

No. 35629-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of

ERIN DEMETRO, Respondent,

And

NATHAN WYRICK, Appellant.

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STATE OF WASHINGTON
BY  DEMETRO
COURT OF APPEALS, DIVISION II

OPENING BRIEF OF APPELLANT

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I. IDENTITY OF APPELLANT

By and through his attorney of record, Sally N. Rees, Esq., Appellant NATHAN WYRICK (“Appellant”) hereby submits the following Brief of Appellant.

II. DECISION BELOW

The action below arose from Respondent’s Petition for Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule. CP at 1-6. The Trial Court, Judge Kitty-Ann van Doorninck presiding, ordered the child to reside with mother and the father to make a transfer payment of child support to the mother.

III. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of November 3, 2006, ordering the child to reside with Respondent Erin Demetro. CP 153-58.
2. The trial court abused its discretion by the order of November 3, 2006, ordering the child to reside with Respondent Erin Demetro. CP 153-58.
3. The trial court erred in entering the order of November 3, 2006, ordering Appellant Nathan Wyrick to pay child support to the child to Respondent Erin Demetro. CP 153-58.

4. The trial court erred in entering the order of September 29, 2006, denying appellant's motion for an examination under Civil Rule 35. CP 136-38.

5. The trial court erred in entering the order of September 29, 2006, denying appellant's motion for trial continuance. CP 139-41.

Issues Pertaining to Assignments of Error

a. Did the trial court rely on substantial evidence in ordering the child to reside with Respondent? (Assignment of Error No. 1)

b. The Guardian ad Litem ("GAL") stated in her reports and testimony that the child did not express fear of his step-mother in the visit in park in July. The GAL also reported that the child stated in private that he was afraid of his step-mother. Did that GAL's conflicting testimony regarding the child's fear of his step-mother support a finding of "detriment" under RCW 26.09.260? (Assignment of Error No. 1)

c. Both parties and the GAL agreed that the child had serious behavioral issues and problems with school performance. The GAL could not correlate the child's behavior to any harm occurring in Appellant's home. Does the child's behavioral and school issues arise to the level of "detriment" under RCW 26.09.260? (Assignment of Error No. 1)

d. Both parents admitted to having previously spanked the child Ethan as a form of discipline. Respondent stated that she had never observed bruises on the child. If no physical abuse is identified, is there harm under RCW 26.09.260? (Assignment of Error No. 1)

e. The child had resided with Appellant from the beginning of the school year until the time that Respondent retained the child in April 2006. The child changed schools in the middle of the school year. Did the benefit in changing the child's residence to Respondent's home from Appellant's home outweigh the detriment under RCW 26.09.260? (Assignment of Error No. 1)

f. The child had developed a familial relationship with his step-mother and step-siblings over the prior 3 years of his life. The GAL observed that the child interacted well with his step-mother and step-siblings at the park in July 2006. The GAL did not observe or identify any abuse of the child in Appellant's home. Did the trial court abuse its discretion in failing to consider the harm in disrupting the child's relationship with his step-family as required under RCW 26.09.260? (Assignment of Error No. 2)

g. Respondent moved residences 12 times in this six-year-old's life. Respondent had prior criminal convictions, including obstructing an officer and driving under the influence of alcohol

("DUI"). Respondent had a bench warrant outstanding until just prior to trial. At the time of trial, Respondent had not completed the criminal court's requirements arising from her DUI. Did the trial court abuse its discretion in ordering the child to move from a stable home environment to a home with a long history of instability? (Assignment of Error No. 2)

h. The trial court made statements of bias against the conduct of a trial in a child custody case. Did the trial court abuse its discretion in its statements of bias against the proceedings? (Assignment of Error No. 2)

i. The trial court limited Appellant's in-court cross-examination of the GAL during trial. The trial court stated that continued cross-examination of the GAL was "cruel." The trial court allowed the GAL to make statements about Appellant's counsel's conduct outside of the court and outside of the GAL's presence. Finally, the trial court allowed the GAL to continue her cross-examination by Appellant's counsel telephonically. Did the trial court abuse its discretion in its preferential treatment of the GAL that violates CR 41? (Assignment of Error No. 2)

j. The GAL visited the Appellant's home once for approximately 5-10 minutes. The GAL never met with Appellant and his wife together. Did the trial court abuse its discretion in relying on the

