

No. 40300-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In Re the Marriage of

MCKAYLA SMITH,  
Petitioner,

and

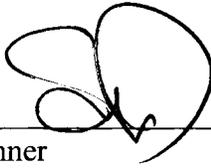
MATTHEW SMITH,  
Respondent.

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BRIEF OF APPELLANT

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## TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR .....	1
ASSIGNMENTS OF ERROR.....	1
ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR .....	7
II. STATEMENT OF THE CASE.....	8
A. FACTS .....	8
III. ARGUMENT.....	16
1. The Trial Court Lacked The Authority To Sua Sponte Enter A Temporary Order “Reversing” The August 7, 2010, Final Parenting Plan And Lacked The Authority To Enter A Final Parenting Plan On April 30, 2010. ....	17
a. The Court Did Not Follow Mandatory Procedures Relating To Entry Of Temporary Parenting Plans On February 5, 2010.....	18
b. The Court Lacked the Inherent Authority to Modify the Final Parenting With its February 5, 2010, Temporary Order And Its April 30, 2010 Modification Order and Final Parenting Plan.....	24
i. Courts Inherent Equitable Powers.....	24
c. The Parties Did not Agree to Waive The Provisions of RCW 26.09.260(1),(2) Relating To The Modification Of Final Parenting Plans Nor Does The August 7, 2010, Final Parenting Plan Express An Intent By The Court To Retain Jurisdiction Over The Residential Schedule Beyond Minor Adjustments.....	32
d. There Was No Substantial Change In Circumstances Because The Parties’ Inability To Communicate And Effectively Co-Parent Was Anticipated In The Prior Final Parenting Plans.....	37
1) August 2008 Final Parenting Plan.....	38
2) August 2009 Plan .....	44

2. The Court Abused Its Discretion In Entering The April 2010 Parenting Plan Because There Was Not Substantial Evidence Introduced At Trial That Modification Was Necessary To Serve The Best Interests Of The Children Or That The Children’s Present Environment Was Detrimental. ....	46
a. Testimony.....	47
1) GAL’s Testimony.....	47
2) Lynette Lyle’s Testimony .....	53
3) McKayla Smith’s Testimony .....	55
4) Barbara Clinton’s Testimony .....	57
5) Matthew Smith’s Testimony .....	57
3. The Trial Court Erred When It Denied Ms. Smith’s Motion To Disqualify The Hon. Judge David Edwards From Presiding Over This Modification .....	62
4. The Trial Court Erred In Its Award Of Reasonable Attorneys Fees To Mr. Smith.....	63
IV. CONCLUSION .....	68

## TABLE OF AUTHORITIES

### Cases

<u>Abel v. Abel</u> , 47 Wn.2d 816, 819, 289 P.2d 724 (1955).....	64
<u>Bedolfe v. Bedolfe</u> , 71 Wash. 60, 61, 1912, 127 P. 594 (1912).....	63
<u>Bordeaux v. Ingersol Rand Co.</u> 71 Wn. 2d 392, 429 P. 2d 207 (1967).....	17
<u>Chandler v. Chandler</u> , 56 Wn. 2d 399, 403-04, 353 P.2d 417 (1960).....	25
<u>George v. Helliard</u> , 62 Wn. App. 378, 383, 814 P.2d 238 (1991).....	18
<u>In re Marriage of Cabalquinto</u> , 100 Wn.2d 325, 327-28, 669 P.2d 886 (1983).....	16, 38
<u>In re Marriage of Knight</u> , 75 Wn. App. 721, 729, 880 P.2d 71 (1994).....	64
<u>In re Marriage of Kovacs</u> , 121 Wn.2d 795, 801, 854 P.2d 629 (1993).....	16
<u>In re Marriage of Littlefield</u> , 133 Wn.2d 39, 46-47, 940 P.2d 136 (1997) .....	38, 59
<u>In re Marriage of McDole</u> , 122 Wn.2d 604, 610, 859 P.2d 1239 (1993).....	16
<u>In re Marriage of Naval</u> , 43 Wn. App. 839, 840, 719 P.2d 1349 (1986).....	37
<u>In re the Custody of Halls</u> , 126 Wn App. 599, 606, 109 P.3d 15 (2005).....	17
<u>In re the Marriage of Caven</u> , 136 Wn.2d 800, 806, 966 P.2d 1247 (1998) .....	17, 63
<u>In re the Marriage of Possinger</u> , 105 Wn. App. 326, 333-34, 19 P.3d 1109 .....	passim
<u>Little v. Little</u> , 96 Wn.2d 183, 194, 634 P.2d 498 (1981).....	25
<u>Marriage of Hansen</u> , 81 Wn. App 494, 914 P.2d 799 (1996).....	38
<u>Munoz v. Munoz</u> , 79 Wn.2d 810, 813-14, 489 P.2d 1133 (1971).....	38
<u>Phillips v. Phillips</u> , 52 Wn.2d 879, 884, 329 P.2d 833 (1958).....	26, 27, 30, 36
<u>Potter v. Potter</u> , 46 Wn.2d 526, 528, 282 P.2d 1052 (1955).....	passim
<u>Roorda v. Roorda</u> , 245 Wn. App 848, 611 P.2d 794 (1980).....	20
<u>State ex rel. Foster v. Superior Court</u> , 1917, 95 Wash. 647, 653, 164 P. 198 (1917).....	63
<u>State ex rel. Mauerman v. Superior Court for Thurston County</u> , 44 Wn.2d 828, 271 P.2d 435 (1954).....	63
<u>State v. Dupard</u> , 93 Wn. 2d 268, 609 P.2d 961 (1980).....	17

### Statutes

RCW 26.09.....	passim
RCW 26.09.002.....	24, 30
RCW 26.09.060.....	18, 30
RCW 26.09.140.....	64
RCW 26.09.160.....	66, 67

RCW 26.09.184(4)(d).....	65
RCW 26.09.187 .....	28
RCW 26.09.187(3). .....	23
RCW 26.09.187(i)(3).....	23
RCW 26.09.194 .....	30
RCW 26.09.197 .....	21, 22
RCW 26.09.220 .....	47
RCW 26.09.260(1), (2).....	32, 60
RCW 26.09.260(13). .....	64, 67
RCW 26.09.260(5) .....	60
RCW 26.09.260. ....	passim
RCW 26.09.270 .....	7, 19, 21
RCW 26.12.175 .....	47, 48
RCW 4.12.040.....	62

**Other Authorities**

Karen Nelson Moore, <u>Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments</u> , 66 Corn. L. Rev. 534 (1981).....	17
<u>Thompson v. Thompson</u> , 82, Wn. 2d 352, 510 P.2d 827 (1973) .....	17

**Rules**

CR 40(f).....	62
RAP 9.6(a).....	65

I. ASSIGNMENTS OF ERROR  
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1. The trial court erred in changing the residential schedule of the minor children at the February 5, 2010, review hearing.
2. The trial court erred in relying on previous allegations and motions in making its Findings of Fact in the Order re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (hereafter referred to as “Modification Order”) in 2.1(1).
3. The trial court erred in entering Finding of Fact number 2.1(4)(a) that the mother has a longstanding and ongoing pattern of refusal or inability to cooperate with the father in its Modification Order.
4. The trial court erred in entering its Finding of Fact number 2.1(4)(b) that the August 7, 2009, parenting plan provides for review which might require ‘further action’ of the court including, but not limited to, minor adjustment in its Modification Order.
5. The trial court erred in entering Finding of Fact number 2.1(4)(c) that the mother filed “unsupported” claims of abuse in its Modification Order.
6. The trial court erred in entering Finding of Fact number 2.1(4)(d) that the mother had failed to provide the father with the necessary

information regarding health care providers despite direction and order within the parenting plan to do so or that she has failed to notify the father of healthcare providers and appointments in its Modification Order.

7. The trial court erred in entering Finding of Fact number 2.1(4)(e) that the mother was not credible or believable because of her demeanor and behavior while testifying in its Modification Order.

8. The trial court erred in entering Finding of Fact number 2.1(4)(g) that the mother scheduled discretionary activities during the father's scheduled visitation and refused to cooperate on alternate dates and times for scheduled visitation and telephone calls with the father in its Modification Order.

9. The trial court erred in entering Finding of Fact number 2.1(4)(h) that the mother has displayed a history of poor judgment and an inability to make good decisions for herself and her children in its Modification Order.

10. The trial court erred in entering Finding of Fact number 2.1(4)(i) in its Modification Order that the February 5, 2010, oral report of the GAL raised issues of immediate concern for the emotional, psychological, and physical health and safety of the minor children requiring immediate action.

11. The trial court erred in entering Finding of Fact number 2.1(4)(j) that the mother's non-cooperation and obstruction of the father's visits and interactions with his sons dates back several years and that the mother's conduct demonstrated a deliberate and consistent interference in the relationship between the sons and the father in its Modification Order.
12. The trial court erred in entering Finding of Fact number 2.1(4)(k) that the Mother's actions, inactions, and failures appear to be intended to undermine and thwart the father's interaction with the children in direct contravention of the court approved, agreed August 7, 2009, parenting plan language to promote "meaningful loving relationships with each of their parents" in its Modification Order.
13. The trial court erred in entering Finding of Fact number 2.1(4)(l) that the eldest child has shown improvement in school and attendance and academic performance since placement with his father on February 5, 2010, in its Modification Order.
14. The trial court erred in entering Finding of Fact number 2.1(4)(m) that the mother has allowed her personal feelings, issues, and anger about the dissolution of the marriage and her feelings towards the father and his current significant other to damage her ability effectively and appropriately co-parent her sons in its Modification Order.

