

No. 70944-5-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re

Richard Warnick,
Appellant,

and,

Linda C. Moravec,
Respondent.

REVIEW FROM THE SUPERIOR COURT
FOR KING COUNTY
The Honorable Regina Cahan

APPELLANT'S AMENDED OPENING BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	2
I. INTRODUCTION.....	3
II. ASSIGNMENTS OF ERROR	3
III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....	4
IV. STATEMENT OF THE CASE.....	4
V. ARGUMENT.....	7
A. Discretionary Standard of Review.....	7
B. Standard of Review in Applying Statutory Law.....	9
C. Modification of Final Orders.....	11
VI. CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases

<u><i>In re Marriage of Horner</i></u> , 114 Wn. App. 495, 501 n. 30, 58 P.3d 317 (2002), review granted, 149 Wn.2d 1027, 78 P.3d 656 (2003).....	8
<u><i>In re Marriage of Kovacs</i></u> , 121 Wn.2d 795, 801, 854 P.2d 629 (1993).....	8
<u><i>In re Marriage of Maughan</i></u> , 113 Wn. App. 301, 53 P.3d 535 (2002).....	7
<u><i>In re Marriage of Ricketts</i></u> , 111 Wn. App. 168, 171, 43 P.3d 1258 (2002).....	8
<u><i>In re Parentage of Calcaterra</i></u> , 114 Wn. App. 127, 56 P.3d 1003 (2002) citing <u><i>Gonzales v. Cowen</i></u> , 76 Wn. App. 277, 281, 884 P.2d 19 (1994).....	9
<u><i>In re Parentage of Jannot</i></u> , 149 Wn. 2d 123, 65 P.3d 664 (2003)...	9
<u><i>In re Parentage of L.B.</i></u> , 121 Wn. App. 460, 473, 89 P.3d 271 (2004) citing <u><i>Harmon v. D.S.H.S.</i></u> , 134 Wn.2d 523, 530, 951 P.2d 770 (1998).....	9
<u><i>State v. Bash</i></u> , 130 Wn.2d 594, 601-02, 925 P.2d 978 (1996).....	9
<u><i>State v. Hennings</i></u> , 129 Wn.2d 512, 522, 919 580 (1996).....	9
<u><i>State ex rel. Carroll v. Junker</i></u> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....	8
<u><i>State ex rel J.V.G. v. Van Gilder</i></u> , 137 Wn.App 417, 423, 154 P.3d 243 (2007).....	11
<u><i>State v. Chapman</i></u> , 140 Wn.2d 436, 448, 998 P.2d 282 (2000) ...	10
<u><i>State v. Olson</i></u> , 148 Wn. App. 238, 243, 198 P.3d 1061 (2009)...	10
<u><i>State v. Rundquist</i></u> , 79 Wn. App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003 (1996).....	8
<u><i>State v. Tejada</i></u> , 93 Wn. App. 907, 911, 971 P.2d 79 (1999).	10

Statutes

RCW 2.24.050.....	11
RCW 26.09.260.....	3,4,10,11,12

I. INTRODUCTION

This is a case about a decision that deviates from statutory threshold requirements allowing the mother to enter final documents and then immediately file for a modification of final orders without meeting the statutorily required threshold for adequate cause justifying any modification. Nothing had changed since the entry of final orders just one week prior to the mother's filing for modification. The father relied on the final agreed orders and was immediately forced to continue litigation in defending them without just cause. The appellant father is asking that Judge Cahan's Order on Revision be vacated and final unappealed orders in this case be upheld.

II. ASSIGNMENTS OF ERROR

1. The court erred, requiring reversal, when it sua sponte put the case on track for trial without making any finding of adequate cause justifying modification of final unappealed orders as required by RCW 26.09.260.

CP 176; CP 177.

2. The court erred, requiring reversal, when it increased the father's child support obligation without notice and without giving the father the opportunity to present actual evidence of the father's current income.

CP 176.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it sua sponte allowed the mother to modify the final orders without finding adequate cause pursuant to RCW 26.09.260? YES
2. Did the trial court err in increasing the father's child support obligation without notice or without reviewing any evidence of the father's current income? YES

IV. STATEMENT OF THE CASE

The parties were married on August 13, 1994, and separated on January 12, 2011. They have one child in common who is 13 years of age. The parties participated in mediation with Boyd Buckingham on June 26, 2012, and entered into a binding CR2A agreement which included modified orders signed by the parties. On December 19, 2012, an order of dismissal was entered as there were no final pleadings entered after the notice of settlement had been filed after mediation. Final documents were not entered because of a drafting dispute between the parties that could not be resolved timely. Mother's counsel filed a motion to vacate dismissal and set a trial date or a date for entry of final pleadings. CP 111. Mother's counsel then filed a motion for presentation/ modification of the final orders based on a change of circumstances, setting the hearing for

April 19, 2013. CCP 117. Assigned Judge, Regina Cahan entered the agreed orders, finding that that there could be no modification of final documents from the terms agreed to during mediation without agreement by both parties. CP 126, 127, 127A, 127B.

