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STATE OF WASHINGTON

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No. 42758-3-II

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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JAMES SWAKA,

Appellant,

v.

ALEXANDRA SWAKA,

Respondent.

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APPELLANT'S OPENING BRIEF

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## **A. INTRODUCTION**

This appeal arises from a modification of a parenting plan following the mother's relocation to Spain with two children, age 8 and 5. Beginning with the mother's belated (by 18 months) request for permission to move, the court made a series of rulings without adequate findings, adopting the mother's proposed orders with few changes. The court ignored the weight of un rebutted evidence regarding the mother's persistent efforts to exclude the father from the lives of the children. Ultimately, the court entered a parenting plan providing for almost no enforceable, meaningful contact between the father and children, without findings justifying such severe limitations. The many errors require reversal.

## **B. ASSIGNMENTS OF ERROR**

1. The Trial Court Erred in Making the Following Findings of Fact:
  - a. "The father has not seen the children since May 2008..."  
CP 720.
  - b. "Mr. Swaka has not been in the children's lives for almost four years." CP 720, 728.
  - c. "The children have never spend [sic] unsupervised time with Mr. Swaka after September 2007, or if they have, it

was very brief. The father did not take the children for overnight trips or to do other things on in [sic] an unsupervised setting.” CP 719.

- d. “No attempts are made by Mr. Swaka to contact Ms. Swaka to set up Skype or Phone contact even though Ms. Swaka has offered as much, and Ms. Swaka gave him full information, current information on January 15, 2010 which had not changed.” CP 721.
- e. “From March 2008 to March 2009 Mr. Swaka makes no attempt to contact the children by phone, card or other means, and there was a failure on his part to maintain and build emotional ties where the children were involved or at issue here [sic].” CP 721.
- f. “The assertions made by Ms. Sneller and Mr. Swaka that Ms. Swaka was not willing to accommodate him to set up time to talk with the children, visit the children and that type of thing, is not true at all [sic]. This court finds it is quite the opposite.” CP 722.
- g. “Samuel... had not seen his father since he was two years old, and still has not seen him.” CP 723.

- h. “Mr. Swaka was not trying to further his emotional bonds to his children, and he did nothing to nurture that relationship.” CP 723.
  - i. “Ms. Swaka has done nothing to interfere with Mr. Swaka contacting the children.” CP 723.
  - j. “Mr. Swaka makes no attempt to contact Ms. Swaka until March 28, 2011 at 6:02 a.m. by email...” CP 723.
  - k. There was “no testimony as to how those [Skype calls] went by Mr. Swaka or Ms. Sneller.” CP 723.
  - l. “There has been willful abandonment by Mr. Swaka of his relationship with his children, and that continued for an extended period of time, and there have been minimal attempts by Mr. Swaka to maintain any type of relationship with his children, positive or otherwise.” CP 724.
  - m. “Adriana was the one who initiated the e-mails, not the other way around.” CP 726.
2. The Trial Court Erred by Dismissing James’s Petition for Modification of the Parenting Plan
- a. The Standard of Review is Abuse of Discretion.
  - b. A Lower Threshold Should Be Applied for Modification of Default Parenting Plan.

- c. Adequate Cause Should Have Been Found.
  - d. Reversal is Required Without Findings Supporting the Decision.
- 3. The Trial Court Erred in Awarding Attorney's Fees to the Petitioner.
- 4. The Trial Court Erred in Allowing Testimony of the Petitioner and her Witnesses via Skype.
  - a. Testimony Not In Person Requires a Showing of Compelling Circumstances
  - b. Ms. Swaka Has Not Shown Compelling Circumstances or Good Cause.
- 5. The Trial Court Erred by Failing to Appoint a Guardian ad Litem.
- 6. The Trial Court Erred by Limiting James's Residential Time to only 36 Hours Per Year, and only in Spain.
- 7. The Trial Court Erred by Requiring Supervision of James's Visits.

### **C. STATEMENT OF THE CASE**

James and Alexandra Swaka (Alex)<sup>1</sup> are the parents of two children, Adriana and Samuel Swaka, ages 8 and 5 at the time of trial in March, 2012. The parties married on November 21, 2001 and initially separated

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<sup>1</sup> The parties will be referred to by first name for clarity. No disrespect is intended.

in 2007. VRP 193. Before separation, James had been a loving, consistent, involved, and devoted father. VRP 29-32, 91-92, 154-5, 185-7, 352. Family disagreements generally included Alex's parents, and resulted in situational violence by Alex towards her mother. VRP 32-3, 62, 98, 165, 190. There was no allegation of violence by James.

James brought a rich cultural history to the marriage. He was born in South Sudan and raised as an orphan in a Catholic mission in Uganda. VRP 172. There was no electricity. Older children were expected to care for younger children. VRP 174. During a year in Kenya, he solicited passage to Maine. VRP 177. He speaks five languages. Id. He spent five years in the Marines, serving in Japan and Afghanistan, and was honorably discharged. VRP 179; CP 895. He earned an AA degree from Olympic College in 2008. CP 929. He is currently studying philosophy and working in Maine. VRP 180. He earns \$13/hour. VRP 237.