15. The trial court erred in entering Finding of Fact number 2.1(4)(n) that the best interest of the children required immediate action on February 5, 2010, and nothing shown at the April 8, 2010, testimonial hearing requires or supports change of that finding and Order of the court in its Modification Order.
16. The trial court erred in entering Findings of Fact number 2.1(4)(o) its Modification Order that the mother's personal feelings, psychological or emotional issues and anger must be addressed and treated before she can effectively and appropriately co-parent the children.
17. The trial court erred in entering Finding of Fact number 2.1(4)(q) its Modification Order that less drastic alternatives, including mediation, to affect a positive co-parenting relationship have been attempted and have failed due to the mother's behavior.
18. The trial court erred in entering Finding of Fact number 2.1(4)(t) in its Modification Order that the evidence presented clearly, cogently, and convincingly that the mother has failed to act in the best interests of the children's best interests are best served by residential placement with the father.
19. The court erred in entering its Conclusion of Law 1) in its Modification Order that the mother has displayed a pattern of behavior and decision making that is injurious to children and which includes a

willful and wanton disregard for the orders of the trial court and the rights of the father and fails to act in the best interest of the minor children.

20. The trial court erred in entering Conclusion of Law number 2) in its Modification Order that residential placement of the children should be with the father.

21. The trial court erred in entering Conclusion of Law number 3) in its Modification Order that the mother should undergo a psychological or psychiatric evaluation and complete whatever therapy or counseling is recommended.

22. The trial court erred in entering Conclusion of Law number 4) in its Modification Order that the mother should take parenting classes as a community college or higher level of instruction.

23. The trial court erred in entering Conclusion of Law number 8) in its modification order that the children's present environment when placed primarily with the mother is detrimental to the children's physical, mental, or emotional health and the harm likely caused by a change of environment and placement primarily with the father is outweighed by the advantage of a change to the children.

24. The court erred in Conclusion of Law number 9) in its Modification Order that the mother should pay the father's reasonable attorney's fees.

25. The court erred in finding that modification was authorized under RCW 26.09.260(1), (2) in number 2.2 of its Modification Order.
26. The trial court erred in finding that the children's environment under the parenting plan is detrimental to the children'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 children in its Modification Order.
27. The trial court erred in changing the residential schedule of the minor children in its Modification Order in number 3.1.
28. The trial court erred in ordering the mother to pay the father's attorney fees.
29. The trial court erred in ordering the mother to undergo a psychological evaluation in its Modification Order.
30. The trial court erred in entering the Final Parenting Plan dated April 30, 2010.
31. The trial court erred in denying the mother's motion for disqualification of the Honorable David Edwards on October 27, 2010.
32. The trial court erred in entering the Final Parenting Plan of August 7, 2009.
33. The trial court erred in failing to establish adequate cause prior to modifying the August 7, 2009, parenting plan.

## ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court had the authority under RCW 26.09, in an action to modify an existing final parenting plan, to enter a temporary parenting plan, sua sponte, on February 5, 2010, at a non-evidentiary hearing, and to subsequently enter a new final parenting plan after a bench trial on April 8, 2010, when no petition to modify had been filed and no adequate cause finding had been made?
2. Whether the trial court abused its discretion in modifying the final parenting plan under RCW 26.09.260; and RCW 26.09.270 when the evidence introduced at trial was that: (1) the mother did not get along with the father or the GAL; (2) the mother had given the father the children's medicine in an unmarked container; (3) the mother had failed to provide the father with a list of health care providers; (4) the mother sent the children to a church activity during the father's scheduled telephone calls as allowed under the parenting plan; (5) the children had resided with the mother their entire lives; and (6) the child's counselor testified that the modification was detrimental to the children; and
3. Whether the trial court erred in denying the motion to disqualify the Hon. Judge David Edwards on a pending parenting plan modification under RCW 4.12.060 when an affidavit of prejudice was presented prior to the judge making any rulings in the Modification.

4. Whether a trial court can order a nonmoving parent to a child modification proceeding under RCW 26.09 to pay the other party's attorney's fees when the court initiates the action sua sponte?

II. STATEMENT OF THE CASE

A. FACTS

The parties were married in Hoquiam on August 16, 2003. The respondent in this matter, Matthew Smith, was in the military during the marriage and served on active duty in many locations. The parties had two children, CS and RS. Up until February 5, 2010, CS and RS had lived with their mother, appellant McKayla Smith. RP II 64

Ms. Smith filed a petition for dissolution on July 17, 2006, in Grays Harbor County Superior Court. A Decree of Dissolution, Findings of Fact and Conclusions of Law, and a Final Parenting Plan were entered on August 15, 2008, after a bench trial in front of the Hon. Judge David Edward. CP 1-19. The Final Parenting Plan provided for primary residential placement of CS and RS with Ms. Smith. CP 12.

On September 15, 2008, Mr. Smith filed a Motion for contempt alleging that Ms. Smith had interfered with his visitations.<sup>1</sup> A hearing was

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<sup>1</sup> Counsel will file an amended designation of clerk's papers and have this document transmitted to the court.

set for September 29, 2008, but was continued several times. It was eventually heard on October 27, 2008.

Two days prior to the hearing on contempt respondent Smith filed a “Motion and Declaration for an Amended Parenting Plan” and a proposed parenting plan with the court. CP 20-21, 23-31. Mr. Smith asked the court to “amend” the Parenting Plan to give him primary residential custody of the children. CP 20-21. Unlike the detailed WPF DRPSCU 07.0100 form that has been mandatory since June of 2008, this pleading is devoid of the required information found in the court mandated form. It merely states that Mr. Smith wants custody of his children on the basis that Ms. Smith had been assaulted. CP 20-21. An adequate cause hearing was scheduled for November 3, 2010.<sup>2</sup>

Because Mr. Smith had filed a request for what was essentially a modification under RCW 26.09.260, her attorney at the time, Ronald Gomes, filed an affidavit of prejudice with the court asking that the Hon. Judge David Edwards be disqualified from hearing the modification action. CP 32,33. When respondent’s show cause hearing on contempt was heard the Hon. Judge David Edwards refused to remove himself from the new modification case. CP 33. It is unknown whether the court found

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<sup>2</sup> Pursuant to RAP 9.6 counsel will file an amended designation of clerk’s papers.

Ms. Smith in contempt but it did order make-up visitation for respondent Smith. CP 33.

The adequate cause hearing was held on November 3, 2010, before the Hon. Judge F. Mark McCauley and the court ruled that it was not making an adequate cause determination at that time. RP I 6-8. The court also appointed Jean Cotton as guardian ad litem for CS and RS. RP I 6-8. The court specifically tasked Ms. Cotton with assisting the court in establishing adequate cause by investigating the reports that Ms. Smith had been assaulted and that the children were coming home from respondent Smith's home with unusual bruising.

Ms. Cotton began her investigation and she reported back to the court on May 8, 2010. The matter was continued until August 7, 2010. The trial court file is devoid of any finding that adequate cause had been established to modify the August 15, 2008, parenting plan.

The parties agreed to the Final Parenting Plan on August 7, 2010, in an attempt to resolve their differences and parent the children more effectively. RP I 11. The August 7, 2010, Final Parenting Plan set a very rigid visitation and telephone call schedule in an effort to reduce the need for communication between the parties to reduce the opportunity for

misunderstandings. RP I 10-11.<sup>3</sup> The Parenting Plan set a review hearing on February 5, 2010, to review the Parenting Plan and make minor adjustments if necessary. RP I 12, CP 12. Ms Cotton indicated to the court at this time that there were a number of minor issues that the parties were not in agreement on and she summarized these for the court and suggested that the parties make arguments to the court about the remaining issues and that the court could review these issues in six months to see how the plan was working.

I summarized my client's issues with the dates of the winter vacation, the conflict between RS' birthday and thanksgiving, ambiguity in the transportation schedule, the requirement that Ms. Smith pay for CS' and RS' private school tuition, concerns that Ms. Smith had about RS' heart condition, the procedure for scheduling medical appointments and the requirement that the parties go through dispute resolution. RP I 12-20.

The court proceeded to give its opinion on these issues. RP I 20-24. The parties' attorneys adjourned to the lawyer's lounge at the

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<sup>3</sup> RP I refers to the report of proceedings for November 3, 2008, in the hearing before the Hon. Judge F. Mark McCauley, the report of proceedings for August 7, 2009, in the hearing before the Hon. Judge David Edwards, and the report of proceedings for February 5, 2010, in the hearing in front of the Hon. Judge David Edwards. RP II refers to the report of proceedings for April 8, 2010, in the bench trial before the Hon. Judge David Edwards. RP III refers to the report of proceedings for April 30, 2010, in the hearing for entry of final orders before the Hon. David Edwards.

courthouse and were able to work these issues out and the agreed Final Parenting Plan was signed by the judge that morning. CP 43-53.

At the February 5, 2010, review hearing the Guardian Ad Litem, Jean Cotton, gave an oral report to the Judge that indicated she felt that Appellant was not complying with the provisions of the Parenting Plan. RP I 25, 26. These accusations were also repeated by William Stewart, attorney for Respondent. RP I 26, 27. These accusations involve allegations that Ms. Smith was not complying with the provisions relating to telephone contact, exchange of health care provider information, and that she was generally incorrigible with respondent Smith and the GAL. RP I 25-27.

