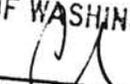


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DIVISION II

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STATE OF WASHINGTON

BY   
DEPUTY

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 REPLY BRIEF

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**ORIGINAL**

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### A. RESPONSE TO STATEMENT OF THE CASE

While Appellant disputes the factual allegations made in Respondent's Statement of the Case, there are only a few significant assertions which bear correction. For example, James did *not* acknowledge that his last contact with the children was "in the late fall of 2007" (Brief of Respondent, page 8); even Alex admitted that James's nearly daily contact with the children extended into the Spring of 2008 after he returned from Maine. Alex's mother testified that James's time was unsupervised. VRP 163. James concurred. VRP 195. And while James's claims about the lack of treatment of Samuel's skin condition were part of his motion in May, 2011, the evidence came from Alex's own family (here, her brother Adam Sneller), who had just returned from seeing her in Spain.

It is also true that Alex "offered" additional time to James in Spain in 2011. However, this was during a period of time when she was consistently interfering with his Skype calls with the children. She refused more than one call per week; she refused any other additional contact, including e-mail; she refused to agree to a guardian ad litem. It would have been quite a leap of faith for James to spend thousands of dollars in the hope that Alex would allow contact in Spain which was not court-ordered.

## B. ARGUMENT

### 1. Trial Court Discretion is Not Unfettered.

While the trial court does have wide discretion, this discretion is not unfettered.

In developing and ordering a permanent parenting plan, the court is given broad discretion. *Marriage of Kovacs*, 121 Wash.2d at 801, 854 P.2d 629. That discretion must be exercised according to the guidelines set forth in RCW 26.09.187(3). This section, in turn, must be read in conjunction with RCW 26.09.184 (setting forth the objectives and required contents of the permanent parenting plan), RCW 26.09.002 (stating the policy of the Parenting Act), and RCW 26.09.191 (setting forth limiting factors which require or permit [940 P.2d 1369] restrictions upon a parent's actions or involvement with the child).

*In re Marriage of Littlefield*, 133 Wn.2d 39, 51-2, 940 P.2d 1362 (1997).

For the appellate court to determine whether the trial court correctly applied the statutory mandates to the given facts of a particular case, the trial judge has a special responsibility to make sufficient factual findings sufficient to permit appellate review. This also maintains public confidence in the judiciary. *Littlefield* recognized that when factual findings are unsupported by the record, or an incorrect standard is applied, or the facts do not meet the requirements of the correct standard, reversal is required.

**2. RCW 26.09.260 did not abrogate the Common Law Rule that  
A Lower Threshold Is Applied for Modification of Default  
Parenting Plans.**

Statutes enacted in derogation of the common law must be strictly construed. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash.2d 107, 177, 744 P.2d 1032 (1987). RCW 26.09.260 at no point mentions the standard to be applied for modification of default parenting plans, and does not overrule the holdings of *In re Rankin*, 76 Wn.2d 533, 458 P.2d 176 (1969) and *Anderson v. Anderson*, 14 Wn. App. 366, 541 P.2d 996 (1975). Through its omission of any contrary rule, the legislature maintained the courts' decisions that parenting plans are significant enough that when entered by default, those plans are still subject to modification. Without some indication that the legislature specifically intended to over-rule *Rankin* and *Anderson*, the court should not presume that it did so.

Therefore, the common law rule is not abrogated by the subsequent passage of the statute.

Alex argues on appeal, "Under Mr. Swaka's theory, a party could follow a default parenting plan for years and then decide on a whim to have it change without any showing of a change in circumstances justifying a change to the parenting plan." That is a different case, and not

what happened here. Here, neither party followed the parenting plan, ever. The plan was entered when James was out of state; when he returned, he resided with the Snellers, seeing the children every day; this was followed by almost three years of efforts to contact the children, which were consistently frustrated by Alex. Ironically, the first time this parenting plan was actually put into effect was on James's petition for modification, when the court ordered, "the final parenting plan (2007) shall remain in full force and effect." CP 309. Of course, this order was impossible, because with James in Maine and Alex and the children in Spain, supervised visits on Bainbridge Island were not going to happen.

