting plan at the first hearing where that relief was requested. "Under RCW 26.09.270, the trial court does not have the unfettered discretion to decide what kind of hearing to hold and when to hold it."[52] RCW 26.09.270 expressly requires courts to first determine whether adequate cause exists for the proposed modification and then, and

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[50] *Id.*, citing RCW 26.09.270.
[51] *In re Marriage of Kinnan*, 131 Wn738, 750, 129 P.3d 807 (2006), citing *In re Marriage of Flynn*, 94 Wn. App. 185, 189–91, 972 P.2d 500 (1999).
[52] *Kinnan*,131 Wn. App. at 751.

only then, can it "set a date for hearing on an order to show cause why the requested order or modification should not be granted." The trial court not only did not first find adequate cause, it also modified the May 2012 agreed permanent parenting plan at the first hearing after Respondent filed her contempt motion wherein she requested the trial court modify the decision making provisions in the parties' May 2012 agreed permanent parenting plan to give her sole decision making over the children's counseling. This was reversible error.

(iii) Failure to find modification was in children's best interests

Judge Hunt abused his discretion when he entered the July 2013 Order and modified the non-emergency health care decision making provisions in the May 2012 agreed permanent parenting plan when he made the modification without finding the change was in the children's best interests. "Absent a finding that modification is in the best interests of a child, the court may not modify for mere violations of the parenting plan."[53] Failure to make a required finding must be treated as though a finding of fact against the party with the burden of proof was made. Here, Respondent bore the burden to prove her proposed change to the decision making provisions was in the children's best interests.[54]

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[53] *Halls*, 126 Wash. App. at 607, citing, *See e.g., Thompson v. Thompson,* 56 Wn.2d 244, 250, 352 P.2d 179 (1960); *Schroeder,* 106 Wn.App. 343, 351, 22 P.3d 1280 (2001).
[54] *Halls*, 126 Wash. App. at 607

Judge Hunt made no finding that Respondent's requested change to the non-emergency health care decision provisions in the May 2012 agreed permanent parenting plan was in the children's best interests. Having not made an essential finding upon which Respondent bore the burden requires this Court to conclude such finding against Respondent. Having found against Respondent, Judge Hunt erred when he modified the May 2012 agreed permanent parenting plan's decision making provisions regarding non-emergency health care. Reversal is required.

F. Judge Hunt violated Appellant's due process rights and abused his discretion when he denied Appellant's motions to recuse Judge Hunt from the contempt and modification proceedings based on the appearance of fairness.

1. The standard of review

The standard of review when a judge refuses to recuse himself is abuse of discretion.[55] "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.[56] The judge abused his discretion by applying an erroneous view of the appearance of fairness doctrine.

2. Judge Hunt used the wrong standard when analyzing appearance of fairness.

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[55] *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056, 1064 (2009).
[56] *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054, 1075-76 (1993).

"Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) require that a judge disqualify from hearing a case if that judge is biased against a party ***or*** *if his or her impartiality may be reasonably questioned.*"[57] (Emphasis added). "The test to determine whether a judge's impartiality might reasonably be questioned is an objective one that assumes that a reasonable person knows and understands all the relevant facts."[58] "[I]n deciding recusal matters, *actual prejudice is not the standard.*"[59] [Emphasis added].

Judge Hunt seems to apply an actual prejudice standard to the request that Judge Hunt recuse himself based on the appearance of fairness doctrine. In his July 12, 2013 Order on Petitioner's Motion for New Judge and Affidavit of Prejudice, Judge Hunt found:

> The [Appellant] did not present any evidence or file an affidavit as required by RCW 4.12.050, that would substantiate that Judge Hunt *is prejudiced* against the petitioner or his counsel, so that petitioner or his attorney cannot or believes that he cannot, have a fair and impartial trial by Judge Hunt.[60]

This underscores that Judge Hunt required Appellant show that he was actually prejudiced against Appellant, but the correct standard is either the judge being actually prejudiced ***or*** *that the judge's impartiality may be*

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[57] *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056, 1064 (2009).
[58] *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 340, 54 P.3d 665, 683 (2002).
[59] *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355, 378 (1995) amended, 61645-1, 1996 WL 137107 (Wash. Jan. 31, 1996).
[60] CP 347-48, Finding 11.

reasonably questioned. Judge Hunt's July 12 Order did not address or make any findings as to the second, objective component of the appearance of fairness doctrine. Having failed to apply the correct law to Appellant's motion, Judge Hunt necessarily abused his discretion and his July 12 Order on Petitioner's Motion for New Judge must be reversed.