I responded that the allegations were untrue and informed the court that there was a CPS investigation of the father and his household based upon a referral made by the minors' doctor and that I was investigating this. This investigation was closed on the same day, after I contacted DSHS and was told that the matter was still open but would soon be closing.

This review hearing was not evidentiary in nature, no motion was made by either the Guardian Ad Litem or the parties, and the court did not take any testimony. RP I 30. No statements were made that the

respondent Smith's residential time with the children had been impacted in any way. RP 25-31.

The allegation that Ms. Smith was not allowing the children to have telephone calls with the father on Wednesday nights was based on the assertions of counsel that Ms. Smith had enrolled the children in a church program on Wednesday nights in an effort to deprive Mr. Smith of telephone contact. I indicated that this was untrue. RP I 28.

Moreover, The GAL and Respondent's attorney complained that Ms. Smith was violating the Parenting Plan by refusing to provide the father with information about the minors' medical conditions and doctors. RP I 25, 27. An incident was also mentioned when Ms. Smith did not provide the name of a new doctor to the father prior to an appointment. I reported to the court that the appointment was last minute and Mr. Smith was notified of the doctor's name and contact information after the appointment. RP 29.

Finally, counsel for Mr. Smith and the GAL alleged that Ms. Smith was not sending prescription medications for the children in the original containers when the children spent residential time with their father. RP I 25, 27. I explained to the Hon Judge Edwards that Mr. Smith had not been sending the unused portion of the medication back to Ms. Smith when the

children returned. Ms. Smith had no choice but to limit the medication to the amount needed or risk that the children would have no medicine upon their return. RP I 28.

Judge Edwards announced that he was “reversing” the parenting plan so that the father and mother’s residential schedule would be reversed effective at 4:00 PM that day. RP I 31. The court made no adequate cause determination and the Order Temporarily Amending Parenting Plan was scheduled to be reviewed on March 12, 2010, at an evidentiary hearing. CP 54, 55.

I filed a Notice of Discretionary Review to the Court of Appeals on February 5, 2010. CP 56-58. I also filed an Emergency Motion for a Stay with this court on February 5, 2010. The Emergency Motion for a Stay was denied by this court on February 10, 2010. I subsequently drafted my Motion for Discretionary Review on February 25, 2010.

On February 23, 2010, I withdrew as trial attorney for Ms. Smith and Tamara Darst substituted in on this case and began to prepare for trial. CP 59. The matter went to trial in Grays Harbor County Superior Court on April 8, 2010, after the March 12, 2010 “review” hearing was continued. CP 267.

After the trial the Hon. Judge David Edwards ordered that the Final Parenting Plan of August 7, 2010, be permanently reversed and that the children should reside the majority of the time with Mr. Smith. RP II 129. The Hon. Judge David Edwards ordered that the matter be noted up for entry of orders if the parties could not agree. RP II 131; CP 267.

On April 30, 2010, the trial court entered its Findings of Fact and Conclusions of Law in the Modification Order. RP III; CP 268, 274-279. The court also entered a Final Parenting Plan. 280-291 Ms. Darst objected to the new Final Parenting Plan, the Findings of Fact, and the Conclusions of Law in their entirety. RP III 3-13; CP 269-273.

The matter was set for oral argument on the Motion for Discretionary Review on May 19, 2010. After the trial court entered its final orders I struck the hearing for discretionary review and filed a Notice of Appeal on May 14, 2010. CP 294-319.

Subsequent proceedings have occurred in the trial court relating to the enforcement of the orders entered on April 30, 2010, as well as child support. On August 25, 2010, the trial court held a contempt hearing and Ms. Smith was found to be in contempt of those orders. On September 7, 2010, Findings of Fact, Conclusions of Law, and an Order Finding Contempt were entered by the trial court.

### III. ARGUMENT

Trial courts are given broad discretion in matters dealing with the welfare of children. In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993); In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); In re Marriage of Cabalquinto, 100 Wn.2d 325, 327-28, 669 P.2d 886 (1983). However, “custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification.” McDole, 122 Wn.2d at 610.

A superior court’s broad discretion in making custody determinations is not unlimited. Procedures relating to the modification of a prior parenting plan are statutorily prescribed and compliance with the criteria set forth in RCW 26.09.260 is mandatory. In re Marriage of Stern, 57 Wn. App. 707, 711, 789 P.2d 807, review denied, 115 Wn.2d 1013 (1990). Failure by the trial court to make findings that reflect the application of each relevant factor is error. Stern, 57 Wn. App. at 711.

RCW 26.09.260 governs the procedures for modifying a permanent parenting plan and contains varying standards depending on the kind of modification sought. These criteria and procedures limit a court's

range of discretion. In re the Custody of Halls, 126 Wn App. 599, 606, 109 P.3d 15 (2005).

Therefore, a court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria. Halls, 126 Wn .App. at 606.

On the other hand, statutory construction is a question of law requiring de novo review. In re the Marriage of Caven, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998).

1. The Trial Court Lacked The Authority To Sua Sponte Enter A Temporary Order “Reversing” The August 7, 2010, Final Parenting Plan And Lacked The Authority To Enter A Final Parenting Plan On April 30, 2010.

As a general rule, the doctrine of res judicata prevents a final judgment from being collaterally attacked in another proceeding. State v. Dupard, 93 Wn. 2d 268, 609 P.2d 961 (1980); Bordeaux v. Ingersol Rand Co. 71 Wn. 2d 392, 429 P. 2d 207 (1967). The purpose of this doctrine is to support the policy of finality. Karen Nelson Moore, Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments, 66 Corn. L. Rev. 534 (1981). This policy of finality applies to final parenting plans in dissolution actions. Thompson v. Thompson, 82, Wn. 2d 352, 510 P.2d 827 (1973)

Specific exceptions to the rule of finality, such as modification of a parenting plan, are allowed by statute but only upon the showing of a substantial change of circumstances or the risk of irreparable injury to the minors. RCW 26.09.060; RCW 26.09. 260; RCW 26.09.270.

a. The Court Did Not Follow Mandatory Procedures Relating To Entry Of Temporary Parenting Plans On February 5, 2010.

A judge does not have discretion to summarily modify a final parenting plan without following the provisions laid out in RCW 26.09.260. Stern, 57 Wn. App. at 711. Courts have interpreted RCW 26.09.260 to mean that a modification is permissible only when there is sufficient evidence to support a finding that: (1) there has been a change in circumstances, (2) the best interests of the child will be served, (3) the present environment is detrimental to the child's well-being, and (4) the harm caused by the change is outweighed by the advantage of the change.” George v. Helliard, 62 Wn .App. 378, 383, 814 P.2d 238 (1991). If a court finds that there is adequate cause to modify the parenting plan it must find that a substantial change in circumstances has occurred with the non-moving party since entry of the last parenting plan RCW 26.09.260.

Questions of statutory construction, in this case the applicability of RCW 26.09.260, are reviewed de novo. Hollmann v. Corcoran, 89 Wn.

App. 323, 332, 949 P.2d 386 (1997). The discretion of the court is limited to modification of a final parenting plan upon the procedures laid forth in RCW 26.09, which provides:

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

RCW. 26.09.270..

The court has no discretion to proceed with a parenting plan modification under RCW 26.09.260 unless it follows the mandatory procedures and makes an adequate cause finding.

In order to obtain a finding on the issue of modification of a parenting plan, a party must submit with his or her motion an affidavit listing facts supporting the requested modification. RCW 26.09.270. The court must deny the motion unless it finds that the affidavits establish adequate cause for hearing the motion. RCW 26.09.270. Adequate cause

is something more than prima facie allegations which if believed would allow inferences that the statutory criteria could met. Roorda v. Roorda, 245 Wn. App 848, 611 P.2d 794 (1980).

RCW 26.09.260 provides that a court shall not modify 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...

In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

- (a) The parents agree to the modification;
- (b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;
- (c) 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; or
- (d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

In this case, no motion was made to modify the August 7, 2009, Final Parenting Plan, no affidavits were filed, no adequate cause finding was made, and no testimony was taken when the court formulated its Temporary Order Amending Parenting Plan on February 5, 2010. RP I. 25-31. The court simply decided sua sponte to enter a temporary parenting plan based upon allegations which at most would have constituted contempt. This is clearly is a derogation from the procedures laid forth above in RCW 26.09.270. and an abuse of discretion by the court.

Furthermore, when a court enters a temporary order relating to a parenting plan the court is required under RCW 26.09.197 to examine certain factors.

After considering the affidavit required by RCW 26.09.194(1) and other relevant evidence presented, the court shall make a temporary parenting plan that is in the best interest of the child. In making this determination, the court shall give particular consideration to: (1) The relative strength, nature, and stability of the child's relationship with each parent; and (2) Which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending. The court shall also consider the factors used to determine residential provisions in the permanent parenting plan (*italics added*).

RCW 26.09.197.

The relevant criteria for determining the residential portions of a parenting plan are as follows:

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions as defined in \*RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

RCW 26.09.187(3).

