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NO. 63162-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

In re the Marriage of:

KAHLIN JEFFERSON (MISH),

Respondent/Cross-Appellant,

v.

PETER B. JEFFERSON,

Appellant/Cross-Respondent.

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STATE OF WASHINGTON
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ON APPEAL FROM KING COUNTY SUPERIOR COURT
(The Honorable Monica J. Benton)

REPLY BRIEF OF APPELLANT
AND RESPONSE TO CROSS-APPEAL

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I. INTRODUCTION

The Parenting Act recognizes that parent-child relationships are of “fundamental importance” to the welfare of a child and establishes a presumption that “the relationship between the child and *each* parent should be fostered unless inconsistent with the child’s best interests.” RCW 26.09.002 (emphasis added). The trial court ignored the statutory presumption and instead presumed that restrictions on the father-son relationship should remain unless Peter met the standard of a perfect parent who posed no risk of any kind to Luke. The trial court also ignored the stipulated Review Order and applied the strict requirements for modification under RCW 26.09.260, which were inapplicable under the Review Order. Under the standards applied by the trial court, the visitation restrictions could never be removed or even reduced.

Kahlin focuses on the domestic violence incident over eight years ago in 2001, its immediate consequences for Peter in 2002 and 2003, and the inapplicable standards of RCW 26.09.260. While Kahlin incurred serious injuries from the incident, and the parties’ brief marriage was undeniably tumultuous, none of that bears upon the legal issues in this appeal: (1) the correct legal standard and procedure, consistent with the statutory presumption and the stipulated Review Order, for removal of

restrictions on parent-child visitation that are premised upon acts of domestic violence against the other parent, not the child; and (2) whether the trial court had any power to modify the Parenting Plan after dismissing the Petition.¹

The trial court stated it maintained the restrictions on Peter and Luke's visitation because there was "[no] clear indication that the best interests of the child are served by unsupervised visits" CP 290, and there was "[no] showing that...unsupervised visitation is advantageous to the

¹ The recitation of the facts in Kahlin's brief not only is focused on events and evaluations from several years ago, it too often is not complete or accurate. One example relates to the 2001 domestic violence incident. According to Kahlin's own contemporaneous statements to police (and consistent with Peter's understated testimony quoted in the Respondent's Brief at page 14 that Kahlin was "a part of" the incident), Kahlin initiated domestic violence because she thought she smelled perfume on Peter. Trial Exhs. 112 and 113. Kahlin told police that Peter initially "just stood there" while she pushed him and struck him with a closed fist, after which Luke started to cry. *Id.* Kahlin stated:

My husband came home late night [sic] tonight. It smelt like he was in a bar and I could smell women's perfume on one side of his face. I asked him about it. I told him that I smelt it and I was upset about it. He denied that I smelt the perfume and he laughed. I told him that I thought he was with some woman and I was getting even more upset. I was so upset, I was worried in the first place because he was gone so late and I did not know where he was at. Then I believe[d] him to [have been] with another woman so I pushed him back and I swung at him and hit him in the shoulder. ... He did not do anything when I swung at him. He just stood there. The baby was crying....

Trial Exh. 112; *see also* Trial Exh. 113 ("She described how she quarreled with [her husband] over suspected infidelity, she punched him at least one time with a close[d] fist[.]"). As noted in the Opening Brief, and despite these facts given by Kahlin to police at the time, Peter accepted responsibility for his actions by pleading guilty to assault, serving jail time (two months in a work-release program), and agreeing to initial restrictions in the Parenting Plan.

child,” RP III 109. But, under the Parenting Act, it is *presumed* that a full and unrestricted parent-child relationship is advantageous to the child unless it is demonstrated otherwise. RCW 26.09.002. The trial court also maintained the restrictions because it “was pretty clear that everyone was saying they weren’t entirely sure that Luke was safe from *all* risk.” RP III 109 (emphasis added). But protection from “*all* risk” is not the standard for imposing visitation restrictions under the Parenting Act. Consistent with the presumption in favor of fostering parent-child relationships, the Parenting Act expressly requires a nexus between perceived risk to the child and the visitation restrictions—they must be “reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time.” RCW 26.09.191(2)(m)(i). The standard applied to Peter was not based on a nexus but was *higher* than the standard set by the Parenting Act for a person convicted of a sex offense against a child, who eventually may have unsupervised visitation even if some “minimal risk” to the child remains. *See* RCW 26.09.191(2)(k).

The proper standard for deciding whether restrictions upon the father-son relationship should remain in place in the context of this case is whether the restrictions are in Luke’s best interests and are reasonably

calculated to protect him, consistent with the statutory presumption to foster parent-child relationships.