3. Had Judge Hunt used the proper standard, then the result should have been different.

When reversing Judge Hunt's July 12 Order on Petitioner's Motion for New Judge, this Court should remand with instructions for Judge Hunt to grant Appellant's motion for a new judge because had he applied the correct legal standard, he should have recused himself.

The hearings before Judge Hunt in the prior Lewis County relocation matter show an escalating series of exchanges between Judge Hunt and three different attorneys that, together, show the appearance of bias or prejudice. On August 17, 2012, in the prior Lewis County relocation proceedings, Judge Hunt chastised Appellant's attorney Robert Cadranell and expressed doubt as to Appellant's credibility ("it throws the entire analysis of what the individual says out the window almost.")[61]

Appellant filed a motion to appoint a guardian ad litem for the limited purpose of interviewing the then 14 and 11 year old children on their thoughts on relocating after spending their entire lives in Adna and having

[61] *See* August 17, 2012, RP 14:18-20.

their school and extracurricular activities there.[62] The hearing was October 12, 2012. Cadranell again represented Appellant. Judge Hunt did not read Appellant's reply, although timely filed.[63] He found the motion brought in bad faith and assessed $1,000 in terms against Appellant.[64]

The next hearing was on Appellant's moot motion to change venue, mooted by Appellant voluntarily dismissing his objection to relocation, and Respondent's motion to dismiss Appellant's motion to change venue. The hearing occurred on February 7, 2013, and Appellant was represented by Dennis McGlothin, a different attorney in the same firm as Mr. Cadranell. At that hearing, Judge Hunt called Mr. McGlothin a liar. Judge Hunt said that Mr. McGlothin's claim that the settlement commissioner told him that the judges in Lewis County did not like Appellant was "a lie."[65] He also stated that he had taken it upon himself to contact Thurston County about Appellant's pending modification action in that county, which arguably contravened the Code of Judicial Conduct.[66]

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[62] Supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available.
[63] RP 5:2-9 (Oct. 12, 2012).
[64] RP 8:15-17 (Oct. 12, 2012); and Order, supplemental designation of clerk's papers filed herewith; awaiting CP numbers and will amend brief when available
[65] RP 9:17-22 (Feb. 7, 2013).
[66] RP 9:1-2 (Feb. 7, 2013). The purpose of CJC Rule 2.9 relating to *ex parte* communication is obvious from its context. Judges are precluded from initiating, permitting, or considering ex parte communications outside the presence of the parties and their counsel about a pending or impending matter. The Rule makes a special effort to preclude expert advice on the law without providing a reasonable opportunity to respond. In addition, a limited right to confer with other judges or court staff is coupled

The next hearing was on Respondent's motion for contempt, held as set forth on the show cause order on May 22, 2013.[67] Appellant was again represented by Mr. McGlothin at that hearing. This time, Judge Hunt said to Mr. McGlothin in open court that he believed Mr. McGlothin had set about to "torpedo" his order, that he did not believe Mr. McGlothin's stated motive for writing a letter to a therapeutic counselor, and that he was going to be sending "an official complaint" to the WSBA.[68]

The presentation hearing for the orders on Appellant's motion for new judge occurred on June 14, 2013. Appellant was represented by Anthony Gipe, with the same law firm as Messrs. McGlothin and Cadranell. Judge Hunt engaged in a bitter exchange with Appellant's third attorney, making clear he had a vendetta against McGlothin and evidence the appearance of bias or prejudice.[69] Taken together, Judge Hunt's statements make an objective appearance of bias and prejudice sufficient to require recusal.

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with an obligation not to consider things outside the record. Comment [6] expressly provides that a judge is not to investigate facts in other mediums outside the record. Certainly the spirit, and probably the letter, of Rule 2.9 was violated when *sua sponte* Judge Hunt contacted Thurston County about the matter filed by Mr. Massingham. Judge Hunt stated on the record he had contacted Thurston County, although to whom he spoke and what he said is unknown. Obviously, a conclusion can be drawn from the context of his comments that by doing so he expressly wanted to poison the well against Mr. Massingham in Thurston County. Judge Hunt's conduct clearly implicates Rule 2.10(A) which prohibits a judge from making "any nonpublic statement that would reasonably be expected to substantially interfere with a fair trial or hearing."

[67] CP 350.