The mother then filed a motion to modify the court's order of April 19, 2013 on April 26, 2013. CP 130. Commissioner Bonnie Canada-Thurston heard the mother's motion to modify on June 13, 2013. Commissioner Canada-Thurston found that there was no adequate cause to modify the agreed orders because there was no substantial change in circumstances between the time that the parties entered the CR2A and the time that the mother requested a modification. The Court noted that the facts pleaded in the modification had been known to the parties prior to the entry of the final parenting plan and that the parties could have gone to trial or sought other applicable remedies but that they chose not to. CP 168.

In response to Commissioner Canada-Thurston's ruling, the mother's counsel filed the revision that is the subject of this appeal. CP 170. Assigned Judge Cahan heard the matter on August 28, 2013. Judge Cahan denied the mother's motion for revision, affirming Commissioner

Canada-Thurston's finding that there was no adequate cause to modify the agreed orders. CP 176.

After properly finding that there was no adequate cause, the Court, sua sponte, revised its earlier ruling upon the entry of final documents in this matter on April 19, 2013. The Court indicated that it had ruled incorrectly when it entered final orders conforming to the CR2A agreement the parties. CP 176.

Without notice, the Court then vacated the child support order and parenting plan entered on April 19, 2013, and replaced it with a plan created by the court. CP 178. The child support order was replaced with one that removed the deviation awarded to the father and increased the child support obligation from \$100/ month to \$316/month. CP176. The Court, acting on its own, increased this amount to \$316 per month without giving the father proper notice to present evidence of his current income and earning ability. CP 176. The reality of the father's financial position at the time was that his back was severely injured and he was not capable of working.

In addition to increasing the child support amount, the Court also, acting sua sponte based solely on the mother's declaration, limited the father's residential time. In the

agreed order, the parties originally stipulated that the father would have residential time on every other Friday through Monday and on Wednesday to Friday on the alternating weeks with week on- week off visitation in the summer months. The court limited the father's residential time by Sunday day visits every other weekend through September and October and Saturday and Sunday visits every other weekend in November until the scheduled trial in March.

The court then ordered the parties to engage in dispute resolution by October 31, 2013, and set a trial date for the modification on March 24, 2013. CP 177. Petitioner Warnick now requests that this court vacate this order of the court and uphold the final orders entered in this matter on April 19, 2013, in accordance with Commissioner Canada Thurston's denial of adequate cause on August 28, 2013.

V. ARGUMENT

A. Discretionary Standard of Review

Threshold determinations for modification of parenting plans are reviewed under an abuse of discretion standard, not de novo (overruling *Roorda* in that respect). *In re Parentage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003); *In re Marriage of Maughan*, 113 Wn. App. 301, 53 P.3d 535

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

The court abused its discretion in upholding the findings of the Commissioner on revision and then allowing the mother to modify final orders despite the threshold finding of adequate cause having not been met. The court made no finding that the father had caused harm to the child and did

not provide the father with adequate notice in modifying the child support order, increasing the father's monthly obligation.

B. Standard of Review in Applying Statutory Law

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

"If the language of the statute is clear and unequivocal, the court must apply the language as written." State v. Olson, 148 Wn. App. 238, 243, 198 P.3d 1061 (2009). The court must also combine all related provisions together so as to "achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes." State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (2000); State v. Tejada, 93 Wn. App. 907, 911, 971 P.2d 79 (1999). When interpreting a statute this court must do so in a way that best advances the legislature's intent and avoiding a strained or unrealistic interpretation. Id.

In this matter, the Court acted unreasonably and on untenable grounds by In the present case, the court committed error in substantially altering the residential schedule and child support obligation of the father without being supported by adequate cause as required by RCW 26.09.260. The statute clearly and unambiguously requires a finding of adequate cause. The court found there was no adequate cause, and despite this finding, put the case on schedule for modification. This is a clear abuse of discretion in interpreting the controlling statute. Allowing a court to disregard the clear statutory guidelines and substitute its sua

sponte powers, will render statutes that are clear in their meaning to be disregarded further.