It is especially those cases in which default parenting plans are *not* followed that they *should* be modifiable. For example, if a parent obtains a default plan that cuts the other parent off from the children, but instead, the defaulted parent continues to see the children consistently without restriction, then the parent who obtained the default should not enjoy a permanent and unmodifiable right to terminate contact at will, whether or not a substantial change of circumstances has occurred.

### **3. The Modification Was Not Mooted by the Relocation Action.**

Alex argues that because the modification proceeded to trial, James's petition for modification was essentially mooted. She fails to recognize, however, that James was prevented from presenting testimony

regarding the risk to the children which formed the primary basis for his petition. VRP 55-58. As there was no petition before the court, James could not present evidence of sexual abuse through Alex's parents and brother. The significant and disturbing testimony of possible sexual abuse of the children, either by the mother's boyfriend or his children, was not heard by the trial court.<sup>1</sup> When Mr. Sneller blurted out that Mr. Gonzalez was a pedophile, the court immediately terminated proceedings and struck his comment from the record. CP 106. Had James's petition been before the court, (1) the court should have appointed a guardian ad litem to investigate the claims, and (2) the court would have heard the testimony regarding the abuse. The dismissal of the petition was by no means moot due to the trial.

On appeal, Alex argues that because the children were the same age, and "both are little kids," that sexual abuse between them is not possible. In fact, sexually inappropriate contact *can* and frequently does occur between children. Sibling incest is believed to be the most common form of intrafamilial abuse. Michael G. Kalogerakis; American Psychiatric Association. Workgroup on Psychiatric Practice in the Juvenile Court (1992). *Handbook of psychiatric practice in the juvenile court: the Workgroup on Psychiatric Practice in the Juvenile Court of the American*

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<sup>1</sup> Even what the court did hear was inconsistent, e.g., regarding whether the children were ages 3 and 6 or ages 4 and 7 when the contact occurred. VRP 452.

*Psychiatric Association*. American Psychiatric Pub. p. 106. In one study, the characteristics of brother–sister incest and its associated psychosocial distress do not differ from the characteristics of father–daughter incest. *Child Abuse & Neglect* **26** (9): 957–973. It is critical that parents (and courts) take sibling sexual contact seriously, and not refuse to acknowledge its existence or ignore it as “perfectly innocent.” The trial court should have found that Alex’s shifting stories on the question constituted a substantial change of circumstances and justified appointment of a guardian ad litem (for which her own parents had offered to pay).

Judge Haberly’s comment that the allegations were made “in hindsight” remains baffling. The evidence came to light only a month before court proceedings began. At that time, Alex, the children, her parents, and brother, were all living in Spain. There was no cause to e-mail one another when they were talking on a daily basis. Alex’s parents assisted James in starting court proceedings with unusual speed, given the distance between the parties.

Notably, Mr. Swaka had achieved sobriety in the time between the entry of the original parenting plan and trial. Alex does not challenge the court’s findings that, “Mr Swaka is not abusing alcohol now” and “The court does not find a limiting factor is appropriate.” CP 725. In other

words, the one basis for a restriction against Mr. Swaka in the default parenting plan no longer exists, which should be an additional change of circumstances for modification of that original plan.

#### **4. A Guardian Ad Litem Should Have Been Appointed.**

Two possibilities exist for a guardian ad litem investigation: flying the GAL to Spain or flying the children to Washington. Based on the likely GAL fees that would be incurred, James suggested it would be more efficient to fly the children to Washington, where they could meet with the GAL. (James might also have been permitted to have a visit under the parenting plan that was in “full force and effect.”) Alex had returned to Washington twice before with the children since the divorce (each time without notifying James until after her return to Spain), and had no job that would prevent her and the children from traveling again. The possibility of flying the GAL to Spain was at least raised at the hearing on October 7, 2011 (page 6), and the court certainly had the discretion to order such an arrangement. The mother’s response was to suggest that a guardian ad litem be found in Spain (page 15) – a completely unrealistic proposal, given that the Spanish GAL would have to be on Kitsap County’s GAL Registry, meet with the father, testify in Washington, and be familiar with Washington law. James showed that any practical

concerns could be overcome. In any event, the court did not explain the reasons that the motion was denied (page 21).