Therefore, in fashioning a temporary plan such as the Temporary Order Amending Parenting Plan the court is required to give consideration to the nature of the relationship of the child to the parent and which parenting arrangement will cause the least disruption in the life of the child. Moreover, the court is required to consider the factors in RCW 26.09.187(3)(i)-(vii). There is no evidence that the court considered anything at all. Instead the court summarily announced its ruling. RP I 31.

If the court had engaged in such a consideration the children should have stayed with their mother pending trial on April 8, 2010. Ms. Smith has been the primary caretaker of the children their entire lives and suddenly moving them into the non residential parents household is a gross disruption in their lives. RP II 33.

RCW 26.09.187(i)(3) states that “(t)he relative strength, nature, and stability of the child's relationship with each parent” is the most important factor for the court to consider.” In this case it appears to have been totally disregarded. More troubling, there was no evidence that the

father even sought primary residential placement of CS and RS on February 5, 2010. “Amending” the parenting plan of August 7, 2009, which was by agreement of the parties, without a motion being made and no findings to support the criteria required by RCW 26.09 relating to parenting plans is a clear abuse of discretion.

- b. The Court Lacked the Inherent Authority to Modify the Final Parenting With its February 5, 2010, Temporary Order And Its April 30, 2010 Modification Order and Final Parenting Plan.
- i. Courts Inherent Equitable Powers.

A family law court retains its common law equitable powers over matters relating to the welfare of minor children to the extent consistent with the Parenting Act, chapter 26.09 RCW. In re the Marriage of Possinger, 105 Wn. App. 326, 333-34, 19 P.3d 1109 (recognizing a trial court's common law authority to enter an interim rather than permanent parenting plan at the time of entry of a dissolution decree even in the absence of express statutory authority), *review denied*, 145 Wn.2d 1008, 37 P.3d 290 (2001).

Under the Parenting Act, "the best interests of the child" remains the touchstone for trial court decisions affecting the welfare of minor children. RCW 26.09.002.. When the best interests of the child require it,

a court may defer permanent decisions on parenting issues until after a decree of dissolution is entered. Possinger, 105 Wn. App. at 336-37. As the Washington State Supreme Court stated:

Family law courts have always possessed the power, in whatever manner the question arose, of protecting and controlling the property and custody of minors. That power is broad and plenary and is not derived from statute. While applied in divorce and separation cases, its exercise is not limited to those actions....In cases involving the custody of minor children, whether it be by divorce or separation proceeding ... the court ... is thus exercising its inherent power and jurisdiction in equity.

Chandler v. Chandler, 56 Wn. 2d 399, 403-04, 353 P.2d 417 (1960).

The Legislature may curtail the court's equitable jurisdiction by statute. However, if it does not express an intent to change current law and the statute is consistent with prior policy the appellate courts will presume that the Legislature intended to leave that prior equitable jurisdiction untouched. Little v. Little, 96 Wn.2d 183, 194, 634 P.2d 498 (1981). In Possinger, Division I of the Washington State Court of Appeals held that the Parenting Act, RCW 26.09, explicitly grants courts the authority to enter either a temporary parenting plan prior to entry of the decree of dissolution, or a permanent parenting plan at the time the decree of dissolution is entered. Possinger, 105 Wn. App. at 333. However, the

Parenting Act is silent as to whether the court has the authority to enter a temporary parenting plan at dissolution of the marriage to see how things develop between the parents and the minor child. *Id.* at 335. Because the statute is silent as to whether a court may enter an interim parenting plan at dissolution and to reserve on a final plan until a period of time has passed, the court in Possinger held that the court retained its equitable jurisdiction to make such provisional plans at dissolution. Possinger, 105 Wn. App. at 337.

In two closely related case that predate the Parenting Act, the Washington State Supreme court held that a court may postpone the making of a custody determination pending a trial custody period, or the happening of some relevant future event. Phillips v. Phillips,<sup>9</sup> 52 Wn.2d 879, 884, 329 P.2d 833 (1958); Potter v. Potter, 46 Wn.2d 526, 528, 282 P.2d 1052 (1955). In Phillips, the court rejected the argument that the court did not have the authority to defer entry of a final order. Phillips, 52 Wn.2d at 884.

It is argued that the court was without authority to continue the hearing until six months after the date of the order, because, under Art. IV, § 20, of the state constitution, the court was required to render its decision within three months after the matter was submitted. In that provision, an exception is made where a rehearing is ordered, and this court has expressly approved such continuances in custody matters where the trial court, in its sound

discretion, deems it wise to postpone final determination until after a trial period during which the effectiveness and propriety of its temporary order can be observed

Id.

Likewise, in Potter, the court deferred entry of a final plan pending review to see how it was working for the child. The trial court stated:

The boy was twenty months old at the time of the trial. The decree provided that appellant should have the care, custody, and control of the child until October 1, 1954 (five months after entry of the decree). The decree further provided that, on October 1, 1954, the parties should appear Before the court for a determination as to whether any change should be made in the custody provision.

Potter, 46 Wn.2d at 527, 528.

However, the Parenting Act limits a court's discretion to delay decisions relating to child custody after final orders in a modification proceeding have been entered. While it may be that the court retains its inherent jurisdiction to enter parenting plans that would best be characterized as temporary in a dissolution under the Parenting Act, the matter before the court is not a dissolution action, but rather it originated in respondent Smith's motion to amend the parenting plan. CP 21-30. Both Possinger and Phillips involved dissolution proceedings.

Furthermore, while, Potter, was a modification action it predated passage of the Parenting Act RCW 26.09.

Unlike RCW 26.09.187, which contains the criteria for establishing a parenting plan during a dissolution, RCW 26.09.260 requires the court not to change a residential schedule unless it finds that facts that have arisen since the prior parenting plan that were unknown to the court at the time of the prior decree or plan and that a substantial change has occurred in the circumstances of the child or the nonmoving party. Indeed, the predominate issue in Possinger, was whether the trial court could fashion a parenting plan based upon the criteria found in RCW 26.09.187 and avoid considering the mandatory criteria found in RCW 26.09.260. Possinger, 105 Wn. App. at 337

The court's discretion in a modification is limited by the requirement that the current residential schedule be retained unless:

- (a) The parents agree to the modification;
- (b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;
- (c) 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; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

RCW 26.09.260

The Legislature clearly expressed its intention in the modification statute to curtail the equitable power of the court to defer disposition of residential schedules once a final order had been entered in modification actions by including strong presumptions in favor of retaining the current schedule.

In Possinger, Potter, and Phillips, the orders issued by the court could best be considered provisional determinations regarding the residential placement of the children. To determine whether an order is final or temporary the court must look at the parenting plan itself and avoid simple semantic distinctions. Possinger, 105 Wn. App. 337. In Possinger the trial court stated in its “Permanent Parenting Plan”:

I am going to adopt the parenting plan proposed by the husband for a one year period of time until the child is in the first grade...I would like you to have this matter reviewed by this Court at the end of that year's period of time...This department retains jurisdiction for this issue.

Id. at 329-330.

Likewise, in Phillips and Potter the trial court expressly held that the matter of the *permanent custody* of the minor be continued six months. Phillips, 52 Wn.2d at 882; Potter, 46 Wn.2d at 527-528. This reading is consistent with policy of stability found within the Parenting Act RCW 26.09..

...(T)he best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

RCW 26.09.002

This does not mean that a court may not remove a child from a harmful and dangerous situation pending resolution of any issues relating to a modification. A court may enter a temporary order relating to parenting on the basis of motion, declaration, and hearing. RCW 26.09.060, RCW 26.09.194

The court summed up this reasoning concisely in Possinger when it stated:

Under either label, the trial court properly considered the criteria contained in RCW 26.09.187 in formulating the 1999 parenting order, rather than treating the matter as a modification proceeding under RCW 26.09.260. The court's formulation of a residential schedule to cover Anna's school years was its *initial decision* (italics added) in that regard, not a modification of its prior decision.

Possinger, 105 Wn. App. at 337-338.

In the present case, the parties were divorced and a final parenting plan was entered on August 15 2008. CP 1-19. Unlike Possinger, the court had already entered a permanent parenting plan.

Respondent Smith filed a motion to modify the parenting plan pursuant to RCW 26.09.260 on an unapproved court form. The adequate cause hearing was never held but continued pending the report of the GAL Jean Cotton. RP I 6-8. When the parties entered the August 7, 2009, parenting plan the court was making a determination about a modification, not an initial determination in a dissolution. There can be no doubt that this action was a modification under RCW 26.09.260 because the trial

court expressly stated that it was modifying the parenting plan based upon 26.09.260 in its Modification Order. CP 277.

The court abused its discretion by deviating from the requirements imposed upon it by the Parenting Act when it modified the August 7, 2009, parenting on February 5, 2010, and then subsequently proceeded to trial on April 8, 2010, without making an adequate cause finding. As of this date no adequate cause determination has been made.

c. The Parties Did not Agree to Waive The Provisions of RCW 26.09.260(1),(2) Relating To The Modification Of Final Parenting Plans Nor Does The August 7, 2010, Final Parenting Plan Express An Intent By The Court To Retain Jurisdiction Over The Residential Schedule Beyond Minor Adjustments.

The parties did not stipulate to, nor did the court expressly state, that the trial court would retain this authority.

Paragraph V(m) of the August 7, 2009, parenting plan did anticipate a review hearing that was limited to minor adjustments. CP 23-31. It states in full:

This parenting plan shall be reviewed in six months to determine whether further minor adjustments or other actions are necessary to make it more workable and for the court to receive a report from the guardian ad litem on the parties' efforts at compliance. Thereafter, any further changes shall only be upon proper filing and prosecution of a petition to modify the parenting plan.