GAL's recommendations when the GAL failed to investigate Appellant's home? (Assignment of Error No. 2)

k. The GAL visited the Respondent on numerous occasions, had many meetings with the child, and even attended a doctor's appointment with Respondent and the child. The GAL recommended that the child reside with Respondent. Did the trial court abuse its discretion in relying on the GAL's recommendations when the GAL's investigation was not balanced between the Appellant and Respondent? (Assignment of Error No. 2)

l. Both parents and the GAL stated their serious concerns about the child's behavior and mental health. Did the trial court err in denying Appellant's motion for CR 35 examination of the child when the child's mental state was at issue? (Assignment of Error No. 4)

m. The GAL did not complete her report and final recommendations 30 days prior to trial. Did the trial court err in denying Appellant's motion for CR 35 examination when the GAL had not completed her investigation at the time of the motion was filed? (Assignment of Error No. 4)

n. Appellant had only supervised visitation during the pendency of the action. Appellant did not have any opportunity for his own experts to evaluate the child. Did the trial court err in denying

Appellant's motion for CR 35 examination when he had only limited access to the child prior to trial and no opportunity to obtain his own expert evaluation? (Assignment of Error No. 4)

o. The GAL did not complete her report and final recommendations 30 days prior to trial. Appellant did not have an opportunity for an independent evaluation of the child by his experts. Did the court err in denying Appellant's motion for trial continuance? (Assignment of Error No. 5)

IV. STATEMENT OF THE CASE

A. Procedural Background.

Respondent Erin Demetro filed Petition for Modification/ Adjustment of Custody Decree/Parenting Plan/Residential Schedule on April 7, 2006, Pierce County Cause No. 06-3-01284-3. Clerk's Papers ("CP") at 1-6. The Petition's allegations at paragraph 2.8 restated RCW 26.09.260. CP at 3:6-12.

The substantial changes in circumstances alleged by respondent included failure of communication between the parties; that Appellant enlisted in the U.S. Army; that Appellant gave his wife a power of attorney for care of the parties' six-year-old son while Appellant was in the military; that Appellant had integrated the child Ethan into his home

in approximately September 2005 when Ethan began kindergarten; and that Appellant did not have the child Ethan's best interest in mind. CP at 3-6.

The parties obtained a dissolution of marriage in Lincoln County Superior Court, Cause No. 02-3-03234-1. The parenting plan entered therewith provided for a 50-50 division of time between Appellant and Respondent.

On Thursday, March 30, 2006, Appellant's wife Rachel Wyrick received a call from Ethan's school Kibler Elementary in Enumclaw informing her that Respondent had withdrawn Ethan from school and re-enrolled him in the Puyallup School District. CP at 46:18-19. Respondent removed Ethan from Appellant's home on April 3, 2006. She failed to return Ethan to the home where he had spent at least half of his time since he was three and had primarily resided for the prior year. CP at 47:4-5; CP at 204:15-18.

Appellant filed a Response to the Petition, specifically alleging that the child had been integrated into his home with the consent of the Respondent in substantial deviation from the parenting plan previously entered. CP at 76:10-12. Appellant denied detriment to the child in his home and that reduction or restriction of the child's time with him would be in the child's best interest. CP at 78.

In the Pierce Court Superior Court's Temporary Order on April 26, 2006, the child was to reside with the respondent/mother. CP at 100. The Court ordered that residential provisions "shall be" reviewed upon Appellant's return from military assignments. Id. The Respondent/Mother was "strongly advised to facilitate and accommodate" visitation between the step-siblings and the step mother at mutually agreeable dates and times. Id. The court placed no restrictions on the interactions between the child and his step-family and granted the father 50% of the time with the child during his military leave. Id.

Rae Lee Newman was appointed as the guardian ad litem for Ethan by Order dated May 18, 2006. CP at 101-06. The GAL filed the Guardian Ad Litem/Parenting Investigator Report to the Court on June 15, 2006. CP at 110. The GAL admitted that she had not had contact with Appellant/Father prior to submitting this report to the court. CP at 111:18-19), and that the report was not intended to be "inclusive [or] a fair representation of both sides of this issue." CP at 112:1-2.

Based on the Guardian ad Litem's admittedly incomplete report and unfounded conclusions, the Court entered orders restricting the Appellant/Father's visitation. CP at 133; CP at 134; CP at 135. The Court also reserved the issue of trial continuance. CP at 135.

The GAL's supplemental report without further investigation of Appellant's home was not filed with the court until September 29, 2006, just five days before trial. Despite the fact that the Guardian ad Litem had not completed her investigation, the Court denied Appellant/Father's motions for a CR 35 examination of the child and a trial continuance. CP at 136-38; CP at 139-41. Appellant based his motion for CR 35 examination on the fact that the primary issue in this matter was Ethan's mental health. CP at 144. At the hearing on September 29, 2007, the GAL hand-delivered her Supplemental GAL Report. CP at 177-201. However, this report was not delivered until after Appellant's counsel had deposed the GAL. Dep. of Rae Lea Newman (Sept. 27, 2006). The GAL based her final recommendation regarding the parenting plan for Ethan primarily because of Ethan behavior in school at Kibler Elementary and because Ethan continued to state that he was afraid of Rachel Wyrick. CP at 182.¹

B. All Evidence Shows that Ethan Needs Special Services and Attention both at Home and School.

Both parents and the GAL described Ethan as a very active child with difficulty concentrating and sitting. Dep. of Erin Demetro at 37:2-6

¹ In observing Rachel and Ethan in the park during one of their visits, The GAL testified that Ethan did not appear to be afraid of Rachel. CP at __ (trans. 27:9-22). In fact, The GAL stated that on that visit, "[Rachel] does an excellent job." Id.