The trial testimony in favor of normalization was overwhelming and included testimony from the case manager (Layton), the former guardian ad litem (Hastings), and Peter's therapist (Cahn), showing the progress and change over the past several years. Kahlin's highlighting of minor issues and mischaracterizations of events² during a few of the well over one-hundred supervised and documented visits between Peter and Luke merely demonstrates that, overall, Peter's parenting relationship with Luke has been "largely successful in the supervised setting," as observed by the parenting evaluator. Trial Exh. 1 at 29.

This Court should vacate the dismissal order because the trial court (1) incorrectly interpreted the Review Order and applied an incorrect legal standard and (2) lacked authority to modify the Parenting Plan in the absence of a live petition. The Court should hold that, under the Review

² For instance, Kahlin points to a 2006 report in which former guardian ad litem Rosie Anderson concluded that Peter committed an act of "domestic violence" during an October 2005 supervised visit, stating that he "grabbed Luke by the neck causing the child to yell that he was hurting him." CP 195. However, the visitation report relied upon by Ms. Anderson actually stated that Peter merely "wrapped his hand around [Luke's] neck for a moment[,] then let go of Luke's neck and grabbed Luke's arm." Trial Exh. 15, Visitation Report dated October 12, 2005. This was in the context of Peter attempting to have Luke to remain seated during breakfast. The report does not indicate that Luke "yelled," but that he "pulled away *saying*, 'You're hurting me,'" upon which Peter let go. *Id.* (emphasis added).

Order, which remains in effect, there is no requirement to establish a substantial change in circumstances or a detrimental environment provided by the mother and that Peter may file a new petition to be governed by the correct legal standard—Luke’s best interests and Luke’s statutory right to have his relationship with his father “fostered,” rather than unnecessarily restricted. The Court should specify that a new petition and parenting evaluation are necessary for any new modification due to the passage of time and that any such petition should be considered on an expedited basis.

Because the trial court proceedings were not frivolous, the Court should deny Kahlin’s cross-appeal of the trial court’s denial of her request for an award of attorney’s fees and costs. It should award Peter his attorney’s fees and costs for this appeal.

II. REPLY ARGUMENT

A. **The Trial Court Erred in Subjecting Peter's Petition to the Strict Requirements for Modification in RCW 26.09.260, Contrary to the Stipulated Review Order, and Requiring Peter to Show a Substantial Change in Circumstances and that the Environment Provided by the Mother Was Detrimental to Luke. The Proper Standard Is the Best Interests of the Child and, Consistent with the Statutory Presumption that Unrestricted Visits Are Preferred, Restrictions Must Be "Reasonably Calculated to Protect the Child" from a Genuine, Likely Risk, Not All Possible Risk.**

It was never contemplated that either supervision or limited residential time should be or would be permanent. In fact, the Parenting Plan originally gave the initial guardian ad litem, Teri Hastings, Ph.D., "decision-making authority regarding the father's access to the child, including supervision and visitation issue[s]," which could be interpreted to mean she had authority to allow unrestricted visitation. CP 5. But for Kahlin's objections, Dr. Hastings was ready to eliminate supervision and move toward normalized visitation when she abruptly resigned for personal reasons in October 2005. CP 164; Trial Exh. 24. At the trial, Dr. Hastings testified she was surprised supervision had not been phased out, that the phase-out should have occurred in 2005, and that continued supervision was not warranted. RP III 14-16, 22, 61.

Due to the interim nature of restricted visitation, a procedure was put in place to allow the trial court to revisit the issue at an appropriate time, without the necessity of establishing the ordinary requirements for modification in RCW 26.09.260, including a substantial change in circumstances and a detrimental environment provided by the mother.

Kahlin contends the trial court properly applied the strict standards for modification in RCW 26.09.260 because the provision of the Review Order under which Peter filed his Petition states that either party may file a petition to “modify” visitation, as opposed to a petition for “review.” Respondent’s Brief at 29. But the record indicates that the Review Order was intended to provide for review without satisfying the RCW 26.09.260 standards. As stated in the Opening Brief, interpretation of the Review Order is a question of law that is reviewed de novo by this Court. *See In re Marriage of Thompson*, 97 Wn. App. 873, 877, 988 P.2d 499 (1999).

Kahlin’s interpretation of the review provision as merely providing an opportunity to file a petition under RCW 26.09.260 renders the provision meaningless. First, Peter could seek a section 260 modification as a matter of right under that statute regardless of any review provision. Second, the review provision, including the stipulation to waive the adequate cause threshold requirement upon a recommendation by the case

manager, is meaningless if the petition is subjected to the requirement to prove a substantial change in circumstances and a detrimental environment provided by Kahlin.