**5. The Award of Attorney's Fees Was Unsupported by Any Findings.**

Aside from its award, the court did not explain its award of fees, except to say the issues lacked merit. However, the merit of the issues raised does not go to the question of fees under RCW 26.09.140 (intransigence or need and ability to pay). Nor did the court make any finding of frivolousness under RCW 4.84.185.

“[RCW 4.84.185] is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite.” *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). An action is frivolous within the meaning of RCW 4.84.185 if it “cannot be supported by any rational argument on the law or facts.” *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82, review denied, 113 Wn.2d 1001, 777 P.2d 1050 (1989). When awarding attorney fees for a frivolous action (RCW 4.84.185), a court cannot pick and choose among those aspects of an action that are frivolous and those that are not. The action must be viewed in its entirety and only if it is

frivolous as a whole will an award of fees be appropriate. *Biggs v. Vail*, 119 Wn.2d 129, 136, 830 P.2d 350 (1992).

Here, James's motion was neither frivolous nor intransigent. Contrary to Alex's argument (which she repeats on appeal), he was not attempting to gain custody of the children by seeking appointment of a guardian ad litem; he was not acting in bad faith by seeking clarification of an order which required visits to be supervised by Alex's parents on Bainbridge Island, and his request to set specific times and conditions for his calls with the children was not frivolous in its entirety. Nor were any of these requests intransigent on his part.

#### **6. The Court Erred in Allowing Alex to Testify Via Skype.**

Each of the cases Alex cites are distinguishable from the situation here. In *In re Vioxx Products Liability Litigation*, 439 F.Supp.2d 650 (E.D. La. 2006), the party seeking to avoid the contemporaneous transmission was the party who controlled access to the witness – a multinational corporation which was not cooperating for purely tactical reasons. Here, Alex is not just a collateral witness, but a *party* trying to avoid the inconvenience of trial, where “[t]he very ceremony of trial and the presence of the fact-finder may exert a powerful force for truth-telling.” *Vioxx*, at 644, citing *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939). *Beltran-Tirado v. I.N.S.*, 213 F.3d 179 (2000), concerns due process in a

review of a Board of Immigration Appeals decision, and whether admission of testimony there is “fair;” its reference to CR 43(a) is dicta. *Edwards v. Logan*, 38 F.Supp.2d 463 (1999), allowed videoconferencing because of the cost (over \$8,000), the security risk of transporting a violent offender, and the “relatively simple and straightforward” issue to be resolved at trial. None of those considerations are present here: Alex repeatedly mentioned the high cost of arranging Skype; there is no security risk; and the issues in this case were numerous, subtle, and necessitated extensive credibility determinations by the trial court.

James did not object to the miscellaneous witnesses in Spain testifying by Skype, or Alex’s sister testifying by phone. For these witnesses’ minimal contribution to the trial, James agrees it made little sense to present their testimony other than by electronic means. Likewise, he attempted to present testimony of a friend by phone.

However, for a party to the case, in-person testimony is critical. It would have been impossible to note when Alex was looking elsewhere in the room, looking at something else on her computer screen or phone, or taking too long to respond, since the image was jerky and there was a delay in the transmission, leading to interruptions. Her testimony is replete with questions about which exhibit was being referred to, and

where it could be found, particularly on cross-examination. VRP 434-36, 443, 459.

The *Vioxx* factors show the error in allowing Alex to testify via Skype. Regarding control over the witness, Alex was able to travel, and had the means of doing so. As to the scope of the litigation, the issue could be solved by simply flying to Washington for a 3-day trial. As to the tactical advantage, the court had already indicated it gave more credibility to Alex than to James, so anything that limited the ability to cross-examine her worked to her advantage. When she is confused about exhibits and there is a delay in the question (and objection), she interrupts the flow of testimony, and prevents the court from appreciating her demeanor and tone. Narrative and rambling answers were impossible to interrupt. E.g., VRP 347. And in terms of flexibility, this case did not involve multi-district litigation, and again, the problem could have been solved by Alex simply traveling to Washington, as James did.

As to Alex's alleged fears of child abduction, Alex could simply have left the children in Spain with Mr. Gonzalez, who she described as incredibly close with the children, and who the children refer to as their father. VRP 363, 370.