(Sept. 27, 2006); RP at 36:2-21 (Oct. 4, 2006). Verbatim Transcript of Proceedings (“RP”) at 9:22-23 (Oct. 6, 2006). Both parents recognized that Ethan needed consistent discipline at home and special attention at school, although prior to this litigation, neither parent had sought medical attention for Ethan’s behavior.

While child was living in Appellant’s home, Appellant requested an evaluation for Ethan (age 4) by the Enumclaw School District Ethan for special pre-school services. The teachers at the School District developed an IEP to assist Ethan with his developmental needs. CP at 45:22-23; RP at 73-74 (Oct. 4, 2006). Ethan’s school Kibler Elementary had an extensive behavioral plan to help Ethan function within the school system. CP at 66-68. By the time Ethan was in kindergarten, school reports indicated that Ethan was making good progress. CP at _.

C. Respondent Failed to Show Any Harm When the Child Resided with Appellant.

Appellant has no prior criminal history. RP at 49:2-3 (Oct. 6, 2006). Appellant has lived a stable lifestyle. He married Rachel Wyrick over three years ago and they resided in two homes in the past 3 years. RP at 130:5-7; 131:10-12 (Oct. 4, 2006). Appellant resided with his parents for the two years prior to his marriage primarily because Respondent was not involved with Ethan and he needed the family

support to care for him. RP at 134:18-22 (Oct. 4, 2006). In addition to an interest in serving in the military, Appellant's enlisted with the U.S. Army to provide him with an opportunity to attend college and to provide better medical care for his family. RP at 27:3-18 (Oct. 6, 2006). Appellant executed a special power of attorney for his wife to take care of Ethan while he was attending boot camp. CP at 68-70.

Father has always spent a lot of time with Ethan and the other children in the home. RP at 45:5-11 (Oct. 4, 2006); RP at 26:3-18 (Oct. 6, 2006). It was undisputed that Appellant has taken care of Ethan for substantial periods of time when Respondent failed to comply with the 50-50 parenting plan.

The GAL's observation of Appellant's interaction with Ethan was that Appellant spent a substantial amount of time playing very vigorously with [Ethan] during her visit. RP at 25:10-13 (Oct. 9, 2006). The GAL concurred that father was very appropriate with Ethan and was very high energy with him, which she felt was very appropriate and important for Ethan. Id.

D. Failure to Show Abuse in Appellant's Home.

At issue was the statement of Rachel Wyrick to the GAL that she had sometimes spanked Ethan and had flicked him on the check in the past. RP at 16:10-17:12 (Oct. 6, 2006). Because of concern regarding

Rachel's discipline of Ethan, Rachel voluntarily met with Ron Lewis, the executive director the behavior health programs at Good Samaritan Community Health Care for three visits. RP at 32-33 (Oct. 9, 2006). Mr. Lewis also met separately with Ethan's two older step-siblings. RP at 33 (Oct. 9, 2006). At trial, Mr. Lewis stated that he had no concerns about Rachel's disciplinary practices as described by her or her two sons. RP at 35-36; 37:9-17 (Oct. 9, 2006).

Rachel Wyrick, in fact, has special training in working with disabled and challenged children. She volunteers for eight weekends in the winter at as snowboard instructor for disabled children with a program called SKI4ALL. RP at 36:16-21 (Oct. 6, 2006).

Moreover, Respondent also admitted to spanking Ethan when he "deserved it." Dep. of Erin Demetro at 35:23-36:4. Respondent never observed any bruises on Ethan that caused her concern. Dep. of Erin Demetro at 59:14-16; RP at 30:1 (Oct. 4, 2006). .

E. Respondent Has Led Highly Unstable Life

Respondent has led a highly unstable life since the birth of Ethan. Respondent admitted that she had lived in 12 different homes since Ethan's birth. RP at 59-64 (Oct. 4, 2006). Respondent also admitted that she had never resided alone as an adult. Respondent works as a bartender an is gone at least five evenings a week. RP at 16:10 (Oct. 4,

2006). Respondent also had no awareness or concerns for Ethan's mental health or behavior or school until after this litigation began.