**Dissolution of Marriage.** Alex obtained an Order of Default on August 16, 2007. CP 5. The final Decree and Parenting Plan were entered by default on September 18, 2007. CP 25. The default parenting plan contained a finding against James of a long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions. CP 26. Weekly, supervised visits

were allowed at the home of the mother or the maternal grandparents on Bainbridge Island. *Id.*

At the time the default orders were entered, James had moved temporarily to Maine. VRP 194. However, he returned to Washington in late 2007 and resided at the home of Alex's parents on Bainbridge Island. VRP 38-39. The parties did not follow the parenting plan. For the first half of 2008, James visited with the children almost daily. VRP 38-40, 442. While the parenting plan called for James's visits with the children to be supervised, his residential time was not supervised, either by Alex or her parents. VRP 39, 163, 195-6, 346.

**Relocation to Spain.** In August 2009, Alex traveled to Spain, intending to remain temporarily. VRP 48, 132-3. She admitted that this was the reason she did not initially provide notice of her move. VRP 434. She did not tell James when she actually went to Spain, or for several months afterward. VRP 437. She did not tell James her address in Spain. VRP 447. She had her family keep her addresses confidential, too. VRP 473. In March, 2010, James asked when Alex would be returning the children to the United States so he could see them, and she said some time after June. CP 955. Not informing James, Alex returned to Washington in August, 2010. VRP 246. James inquired again at the end of the summer about seeing the children, only to learn that Alex had briefly returned to

the U.S. without telling him, and then went back to Spain. VRP 48, 246. She also did not tell James when she returned to Washington briefly in November, 2010. VRP 48-9.

Alex did not provide James a formal notice of her relocation. She moved at least four times from 2009-11 without providing notice to James of her changing addresses. VRP 416-7.

Shortly after arriving in Spain, Alex moved in with Juan Gonzalez and his two children, each slightly older than Samuel and Adriana.

**Period of Separation.** James moved to Maine in about May, 2008. For the next three years, he made various attempts to contact the children. Alex stated “we had tons and tons of e-mail contact,” and there were “like 500” e-mails exchanged. VRP 346, 354, 414-5. Only a few were submitted into evidence, including exchanges between the parents, and exchanges between James and Alex’s parents, all including some effort by James to arrange contact with the children. These internet exchanges happened in 2009 (931-6), 2010 (861, 897-904), 2011 (CP 853-6, 925, 941-42, 946-51), and 2012 (917-9). Alex deleted James’s record of the e-mail exchanges, limiting James’s ability to produce a complete record. VRP 170, 332.

Extensive testimony was presented from Alex’s family regarding her campaign to eliminate James from the children’s lives, and her

interference with James's attempts to contact the children. VRP 41, 44-45, 72, 76, 88, 99-103, 107, 140-5, 164, 169, 243-6, 263-6, 290-4, 305, 315, 334.

Alex did not specifically refute the testimony from her family regarding her proactive interference in James's relationship with the children. She did not deny accessing James's e-mail, as alleged by her mother and James. VRP 246, 471. Alex falsely testified that she did not change Adriana's e-mail address, then admitted she might have, then blamed Adriana herself for the change. VRP 442-3. She told her mother she did it in order to cut James out of the children's lives. VRP 470.

**Sexual Contact Between Children and Mr. Gonzalez's Children.**

Alex's family, particularly her mother, spent months with Alex and the children in Spain. VRP 49, 157-8. Sherry Sneller lived in Spain from September, 2009 to April, 2010, for October of 2010, and from November 2010 to June, 2011. VRP 49. Ms. Sneller had daily contact with the children. VRP 51-2.

Beginning around the middle of May, 2011, Alex's parents began expressing concern about disclosures from the children of sexual contact between the children and Mr. Gonzalez and his children. VRP 450. Alex denied anything inappropriate occurred, indicating the children had only seen each other naked. CP 249. At trial, Alex acknowledged for the first

time that there had been “looking and maybe touching” between Samuel and Adriana and her fiancé’s children. VRP 448. On further questioning, she admitted the children revealed actual touching, including of “gender parts.” VRP 453-4. She described it as “really, really normal.”

Throughout the children’s lives, they enjoyed a close relationship with Alex’s parents and brother. VRP 353, 444. As of June 8, 2011, Alex suddenly terminated all contact between the children and her family. VRP 60-2, 446, CP 103-5, 944. She said she would be willing to restore contact only if she is paid money she feels is owed to her. CP 915.

**Commencement of Court Action.** It was not until Alex had resided in Spain for 18 months that she sought permission to move. VRP 445. Without providing notice to James, she sought an Ex Parte Order waiving the statutory notice requirement. CP 56-57. Alex admitted at trial that she alleged there was an immediate risk to her health and safety in order to give the court a reason not to allow notice. VRP 445. This contradicted her assertion that James had always known where she lived, and made no sense, given the fact she had been in Spain for two years. CP 722. She later admitted that in her years with James, “It never got to the point of physical abuse.” VRP 344.

Alex alleged in April, 2011 that James “has not made an effort to see the children in four years.” CP 58. However, she admitted that James saw

the children daily in the first half of 2008; she acknowledged his e-mail exchanges with Adriana in June – August 2009; and she alleged they exchanged “like 500” e-mails. CP 867-887. Alex also admitted at trial that James had regularly asked, “can I make a time for the kids,” and would sometimes talk with them. VRP 354. She claimed to have no way to notify him of the relocation (contrary to the court’s findings that the parties always knew how to communicate with each other). CP 58, 720-3.