CP 30.

The parties had extensive off the record discussions about this provision and it was agreed that the parenting plan should be flexible enough to allow the court to make changes to the parenting plan that did not change the primary residential placement of the children with the mother. Support for this position is found throughout the parenting plan where provisions relating to the children's school schedule are planned out in some detail. For instance, in paragraph 3.2 of the parenting plan which states that "until the youngest child reaches the second grade the schedule will be the same as paragraph 3.1" CP 24. If the parties had contemplated adjusting this section of the plan at the review hearing this provision would be meaningless.

Likewise, if paragraph V(m) meant that the court was retaining jurisdiction to do a major modification then planning a summer schedule in section 3.5 would make no sense. The order was due to be reviewed well before summer.

More importantly, the use of the term "minor modification" was not an accident. A minor modification is a very specific change to a

parenting plan that only impacts a child's residential schedule in limited ways. A minor modification is a change to the parenting plan based upon a substantial change of circumstance of either parent or the child that does not require the court to retain the current residential schedule unless the court makes specific findings. A minor modification

“does not change the residence the child is scheduled to reside in the majority of the time and:

- (a) Does not exceed twenty-four full days in a calendar year; or
- (b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or
- (c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion.”

RCW 26.09.260(5).

A review of the report of proceedings at the August 7, 2009, hearing on entry of the final parenting plan indicates that it was not the intent of the appellant or the court to retain jurisdiction to change the residential schedule of CS and RS beyond “minor adjustments.” For instance, during her report to the court, the GAL, Jean Cotton stated after meeting with the parties on this issue:

One of the things I am proposing in this plan is that we will – if it will work, um, give him six months to try and make things better, come back, just to see of(sic) we need some *minor, minor* adjustments to make it more workable, and then conclude this process so that future modifications after that point, somebody would have to file a petition for modification and go through the regular process, but I think both of the parties are willing to work at this.

RP I 11-12.

In addition, when the parties and the GAL reported to the court about the issues surrounding the proposed final parenting plan the issue of primary residential placement never came up. RP I 9-24. However, the parties expended considerable time going into issues surrounding telephone calls, health issues, dispute resolution, and other matters. RP I 9-24.

Moreover, the court never indicated that it was deferring making a ruling on the issue of primary residential custody of the minors. Clearly, the plain language of paragraph V(m) along with the statements made by the attorneys does not support the provision that the appellant was waiving the provisions of RCW 26.09.260(1),(2).

A party may waive the requirements of RCW 26.09.260. In re Marriage of Adler, 131 Wn. App. 717, 129 P.3d 293 (2006).

If paragraph V(m) constitutes such a waiver of the adequate cause requirement then it is a waiver only of the procedures required to review the plan to make adjustments that do not affect the primary residential placement of the children. While a court may retain jurisdiction to review the efficacy of its orders, in all cases where the court has found that the court did reserve such review of the primary residential schedule it was clearly and expressly stated by the court and present in the interim order. Phillips, 52 Wn.2d at 889; Potter, 46 Wn.2d at 527-528; Adler, 131 Wn. App. at 725; Possinger, 105 Wn. App. 333-34.

In this case the court's order and the surrounding circumstances indicate that the August 7, 2009, parenting plan was meant to be a final order with regards to primary residential placement of the minors with the appellant. For this reason the February 5, 2010 temporary order and the

final orders entered on April 30, 2010, should be reversed and the matter remanded to the trial court for an order reinstating the August 7, 2009, parenting plan.

If the August 2007 order is not a “final order” then agreeing to it would not impliedly waive any objections to the lack of adequate cause. Parties enter temporary orders all the time and merely stipulating to a temporary parenting plan during the pendency of a modification should not be seen as a waiver of the right to object to procedural irregularities at final judgment.

For instance, in a case where the Division I of the Washington State Court of Appeal found that a party stipulated to adequate cause the party signed a stipulation that stated a substantial change in circumstances did exist and that it warranted a trial on the issues of custody, visitation and support. In re Marriage of Naval, 43 Wn. App. 839, 840, 719 P.2d 1349 (1986). Ms. Smith agreed to no such thing.

d. There Was No Substantial Change In Circumstances Because The Parties’ Inability To Communicate And Effectively Co-Parent Was Anticipated In The Prior Final Parenting Plans.

Trial courts are vested with great discretion in determining the custody of minor children. Such exercise of discretion will not be

disturbed on appeal absent an abuse. Munoz v. Munoz, 79 Wn.2d 810, 813-14, 489 P.2d 1133 (1971). A trial court's final parenting plan is reviewed for an abuse of discretion. In re Marriage of Cabalquinto, 100 Wn.2d 325, 327, 669 P.2d 886 (1983). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 136 (1997).

A substantial change in circumstances sufficient to allow a change in the residential provisions of a final parenting plan must be based upon a change that has occurred since the entry of the order or upon facts that were unknown to the court at the time the order was entered. In re Marriage of Hansen, 81 Wn. App 494, 914 P.2d 799 (1996).

As is made repeatedly clear throughout this case is that the parties had a longstanding history of not getting along. During the trial respondent Smith testified that even when they were married he and Ms. Smith did not get along and that she would not let him have telephone contact with the children. RP II 94-95.

1) August 2008 Final Parenting Plan

The court entered a final parenting plan in August 2008 after a bench trial in the initial dissolution. CP 11-19. This plan provided for primary residential placement of the children with Ms. Smith. In

September of that year Mr. Smith brought a Motion for Contempt and then in October he brought a motion to modify the August 2008 parenting plan. CP 20-21. In his declaration in support of this motion Mr. Smith states that the basis for his request is that Ms. Smith was recently the victim of a domestic violence incident and that she has previously been involved in a similar situation. Id. at 21. When the matter came before the court on a show cause hearing on November 3, 2010, respondent Smith's attorney indicated that one incident occurred before the August 2008 parenting plan and that one incident occurred after. RP I 1-2. Clearly this was not a fact unknown to the court prior to the entry of the parenting plan in August of 2008.

At this hearing Mr. Stewart also brings up an incident prior to the August 2008 parenting plan where rocks were allegedly thrown at respondent Smith by Ms. Smith when the children were being transferred. RP I 4. Neither this incident nor the assault on Ms. Smith are brought up in subsequent proceedings. Indeed, at the trial on April 8, 2010, the court hears nothing about the assault on Ms. Smith or the incident with the rocks.

A modification under RCW 26.09.260 may only proceed based upon facts that have arisen since the last plan or that were not known to

the court then. Not only had the court never made an adequate cause determination, but the substantial change in circumstances that it cites in its Modification Order are not even remotely related to the declaration in support of the motion for modification.

The Modification Order cites the Findings of Fact and Conclusion of Law set forth in section II of the order as the substantial change in circumstances. A cursory review of these Findings of Fact and the testimony in support of them reveals that there had been no substantial change in circumstances since in these areas since the August 2008 plan..

If the court concludes that the February 2010 temporary order or the April 2010 parenting plans were based upon the motion for modification filed by the respondent in October of 2008 then the decision of the trial court to modify the parenting based upon Findings of Fact numbers 2.1(4)(a), (c), (h), (j), (q), (m) and Conclusions of Law numbers 1 was a manifest abuse of discretion and an error of law because it appears that these findings were based upon facts that preexisted the final parenting plan of August 2008.

For instance, it was an abuse of discretion for the court to find that an ongoing pattern or refusal to cooperate with the father was a substantial

change of circumstances from the August 2008 order. Indeed the court states in its ruling on April 8, 2010:

There has been a history of decisions by McKayla Smith since the inception of this case that establish poor judgment and inability to make good decisions both as it relates to herself and her children and to her relationships with other people. I don't know what she can do to obtain better skills at dealing with her ex-husband, his significant other and the guardian ad litem and anybody else in her life with whom she has found conflict.

RP II 128-129.

Likewise, the trial court manifestly abused its discretion when it entered Finding of Fact number 2.1(4)(h) that the mother has displayed a history of poor judgment and an inability to make good decisions for herself and her children in its Modification Order. CP 276. It is unclear what testimony the court heard during the trial that lead it to this conclusion. This finding appears to be related to the declaration filed in support of the Motion to Modify the parenting plan almost 2 years previously. CP 21. The issue of the mother being the victim of a domestic violence assault never came up at her trial on April 8, 2010.

The trial court best revealed the source of the evidence that it was relying on to make these findings in Finding of Fact number 2.1.4.j where it found

that the mother's non-cooperation and obstruction of the father's visits and interactions with his sons dates back several years and that the mother's conduct demonstrated a deliberate and consistent interference in the relationship between the sons and the father in its Modification Order.

CP 276.

The trial court is intimately related with the facts of this case and the Hon. Judge David Edwards presided over the trial in August of 2008 and also signed the final parenting after that trial. A judge manifestly abuses his discretion where it is apparent on the face of his findings that he is making factual findings not on the evidence submitted to him at trial, but facts which he has firsthand knowledge of. The legislature sought to curtail the inherent discretion of the Judge in a modification action to making changes in custody on the basis of unknown facts or circumstances that have arisen since the entry of the last parenting plan. Moreover, the court erred in relying on Finding of Fact number 2.1(4)(g) in its Modification Order that the mother scheduled discretionary activities during the father's scheduled visitation and refused to cooperate on alternate dates and times for scheduled visitation and telephone calls with

the father in its Modification Order. CP 276. The GAL testified at the trial there had been problems with telephone calls prior to the August 2008 parenting plan. The court abused its discretion in finding that past difficulties with telephone calls could establish a substantial change of circumstances under RCW 26.09.260, since this is not a fact that had arisen since entry of the order.