A substantial change in circumstances ordinarily is a prerequisite to modification of a parenting plan under RCW 26.09.260, even if the modification is minor. *In re Marriage of Holmes*, 128 Wn. App. 727, 734, 117 P.3d 370 (2005), citing *Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 807, 929 P.2d 1204 (1997); RCW 26.09.260(1), (5), (10).³ Kahlin concedes that this standard was inapplicable under the initial Parenting Plan, which provided for “review” under RCW 26.09.187. Respondent’s Brief at 2. *See* CP 9. No review hearing was ever held under that provision; Peter’s 2005 Petition (CP 153-59) was resolved by agreement and arbitration. CP 220-30. The parties agreed there would be an opportunity for further review of visitation if the case manager so

³ A “major” modification (more than 24 full days or 90 overnights per year) requires a substantial change in circumstances of the child or the nonmoving party, whereas a “minor” modification or a modification of non-residential provisions requires a substantial change in circumstances of the child or *either* parent. RCW 26.09.260(1), (5), (10). A parent whose residential time is subject to limitations under RCW 26.09.191(2) (including for domestic violence) and seeks expansion of residential time must demonstrate “a substantial change in circumstances specifically related to the basis for the limitation.” RCW 26.09.260(7).

recommended, CP 223, and the agreed provision for review was incorporated into the Review Order, CP 14.

None of the visitation restrictions was reduced or modified under the September 2006 CR 2A agreement, CP 220-30, or the March 2007 Review Order, CP 13-14. Furthermore, there could be no substantial change in circumstances greater than the events of June 2004, when Peter graduated from Dr. Maiuro's domestic violence treatment program, Trial Exh. 23; of October 2005, when the guardian ad litem concluded that the visitation restrictions should be phased out, CP 164, Trial Exh. 24, RP III 14; and of December 2006, when Peter's therapist concluded that phasing out the restrictions was "long overdue," CP 165. The parties therefore could not have contemplated that a petition pursuant to the Review Order would be subject to higher standards than under the original Parenting Plan. And, again, that would make the Review Order a meaningless restatement of Peter's statutory rights.

The trial court ruled that Peter not only had to establish a substantial change in circumstances but that the environment provided by the mother was detrimental to the child's physical, mental, or emotional health under RCW 26.09.260(2)(c), which both parties concede is not met. But both the review provision in the original Parenting Plan *and* the

agreed review provision in the Review Order were based upon the recognition that mother's environment for Luke was *not* detrimental and that a showing to the contrary should *not* be a prerequisite to lifting the restrictions that are precluding a normal father-son relationship between Peter and Luke. Otherwise, the review provision is meaningless. Because the Review Order waived this requirement, the trial court's ruling was error that must be reversed.

Kahlin also argues that the trial court properly considered the Petition under the strict standards of RCW 26.09.260 because the relief sought by Peter was consistent with a "major" modification in that he sought a change of more than 90 overnights per year. However, the provision for review in the Review Order was not limited to review of supervision; it provided that either party could petition for *any* modification of Peter's visitation based upon a recommendation of the case manager and a parenting evaluation. And the restrictions of supervision and limited residential time are linked; residential time is limited in large part due to the high cost of supervision. Peter proposed an appropriate plan for a gradual phase-out of supervision over six months, followed by an increase in residential time, including split or alternating time during school breaks and holidays. CP 38-42.

The central issue is the correct legal standard and procedure for removing the restrictions on Peter and Luke's relationship and fostering a more normal relationship. Under the Review Order, the proper standard for lifting the restrictions is whether a change is in Luke's best interests and whether the restrictions are "reasonably calculated to protect" Luke under RCW 26.09.191(2)(m)(i), recognizing that "the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests" as stated in RCW 26.09.002.

This interpretation of the Review Order is consistent with *In re Marriage of Adler*, 131 Wn. App. 717, 129 P.3d 1293 (2006), where this Court recognized that a Parenting Plan may provide for future review, and "in such a review the court may properly apply the criteria in RCW 26.09.187 rather than treating the review as a modification." *Id.* at 725, citing *In re Marriage of Possinger*, 105 Wn. App. 326, 337, 19 P.3d 1109 (2001). The parenting plan in *Adler* was different than the one in *Possinger* because it referred to and eliminated the RCW 26.09.260 threshold requirement of a substantial change in circumstances. *Id.* This Court thus concluded that review in *Adler* was to be governed by RCW 26.09.260, minus the requirement of a substantial change in circumstances. *Id.*

Under *Adler* and *Possinger*, where the trial court reserves an opportunity for review, the standards for initial parenting plans under RCW 26.09.187 apply *unless* the trial court indicates otherwise. Even assuming the Review Order can be interpreted to provide that a petition should nominally be governed by the modification statute, RCW 26.09.260, rather than RCW 26.09.187, the record establishes that the requirements to establish a substantial change in circumstances and a detrimental environment provided by the mother were not to be applied under the Review Order. If those requirements applied, restricted visitation would become permanent, contrary to the statutory presumption that favors a relationship with both parents, and contrary to Luke's best interests.