Based on her request to waive notice, the court initially signed a blank order, as if the terms of the order had not been judicially reviewed at all. CP 61-2. The court later signed an order granting the requested waiver, without further inquiry. CP 63-4. This would have effectively eviscerated the parenting plan, eliminating any right to contact between the father and children, without any notice to the father or opportunity to respond.

Upon learning of the order, James sought reconsideration. CP 65-72. He requested appointment of a guardian ad litem. CP 86-7. He objected to the relocation. CP 164-172. Alex’s brother, mother, and father submitted declarations describing Alex’s lack of medical care for the children and persistent interference with James’s attempts to contact the children, but more importantly, the disclosures by the children of sexual contact with Alex’s boyfriend’s two children, who are slightly older. CP 89-123, 186-99. Specifically, Adriana told Alex’s mother that Mr.

Gonzalez's son had been fondling the children's genitals, and Adriana had expressed fear of Mr. Gonzalez. CP 99, 112. While Alex later admitted to touching at trial, she denied this in her declaration in response to James's motions. CP 249. Alex again falsely alleged that James had not seen the children since 2007. CP146.

The court denied reconsideration of its orders waiving notice, allowed the temporary relocation to Spain, and denied James's request for a guardian ad litem without prejudice. CP 308-9. The court denied the GAL "unless you can find some way to do it in Spain." CP 520. The court inexplicably maintained the 2007 parenting plan, allowing visits between James and the children at the grandparents' home on Bainbridge Island, even though neither party resided in Washington. *Id.* The court explained that the basis for its ruling as: "allegations of abuse by maternal grandparents made in hindsight." CP 309, 519.

James filed a petition for modification of the parenting plan based on RCW 26.09.260(2), based on detriment, specifically the sexual abuse allegations and lack of appropriate health care. CP 313-21. He also sought modification based on his own relocation under RCW 26.09.260(5), based on his extended sobriety and the lack of reasonable time under RCW 26.09.260(5)(c), based on the need to change nonresidential provisions (such as establishing phone contact) under RCW

26.09.260(10), and based on the fact the prior plan was entered by default.

*Id.*

James again requested appointment of a guardian ad litem at trial, which the court did not allow. CP 683.

**Skype Calls.** James tried to maintain weekly contact with the children beginning in June, 2011. There were problems in getting the calls established. CP 347. Alex read a combative letter from her attorney to James in front of the children. CP 349. Some calls were positive, but there was ambiguity in the order, since calls were only “as agreed.” Alex occasionally caused problems, such as not allowing the children to call James “Papa.” VRP 475-6, 480. On another occasion, she cut off the call when her parents tried to say hello to the children. VRP 274-5. She canceled one call when she learned James was staying with her parents. VRP 282.

By the time of trial, the calls were generally positive and consistent. VRP 249-51, 273, 399-400, 412. A witness in Spain testified that during the year the calls occurred, the children had improved. VRP 371.

**Motion for Clarification and Adequate Cause.** The problems in the Summer of 2011 were severe enough that James sought specific times and conditions for the calls. CP 344-363. He also sought appointment of a guardian ad litem, volunteering to pay the cost, including sending a local

GAL to Spain. He sought clarification of the temporary parenting plan which had no specific schedule or terms for his Skype contact with the children. And he sought a finding of adequate cause for his petition. CP 362-3. The court denied all his requests and awarded attorney's fees against him without making any written or oral findings. CP 523-4, 570-1.

The father renewed his request for a guardian ad litem at trial, and was again denied. VRP 55-8.

**Motion to Present Testimony by Skype.** Alex sought an order allowing herself and her witnesses in Spain to testify via Skype. CP 585-623. While not alleging she was unable to travel to Washington, she did allege it would be inconvenient. CP 625, 650. Over the father's objection, the court granted her motion. CP 656-7. Alex and all her witnesses ultimately did testify by Skype or telephone.

**Final Parenting Plan.** The court entered a final parenting plan which allows James a maximum of 36 hours of supervised residential time with the children per year. CP 708-717. This is allowed so long as he travels to Spain four times per year at his own expense. CP 712. The court did not allow for phone contact outside the Skype calls. E-mail contact with the children is only allowed through Alex. CP 715.

## D. ARGUMENT

### 1. The Court Erred in Specific and Significant Findings of Fact.

The court entered various findings of fact that were not supported by the evidence. CP 718-732. James strongly disagrees with the court's findings, particularly as they ignore the heavy weight of the testimonial evidence from the maternal grandparents, from the maternal uncle, and from James himself.

- For example, the court found, “The father has not seen the children since May 2008” (CP 720) and “Mr. Swaka has not been in the children’s lives in nearly four years” (CP 728). In fact, James and the children enjoyed nearly a year of Skype contact prior to trial. VRP 273. Alex admitted there was phone contact between James and the children in the latter part of 2009 through Alex’s parents. VRP 334, 346.
- The court found that James had had only unsupervised contact with the children in 2008, ignoring the unrebutted evidence that James’s contact was not actually supervised. VRP 39, 163, 195-6, 346.
- The court found that there was “no testimony as to how those [Skype calls] went by Mr. Swaka or Ms. Sneller” (CP 723), when both James and Ms. Sneller described the call. VRP 43, 248-9.