Finally, it appears that the court considered evidence prior to the August 2008 parenting plan when it entering Finding of Fact number 2.1(4)(q) its Modification Order that less drastic alternatives, including mediation, to affect a positive co-parenting relationship have been attempted and have failed due to the mother's behavior. CP 277. Counsel for the appellant is not aware whether mediation occurred prior to the August 2008 parenting plan but it did not occur subsequent to it. While the parties did meet in the office of Jean Cotton prior to the entry of the August 2009 parenting plan, this was not "mediation" but more akin to a settlement conference. RP I 11. In any event, there was no evidence presented that a mediation session had ever failed due to Ms. Smith's behavior.

Furthermore, the court abused its discretion in entering Finding of Fact number 2.1(4)(c) that the mother filed "unsupported" claims of abuse in its

Modification. The record is devoid of any testimony relating to the mother reporting abuse. While the issue was raised at the February 5, 2010, hearing, there was no testimony and no evidence taken. RP I 30.

The Parenting Act clearly mandates that a judge may only look to facts and circumstances that have developed or were unknown at the time the last decree was entered. It is clearly error for the judge to look at facts that were known to the court or had occurred prior to the modification to form the basis for satisfying RCW 26.09.260's substantial change of circumstances requirement. Likewise, it would be error for the judge to consider facts that had occurred subsequent to the petition to modify

2) August 2009 Plan

Moreover, the court also abused its discretion in modifying the August 2009, parenting plan on the basis of a substantial change in circumstances based on Findings of Fact numbers 2.1.4(a)-(t) in its modification order. Each and every one of these findings relate to difficulties that Mr. and Ms. Smith were having prior to the entry of the August 2009 parenting plan.

At the August 7, 2009, hearing for entry of orders the GAL and the parties' attorneys reported on these issues in detail to the court.

The trial court erred when it concluded that Finding of Fact number 2.1(4)(d) that the mother's failure to provide the father with the necessary information regarding health care providers despite direction and order within the parenting plan to do so or that she has failed to notify the father of healthcare providers and appointments in its Modification Order was a substantial change in circumstances. CP 275 - 276. While the appellant denied that she had failed to comply with this provision because of the letter I had mailed both Mr. Stewart and Ms. Cotton, certainly this was an issue that the court was aware of when the August 2009 parenting plan was entered.

For the same reason the court abused its discretion in finding a substantial change in circumstances in Finding of Fact 2.1(4)(i) and (o) that the oral report of the GAL raised issues of immediate concern for the emotional, psychological, and physical health and safety of the minor children requiring immediate action.. During Ms. Cotton's report on February 5, 2010, she discussed her opinion that Ms. Smith was inflexible, that the children were not available for the Wednesday night telephone call, that the mother had sent medication for the children to the father's home in unmarked containers, and had failed to inform him of a doctor appointment. The only issue unknown to the court at the time the parties entered into the August 2009 Parenting Plan was the mother sending

medication home in an unmarked container because of the parties' difficulties co-parenting. This is nothing new.

In addition the court also abused its discretion in ruling that a substantial change in circumstances has occurred as a result of its Finding of Fact number 2.1(4)(m) and (o) that the mother has allowed her personal feelings, issues, and anger about the dissolution of the marriage and her feelings towards the father and his current significant other to damage her ability effectively and appropriately co-parent her sons in its Modification Order. CP 276. The parties had agreed to try and resolve their differences in the August 2009 parenting plan and the history and inability to get along was well documented. Clearly this is not a substantial change in circumstances.

The August 7, 2009 parenting plan, as a final order could only be modified if the court found that there had been a substantial change of circumstances since it had been entered. On the basis of the above argument the court abused its discretion when it cited Findings of Fact number 2.1.(4)(a), (b), (c), (d), (h), (i), (j),(k), (l), (m), (o). and (q).

2. The Court Abused Its Discretion In Entering The April 2010 Parenting Plan Because There Was Not Substantial Evidence Introduced

At Trial That Modification Was Necessary To Serve The Best Interests Of The Children Or That The Children's Present Environment Was Detrimental.

The crux of the court's ruling in this case was that because of the mother's inflexibility and difficulty in communicating with the father that the current residential schedule was detrimental to the children and that the harm in a disruption to their lives was outweighed by the benefit of a change in custody. This conclusion is not supported by the testimony nor is it logically cogent.

a. Testimony

On April 8, 2010, testimony was heard by the court from the guardian ad litem, Jean Cotton, CS's counselor, Lynette Lyle, McKayla Smith, appellant's mother Barbara Clinton, and respondent Smith.

1) GAL's Testimony

As a preliminary matter, the court abused its discretion by relying on the oral report of the GAL. A GAL or an investigator may be appointed by a court under either RCW 26.09.220 or RCW 26.12.175.

RCW 26.09.220 states:

The investigator *shall* (italics added) mail the investigator's report to counsel and to any party not represented by counsel at least ten days prior to the hearing unless a shorter time is ordered by the court for good cause shown.

RCW 26.09.220(3). Furthermore, RCW 26.12.175 requires that a GAL provide a written report prior to the hearing.

The guardian ad litem *shall* (italics added) file his or her report at least sixty days prior to trial. The parties to the proceeding may file with the court written responses to any report filed by the guardian ad litem or investigator. The court *shall* (italics added) consider any written responses to a report filed by the guardian ad litem or investigator, including any factual information or recommendations provided in the report.

RCW 26.12.175(b),(c).

Regardless of which statute applies in the present case the court abused its discretion in relying on her oral report when a written report is mandated by statute.

The GAL's testimony did not support the position that the children's present environment was detrimental and that the harm from a change in residential placement was outweighed by the benefits of such change. The GAL testified on a wide range of facts regarding the parties' efforts at compliance with the August 7, 2009, parenting plan. She indicated that she had not been actively involved in the case since the final

parenting plan was entered on August 7, 2010. RP II 10. However, she did testify that she had some contact with parties in the intervening time since the August 7, 2009, order had been entered. For instance on direct examination she states that set times and days for the telephone calls was Ms. Smith's request and done to accommodate her work schedule. RP II 11. She also stated that since the plan had been entered that if Mr. Smith did not call, or Ms. Smith was not available to take the call that "Ms. Smith was making the determination of how that would be resolved, regardless of the content of the parenting plan. RP II 11.

It was an abuse of discretion for the court to find that the mother was interfering with the father's telephone calls on the basis of this testimony. The August 7, 2009, parenting plan had a very explicit plan to deal with this issue. CP 50. Paragraph VI(b) states "*if for any reason* (italics added) the receiving party is not available for the call, the calling party shall leave a message and the receiving party shall make reasonable efforts to have the children return the call within 24 hours." CP 50. This appears to be exactly what Ms. Smith did. Ms. Smith submitted literally hundreds of pages of her phone records that indicate when Mr. Smith called and she was not available that the calls were returned within 24 hours. CP 61-200. When questioned about the phone records the GAL admitted that she had seen them and after some equivocation admitted that

they showed the make-up calls had been made and that the majority of the telephone calls had occurred as scheduled. RP II 28.

Ms. Cotton also indicated that she felt that Ms. Smith was withholding information about the children's doctors from Mr. Smith. As proof she cited a request that she made for documents that indicated that RS was unable to travel because of a health condition. RP II 14. However, Ms. Smith was not required to produce such records because such records do not exist. According to paragraph VI(j) of the Final Parenting Plan such a letter need only be produced if the condition did interfere with the travel plans of one of the parents. CP 52. Ms. Cotton understands that Ms. Smith was not required to produce such a letter but could if RS's doctors have concerns. As I indicated to the court back in August of 2009, it was unknown whether RS's heart condition would pose a risk to his health that would rise to the level of life threatening, as requested by Ms. Cotton. RP I 17-18.

Furthermore, Ms. Cotton denied receiving a letter that I had sent out on September 29, 2010, providing the names of the children's doctors. RP II 15. She felt that Ms. Smith had not cooperated with the requirement present in paragraph VI(d) of the parenting plan that required Ms. Smith to give Mr. Smith a list of the doctors. When Mr. Smith claimed that she had not provided the list of doctors, I sent a list to Mr. Stewart and cc'd it to

Ms. Cotton. It is unknown why Ms. Cotton did not receive this letter. It may have something to do with her testimony that her staff believed that she was no longer working on the case when the letter was sent. RP II 23-24.

It appears that Ms. Cotton believed that somewhere in the Final Parenting Plan that Ms. Smith was required to release the children's medical records to her. Surprisingly, when asked whether she felt that Ms. Smith felt justified in believing that she had complied with the court order requiring her to notify Mr. Smith of all the children's doctors Ms. Cotton replied: "No, I mean she turned over the name, but she didn't turn over any documentation." RP II 30. Considerable doubt on the reliability of her contention that she did not receive the letter should have arisen in the fact finder's mind when, after testifying that she had never seen the letter, she goes on to state that she had been provided the names.