The unreasonableness of Kahlin's position and the trial court's ruling is illustrated by reviewing the provisions of RCW 26.09.191 applicable to parents convicted of sex offenses against children—not applicable to Peter. The statute eliminates the usual presumption in favor of a relationship and establishes a rebuttable presumption that a parent convicted of a sex offense against a child “poses a present danger to a child,” and contact with the parent's child is precluded unless the parent rebuts the presumption. RCW 26.09.191(2)(d). The presumption is

rebutted if the court finds that contact is “appropriate and poses minimal risk to the child” and if the parent’s sex offender treatment provider supports such a finding. RCW 26.09.191(2)(f)(i).⁴ If the presumption is rebutted, the court may order supervised visitation. RCW 26.09.191(2)(h). After two years of supervised visitation with no further arrests or convictions of sex offenses involving children, the court may order unsupervised contact if it finds that such contact is “appropriate and poses minimal risk to the child.” RCW 26.09.191(2)(k).

The trial court held Peter to a higher standard than a parent who has been convicted of a sex offense against a child. Peter and Luke have had successful supervised visitation for more than *five* years, not just two years as required for sex offenders. Furthermore, the trial court maintained the restrictions because it “was pretty clear that everyone was saying they weren’t entirely sure that Luke was safe from *all* risk.” RP III 109 (emphasis added). But convicted sex offenders can have unsupervised residential time even if there is still some risk, albeit minimal risk, to the child. RCW 26.09.191(2)(k) (emphasis added). Dr. Hastings, the former guardian ad litem, appropriately observed, “I’ve seen

⁴ An additional requirement applies if the victim was the parent’s child: if the child has been in therapy, the child’s counselor must believe contact “is in the child’s best interest.” RCW 26.09.191(f)(ii).

so many cases that are far worse than this [where the restrictions] would have been dropped some time ago.” RP III 15.

In the case of a parent who has a “history of acts of domestic violence” (here, against the other parent, not the child), the statute does *not* establish a presumption that the parent poses a danger to a child. *See* RCW 26.09.191(2)(a). Instead, the usual presumption applies under RCW 26.09.002—that “the relationship between the child and each parent should be fostered unless inconsistent with the child’s best interests” applies under in RCW 26.09.002.

This Court should vacate the dismissal order in its entirety and rule that any future petition under the Review Order will not be subject to the requirements to prove a substantial change in circumstances and a detrimental environment provided by the mother. Such a petition should instead be granted if modification is in Luke’s best interests and the existing restrictions are no longer “reasonably calculated to protect” Luke under RCW 26.09.191(2)(m)(i), giving proper weight to the statutory presumption that parent-child relationships should be fostered.

B. The Trial Court Impermissibly Modified and Did Not Merely Clarify the Parenting Plan After Dismissing the Petition. The Impermissible Modification Should Be Vacated So That Peter Can File a New Petition under the Review Order to be Determined under the Correct Standards.

Kahlin contends that the trial court did not impermissibly “modify” the Parenting Plan (as modified by Review Order) after dismissing Peter’s Petition, but merely “clarified” the Parenting Plan. Respondent’s Brief at 36-37. A clarification of a dissolution decree is “merely a definition of the rights which may have already been given[,] and those rights may be completely spelled out if necessary.” *In re Marriage of Christel*, 101 Wn. App. 13, 1 P.3d 600 (2000), quoting *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969). “A modification, on the other hand, occurs when a party’s rights are either extended beyond or reduced from those originally intended in the decree.” *Id.*, citing *Rivard*, 75 Wn.2d at 418.

Christel, a case cited by Kahlin, supports Peter’s position. In *Christel*, the father filed a motion to “enforce” the parenting plan after learning that the mother was contemplating a move to another city and unilateral change of the child’s school, contrary to the parenting plan, which provided for joint decision-making and included a dispute resolution provision. 101 Wn. App. at 17. The trial court entered an order prohibiting the move and purporting to “clarify” the dispute resolution

provision. *Id.* at 19-21. The order set a deadline for seeking a change in school enrollment for an upcoming academic year and provided that failure to meet the deadline would be deemed a waiver of the right to seek a change. *Id.* The mother appealed. This Court held that the change to the dispute resolution process was a modification:

This language goes beyond explaining the provisions of the existing parenting plan. The language goes beyond filling in the procedural details. The order on its face imposes new limits on the rights of the parents. It is not a clarification of the existing parenting plan. In addition, the language is clearly intended to apply into the future. It has all of the characteristics of a permanent change rather than a temporary order.

Id. at 23. Because no motion to modify the dispute resolution process was pending before the trial court when the order was entered, this Court held that the trial court lacked authority to make the change and vacated the order. *Id.* at 23-24.