- The court found that Adriana initiated the e-mails between herself and James (CP 726), ignoring the several e-mails James sent in June, July, and August of 2009, which Adriana did not respond to (after Alex changed her e-mail address). CP 885-7. The court also ignored James's testimony regarding the e-mail. VRP 331-2.
- The court found that James made no efforts to contact the children (CP 722), ignoring the exhibits showing James enlisted the help of Alex's parents to make contact, and Alex's instruction to her parents to ignore him. CP 861, 897-904, 925. The court also ignored Alex's admission that James had tried to contact the children on several occasions, including in August of 2009. CP 936. The court made no mention of the 500 e-mails and many phone contacts that Alex admitted to. The court did not mention the testimony of Mr. Sneller, who described James's many attempts to contact the children.

Ultimately, the court found that James, not Alex, was responsible for his lack of contact with the children, which James also disputes. While making this conclusion, the court did not explain either (a) why James's residential time with the children should be so severely limited, (b) why James's residential time with the children should be supervised, or (c) why it must only take place in Spain.

A finding of fact may be reversed “only if that finding is clearly erroneous, that is, if we are left with a definite and firm conviction that a mistake has been made.” *Coble v. Hollister*, 57 Wn. App. 304, 788 P.2d 3 (1990). The court will not reverse a trial court's finding of fact when there is substantial evidence in the record to support it. *Holland v. Boeing Co.*, 90 Wn.2d 384, 583 P.2d 621 (1978). Where a significant error in a finding of fact may affect the overall judgment, remand is appropriate. *Thompson v. Hanson*, 6 Wn.App. 1, 491 P.2d 1065, (1971); *In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997). Where testimony is unrebutted, courts look more closely at findings that contradict the testimony. See, e.g., *In re Custody of Stell*, 56 Wn.App. 356, 368, 783 P.2d 615, (1989). The court’s findings must support its orders. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). In the absence of findings on a critical issue, the record is inadequate for review and remand is appropriate. *In re Marriage of Brockopp*, 78 Wn.App. 441, 446, 898 P.2d 849 (1995).

Here, the court erred in making a number of significant findings, squarely placing the blame on James for the lack of contact with the children between 2008 and 2011. The court’s findings are not reflective of the evidence, particularly the evidence that was unrebutted. The court seems to have mis-read the e-mail exchange between James and Adriana,

finding Adriana initiated all contact and that it lasted only two days, when James sent unrequited messages for months after Alex had changed Adriana's e-mail address. While Alex alleged James had no unsupervised time with the children, she had no foundation for the allegations made while the children were with her parents, and admitted she left the children with James while she went to the gym and school. Alex admitted significant contact with James over the years between 2008 and 2011, which the court inexplicably disregarded.

As in *Coble*, "a mistake has been made," and the case should be remanded for a new trial.

## **2. The Trial Court Erred by Dismissing James's Petition for Modification of the Parenting Plan.**

**a. Standard of Review is Abuse of Discretion.** The court's decision whether to find adequate cause is normally reviewed for a manifest abuse of discretion. *George v. Helliar*, 62 Wn. App. 378, 814 P.2d 238 (1991). "Procedures relating to the modification of a prior custody decree or 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.*” *In re Marriage of Shryock*, 76 Wn. App. 848, 850, 888 P.2d 750 (1995).

**b. A Lower Threshold Should Be Applied for Modification of Default Parenting Plan.** A different, lower standard should be applied when a parenting plan is entered by default. *In re Rankin*, 76 Wn.2d 533, 458 P.2d 176 (1969) (prior to RCW 26.09.260); *Anderson v. Anderson*, 14 Wn. App. 366, 541 P.2d 996 (1975); *Ellis v. Nickerson*, 24 Wn. App. 901, 604 P.2d 518 (1979), citing *Rankin* with approval.

Specifically, the court in *Rankin* held, at 536-37:

Where a custody decree is entered upon default, the court has had no opportunity to observe the two contending parents upon the witness stand or to examine the evidence concerning their fitness and concerning the welfare of the child. It must accept the allegations of the petitioner or, at best, the uncross-examined testimony of the petitioner. Therefore, in such a case, the rule that a change of circumstances must be shown before a change of custody can be ordered does not have its usual efficacy. The purpose of that rule is, of course, to discourage harassment of the parent who is awarded custody by the disgruntled parent who is denied it and to assure as much stability as possible in the environment of the child.

But the primary concern of the courts is always the welfare of the child. It would be unrealistic to assume that this concern can be served as well by a court which does not hear evidence and does not have an opportunity to observe both parents as it can by one in which the right of one parent to custody is contested by the other. Where the court in the prior hearing heard the evidence and observed the parties, it can be assumed that all of the circumstances existing at that time were made known to the court and a

sound discretion was exercised. But where the prior decree was by default, no such assumption can be indulged.

It is for this reason that we have held in this state that a default custody decree can be modified without a showing of a change in circumstances.

Therefore, the court should find adequate cause to modify this parenting plan on a lesser showing of a change of circumstances. Particularly given the father's showing of a secure, stable home, and the concerns raised about the children's environment with their mother, the court should find adequate cause to modify the plan.

**c. Adequate Cause Should Have Been Found.** Here, James sought modification of the parenting plan under several different provisions of the statute, and under the common law allowing modification where a parenting plan is entered by default.