Respondent has a conviction for gross misdemeanor for obstructing a police officer. RP at 17:22-25; 18:16-24 (Oct. 4, 2006). She was arrested for DUI in 2003. RP at 19:3-19 (Oct. 4, 2006). She also had an outstanding bench warrant against her, and she had failed to serve the court ordered jail time until five days before trial. Id.; RP at 21:9-15; 31:5-11; 92:19-25 (Oct. 4, 2006). She had not begun her required drug and/or alcohol treatment program at the time of trial. RP at 93:17-25 (Oct. 4, 2006).

Respondent was also charged with Driving While License Suspended. RP at 21:1-5 (Oct. 4, 2006). She had not held a valid driver's license or insurance until the time of trial. She had not held a valid driver's license or insurance until the time of trial. RP at 87:2-24 (Oct. 4, 2006).

The GAL admitted that she knew about Respondent's prior history before her first meeting with Respondent, but had not included any of it in her first report to the court. RP at 31:8-11 (Oct. 9, 2006). The GAL had not reported this history to the court until her Supplemental GAL Report submitted September 29, 2006, just a few days prior to trial. RP at 30:5-9 (Oct. 9, 2006).

F. Respondent Did Not Object to the Integration of Ethan into Appellant's Home.

Respondent failed to raise any objections to Ethan living with father during prior three years, claiming ignorance of the law. RP at 27:11-14 (Oct. 4, 2006). Respondent also admitted that she was aware of how Ethan was disciplined in Appellant's home, but other than disagreeing with the discipline, did nothing to stop it. RP at 30:9-20 (Oct. 4, 2006).

Respondent did not make an effort to make contact with Ethan's school until well after the school year had begun. RP at 32:14-17 (Oct. 4, 2006); 75:3-6.

Although Respondent complained that she had been excluded from meeting with Ethan's teachers, she admitted that she had never requested a meeting with Ethan's teacher. Dep. of Erin Demetro at 26:5-9. Respondent also admitted that although "[she] was not informed that he was enrolled there until after school had started, which seemed at the time okay with me." Dep. of Erin Demetro at 24:2-4. Respondent blamed Appellant for not providing her with information from school even though she picked Ethan up from school.

After litigation began and the GAL was appointed as the guardian ad litem, the GAL advised Respondent to take Ethan for evaluation by a

neurobehavioral physician Heather Daniels. RP at 104:19-22 (Oct. 4, 2006). Dr. Daniels diagnosed Ethan with ADHD, Anxiety Disorder NOS and Post Traumatic Stress Disorder. CP at 182:22-24. Dr. Daniels did not identify any potential causes of Ethan's behavior arising from the environment in Appellant's home.

G. Guardian Ad Litem's Investigation Failed to Establish Any Detriment to the Child by Remaining in Appellant's Home.

The GAL's report reflects many comments regarding Ethan's difficulties at school, and some general statements made by a teacher about the Wyrick family that did not directly affect Ethan and did not rise to the level of abuse. CP at 113. In contrast, the GAL initially reported no problems at Ethan's new school Stewart Elementary where he had attended approximately six weeks at the end of the school year. Id. In The GAL's Supplemental Report, she reported Ethan's behavior that was very similar to what he had exhibited at Kibler Elementary, and this was after Ethan had been evaluated by Dr. Daniels and was on medication. CP at 179. Respondent also admitted that Ethan's behavior worsened after he came to reside with her. RP at 122:6-25 (Oct. 4, 2006).

The only evidence of alleged abuse that the GAL uncovered was Rachel Wyrick description of her discipline of Ethan. She admitted to

physical discipline of Ethan and grounded Ethan for periods of time that the GAL thought excessive in length. CP at 115. The GAL also reports that Ethan stated that he was afraid of Rachel Wyrick and that his step-brothers get in trouble during the visits. CP at 116. Finally, the report notes that Ethan is “extremely challenged behaviorally while in Rachel and Nathan Wyrick’s care...” CP at 117.

The GAL believed that Ethan’s behavior dramatically improved while in the care of Respondent/Mother. CP at 118. On the other hand, Respondent’s view was that the child’s behavior worsened after he came to live with her. The GAL further concludes that “something was causing his horrifying behavior at Kibler Elementary.” CP at 118. The GAL reiterated this conclusion at trial, but again was unable to identify any cause for his behavior while living at the Wyrick home. RP at 8:20-9:911:3-10 (Oct. 10, 2006). Without being able to draw any conclusions as to the cause of Ethan’s behavior, the GAL still recommended to the court that Ethan’s visitation be limited with his step-mother and step-siblings. At trial, the GAL identified the detriment to Ethan in Appellant’s home as Rachel Wyrick’s discipline style and the child’s behavior at Kibler Elementary. RP at 8:20-9:9 (Oct. 10, 2006).

