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INTRODUCTION

Matthew Smith and McKayla Smith were formerly married and have two sons, Rhyllie age 3 and Colin age 7. They were divorced in Grays Harbor County Superior Court in August 15, 2008. A parenting plan was entered with the mother having the bulk of residential placement, with liberal visits to the father. From the outset, Ms. Smith displayed anger at her former husband and a lack of cooperation in parenting, visits and decision making. Numerous hearings occurred and the Court ordered a mediation with the Guardian ad litem to address problems. In August 2009, after mediation attended by all parties, counsel and the GAL, an agreed parenting plan was entered.

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STATEMENT OF THE CASE

The Trial Court may review the entire file and the record in making its decisions.

The GAL in this matter, Jean Cotton, was appointed by the Court specifically to assist with its Adequate Cause determination. RP I 6-8. Judge McCauley specifically waived a written report by the GAL. (November 3, 2008, RP pg 7 at line 24.)

An agreed Final Parenting Plan was entered August 7, 2010. It contained language that the court would review the matter for "minor adjustments or other actions". A review hearing was scheduled for February 5, 2010. On February 5, 2010, the Court reversed the parenting plan and requested that the matter be set for hearing as soon as possible, in light of the Court's trial schedule. The trial calendar prevented immediate hearing and the matter was set for April 8, 2010.

On April 8, 2010, at the scheduled hearing, the Court took testimony then entered findings of fact and conclusions of law. The Petitioner, in her appeal to this court and brief, ignores the existence of specific language in the Agreed Parenting Plan that the Judge left the plan open for "minor adjustment or other

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action", RP pg. 12 line 3.

The Court scheduled the testimonial hearing as quickly as it could be heard. On April 8, 2010 the Court took testimony from both parties, the Counselor for the children, Ms. Smith's mother, and the Guardian ad litem. The Court made very detailed and complete findings for the Residential Parenting Plan based on the testimony and review of the record in the Court file.

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ARGUMENT

The Court does not and did not act in a vacuum in its decision to reverse the Parenting Plan on February 5, 2010. This dissolution action and follow up had been in the trial court for several years. The Court reviewed the record before it and heard the oral report of the Guardian ad litem who was appointed to assist the court on parenting issues, RP. Pg 7 line 24. Clearly, the Court retained jurisdiction at prior hearings and specifically left the matter subject to and open to review, "minor adjustment or other action", RP pg. 12 line 3. The Court specifically addressed that at the review minor adjustments or other action would be available without going through the whole process of a modification and that afterward future changes would only be allowed by petition to modify RP. pg. 11 line 25 through pg. 12 line 12. The Appellant conveniently omits reference to that specific language.

If the Court of Appeals finds that the Trial Court acted prematurely in "reversing" the parenting plan on February 5, 2010, any error was corrected or resolved during the April 8, 2010 testimonial hearing. Both of the parties were present, represented by competent

1 counsel and testimony was taken.

2 The appeal was filed prior to the April 8, 2010
3 hearing. The issues presented are moot, having been
4 resolved by the testimonial hearing before the Court
5 which occurred after the filing of this appeal.

6 Ms. Smith's reliance on her counsel's statement
7 made to the Court without supporting affidavits are
8 inappropriate. Similarly inappropriate are references
9 to discussions of both counsel and the guardian ad
10 litem in private in the conference room before or after
11 court sessions, RP. p11 at line 16.

12 The trial court must be given great deference in
13 its decisions regarding credibility and quantum of
14 evidence. Appellate courts should defer to the trial
15 court, without a showing of abuse of discretion.

16 Both, *Phillips v. Phillips* 52 Wn. 879 329 P2nd.
17 853 (1958) and *Potter v. Potter* 42 Wn. 2d 52 282 P2d.
18 1052 (1958), cited by Appellant give support to the
19 trial Judge's ability to postpone or defer final entry
20 of a parenting plan. The trial court here did exactly
21 that with its language leaving the parenting plan open
22 for "minor adjustment or other action" until the review
23 hearing.
24

1 made a decision and scheduled a hearing to prevent
2 further detriment to the children. The testimonial
3 hearing and findings of fact and conclusions of law
4 detail that.

5 The trial court did exactly as allowed and
6 prescribed in cases and statutes cited by Appellant.
7 Parenting Plans must be flexible in the event of change
8 or circumstance. Due to the history of conflict, the
9 Court did not finalize the parenting plan but left it
10 open for follow up reports and modification.