A similar result was reached in *In re Custody of Halls*, 126 Wn. App. 599, 109 P.3d 15 (2005). There, the father moved for a contempt order after the mother suddenly left the state with the children and failed to make them available for the father's weekend visitation. *Id.* at 602. The trial court entered a contempt order and granted the father sole custody, even though he had not filed a petition to modify the parenting

plan. *Id.* at 603. The trial court subsequently entered a modified parenting plan reflecting the change in custody. *Id.* at 603-04. While the mother's appeal was pending, the father filed a petition to modify the parenting plan. *Id.* at 604. The trial court then entered a second modified parenting plan and a "temporary" order that, among other things, restrained the mother from leaving Jefferson County with the children for ten years. *Id.* at 605. Appeals from all the orders were consolidated. *Id.*

The Court of Appeals held that the trial court "lacked authority" initially to modify the parenting plan because the father only moved for contempt and did not petition to modify. 126 Wn. App. at 608. The Court held that the second modified parenting plan was invalid because the trial court failed to find that the change was in the children's best interests. *Id.* at 609. And, citing *Christel*, the Court held that the "temporary" order was a modification with permanent effects and was not based upon a petition to modify. *Id.* at 609-10. All three orders were vacated. *See also In re Marriage of Watson*, 132 Wn. App. 222, 238-39, 130 P.3d 915 (2006) (trial court lacked authority to modify parenting plan after dismissing petition to modify); *In re Marriage of Shryock*, 76 Wn. App. 848, 851-52, 888 P.2d 750 (1995) (same).

Here, as in *Christel, Halls, Watson, and Shryock*, the trial court did not merely clarify, but modified, the Parenting Plan. In its February 2009 order (App. D to Opening Brief), the trial court modified the Parenting Plan in at least the following ways:

- Eliminated the Dispute-Resolution Process and Eliminated the Case Manager. The stipulated Review Order modified the Parenting Plan by providing for the appointment of a case manager, Don Layton, and vesting him with dispute-resolution authority. CP 13-14; *see also* CP 17-21 (Order Appointing Case Manager). In its February 2009 order, the trial court not only terminated Mr. Layton but eliminated the position of case manager. This modified the dispute-resolution process. The only dispute-resolution process after the February 2009 order is court action.
- Eliminated the Review Procedure. The trial court eliminated the review provision agreed to by the parties, CP 223, and set forth in the Review Order, CP 14. The court reinstated the adequate cause requirement for any future petition (contrary to the parties' stipulation) and retained jurisdiction over any future petition.⁵ CP 293. This change affects Peter's ability to seek unsupervised visitation or increased residential time in the future.
- Increased the No-Contact Restriction and Extended It Indefinitely. The Parenting Plan referenced a no-contact order entered in Peter's criminal case that prohibited Peter from knowingly coming within 500 feet of Kahlin or her residence or workplace until October 11, 2007. CP 5; Trial Exh. 108. Pursuant to the parties' agreement, the Review Order extended the no-

⁵ This asserted retention of jurisdiction for future modifications also is contrary to law since each modification is a new proceeding and "the parties may file for a new judge as a matter of right." *Kinnan v. Jordan*, 131 Wn. App. 738, 756 n.17, 129 P.3d 807 (2006), citing *State ex rel. Mauerman v. Superior Court*, 44 Wn.2d 828, 830, 271 P.2d 435 (1954).

contact order as to Kahlin until October 11, 2012. CP 13. In its February 2009 order, the trial court modified the Parenting Plan by requiring that Peter's contact with Luke not occur within *one mile* of Kahlin's residence or workplace (instead of the 500 feet previously ordered) or within the same distance of Luke's school or daycare. CP 292. The trial court provided no expiration date for this restriction.

- Required Peter to Undergo "Mental Health," "Pharmacological," and "Therapeutic" Treatment. Peter completed Dr. Maiuro's domestic violence program and "additional therapy" with Dr. Cahn in accordance with the Parenting Plan. CP 4-5. The Review Order deleted all provisions regarding treatment or therapy from the Parenting Plan. CP 14. The trial court's addition of new requirements in its February 2009 order for Peter to undergo "mental health," "pharmacological," and "therapeutic" treatments places further conditions on Peter's visitation rights. CP 292.
- Required Peter to Meet Unspecified "Goals." The trial court modified the Parenting Plan to require Peter to "follow all recommendations with the *following goals* for possible reunification." CP 292 (emphasis added). Requiring Peter to meet additional "goals" as a condition of seeking unsupervised visitation in the future is a substantial alteration of Peter's rights under the Parenting Plan. Moreover, the trial court's order did not actually specify what those "following goals" were, so Peter can never even arguably meet them.
- Required a Parenting Coach and Appointed a Visitation Supervisor. The trial court required the parties to employ Lynn Tienken, a parenting coach, which was not required under the Parenting Plan or the Review Order. CP 292. In addition, the court modified the Parenting Plan to appoint Cathy Eisen as the permanent visitation supervisor. *Id.* Although Ms. Eisen had been the de facto visitation supervisor for years, selection of a supervisor was at the case manager's discretion under the Review Order. CP 13.