H. The GAL's Actions and Testimony Demonstrated Bias.

The GAL also admitted that she had numerous contacts with Respondent/Mother that she did not record, including phone calls and stopping by her house. RP at 17:15-23 (Oct. 9, 2006). In fact, the GAL interviewed Ethan at his grandparent's home one more time on the day before she testified in court. RP at 8; 22:25-23:3 (Oct. 10, 2006).

In sharp contrast, the GAL admitted that never had a visit with Appellant, his wife Rachel, and the other children in their home. RP at 23:3-12 (Oct. 9, 2006). She never had a visit with Rachel and Nathan alone. Id. at 17-19. The GAL did have a visit with Rachel, Ethan, and his step-brothers, and the GAL indicated that Rachel's parenting of her children was appropriate. Id. at 24:5-8. The GAL also admitted that in her observation that Ethan's interactions with his brothers were "normal, healthy and brotherly." Id. at 24:22-25:3.

At the time of trial, the GAL indicated that she had back pain that radiated down her leg, but she also indicated to the court that she was capable of testifying. Id. at 5. The Court showed extreme deference to the GAL including limiting her testimony in court and Appellant's cross-examination to 15 minutes of in court time. Id.

In the middle of her testimony, the GAL interrupted her testimony to directly address the court to report highly prejudicial and

not probative hearsay statements allegedly made out of court by Appellant's counsel. Id. at 9. The GAL further stated that she believed that counsel's questioning of her had turned into "an all-out war on me..." Id. Again, the court offered to interrupt the GAL's testimony so that she would not "sacrifice" herself. Id.

When Appellant's counsel objected to The GAL's outburst, the court told counsel that "You need to sit down. We need to expedite this. I don't want The GAL being here any longer than she possibly has to be. It's cruel how this is going." Id. at 10:18-21.

V. ARGUMENT

A. The Standard of Review Is De Novo.

The standard of review from a final order is de novo. Although family law decisions rely heavily on the facts of the case, those facts must still be applied to the applicable law that is RCW 26.09.260 providing for the modification of the child's residence. "The meaning of a statute is inherently a question of law and our review is de novo." In re Parentage of J.M.K., 155 Wn.2d 374, 386-87, 119 P.3d 840 (2005). "The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose." American Cont'l Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).

Appellant contends that the Trial Court erred in its interpretation of RCW 26.09.260 as applied to the facts as found by the court.

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 26.09.260(1).

In applying these standards, the court shall retain the residential schedule established by a prior parenting plan unless the 'child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.'

RCW 26.09.260(2)(c).

B. The Trial Court's Ruling Cannot Be Upheld if There Is No Substantial Evidence to Support that Ruling.

"We are bound by the frequently stated rule that findings of fact made by the trial court cannot be disturbed on appeal if there is substantial evidence to support such findings." Peste v. Peste, 1 Wn. App. 19, 22, 459 P.2d 70, citing Watson v. Yasunaga, 73 Wn.2d 325, 438 P.2d 607 (1968). The statute requires a finding of a detriment to the child's physical, mental or emotion health while living in the Appellant's home. However, none of the findings of the GAL and ultimately the Trial Court

rise to this level. Further, Appellant also contends that substantial evidence does not support the trial court's findings of fact.

C. **The Trial Court Erred in Concluding that the Facts Supported a Finding of “Detriment.”**

Nothing in the GAL’s report and testimony presented at trial that points to a detriment in Appellant’s home that outweighs the detriment of moving the child to Respondent’s home. If fact, when questioned at trial, the GAL protested that she was not an attorney and could not understand the legal standards under which she was conducting her investigation. RP at 21:2-9 (Oct. 9, 2006). The GAL admitted at trial that she had not gotten “to the bottom of what’s going on.” RP at _ (Oct. 10, 2006).

1. **A Finding that the Child Is Afraid of His Step-mother Is Not a Sufficient “Detriment” under the Statute.**

The Trial Court found that the child Ethan was afraid of his step-mother. However, even such a finding is not sufficient under the law to support a finding of “detriment” as required under the statute. A child’s apprehension of going to the other parent’s home is not uncommon in children. Such apprehension is not sufficient detriment to change a parenting plan.

Furthermore, this fear was not of recent origin was an ongoing emotion that the child presented at times of transition between the households. Respondent indicated that Ethan was apprehensive when Rachel was at transfers. RP at 45:19-23 (Oct. 4, 2006). Respondent believed that the prior residential arrangements were “unworkable” because of the son’s fear of going back to his father’s home. RP at 48:10-19 (Oct. 4, 2006).

Furthermore, substantial evidence did not support the finding that the child was afraid of his step-mother. Although the GAL relied heavily on Ethan’s alleged fear of Rachel Wyrick, she could not describe any reason or basis for this fear. In fact, the GAL’s actual observation of Rachel with the children in the park was that Rachel did an “excellent” job and that Ethan did not display any fear of her.