Ms. Cotton also expressed considerable concern about medication being sent with the children by Ms. Smith once in an unmarked container. RP II 18-20. However, Ms. Cotton does state that the reason this was done was that Mr. Smith had refused to return unused medication in the past. CP 19. Ms. Cotton stated that she understood Ms. Smith's concern but thought that it had been handled poorly. CP 20. As Ms. Cotton stated

“She knew I was involved; she could have asked me to get it. But instead she asked no one and then refused to give a bottle of the prescription. So it’s very concerning to me.” RP II 20. Ms. Cotton’s suggestion that Ms. Smith should have asked her to get the medication ignores that fact that, as Ms. Cotton testified, her office had erroneously told Ms. Smith she was not involved in the case anymore.

Ms Cotton did state on the record in her oral “report” that Ms. Smith has been the parent primarily responsible for parenting CS and RS their entire lives. RP II 32, 33. When asked by Ms. Darst whether a sudden change of custody can be traumatic for a child Ms. Cotton replied that it can but she felt that several things were present in this case that would traumatize a child. RP II 32. She did not identify if those “things” were present in this case. The GAL appears to defer to the opinion of the CS’s counselor, Ms. Lyle, on whether the sudden change of custody had been traumatic for the children. RP II 32-33.

During Ms. Cotton’s testimony she indicates that she has not met with the children, and only recently met with Ms. Lyle. She does not indicate whether she thinks the residential placement of the children should be changed or whether she believes that the harmful impacts on the children from a change in the primary residential schedule is outweighed

by the benefit of such a change. More importantly she does not indicate whether the children have witnessed any of the strife between parents. However, she does correctly state that under the August 7, 2009, parenting plan that Ms. Smith's mother, Barb Clinton, has been providing the transportation for the children. CP 21. Just how Ms. Smith is alleged to be interfering with Mr. Smith's visitation when she is not present is not explained.

2) Lynette Lyle's Testimony

Ms. Lyle testified at the trial that she had been seeing CS for over a year and began seeing him prior to the August 7, 2009, parenting plan. RP II 42. Ms. Smith had brought CS to see Ms. Lyle for separation anxiety and bed wetting. RP II 42. Ms. Lyle went on to testify that CS had never brought up conflict with his parents as a source of his anxiety but that he has lots of issues with his father and wants to live with his mother. RP II 43. CS' primary concern is that his father does not pay attention to him, his father is mean to him, and he felt lost living in his father's home with 13 other people. RP II 44. His concerns about his mother revolve around how much he misses her and fears being away from home. RP II 44. Ms. Lyle stated that CS' separation anxiety about his mother has grown worse since the February 2010 temporary order and he was now displaying symptoms of what she called grief issues. RP II 44-45.

Ms. Lyle did speak about a referral to CPS that MS. Lyle made after CS reported that his father was having him shoot guns. RP II 47. Ms. Lyle's impression about Mr. Smith was that he was polite but that he appeared to roughhouse a lot with the boys and that Ms. Smith was the parent who expected the children to be well behaved and to use proper manners. RP II 48, 62.

In contrast to Ms. Cotton's characterizations of Ms. Smith as being resistant to suggestions, Ms. Lyle explained how she and Ms. Smith worked on improving Ms. Smith's parenting skills and that her impression was that Ms. Smith was not resistant to these suggestions at all.

Ms. Lyle also has observed that when CS is brought to counseling with Mr. Smith that he is hyperactive if he has been with his father for any period of time. RP II 50. Ms. Lyle also testified that CS is profoundly sad since the February 5, 2010, temporary order and that CS identifies Ms. Smith as his primary parent. RP II 51.

On cross examination Ms. Lyle conceded that she did not have any concerns with Mr. Smith as a parent. RP II 56. She also testified that it is normal for a child even in an optimal situation to have some separation issues when they go and spend significant periods of time with the non-

custodial parent. She also stated that if the mother was more supportive of the visitation it actually could make CS' anxiety worse. RP II 59-60.

3) McKayla Smith's Testimony

Ms. Smith testified that her mother handles all of the phone visitation because Mr. Smith has hassled her over the phone. RP II 64. She testified that her mother handles all of the exchanges of custody. She stated that she has provided the doctor's information to Mr. Smith multiple times and that they had been provided to him in Ms. Cotton's office during the settlement meeting as well as by way of letter from her attorney Sean Taschner. RP II 66.

Ms. Smith testified that she could not remember when the AWANA meeting was changed to Tuesday night but that she always made sure that the children called Mr. Smith within 24 hours as required by the parenting plan. RP II 69.

She stated that since the August 7, 2009, parenting plan was implemented that she suffers stress seeing the boys go back to their father.

They cry, beginning me not to send them back, asking me if they can stay. For me it's stressful, too, because I hate to have to tell them no. I – I want to be able to tell my kids that they can stay with me, and that's very hard for me to have to return them when they're upset like that.

RP II 69-70.

On cross examination Ms. Smith denied that she had ever interfered with Mr. Smith's visitation or that he had been excluded from the AWANA program. She also denied that she had told Mr. Smith that the Wednesday telephone call could not be moved to another night.

In response to Mr. Stewart's questions about whether the kids are picking up on her anger issues with Mr. Smith when the visitation exchange is made Ms. Smith correctly pointed out that she is not present when this happens. RP II 74. She also denied that she did not want the kids going to Mr. Smith's house and is stressed out about it only because the children get so upset. RP II 75. She also testified that she had no animosity towards Mr. Smith, only against his significant other.

When Ms. Cotton was cross examining Ms. Smith, Ms. Cotton learned for the first time that it was in August 2008 when the prescription medication had not been returned by Mr. Smith. RP II 78.

Ms. Cotton asked Ms. Smith whether Matt had any input on when the Wednesday night phone call would be returned. Ms. Smith's response was that she was never able to get a hold of him at the times he

suggested so she started calling whenever she had the kids at her mom's house. RP II 80.

Finally, Ms. Smith stated that when the kids are returned to Matt's house she keeps a stiff upper lip and tells the kids that they have to go and that it is court ordered. RP II 80. When Ms. Cotton asked her why she did not try something more positive Ms. Smith testified that she has tried that and it has not worked. RP II 81.

4) Barbara Clinton's Testimony

Ms. Clinton testified that she has become involved in the telephone calls and the visitation exchanges because the kids parents don't get along. Since she began doing this she stated that the children have become more upset since February 5, 2010. RP 83. She recounted an incident when CS locked himself in the car and would not come out screaming "No, I don't want to go". RP 83.

She also testified that she has accommodated Mr. Smith's schedule and had the children make calls at different times of the day. RP II 85. Ms. Clinton testified that she wanted Mr. Smith to be a part of the children's lives and would not let her daughter exclude Mr. Smith.

5) Matthew Smith's Testimony

He testified that throughout their marriage Ms. Smith would not allow him to speak to CS and RS on the phone. RP II 95. He stated that he did ask Ms. Smith if he could call the boys on a day other than Wednesdays and that she said “no”, and correctly pointed out that she 24 hours to return a call. Mr. Smith testified that CS’ attendance at school had improved since February. RP 99.

Mr. Smith also testified that Ms. Smith has not kept him updated on all the children’s medical appointments. “Just last week she took them to the doctor, and I had no clue they went to the doctor. There was two counseling appointments last week. I was only aware of one counseling appointment last week” RP II 99. He also stated that things have been much better with the visitations and the phone calls since Barb Clinton got involved well over a year before. RP II 100. He also testified that rather than ask Barb to reschedule the phone calls he has only asked Ms. Smith, despite talking to Barb most of the time. RP II 101.

He acknowledged under cross examination that Ms. Smith has made him aware of appointments that she has made and he has taken the children to the doctor on the basis of this information. He also acknowledged that while Collin’s attendance and reading had improved

that his grades in fluency, effort, self control, independent working, and staying on task had declined. RP II 102-103.

Mr. Smith states that he has observed fits of rage from the boys when they are transferred to his custody but that it subsides within 2 miles.

5. The Trial Court Abused Its Discretion In Making The Findings Of Fact and Conclusions of Law In Its Modification Order.

While the court is granted great discretion in making factual determinations this discretion is not boundless. Littlefield, 133 Wn.2d at 46–47.. In the present case the court abused this discretion in making Finding of Fact numbers 2.1.(4)(a), (c), (h), and (q), in its Modification Order because no testimony was presented to support these findings.

Furthermore the court abused its discretion in entering Finding of Fact numbers 2.1.4(d), (e), (g), (i) – (o), (t). The testimony elicited at trial did not cast doubt on Ms. Smith’s veracity. Clearly she is upset at the trial court for removing two very young children from her home and placing them in an uncomfortable situation. It does not follow that she is untrustworthy and no instance of dishonesty on her part was elicited at trial. Clearly there was conflicting testimony, but it does not follow that Ms. Smith is not credible because she is upset.

However, even if the court were to accept that these findings of fact were within the sound discretion of the trial court they do not support the Conclusions of Law entered in the Modification Order. While it is not conceded that that these findings constitute a “substantial change in circumstances”, they clearly do not support the finding that modification was authorized under RCW 26.09.260(1), (2). These are the types of facts that would support a “minor modification” under RCW 26.09.260(5). The GAL and Mr. Smith never testified that the parents’ difficulties had any impact on the children. In fact the only testimony at the trial on the impact came from CS’s counselor who testified that CS preferred to be with his mother and had been traumatized by the court’s temporary order on February 5, 2010.