Each of these changes did not merely clarify or define the parties' rights under the Parenting Plan but was an impermissible modification. Collectively, the modifications are a major transformation of the rights of *both* parents under the Parenting Plan, impermissible in the absence of a live petition. *See Watson*, 132 Wn. App. at 238-39; *Halls*, 126 Wn. App. at 608-10; *Christel*, 101 Wn. App. at 23-24; *Shryock*, 76 Wn. App. at 851-52.

Kahlin argues that only a change in the residential provisions of a parenting plan is a "modification." Respondent's Brief at 37. But no case so holds. In fact, in *Christel*, a case cited by Kahlin, this Court held that the trial court impermissibly modified the parenting plan when no petition to modify was pending even though the trial court modified only the dispute resolution process for changes in school enrollment, not the residential provisions. 101 Wn. App. at 23-24. Here, likewise, the trial court modified the dispute resolution process, among other things.

Kahlin contends that, even in the absence of a live petition to modify, the trial court had authority to modify non-residential aspects of the Parenting Plan under RCW 26.09.260(10), which provides:

The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or

of a child, and the adjustment is in the best interest of the child. Adjustments ordered under this section may be made without consideration of the facts set forth in subsection (2) of this section.

This provision does not provide authority to modify a parenting plan absent a live petition to modify, simply because the parties are before the court. There is no case authority supporting Kahlin's position. Kahlin cites *In re Marriage of Scanlon*, 109 Wn. App. 167, 34 P.3d 877 (2001), a child-support modification case, for the proposition that the trial court may grant relief to the respondent once a basis for modification is established. But *Scanlon* is distinguishable because the respondent, the mother, cross-moved for an upward modification of child support in response to the father's petition for downward modification. *Id.* at 171. Here, on the other hand, as Kahlin concedes she did not cross-move, but the trial court modified the Parenting Plan *sua sponte*. Respondent's Brief at 22.

Scanlon not only is distinguishable, it supports Peter's position. This Court reversed the order granting upward modification of child support in favor of the mother because the trial court failed to enter a finding that the modification was justified by a substantial change in circumstances. *Id.* at 173-74; *see also Halls*, 126 Wn. App. at 609 (trial court failed to find that modification as in the child's best interests).

Similarly here, even if RCW 26.09.260(10) authorized modification in the absence of a petition, the trial court did not find that a substantial change in circumstances occurred to justify the modifications or that they were in Luke's best interests, as required by the statute.⁶ See CP 292-93. Thus, the modifications cannot be sustained.

The trial court lacked authority to modify the Parenting Plan once it dismissed Peter's Petition. This Court should vacate the trial court's modifications to the Parenting Plan and order that (1) Peter may file a new petition under the Review Order pursuant to a recommendation by the case manager and (2) the petition should be governed by the appropriate standards as set forth above.

C. Time Is of the Essence. There Is Only One Opportunity for Luke to Have a Meaningful Relationship With His Father During His Childhood, Which Is Passing Quickly. Delay Should Not Be Tolerated, but Condemned.

Kahlin accomplishes her goal of maintaining the status quo of restricted, supervised (expensive) visitation regardless of whether she prevails on the merits or simply delays the judicial process. Luke is almost nine years old. Every day that he is denied a normal relationship

⁶ Kahlin's assertion that the trial court's *sua sponte* modification was justified by a "substantial change in circumstances" contradicts her position at trial and on appeal that there was no "substantial change" and so is disingenuous and frivolous.

with his father, free from artificial restrictions, the possibility for him to grow up with a father who can be meaningfully involved in his life grows fainter. Peter understands the importance of a father-son relationship and, for most of Luke's life, has been investing tremendous time, effort, and money (including over \$36,000 through February 2009 just for the visitation supervisor) to provide Luke the opportunity for such a relationship. But it becomes more difficult to establish and maintain a more normal father-son bond as Luke grows older and his childhood wanes.

Luke's childhood will be more than half over by the time this appeal is resolved.

To date, this Court has taken appropriate measures to accelerate review at Peter's request. Although Peter's motion to accelerate review under RAP 18.12 initially was denied, Commissioner Neel ruled that the case should be heard without delay and left open the possibility of a renewed request for accelerated review "in the event there is any significant delay." Commissioner Ellis subsequently denied a 30-day extension to file the Brief of Respondent, granting only a 14-day extension. Peter then filed a renewed motion to accelerate review, requesting that the case be heard on the November 2009 calendar.

If this Court rules in Peter's favor on the merits, Kahlin no doubt will seek to delay the process further by moving for reconsideration and then filing a petition for review. To minimize the potential delays, Peter requests that this Court provide clear direction to the trial court in the event Peter must file a new petition to seek removal of the restrictions on visitation with Luke. This Court should not only instruct the trial court on the proper standard under which to decide such a petition, as outlined above, but should direct the trial court to require an expedited parenting evaluation and to set the case for trial on an expedited basis.