The court did not explain why it was dismissing the petition, except that Alex's parents' allegations were made "in hindsight," begging the question of how allegations are to be made in any other way. CP 309, 515. The failure to make any specific findings as to whether a substantial change of circumstances occurred was an abuse of discretion.

Evidence certainly supported the existence of a substantial change, particularly as to the possibility of sexual abuse of the children. The children disclosed sexual contact with Alex's boyfriend's children. CP 99,

112. When Alex pretended to be unaware of the incidents, Adriana told her, “You knew!” *Id.* Alex then terminated contact between the children and her family, preventing any further inquiry into the issue. While she denied any contact between the children and Mr. Gonzalez’s children at the adequate cause hearing, she later admitted it at trial. Based on the concern of sexual abuse, the court should have found adequate cause for further investigation, including appointment of a GAL.

Other changes in circumstances included James’s own relocation, his achieving sobriety since the 2007 plan was entered, his stable home life and employment, the need to change transportation provisions, the need to address the location of visits, the need to modify the supervision requirement, and more. CP 317. Adequate cause should have been found to modify these provisions, too.

While many of these issues were addressed at trial anyway, the dismissal was particularly significant because it denied James the ability to present testimony regarding possible sexual abuse of the children, and may have been a basis for the court’s refusal to appoint a guardian ad litem. (The court did not explain the basis for its denial.)

**d. Reversal is Required Without Findings.** Again, findings are required when the court addresses adequate cause. *Stern, Shryock, supra.* Here, the court made no specific findings as to the sexual contact, the

reasons for denying adequate cause, the standard that was being applied, or the need for modification based on the asserted provisions in RCW 26.09.260(5)(a), (b), and (c), and 26.09.260(10). “Discretion is abused if the court’s decision is manifestly unreasonable or based on untenable grounds or untenable reasons. ... In addition, the reviewing court must determine if the findings of fact are supported by substantial evidence and whether the court made an error of law. ... Issues of law are reviewed de novo. ...” *In re Marriage of Chua*, 149 Wn. App. 147, 153-4, 202 P.3d 367 (2009). Here, the lack of findings and improper findings require reversal.

**3. The Trial Court Erred in Awarding Attorney’s Fees to the Petitioner.**

The court ordered James to pay \$8,454.45 in Alex’s attorney’s fees following his motion to establish adequate cause, clarify the parenting plan, and appoint a guardian ad litem. CP 523-24, 570-1. The court has the authority to award fees in a modification action under RCW 26.09.140 on the basis of need and ability to pay, or on a finding of bad faith under RCW 26.09.260(13). However, findings are required to support any award of attorney’s fees. *In re Custody of BJB*, 146 Wn. App. 1, 189 P.3d 800 (2008). In *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998), the court held, “Not only do we reaffirm the rule

regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.” See also *Bay v. Jensen*, 147 Wn. App. 641, 659, 196 P.3d 753 (2008) and *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006).

The court made no findings supporting its award of fees. The court made no finding of intransigence, bad faith, or need and ability to pay. Nor is any such finding supported in the record. James sought three forms of relief at this motion:

- a. Adequate Cause for proceeding on his petition to modify, which was supported by the affidavits of Alex’s family and the fact that prior orders were entered by default;
- b. Clarification of a temporary order that allowed only Skype contact “as agreed” and maintained in full force and effect a parenting plan that allowed weekly visits on Bainbridge Island, supervised by Alex’s parents (when James was in Maine and Alex and the children were in Spain); and
- c. Appointment of a guardian ad litem, when a prior motion was denied *without prejudice* because no means of payment had been proposed, and James was now proposing a means of payment.

Each of these requests was reasonable and made in good faith.

Moreover, James made only \$13/hour, was assigned substantial debt in the dissolution, and had no ability to pay Alex's fees. CP 767-834. Nor did Alex show a need. Even at trial, the testimony was that *her* family is doing well. VRP 339.

The award of fees should be reversed.

#### **4. The Trial Court Erred in Allowing Testimony of the Petitioner and her Witnesses via Skype**

##### **Testimony That Is Not In Person Requires a Showing of**

**Compelling Circumstances.** The court addressed the question of telephonic testimony in *Kinsman v. Englander*, 140 Wn. App. 835, 843-44, 167 P.3d 622 (2007) [footnotes omitted]:

In this context, we start our analysis with CR 43, which provides, "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute." CR 43(a)(1). No Washington court has yet to interpret the phrase "unless otherwise directed by the court." CR 43(a)(1). But our court rules strongly favor the testimony of live witnesses whenever possible so that the fact finder may observe the witnesses' demeanor to determine their veracity. Thus, we believe that CR 43(a) presupposes that a witness will be physically present in the courtroom to give oral testimony. But we agree with *Kinsman* that under CR 43(a) the trial court may direct otherwise. Nevertheless, we are persuaded that the trial court may direct the telephonic testimony of witnesses only after all parties' consent where there is no statute or court rule permitting telephonic testimony.

In such a manner, we still favor the testimony of live witnesses whenever possible, but recognize the increasing reality that

some witnesses, who may be unable to attend trial, are nevertheless able to testify from a different place via the telephone. And, among other things, consent by all the parties ensures that: (1) the opposing party has an opportunity to argue for attendance of the witness at trial and (2) the trial court can adopt appropriate safeguards to ensure the accurate identification of the witness and protect against influence by persons present with the witness. Thus, based on this analysis, we hold that the trial court erred in allowing Vergowe to testify telephonically without the Englanders' consent.