[68] RP 16:5-12; 22:17-23:6 (May 22, 2013).

[69] RP 20:1-19 (June 14, 2013):

THE COURT: Yes, and let me say that I know that you weren't involved in it, and Mr. McGlothin noted this matter. How could he note it with such issues as are brought here

G. Appellant's objection to relocation is different from his petition to modify the existing parenting plan

Judge Hunt erred when he found Appellant's July 2012 objection to relocation was a petition for modification because objections to relocation are different from petitions to modify a parenting plan. A party objecting to relocation objects to *the children* relocating with a primary residential parent.[70] A parent may also modify a parenting plan based on a change in circumstances since entering the last parenting plan.[71] "Ordinarily, in a relocation case, it will not be necessary for the court to consider whether there is a substantial change in circumstances, or to consider the factors contained in RCW 26.09.260(2)."[72] Instead, the trial court must consider 10 equally weighted factors in RCW 26.09.520.[73]

In relocation cases courts do not consider whether to modify the parenting plan until after they determine whether to restrain the children's

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and then send you down here to argue these motions? He's not available to argue a motion that he set?
Mr. GIPE: He had another motion already set on an emergency basis that he had to deal with. That's my understanding. He could not be here. I was only – and I'm not here to explain why that happened, Your Honor.
THE COURT: Well, I would like to know why, because I have some things I wanted to say to Mr. McGlothin.
Mr. GIPE: I will let counsel know that, Your Honor, and if there's some proceeding in which you would like to address that with Mr. McGlothin --
THE COURT: No, the proceeding that I wanted to address it was in this hearing.
Mr. GIPE: I --
THE COURT: He set it, and I prepared for that, not for you.

[70] RCW 26.09.480(1).
[71] RCW 26.09.260(1).
[72] *In re Marriage of Grigsby*, 112 Wn. App. 1, 15, 57 P.3d 1166, 1173 (2002).
[73] *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124, 130 (2004).

relocation. RCW 26.09.530 does not even allow a court to consider whether the parent seeking relocation will relocate if the children are restrained from relocating. If a parent no longer seeks relocation, either before or after the trial court determines whether the children are allowed to relocate, then a parent seeking to modify the parenting plan must establish adequate cause and must establish one or more grounds to modify the parenting plan under RCW 26.09.260.[74]

In the Lewis County relocation case a trial judge never determined the preliminary issue of whether the children would be restrained from relocating. Trial was supposed to occur in December 2012, but no trial judge was available. After the relocation trial was re-set for May 2013 – more than 5 months after the initial trial and 10 months after Respondent served her notice of intended relocation – Appellant no longer wished to object to the children's relocation and dismissed his objection. At that time Respondent was no longer pursuing relocation because Appellant had consented to it. Accordingly, Appellant had to pursue a separate parenting plan modification action, establish adequate cause, and prove the requirements in RCW 26.09.260 to adjust or modify the parties' operative parenting plan provisions to accommodate the children's best interests now that they have been allowed to relocate to Olympia.

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[74] *Grigsby*, 112 Wn. App. at 16.

Because objections to relocation are fundamentally different from petitions to modify a parenting plan, Appellant's July 2012 objection to relocation cannot be found to have been a modification petition, and Judge Hunt's contrary finding is not supported by sufficient evidence.

VI. Conclusion

The trial court should be reversed and remanded with instructions that Judge Hunt be recused from hearing either Respondent's contempt motion or Appellant's parenting plan modification petition. The July 12, 2013 order entered in Respondent's contempt proceeding should be vacated because Judge Hunt did not have the jurisdiction, power, or authority to enter it. If this Court determines Judge Hunt should have recused himself and vacates the July 12, 2013 contempt order that impermissibly modified the May 2012 agreed permanent parenting plan, then this Court need not address Appellant's arguments regarding impermissible parenting plan modifications in contempt proceedings. If this Court does not determine that Judge Hunt should have recused himself, then this Court should reverse Judge Hunt's July 12, 2013 Order on Motions Re: Counseling, Contempt, Affidavit of Prejudice and Attorney Fees because the trial court did not follow the mandatory procedures in RCW 26.09.260 and .270. Finally, Appellant should be determined to be the prevailing party and awarded his costs for bringing this appeal.

DATED this 9th day of May, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

I will cause delivery of a true copy of Brian Massingham's Reply Brief to the following individuals on **May 9, 2014:**

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Signed this 9th day of May, 2014 Seattle, Washington.

Lindsey Matter
Paralegal