D. Kahlin Should Be Denied, and Peter Should Be Awarded, Attorney's Fees on Appeal.

Peter should be awarded his attorney's fees and costs for this appeal, which was made necessary by Kahlin's unreasonable position at trial and on appeal—contrary to the agreed provision in the Review Order—that a normal father-son relationship between Peter and Luke should be precluded indefinitely unless Peter can demonstrate a substantial change in circumstances and that the environment provided by the mother

is detrimental to Luke. Peter should be awarded his attorney's fees on appeal under RCW 26.09.140 and based on Kahlin's intransigence.⁷

For the reasons discussed below in response to the cross-appeal, this Court should decline to award Kahlin her attorney's fees for this appeal.

III. RESPONSE TO CROSS-APPEAL

No party to a dissolution action is entitled to attorney fees as a matter of right. *In re Marriage of Stachofsky*, 90 Wn. App. 135, 148, 951 P.2d 346 (1998). Kahlin requested an award of \$43,981.30 in trial court attorney's fees and costs and \$25,000 advance attorney's fees and costs for the appeal, arguing that (1) the Petition was "frivolous," entitling her to fees and costs under the Review Order, (2) consideration of need and ability to pay supported an award under RCW 26.09.140, and (3) Peter was intransigent. CP 394. The trial court affirmatively ruled that the proceeding was not frivolous and awarded no fees. CP 309-10.

⁷ One of Kahlin's attorneys previously was sanctioned for similarly taking an unreasonable position with respect to interpretation of the same CR 2A agreement. CP 22-25.

A. The Trial Court Correctly Determined that the Petition Was Not Frivolous.

Kahlin's main argument in support of her cross-appeal is that the trial court abused its discretion in finding that the Petition was not frivolous. The Review Order provided for an award of attorney's fees and costs if either party filed a "frivolous" petition. App. A to Opening Brief, CP 14. An action is frivolous if it "cannot be supported by any rational argument on the law or facts." *Layne v. Hyde*, 54 Wn. App. 125, 135, 773 P.2d 83 (1989); *see also id.* at 135-36 (appeal is frivolous if it "presents no debatable issues upon which reasonable minds might differ, and...is so devoid of merit that there is no possibility of reversal").

Kahlin asserts, as the basis for her argument that the Petition was frivolous:

There was no factual basis to support the father's petition to modify the parenting plan under RCW 26.09.260(1) and (2). In fact, the father never even attempted to prove his case under the statutory requirements of RCW 26.09.260.

Respondent's Brief at 41. This argument ignores the basis for the Petition—the Review Order—which provided an opportunity to petition to modify visitation upon the case manager's recommendation without meeting the requirements of RCW 26.09.260. CP 14.

Even though it dismissed the Petition, the trial court properly found it was “not frivolous as defined by law.” CP 309. Likewise, even if this Court were to reject Peter’s appeal, that does not mean the Petition or this appeal was frivolous. *See In re Marriage of Gillespie*, 77 Wn. App. 342, 349-50, 890 P.2d 1083 (1995) (appeal is not frivolous merely because the arguments are rejected; all doubts regarding whether an appeal are frivolous are resolved in favor of appellant).

Kahlin argues “it was evident that there was no basis to modify the parenting plan” after the parenting evaluator, Kelly Shanks, issued her report in 2008. But the trial court was not required to adopt Ms. Shanks’ recommendations, particularly in light of the testimony from Dr. Cahn, Dr. Hastings, Dr. Maiuro, and Mr. Layton that supervision should be phased out without any further requirements of Peter. *See* Opening Brief at 17-20; *see also* CP 294-98. Furthermore, even Ms. Shanks was equivocal regarding the need for continued restrictions, noting that Peter had not been involved in any “further incidents of violence” and that his parenting relationship with Luke was “largely successful,” and recommending that supervision be gradually phased out after six to nine months of additional treatment and parent coaching. Trial Exh. 1 at 29-30, 34. Ms. Shanks praised Peter’s commitment to having a relationship with Luke:

Peter has followed through on supervised visits with an astonishing regularity given the expense. Not many fathers in Peter's position would have persisted in the way that Peter has and this reflects positively on him. Peter's commitment to maintaining a relationship with Luke is a gift to Luke.

Trial Exh. 1 at 26. This is an especially important point given that Peter is not a wealthy man. He has given precious time and money to try and give Luke what no one else can—a relationship with his father—as the Parenting Act says should be fostered. Both Ms. Shanks and the trial court recognized this.

The trial court did not abuse its discretion in determining that the Petition was not frivolous.