*Kinsman* was decided before modification of Washington's CR 43(a), allowing for contemporaneous transmission from a different location *in compelling circumstances and with appropriate safeguards*. Still, the decision highlights the importance of in-person testimony, as reflected in *In re Detention of Stout*, 159 Wn.2d 357, 385-86, 150 P.3d 86 (2007): "The primary purpose of CR 43 is to ensure that witness statements are accurate. *In re Adair*, 965 F.2d 777, 780 n.4 (9th Cir. 1992) (referring to F. R. Civ. P. 43(a) advisory committee's note to 1937 adoption and Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2407 at 329 (1971)). The rule presupposes that witnesses must be physically present in the courtroom to give live, oral testimony."

The problems noted in *Kinsman* and *Stout* are particularly relevant here:

- Lack of influence from unseen people. For example, Alex's fiancé is an attorney, who could easily provide secret, off-

screen advice on how to answer questions. He could whisper answers from offscreen, or easily transmit answers electronically. Alex was in constant communication with her attorney via an instant messenger service, and could have been in communication with others, too. VRP 3.

- Lack of ability to judge demeanor and credibility. Nothing substitutes for in-person contact. It is much more difficult to judge credibility and demeanor through a computer screen than through in-person testimony. This is particularly important when testimony is contested. In trial, the video often froze, which the court commented on: “It’s been doing that a lot.” VRP 419.
- Inability to present exhibits to the witness on cross-examination.
- Skype testimony made identification of exhibits difficult. VRP 418-419, 434-35, 439-440, 446.

**Alex has not shown “good cause” or “compelling circumstances.”** Alex relied primarily on her presence in Spain to argue for Skype testimony. However, she admitted that if she had to, she could travel to Washington for trial. VRP 422. She did not deny having the *ability* to travel, only that it would be inconvenient. CP 625, 650. She

provided no evidence that she was financially unable to afford the expense (which would have been minor, in comparison to the attorney's fees incurred). She was not working, and did not argue that she would miss time from school. Her husband boasted of caring for the children, so she would not have had to bring them. VRP 374. She simply preferred not to.

“Good cause” and “compelling circumstances” are the rare exception to a rule, not a standard practice when a party resides out of town. “Compelling circumstances” may include a situation where a party is unable to travel to court due to medical conditions or foreign incarceration. It may include a situation in which travel to court is prohibited by weather, and the hearing cannot be continued.

Inconvenience is not a “compelling circumstance.” Trials are inconvenient for everyone participating. *Most* litigants have to take time off work, miss time with their children, and travel some distance to testify. Mr. Swaka took time off work (twice – once due to trial being canceled by weather) and flew across the country to attend trial in person. Alex's flight would be a few hours longer than James's, but this is not a basis to free her from the requirement of personal appearance, for herself or her witnesses.

In *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 668-69 (D.C. Cir. 2007), the court allowed testimony from Egypt only when the plaintiff

proved that he had “pursued and repeatedly been denied a visa to the United States.” “Compelling circumstances” means more than a need for international travel. As Comment 4 to the federal rule change indicates,

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. ... A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances.

Here, of course, Alex could have reasonably anticipated having to testify, particularly when she requested that the case be set for trial.

Washington law permits a hearing on a new parenting plan when a party seeks to relocate. Alex was aware, when choosing to relocate to Spain, that she may have to appear in court in Washington for a hearing on what the new parenting plan should provide.

*In re Vioxx Products Liability Litigation*, 439 F.Supp.2d 640 (2006), outlined a 5-factor test for determining whether compelling circumstances exist:

- (1) The control exerted over the witness – here, Alex did not even argue that she or her fiancé could not attend. She did not argue that they could not travel, only that it would be inconvenient.

(2) The complex, multi-party, multi-state nature of the litigation.

The *Vioxx* case was enormous and complex; this case involves only two parties and one state. Trial lasted only three days.

(3) The apparent tactical advantage to not producing the witness.

Again, it is impossible to monitor the witnesses, particularly with a frequent freeze in transmission. The witness could maintain a separate, open window on the computer through which answers are suggested from someone domestically or internationally.

(4) The lack of prejudice. While *Vioxx* discusses prejudice to the defendant, the prejudice here would be to the children, as the court would lack the benefit of judging testimony in person.

(5) The flexibility needed to manage a complex multi-district litigation. Again, this case is in one court, applying one state's law.

One issue not noted by the court in *Vioxx* is that testimony is presented under penalty of perjury under the laws of the State of Washington. Attendance at court in the jurisdiction where one's testimony is being presented reaffirms the importance of stating only the complete truth. If a witness is testifying from Spain, having no intention of coming to the United States or the State of Washington, that witness

lacks the same motivation to testify truthfully. Here, there were multiple instances of Alex contradicting herself, none of which the court commented on. Despite the contradictions, the court accepted Alex's testimony on nearly every disputed factual point. As in *Kinsman*, however, where the testimony was improperly allowed, reversal is required for a new trial, with Alex being required to testify in person.