2. The Child’s Behavioral Issues and School Performance Does not Rise to the Level of “Detriment.”

Behavioral issues and school performance are not a “detriment” sufficient to modify a child primary residence. Both parents expressed concern for Ethan’s mental health and behavior issues. Both parents recognized that Ethan needed consistent discipline at home and special attention at school. Prior to this action, neither parent had sought medical attention for Ethan’s behavior. Appellant had Ethan evaluated

through the Enumclaw School District. Ethan had an IEP and had been receiving services in the two years prior to this litigation.

At trial, much testimony was presented on Ethan's educational history, his placement into Special Education in the Enumclaw School District, and subsequent evaluations by Dr. Daniels. Dr. Daniels' diagnosis of ADHD, depression and anxiety did not reflect in any way upon Appellant's home any more than if the child had gotten a cold at the father's home. No any connection between Ethan's behavior and the environment at Appellant's home.

The Trial Court's only finding regarding any lack of medical care by Appellant was that he had not attending to the child's dental care and tooth grinding. CP at 3. Such a finding, however, does not warrant a modification of residence.

3. The Trial Court Did Not Find Abuse in Appellant's Home.

Although there was much contention about Rachel Wyrick's discipline of Ethan, the Trial Court did not make a finding that her actions constituted abuse. Respondent indicated that she had never seen bruises or other signs of physical abuse. As stated above, both parents admitted to sometimes spanking Ethan.

The Trial Court found Mr. Lewis' testimony to be professional and credible regarding Rachel's discipline of her children. CP at 204. Again, there was no evidence that Mr. Lewis found Rachel to be abusive. Consequently, the Trial Court did not find that Ethan had been abused in Appellant's home.

D. The Trial Court Erred in Failing to Consider the Harm in Removing the Child from Appellant's Home.

The second, and vital, part of the statute requires the court to consider the "harm" in removing the child from his current environment. That harm must be less than the detriment. The statute on its faces recognizes that moving a child from the primary residential care of one parent to another inherently involves harm to the child. Therefore, before making such a modification, the court must consider the harm that the child will suffer in such a move. The Trial Court erred by failing to consider the harm to the child in making such a move.

1. The Court Did Not Consider the Disruption of the Child's Relationship with His Step-mother and Step-Siblings.

Given that the GAL could find no correlation between Ethan's behavior and his environment at the Appellant's home, there was no "compelling" reason to disrupt his relationship with his father, step-mother and step-brothers. In re Marriage of Little, 26 Wn. App. 814, 816-17, 614 P.2d 240 (1980), rev'd 96 Wn.2d 183, 634 P.2d 498 (1981).

The Court in Little also reasoned that a child has an "independent, constitutionally guaranteed right to maintain contact with a person with whom the child has developed a parent-like relationship[.]" Little, at 816.

The criteria for determining the best interests of the child are varied and highly dependent on the facts and circumstances of the case at hand. [In re Aschauer, 93 Wn.2d 689, 695]. Yet continuity of established relationships is a key consideration. Aschauer, at 695;

McDaniels, 108 Wn.2d at 311. Neither the Trial Court nor the GAL took into consideration the continued relationship of Ethan. In fact, the legal proceedings from the filing of the petition and the trial completely disrupted the child's relationship with Appellant and his step-family. Immediate limitations were imposed based on the GAL's limited initial report. At the end of the case, the GAL still could not identify what was "at the bottom" of this matter.

2. Stability of the Family Home in Which the Child Was Residing Is of Paramount Consideration.

The Trial Court and the GAL complete ignored the facts that the child had established a stable home in an ongoing family unit with the Appellant over the prior three year of this six-year-old's life. "Child development experts stress the importance of a stable and predicable parent/child relationship, even if the parental figure is not the biological

parent.” McDaniels, 108 Wn.2d at 309-10. Neither the Trial Court nor the GAL evaluated the stability that had been provided in Appellant’s home when Respondent had been moving regularly, had various legal problems, and had been involved in abusive relationships.

In making the determination, the court is not bound by the recommendations of the guardian ad litem. Instead, it must keep in mind that the child's interests are paramount and consider the stability of the present home environment, the existence or an ongoing family unit, the extent to which uncertainty of parentage already exists in the child's mind, and any other factors which may be relevant in assessing the potential benefit or detriment to the child in allowing the paternity petition to continue.

McDaniels, 108 Wn.2d at 312-13.

The GAL admitted that stability in Ethan’s life was of paramount importance and that Dr. Daniels would undoubtedly concur with that conclusion. RP at 24:13-21 (October 9, 2006). However, nothing in the guardian ad litem’s report commented on the completely disparate lifestyles of each of the parents.