11 Disqualification of Judge. Appellant asserts that
12 an affidavit of prejudice filed on the day of the
13 hearing serves to remove that Judge from hearing the
14 case.

15 **RCW 4.12.050 Affidavit of prejudice states in part....**

16 Any party to any action or proceeding in a
17 superior court, may establish such by motion,
18 supported by affidavit that the judge is
19 prejudiced, so that such party cannot, have a
20 fair and impartial trial before such judge:
21 PROVIDED, That such motion and affidavit is
22 filed and called to the attention of the
23 judge before he or she shall have made any
24 ruling whatsoever in the case, either on the
25 motion of the party making the affidavit, or
26 on the motion of any other party to the
action, of the hearing of which the party
making the affidavit has been given notice,
and before the judge presiding has made any
order or ruling involving discretion.....

1 Judge Edwards denied Appellant's affidavit as not
2 timely, in light of his having heard matters in the
3 case and having made rulings or orders.

4 Appellant erroneously argues that the Court sua
5 sponte reversed the parenting plan without that request
6 being made, yet admits in its brief (Appellant's Brief
7 p. 9 at line 4) that Mr. Smith did file a motion to
8 amend the parenting plan, requesting primary
9 residential placement of the children with him.

10 Appellant's characterization of the GAL's oral
11 report to the Court and Counsel's argument thereon as
12 "accusations" is inappropriate. The Guardian ad Litem
13 was court appointed to investigate and report on
14 parenting issues, especially with regard to reasonable
15 cause and to give an oral report, RP. pg. 7 line 24-25
16 and pg. 12 line 1-3. Doing so is not an accusation.
17 Similarly, counsel's argument to the court from the
18 record and information before the Court is not an
19 "accusation".

20 Mr. Taschner indicates that he, as counsel for Ms.
21 Smith, stated the Guardian ad litem's report or
22 "allegations" were not true and informed the Court
23 about an alleged CPS investigation. No affidavits or
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declarations were offered, and no testimony was given.
The appellant's attorney comments were in the nature of
testifying and not appropriate arguments (Appellant
brief p. 12 at line 12).

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CONCLUSION

The Affidavit of Prejudice filed by Ms. Smith purporting to remove Judge Edwards was not timely and was not in compliance with the applicable statute. RCW 4.12.040 and 050. The matter was on for trial when Ms. Smith tried to remove the judge on the morning of hearing. No copy of the Affidavit of Prejudice was filed with the Court Administrator. Judge Edwards had already heard matters and made rulings in the case.

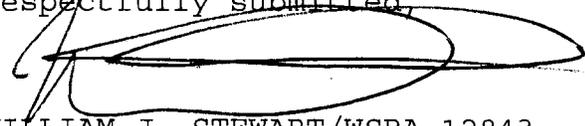
The Respondent, Matthew Smith had requested a reversal of the parenting plan in its motion to amend the parenting plan, the Court did not act sua sponte without a pleading before it.

The Court had left its final determination of the Parenting Plan open for review and "minor adjustments or other action". The morning of February 5, 2010, the Court appropriately took strong action after hearing from the Guardian ad litem. As soon thereafter as possible, the Court conducted a full evidentiary hearing and made findings of facts, reached conclusions of law and established a new parenting plan and entered a new order. Sending this matter back for a hearing that has already occurred is not effective or efficient

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use of the Court's time.

Respectfully submitted,



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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

November 24, 2010

Washington State Court of Appeals
Division Two
Attn: Kim Cleveland, Case Manager
950 Broadway, Suite 300
Tacoma, WA 98402-4454

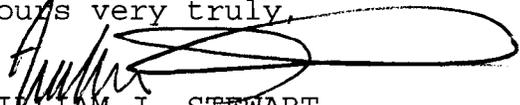
RE: #40300-5 II - Smith

Dear Ms. Cleveland:

Enclosed for filing please find the Respondent's Brief in the above referenced matter. I contacted the Court today and was told that sending my brief via mail rather than faxing it today would be sufficient to meet the November 27, 2010 deadline.

Thank you in advance for your assistance.

Yours very truly,


WILLIAM J. STEWART
STEWART & STEWART LAW OFFICE

WJS/cas

Enclosure:

cc: Sean Taschner, Attorney for Appellant
Jan Cotton, Guardian ad Litem