These facts, if taken at face value do not lead to the conclusion that the children’s present environment is detrimental to the their 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 children in its Modification Order. CP 278. It was an abuse of discretion for the court to enter Conclusion of Law numbers 1,2, and 8 in its Modification Order because there was no evidence introduced that the parents’ difficulties had any impact on the children. As a result it was error for the court to conclude that harm it caused the children in moving them from

the primary parent's household was outweighed by an advantage to the children.

This manifest abuse of discretion is clearly demonstrated by the Final Parenting Plan of April 30, 2010. CP 280-291. With a few exceptions it is exactly the same as the Parenting Plan entered on August 7, 2009. While there are limiting factors listed in the 2010 plan they do not restrict the mother's contact with the children at all. The residential provisions of the new parenting plan are a mirror image of the 2009 with the children primarily residing with the father. If the children's residential schedule in the 2008 or 2009 parenting plans was detrimental to the children the 2010 order does nothing to address that. This is understandable since there was no testimony introduced at trial to show how the parents' difficulties affected the children. The 2010 order does give the mother one less telephone call per week and it does require her to take parenting classes and get a psychological evaluation. However, these are orders that should have been made as part of a minor modification. These provisions would have allowed the court to address concerns it had with the mother's anger towards Mr. Smith and his partner without traumatizing the children.

3. The Trial Court Erred When It Denied Ms. Smith's Motion To Disqualify The Hon. Judge David Edwards From Presiding Over This Modification

A litigant in a civil proceeding is allowed as a matter of right to request that a judge be disqualified from hearing a case if he or she believes that this judge cannot fairly adjudicate the issues. RCW 4.12.040.; CR 40(f).

RCW 4.12.040 provides that:

No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.

RCW 4.12.040(1).

This law is reflected in CR 40(f) which states that a litigant may make a motion to have a judge disqualified upon filing of an affidavit at least 30 days prior to the trial.

A trial court has no discretion and the judge must be disqualified unless the litigant has failed to comply with the requirements of CR 40(f)

and RCW 4.12.040. As a question of statutory construction this issue is reviewed de novo. In re the Marriage of Caven, 136 Wn.2d 800, 806.

Furthermore, a motion to modify a final parenting plan is a new proceeding and a petitioner has an absolute right to a change of judges. State ex rel. Mauerman v. Superior Court for Thurston County, 44 Wn.2d 828, 271 P.2d 435 (1954); State ex rel. Foster v. Superior Court, 1917, 95 Wash. 647, 653, 164 P. 198 (1917); Bedolfe v. Bedolfe, 71 Wash. 60, 61, 1912, 127 P. 594 (1912);

Mr. Gomes, attorney for Ms. Smith when Mr. Smith filed his motion to modify the 2008 parenting plan, filed a timely motion to disqualify the Hon. Judge Edwards on October 27, 2010. CP 32-33. This was filed only 3 days after Mr. Smith filed his motion to modify the August 2008 parenting plan on October 24, 2010. CP 20-21. The matter was scheduled for hearing on November 3, 2010. When the Hon. Judge David Edwards issued his order on contempt on October 27, 2010, he refused to remove himself from the case. CP 34-35.

Prejudice is established merely by the filing of the affidavit. Mauerman, 44 Wn.2d 828, 830.

4. The Trial Court Erred In Its Award Of Reasonable Attorneys Fees To Mr. Smith.

A trial court may order attorney fees to be assessed against a party in a modification of a parenting plan. RCW 26.09.140 RCW 26.09.260(13). The decision to award fees is within the trial court's discretion. In re Marriage of Knight, 75 Wn. App. 721, 729, 880 P.2d 71 (1994). The party challenging the award bears the burden of proving that the trial court exercised this discretion in a way that was clearly untenable or manifestly unreasonable. Abel v. Abel, 47 Wn.2d 816, 819, 289 P.2d 724 (1955). In awarding attorney fees, the court must balance the needs of the spouse seeking the fees against the ability of the other spouse to pay. Knight, 75 Wn. App. at 729, 880 P.2d 71

RCW 26.09.140 permits a trial court to award attorney's fees in any action under RCW 26.09 if it finds a financial disparity between the parties.

In its Modification Order on April 30, 2010, in section 3.3(f) the trial court indicated that it would award reasonable attorneys fees to Mr. Smith. CP 279. Subsequently, Mr. Stewart filed an invoice detailing his fees on May 20, 2010. CP 326 336. At the time the Notice of Intent to Appeal was filed the trial court had not yet entered an order regarding attorney's fees. However, the trial court did order Ms. Smith to pay \$8,348.49 in

attorney's fees on June 1, 2010.<sup>4</sup> In this order the trial court states that the basis for this award of attorney's fees is "Ms. Smith's failure and refusal to cooperate and co-parent the children with the respondent, after a mediation and entry of an agreed parenting plan has caused Mr. Smith to incur attorney's fees and costs."

It appears that the trial court based its decision to award attorney's fees to Mr. Smith on RCW 26.09.184(d) , which states a trial court may award attorneys fees "If the court finds that a parent has used or frustrated the dispute resolution process without good reason." RCW 26.09.184(4)(d). As an initial matter, the parties did not engage in mediation prior to entry of the August 2007 parenting plan. It is incorrect to characterize the settlement conference the parties had with the GAL as "mediation." Furthermore, this provision only allows for attorney's fees if the parent has "used or frustrated the dispute resolution process without good reason." RCW 26.09.184(d). There was no evidence introduced at trial to indicate that Ms. Smith had been anything other than cooperative at this settlement conference. In fact this was testified to by the GAL at the trial. RP II 10, 23.

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<sup>4</sup> An amended designation of clerk's papers will be filed with the trial court requesting that this order be sent to the appellate court pursuant to RAP 9.6(a).

The trial court also assessed attorney's fees against Ms. Smith on the basis that she refused to co-parent the children with the respondent. This language appears to reflect the criteria found in a motion for contempt in awarding attorney's fees. RCW 26.09.160 states

If a party fails to comply with a provision of a decree or temporary order of injunction, the obligation of the other party to make payments for support or maintenance or to permit contact with children is not suspended. An attempt by a parent, in either the negotiation or the performance of a parenting plan, to refuse to perform the duties provided in the parenting plan...shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court.

RCW 26.09.160(1).

However, while it is arguable that this action should have been brought as a motion for contempt, it was brought as a modification action. In a modification action the court is not authorized to award attorney's fees on the basis that a party has refused to perform under a parenting plan. In a modification action under RCW 26.09.260, the court may order only an award of attorney's fees if:

(T)he court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court shall assess the attorney's fees and court costs of the nonmoving parent against the moving party.

RCW 26.09.260(13).

In its Order and Judgment for Attorney's Fees and Costs the court found that

"Ms. McKayla Smith's failure and refusal to cooperate and co-parent the children with Respondent, after a mediation and entry of an agreed Parenting Plan has caused Matthew Smith to incur attorney's fees and costs."

(citation to clerk's papers not available at this time).

This language reflects the provisions for attorney's fees found in the section of RCW 26.09 relating to contempt. RCW 26.09.160.

The trial court abused its discretion in not considering the relative ability of the parties to pay attorney's fees and in applying the standards set forth in a contempt action to impose attorney's fees against Ms. Smith in a modification action. Ms. Smith did not make a motion to modify the parenting plan so she is not the "nonmoving parent" and can't be ordered to pay Mr. Smith's attorney's fees in a modification action. Furthermore, the testimony at trial did not establish that she had acted in bad faith, but only that she and her husband did not get along.

While the standard of review for the award of attorney's fees is abuse of discretion, statutory interpretation is not. The court should review the award of attorney's fees in this case by applying de novo review. RCW 26.09.260(13) limits a trial courts discretion to impose attorney's fees to those case where a party initiates a modification in bad faith. Ms. Smith did not initiate this action nor did she act in bad faith.

#### IV. CONCLUSION

Ms. Smith requests that this court vacate the final parenting plan entered on April 30, 2010, and remand the case to the trial court with instructions to terminate all orders ancillary to these orders.

DATED this 30<sup>th</sup> day of September 2010

TASCHNER LAW, PLLC

By \_\_\_\_\_



SEAN TASCHNER, WSBA# 37523

Attorney for Appellant

COURT OF APPEALS, DIV. II, IN AND FOR THE STATE OF WASHINGTON

In re Marriage of:

MCKAYLA SMITH

Appellant,

vs.

MATTHEW SMITH,

Respondent.

NO. 40300-5-II

DECLARATION OF SERVICE

SEAN TASCHNER, declares and states as follows:

That on September 30, 2010, I mailed a copy of the Appellant's Brief, copies of the transcripts, and the Motion for an Order Allowing an Overlength Brief and Additional Issue of Appeal, first class postage prepaid to:

**Attorney for Respondent**

William Stewart  
101 S 1st St  
Montesano, WA 98563  
(360) 249-4342

**Guardian ad Litem for Minors**

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(360) 482-6100  
DECLARATION OF SERVICE

FILED  
COURT OF APPEALS  
DIVISION II  
10 OCT - 1 PM 2:33  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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I declare under penalty and perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Aberdeen, Washington this 30<sup>th</sup> day of September 2010.



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SEAN TASCHNER, WSBA 37523

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10 OCT -4 AM 9:05

STATE OF WASHINGTON

BY \_\_\_\_\_  
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