#### **5. The Trial Court Erred by Failing to Appoint a Guardian ad Litem**

The decision whether to appoint a guardian ad litem under RCW 26.09.220 is within the discretion of the court. *In re Marriage of Waggener*, 13 Wn. App. 911, 914, 538 P.2d 845 (1975). The statute "recognizes that the parental adversaries do not always bring to light those factors most important in the proper resolution of the dispute, i.e., the best interests of the children." *Id.*, at 915. See also *In re Marriage of Nordby*, 41 Wn.App. 531, 705 P.2d 277 (1985).

In this case, there were two critical issues on which a guardian ad litem should have provided insight to the court, which the parents were unable to provide. First, the GAL would have been able to provide some investigation into the disclosures the children had made regarding sexual contact with Alex's fiancé and his children. Alex obviously wanted no such prying into this question: when her parents raised the issue, she

immediately and permanently cut them out of the children's lives, even though she had previously advised the court that her relocation should be allowed because her family moved to Spain to support her. CP 54. James had no independent knowledge of the events or disclosures, and appropriately did not inquire of the children. VRP 234-5. Where evidence of sexual abuse exists, the court should not shield its eyes. A GAL would have been able to explore this issue with the only people who knew about it – the children themselves.

Second, the children would have been able to provide insight into the nature of their relationship with James. The court made certain assumptions based on the testimony of the parties, but was sometimes left speculating. CP 722-3. Adriana could have explained to a GAL what her feelings towards James were, how the Skype calls went for her (and Samuel), to what degree Alex interfered with the Skype calls, and what kind of contact she would like to have with her father in the future. RCW 26.12.175(b). Instead of relying on Alex's testimony – contradicted by her own family – the court should have appointed a GAL to talk with the children. Its failure to do so, as in *Waggener*, requires reversal so that the court can hear additional evidence from the GAL.

James acknowledged pragmatic concerns, but Alex's father volunteered to cover the cost of the GAL, whether it was a trip to Spain

for the GAL or a trip to Washington for the children. Alex acknowledged she could arrange a trip for the children to travel to Washington to meet with a GAL. CP 251.

**6. The Trial Court Erred by Limiting James's Residential Time to only 36 Hours Per Year, and only in Spain**

The parenting plan adopted by the court is within its discretion. *In re Marriage of McDole*, 122 Wn.2d 604, 859 P.2d 1239 (1993). Discretion, of course, is not unbounded, and findings are required to support the court's rulings. *Shryock, supra, and Stern, supra*. A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997). When a court does not state adequate reasons for its decision (e.g. on adequate cause), its decision is an abuse of discretion. *Kinnan v. Jordan*, 131 Wn. App. 738, 750, 129 P.3d 807 (2006). While a court is not required to make findings on every factual issue, the court must make findings on ultimate facts and material issues. *Wold v. Wold*, 7 Wn. App. 872, 503 P.2d 118 (1972). "A material fact is one which a reasonable man would attach importance to in determining his course of action." *Wold*, at 875.

The limitation on James's time with the children violates a fundamental purpose of the Parenting Act. "The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests." RCW 26.09.002.

Aside from whatever Skype calls the parents can agree on, the court limited James's residential time with the children to a maximum of 36 hours per year, or a total of 1.5 days each *year*. This assumes James travels to Spain at his own expense, missing work, four times each year, to visit with the children for 90 minutes per day on 6 consecutive days. Jeffrey Sneller agreed to pay for one trip, but his resources are not unlimited, and may be cut off at any time.

James respectfully submits that no reasonable person would limit his time with the children so severely. Even if all other aspects of the court's order are affirmed, this is not adequate to satisfy the basic purpose of the parenting act – fostering the relationship between parent and child. Parents guilty of severe domestic violence, a history of sexual abuse, mental illness, alcohol and drug addiction, normally receive significantly more residential time than James.

Furthermore, such a severe restriction requires some specific finding as to how this restriction is in the best interests of the children. While the court generally faulted James for the lack of contact between 2008 and 2011 (which was disputed by James, Alex's mother, Alex's father, and Alex's brother), this still does not explain how such a draconian limitation on his time is appropriate. The court made no specific finding as to how such a severe restriction is appropriate.

#### **7. The Trial Court Erred by Requiring Supervision of James's Visits**

Aside from elimination of face-to-face residential time entirely, one of the most severe limits a court may impose on a party's contact with his children is to require that contact be supervised. Supervision invades the fundamental privacy of the family, monitoring the most personal and important relationship in a parent's life. When supervised, a parent's interactions are limited in innumerable ways; a parent can not enjoy the normal, natural interchange that typifies family life. A relaxed, normal relationship is impossible under the supervision of others.<sup>2</sup> *Striking a Balance: the Use of Supervised Visitation Programs to Protect Children*, Mich. Fam. Law Journal, pp. 8-13 (2000).

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<sup>2</sup> In this case, Alex cut off communication with James whenever the subject of her parents came up, even when the children initiated the discussion. James therefore is forced to avoid certain subjects in his communications with his own children.

Imposition of this kind of restriction requires a finding to support it. *Shryock, supra, and Stern, supra.* The court did not, however, describe why visits are to be supervised. When imposing limits on a parent's natural parenting of his children, the court should impose the least restrictive limitation necessary to protect the children's interests. *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 899 P.2d 803 (1995).