B. The Trial Court Correctly Determined that Peter Was Not Intransigent.

Intransigence is a recognized equitable ground for an award of attorney's fees. *In re Marriage of Greenlee*, 65 Wn. App. 703, 707, 829 P.2d 1120 (1992). "A trial court may consider whether additional legal fees were caused by one party's intransigence and award attorney fees on that basis." *Id.* at 708. "Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one's actions." *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006), citing *Greenlee*, 65 Wn. App. at

708. “The party requesting fees for intransigence must show the other party acted in a way that made trial more difficult and increased legal costs, like repeatedly filing unnecessary motions or forcing court hearings for matters that should have been handled without litigation.” *In re Marriage of Pennamen*, 135 Wn. App. 790, 807, 146 P.3d 466 (2006), citing *Greenlee*, 65 Wn. App. at 708-09.

Kahlin argues that Peter was intransigent because he “filed his second petition to modify the parenting plan in less than two years.” Respondent’s Brief at 44. However, both petitions were expressly authorized by court order. The 2005 Petition was authorized by the original Parenting Plan (App. B. to Opening Brief, CP 9), and the 2007 Petition was authorized by the Review Order (App. A to Opening Brief, CP 14). In fact, the 2007 Petition was filed based upon the case manager’s recommendation pursuant to the Review Order. There is no indication that Peter’s court filings were motivated by anything other than a desire to provide Luke the opportunity to have a father who can be more fully involved in his life. And, as discussed above, Peter’s request was not frivolous but was supported by the case manager’s recommendation pursuant to the Review Order, as well as the testimony of three experts. The trial court correctly determined Peter was not intransigent.

C. The Trial Court Properly Exercised Its Discretion in Declining to Award Kahlin Fees under RCW 26.09.140.

A trial court's decision not to award attorney's fees under RCW 26.09.140 will be reversed only if "untenable or manifestly unreasonable." *In re Custody of Salerno*, 66 Wn. App. 923, 926 833 P.2d 470 (1992); *see also Kruger v. Kruger*, 37 Wn. App. 329, 333, 679 P.2d 961 (1984) (decision whether to award fees "rests with the sound discretion of the trial court"). A court has discretion to award fees under RCW 26.09.140 "after considering the financial resources of both parties." A request for fees is properly denied where neither party can reasonably afford to pay the other's fees, and where both parties have received financial assistance to pay for litigation. *See Pennamen*, 135 Wn. App. at 808 ("Looking at both parties' affidavits of financial need, it is clear that neither can afford to pay the other's fees."); *see also In re Marriage of Wright*, 107 Wn. App. 485, 489-90, 27 P.3d 263 (2001) (fees denied on appeal where husband's affidavit established that he had insufficient resources to pay the wife's fees).

Kahlin contends the trial court abused its discretion in finding that the disparity between Peter's ability to pay and Kahlin's need was "not so great as to be inequitable given the [mother's] financial assets and

obligations.” CP 309. The parties’ financial declarations submitted to the trial court disclose that Peter has gone into debt to pay litigation expenses, whereas Kahlin has been able to draw from substantial liquid assets. Notwithstanding her relatively smaller income, Kahlin has significantly more liquid assets and less debt than Peter. *Compare* CP 367, 369-70 with CP 439-40. Peter has paid not only his litigation expenses but the entire cost of the visitation supervisor (totaling more than \$36,000 by February 2009). RP I 85, RP II 26-27. The trial court clearly took all these facts and more into account. *See* CP 447-49 (Response to Request for Attorney’s Fees).

The trial court did not abuse its discretion in determining that Peter should not be required to pay Kahlin’s attorney’s fees.

IV. CONCLUSION

Luke is entitled to the opportunity to have a meaningful relationship with his father, but the trial court’s application of incorrect legal standards and impermissible modifications of the Parenting Plan have unfairly denied him that opportunity. This Court should vacate the dismissal order and rule that any future petition under the Review Order will not be subject to the requirements to prove a substantial change in circumstances and a detrimental environment provided by the mother, and

legal standards and impermissible modifications of the Parenting Plan have unfairly denied him that opportunity. This Court should vacate the dismissal order and rule that any future petition under the Review Order will not be subject to the requirements to prove a substantial change in circumstances and a detrimental environment provided by the mother, and instead should be granted if modification is in Luke's best interests and the existing restrictions are no longer "reasonably calculated to protect" Luke under RCW 26.09.191(2)(m)(i), consistent with the statutory presumption in RCW 26.09.002 that a relationship with each parent should be fostered.

DATED this 23rd day of October, 2009.

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COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

In re the Marriage of:

KAHLIN JEFFERSON (MISH)

Respondent/Cross Appellant,

v.

PETER B. JEFFERSON,

Appellant.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused true and correct copies of the *Reply Brief of Appellant and Response to Cross-Appeal* and this *Certificate of Service* to be served upon counsel of record today as follows:

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DATED this 23rd day of October, 2009.


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