“[W]hen the superior court denies a motion for revision, it adopts the commissioner’s findings, conclusions and rulings as its own.” RCW 2.24.050. *State ex rel. J.V.G. v. Van Gilder*, 137 Wn. App. 417, 423, 154 P.3d 243 (2007). In the case at hand the court effectively granted adequate cause while simultaneously ruling that adequate cause was not supported by the law. The court denied the motion for revision but did not adopt the Commissioner’s findings. Commissioner Canada-Thurston ruled that the parties could have resolved their dispute by taking the case to trial but instead entered agreed orders. A modification was not properly supported in law as no substantial change of circumstances took place during the one week between entry of final orders and filing for modification that were unknown to the parties at the time of entry of final orders.

C. Modification of the Final Orders

RCW 26.09.260 (1) instructs that a court “...shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has

occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child...”

The trial court in this matter manifestly abused its discretion when it ruled that adequate cause was not supported by the evidence or required by the modification statute RCW 26.09.260, yet granted the mother a modification sua sponte. The father’s residential time and child support obligation were severely impacted with no reasonable basis substantiated by anything other than the mother’s self-serving declaration. This is a contradictory ruling on its face.

The extreme limitations of residential time from every other weekend to only day visits once per week not only impact The father but also his sister and mother who spent time with the minor child regularly during The father’s scheduled time. The court made no findings of The father having engaged in conduct endangering or harming the child.

The difficulty in the relationship between father and son does not justify an extreme limitation on The father’s residential time without basis in law. This difficulty had been

developing well before the final documents were entered in the case and the mother had many alternative forms of relief. A modification without establishing any substantial change in circumstances is not a legally sound or equitable solution for this family.

The child support worksheet relied upon by the court imputed the father's income at \$1,566.90. The current reality of The father's financial position is that he is unemployed after having been seriously injured and has no income currently. The court's order increased the father's monthly child support obligation to \$316.00. The agreed order of child support dictated that The father was to transfer a payment of \$100 per month. This increase in his financial obligation was contrary to the parties' agreement and it is impossible for the father to meet the financial obligation.

The father fought an expensive fight to get final documents entered in this case after the parties reached agreement that protected his relationship with his son. Even after the parties agreed on the terms of their dissolution, The father could not get the mother to sign final documents that conformed to that agreement. Finally, on the motion of the mother, final documents were entered and then immediately challenged within one week of entry of final orders.

The minor child is thirteen and struggling in this relationship with his father and the mother is not constructively supporting the development of that relationship. The court had less intrusive means to remedy the underlying concerns related to this child's best interests. The court could have properly denied adequate cause and sua sponte ordered counseling between father and son to remedy the existing relationship challenges without putting the case on track for modification and fundamentally altering the agreement between the parties. This would have been truly in the best interest of this family.

Instead, without giving the father the statutorily necessary period of time to seek all means to remedy the concerns of both parties regarding this delicate relationship, the court has created opportunity for continued litigation.

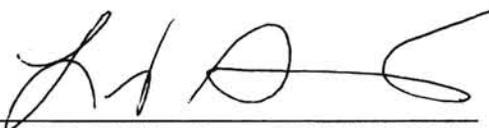
This ruling has potential far reaching consequences in allowing parties to continue litigation in high conflict cases without any proper basis. It is in the interest of finality and judicial efficiency to uphold the threshold demanded by the modification statute in order to allow a party to make modifications to final orders. In allowing the mother to make such changes after refusing for months to enter documents conforming to the parties' initial mediation agreement and

then attempting to modify the agreed final orders, the court has abused its discretion.

VII. CONCLUSION

This court should uphold the ruling of the Superior Court Commissioner Canada-Thurston denying adequate cause on modification and vacate the orders on revision ordered by Judge Cahan on August 28, 2013, modifying final unappealed orders in this matter. The final orders from April 19, 2013, should stand.

DATED this 12th day of February 2014, at Bellevue, Washington.



Leslie E. Gilbertson, WSBA# 41059
Attorney for Appellant Richard
Warnick

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

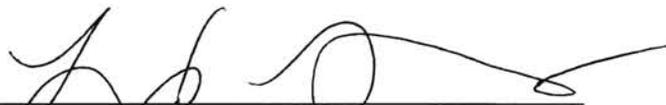
That on February 12, 2014, I arranged for service of the forgoing Amended Opening Brief on the following parties:

Office of the Clerk	<input type="checkbox"/>	Facsimile
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DATED this 12th day of February, 2014.



LESLIE E. GILBERTSON