Supervision is frequently appropriate to protect the safety of children. For example, if James were still drinking, then this might support supervision, because a parent under the influence of alcohol poses an inherent risk to the safety of his children. In fact, in support of Alex's request for supervision, she only referred to James's drinking. VRP 398. Likewise, if a parent is violent or dangerous, then this could support supervision. RCW 26.09.191. However, the court found that James is not abusing alcohol now, and no limiting factor was appropriate based on the possibility that he would be drinking. CP 725.

No findings exist in this case justifying supervision of residential time. While the court did find willful abandonment, even this does not support the imposition of supervision. If the court is concerned that James is not going to follow through in his efforts to maintain his relationship with the children, then he should be given *more* time, not less.

**E. CONCLUSION**

The court's decision should be reversed and the case remanded for a new trial, including entry of appropriate findings supporting the trial court's ultimate decision.

Respectfully submitted this 6<sup>th</sup> day of September, 2012.



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Attorney for Appellant

§ 26.09.260. Modification of parenting plan or custody decree.

## **Washington Statutes**

### **Title 26. Domestic relations**

#### **Chapter 26.09. Dissolution proceedings - Legal separation**

*Current through 2012 Second Special Session*

#### **§ 26.09.260. Modification of parenting plan or custody decree**

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) 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.

(3) A conviction of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070 shall constitute a substantial change of circumstances for the purposes of this section.

(4) The court may reduce or restrict contact between the child and the parent with whom the child

does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that 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. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

(6) The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

(7) A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191 (2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.

(8)(a) If a parent with whom the child does not reside a majority of the time voluntarily fails to exercise residential time for an extended period, that is, one year or longer, the court upon proper motion may make adjustments to the parenting plan in keeping with the best interests of the minor child.

(b) For the purposes of determining whether the parent has failed to exercise residential time for one year or longer, the court may not count any time periods during which the parent did not exercise residential time due to the effect of the parent's military duties potentially impacting parenting functions.

(9) A parent with whom the child does not reside a majority of the time who is required by the existing parenting plan to complete evaluations, treatment, parenting, or other classes may not seek expansion of residential time under subsection (5)(c) of this section unless that parent has fully complied with such requirements.

(10) The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child. Adjustments ordered under this section may be made without consideration of the factors set forth in subsection (2) of this section.

(11) If the parent with whom the child resides a majority of the time receives temporary duty, deployment, activation, or mobilization orders from the military that involve moving a substantial distance away from the parent's residence or otherwise would have a material effect on the parent's ability to exercise parenting functions and primary placement responsibilities, then:

(a) Any temporary custody order for the child during the parent's absence shall end no later than ten days after the returning parent provides notice to the temporary custodian, but shall not impair the discretion of the court to conduct an expedited or emergency hearing for resolution of the child's residential placement upon return of the parent and within ten days of the filing of a motion alleging an immediate danger of irreparable harm to the child. If a motion alleging immediate danger has not been filed, the motion for an order restoring the previous residential schedule shall be granted; and

(b) The temporary duty, activation, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer residential placement from the parent who is a military service member.

(12) If a parent receives military temporary duty, deployment, activation, or mobilization orders that involve moving a substantial distance away from the military parent's residence or otherwise have a material effect on the military parent's ability to exercise residential time or visitation rights, at the request of the military parent, the court may delegate the military parent's residential time or

visitation rights, or a portion thereof, to a child's family member, including a stepparent, or another person other than a parent, with a close and substantial relationship to the minor child for the duration of the military parent's absence, if delegating residential time or visitation rights is in the child's best interest. The court may not permit the delegation of residential time or visitation rights to a person who would be subject to limitations on residential time under RCW 26.09.191. The parties shall attempt to resolve disputes regarding delegation of residential time or visitation rights through the dispute resolution process specified in their parenting plan, unless excused by the court for good cause shown. Such a court-ordered temporary delegation of a military parent's residential time or visitation rights does not create separate rights to residential time or visitation for a person other than a parent.

(13) If the 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.

**Cite as RCW 26.09.260**

**History.** 2009 c 502 § 3; 2000 c 21 § 19; 1999 c 174 § 1; 1991 c 367 § 9. Prior: 1989 c 375 § 14; 1989 c 318 § 3; 1987 c 460 § 19; 1973 1st ex.s. c 157 § 26.

**Note:**

**Applicability -- 2000 c 21:** See RCW 26.09.405.

**Intent -- Captions not law -- 2000 c 21:** See notes following RCW 26.09.405.

**Severability -- Effective date -- Captions not law -- 1991 c 367:** See notes following RCW 26.09.015.

**Severability -- 1989 c 318:** See note following RCW 26.09.160.

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STATE OF WASHINGTON  
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DEPUTY

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

JAMES SWAKA,  
Appellant,  
And

ALEXANDRA SWAKA,  
Respondent.

Court of Appeals No. 42758-3-II  
AFFIDAVIT OF MAILING

I, Abigail Esteban, declare on this 6<sup>th</sup> day of September, 2012, I mailed a true and correct copy of the Appellant's Trial Brief along with this Affidavit of Mailing to the following addresses, first class postage prepaid:

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Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

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

3  
4 Signed at Seattle, Washington, this 6<sup>th</sup> day of September, 2012.

5   
6 \_\_\_\_\_  
Abigail Esteban