It was not until the GAL’s Supplemental Report, and following the deposition of Respondent, that the GAL revealed Respondent’s past issues with the law. CP at 114. The fact that Respondent had had an outstanding bench warrant until shortly before trial did not appear to phase the GAL. Further, Respondent admitted that she had a history of

being in relationships with abusive men. Id. Respondent has led an unstable and questionable lifestyle. However, it was not until shortly before the trial date that respondent and the GAL began to attend to these serious issues.

In contrast, Appellant's life focused on children, home and church. Appellant had a stable home, had remarried, and sought to provide for his family and improve his life. His actions of joining the military were to better himself and provide greater opportunities for his family.

3. The Trial Court Failed to Consider that the Child Did Not Received Any Additional Services Than What He Was Receiving in the Appellant's Home.

In relocation cases, the court has denied the relocation petition when the moving party cannot show any cogent reason for making such a move. Although such a holding is not binding in a modification of parenting plan, it is instructive regarding the issues of the best interests of the child.

[Considering] the quality of life, resources, and opportunities available to the child and the relocating party in the current and proposed geographic locations, there is no demonstration that Browns Valley, South Dakota offers anything better to the child than what is available in Spokane.

In re Marriage of Momb, 132 Wn. App. 70, 84.

None of the GAL's recommendations, except as to visitation, could not have been incorporated into Appellant's home where he was already integrated and where he was already receiving extensive special education resources within Kibler Elementary. Ethan's new school in Puyallup implemented a behavioral plan with Ethan, and the teacher also complained of Ethan's hyperactivity. RP at 39:8-24 (Oct. 4, 2006).

The GAL could have recommended that Dr. Daniels evaluate Ethan for possible medical causes of his behavior while in the Appellant's home. She could have also as easily recommended no corporeal punishment in the Appellant's home and advised that Appellant attend counseling with Ethan to better understanding appropriate discipline.

In applying these standards, the court shall retain the residential schedule established by a prior parenting plan unless the 'child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.'

RCW 26.09.260(2)(c).

E. The Trial Court Abused Its Discretion in Ordering the Child to Reside with Respondent.

The Court's Order is an abuse of discretion. 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). The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982). “Deference to a trial judge's discretion recognizes that there must be some ‘individualizing agent’ in the administration of justice.” In re Russell, 110 Wn. App. 16, 20, 37 P.3d 1265 (2002), citing Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 *N.Y.U. L. REV.* 925 (1960). The Court of Appeals has recognized that the trial court takes into account “For this reason, and others, we defer to trial judges on other questions, like questions of evidence.” *Id.*

1. The Trial Court Abused Its Discretion in Making Biased Statements and Giving Preferential Treatment to the Witness.

The Trial Court stated that it did not approve of litigation in the management of custodial disputes. However, as the Unified Family Court, it is the court’s responsibility to make available the litigation process in a fair and impartial manner notwithstanding the judge’s personal bias. RP at 5:16-24 (Sept. 29, 2006).

Furthermore, the Trial Court’s highly deferential treatment of the GAL, interrupting and limiting Appellant’s counsel to cross-examination within the courtroom is an abuse of direction. Consequently, the order

for the child to reside with the mother should be reversed for lack of substantial evidence, bias, and abuse of discretion.

2. The Trial Court Abused Its Discretion in Following the Recommendations of the GAL When the Investigation Was One-sided and Incomplete.

The GAL failed to thoroughly investigate the detriment in Appellant's home. The GAL admitted in her testimony that she had visited the Wyrick home only on one occasion very shortly prior to trial. The GAL appeared unannounced at the Wyrick home on a Sunday morning just before the family was heading off to church. In her Supplemental Report, the GAL "did not note any concerns." CP at 111.

The GAL admitted that she never interviewed Appellant/Father and his wife together. She completely failed to address the Appellant's allegations that the child had been integrated into his home.

In sharp contrast that strongly suggests bias, the GAL admitted that she had visited with Respondent/Mother on numerous occasions, with the paternal grandparents, had numerous phone calls with Respondent. Further, the Guardian ad Litem made informal recommendations to the Respondent about medical care for the child without presenting her concerns to the court.

Finally, as required by the Order Appointing Guardian ad Litem, she failed to prepare and serve her Supplemental GAL Report 30 days

before trial. In fact, she arguably only prepared her final report as a result of questioning at her deposition only days before. CP at 110.

The Court in Bobbit v. Bobbit, App. Slip Opinion 31997-7-II, commented on the responsibilities of the GAL.

It has long been a concern of the legislature that GALs, who are appointed in family law matters to investigate and report to superior courts about the best interests of the children, do their important work fairly and impartially. ... These measures are intended to assure that the welfare of the children whose parents are involved in litigation concerning them remains the focus of any investigation and report, and that acrimony and accusations made by the parties are not taken up by an investigator whose only job is to report to the court after an impartial review of the parties and issues.

... GALR 2 articulates the general responsibilities of GALs. As relevant here, it states:

[I]n every case in which a guardian ad litem is appointed, the guardian ad litem shall perform the responsibilities set forth below[:]

(b) Maintain independence. A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom.

(f) Treat parties with respect. A guardian ad litem is an officer of the court and as such shall at all times treat the parties with respect, courtesy, fairness and good faith.

(g) Become informed about case. A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. A guardian ad litem shall examine material information and sources of information, taking into account the positions of the parties.

(o) Perform duties in a timely manner. A guardian ad litem shall perform responsibilities in a prompt and timely manner, and, if necessary, request timely court reviews and judicial intervention in writing with notice to parties or affected agencies.

Bobbit v. Bobbit, App. Slip Opinion 31997-7-II, at 4.

The GAL's behavior in this case failed to meet these standards. First, upon questioning, the GAL was unclear as to her duties in the case and the statutory meaning of "detriment" to the child in the current living environment.

Second, the GAL clearly failed to maintain independence and objectivity by her multiple visits with the Respondent, some of which she did not document. Further, she attended an appointment with the Respondent at Dr. Daniels' office that certainly exhibits the GAL's lack of independence. CP at 112.

In contrast, the GAL made a single visit to Appellant's home and found "nothing of concern." However, "nothing of concern" was sufficient "detriment" to recommend against the child returning to Appellant's home.

Second, the GAL failed to comport herself as an officer of the court. She personally attacked Appellant's counsel when taking the stand to testify. RP at 9:4-18 (Oct. 9, 2006). She accused counsel of turning the litigation into a personal attack on her.

The Trial Court abused its discretion in considering the GAL's recommendations that were biased and unfounded. Furthermore, the GAL's demeanor and personal attack constituted overt bias against Appellant thereby disqualifying herself as an independent and impartial investigator.

3. The Trial Court Abused Its Discretion by Failing to Abide by the Statutory Requirement of a Finding of "Detriment" in Appellant's Home.

Here, the court's failure to follow the statutory requirements was an abuse of discretion. Appellant contends that the facts, as presented in evidence and as found by the court, do not meet the statutory requirement of "detriment" in the child's environment while in the Appellant's home. 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). The Trial Court's decision to remove the child from Appellant's home and place him with Respondent is manifestly unreasonable given the facts as found by the court. The Trial Court's decision is therefore untenable.

F. Appellant Contends That the Trial Court Erred in Denying His Motions for CR 35 Examination and Trial Continuance.

Appellant's contentions are based on essentially the same facts. At the time of Appellant's motions, which Appellant acknowledges were made shortly before trial, Appellant had been on extremely restricted visitation with the child of approximately only 4-6 hours once a week. Appellant's interaction with the child was very limited.

The GAL had prepared a report for the court in June 2006 while Appellant was in military service. This report stated that the GAL had not interviewed Appellant because of his military duty and that the report could not be relied upon because it was incomplete. Many court orders, however, were entered based on that report.

At the time the motions were filed, the GAL had not served a more complete report on the parties. Even at the time of the deposition of the GAL just a week before trial, no report had been prepared. It was not until the date that the motions were heard that the GAL presented a more complete report.

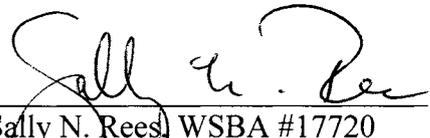
Therefore, appellant contends that the court erred in denying his motion for CR 35 when no complete, independent evaluation or investigation was available until less than a week before trial. Similarly, the Trial Court erred in denying the motion for trial continuance when

the GAL had not completed, when the GAL's investigation was admittedly incomplete and one-sided.

VI. CONCLUSION

Appellant contends that the Trial Court's order for the child to reside with Respondent should be should be reversed for lack of substantial evidence, bias, and abuse of discretion. Appellant requests that the Court order the child to be returned to his residence. Concurrently, a parenting plan providing for consistent visitation with Respondent should be implemented. Child support should be recalculated based on the parties' income at the time of trial.

RESPECTFULLY SUBMITTED this 20th day of August, 2007.


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DECLARATION OF SERVICE

STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

That on August 20, 2007, I caused to be served the foregoing document on the following attorneys of record via legal messenger as follows:

Edward Lane Law Office of Alisa Maples 15 S. Grady Way, #400 Renton, WA 98057-3240	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail (overnight) <i>sk</i>

DATED at Seattle, Washington, this 20th day of August, 2007.

[Signature]
Sally N. Rees, WSBA # 17720