**7. The Lack of Sufficient Findings Requires Remand.**

Initially, James does not admit that he “did not have time with the children for four years.” Brief of Respondent, at 41. He was seeing the children almost daily and in person through the first half of 2008; Alex began allowing Skype contact in mid-2011. Only a strained definition of “having time” would permit this statement to be correct.

There are two points of particular concern regarding the court’s lack of findings: first, the restriction of time to 1.5 hours/day for 6 days at a time, assuming James is able to travel to Spain; and second, the supervision requirement. Even if all the court’s findings are taken as true, the court nowhere addresses either of these restrictions.

As to the 1.5 hour minimum, there is no basis for it. The children attend school for six or seven hours per day. As in the United States, they change teachers yearly, with each year bringing a new stranger into their lives. Like any normal children, they adapt to the changes, and to the time away from their mother. The court did not explain why they could not enjoy a similar amount of time with their father, particularly when they are not attending school during breaks and vacations. James poses no threat to their health or welfare; he *wants* to spend as much time with them as possible; he focuses his attention on them during their time together. In Washington, he was caring for the children alone, without Alex, when she went to the gym, worked late, went shopping, and attended school. If the

court is concerned about James not following through, then it should allow even *more* time, not less.

Possible findings justifying the limit of 1.5 hours would include: breastfeeding infants, special needs children with particular emotional risk factors; or a demonstrated lack of patience by a parent or loss of temper. Here, however, the court restricted James's time with the children to less than a typical babysitter is allowed, without explanation or sufficient findings.

Similarly, the court imposed the draconian restriction of supervision. Again, however, such a restriction requires findings to support it. Supervision can be imposed in many circumstances, including ongoing substance abuse, a history of violence, a demonstrated risk of flight, or a history of putting children at some risk to their health and safety. Not only are none of these factors present here, the court made no findings justifying supervision.

The court's requirement that James fly to Spain four times a year, in order to visit with the children for nine hours per trip, is not "realistic given the distance, cost, and past experience." Brief of Respondent, 42. James makes \$12/hour. CP 397. Even if Jeff Sneller is, for the moment, able to help him with some costs of travel, James still must miss work and

incur additional expenses in Spain. He should be able to have as much time as possible during each trip.

The question is not whether the court could have found reasons to require supervision, and to limit James's time; the question is whether the court did – and it did not. At a minimum, this matter should be remanded for findings justifying the court's orders, or for review of whether those orders are appropriate.

**8. Respondent's Request for Attorney's Fees on Appeal Should Be Denied.**

Attorney's fees on appeal should be denied. First, Respondent has failed to comply with RAP 18.1(b). Second, the trial court found no basis to reallocate fees. Third, there is insufficient information before the court to reallocate fees under RCW 26.09.140, as Alex did not present information regarding her financial circumstances to the trial court (including tax returns, pay stubs, bank statements, or information about her assets). Fourth, James has no ability to cover fees – when he travels to see the children, he loses what little income he has. Finally, this appeal is by no means frivolous, but raises important questions about the trial court's decision, and ultimately, whether the children in this case will be able to have a relationship with their father over the next ten to twelve years.

### C. 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 26<sup>th</sup> day of November, 2012.



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MICHAEL W. LOUDEN, WSBA #24452  
Attorney for Appellant

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DECLARATION OF SERVICE

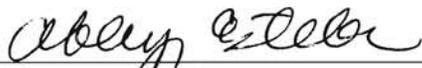
STATE OF WASHINGTON

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

That on November 26, 2012, I arranged for service of this Reply Brief, to the court and to the parties to this action as follows:

Office of the Clerk Kitsap County Superior Court 614 Division Street, MS-34 Port Orchard, WA 98366	<input type="checkbox"/> E-Filing <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 26<sup>th</sup> day of November, 2012.

  
Abby Esteban

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

In re the Marriage of:

ALEXANDRA SWAKA,

Petitioner (Respondent on Appeal),

and

JAMES KHAMIS SWAKA,

Respondent (Appellant).

Court of Appeals No. 42758-3-II

APPELLANT'S RESPONSE TO  
MOTION ON THE MERITS

Appellant James Swaka responds to Alexandra Swaka's Motion on the Merits by incorporating by reference herein his opening and reply briefs.

DATED this 26<sup>th</sup> day of November, 2012.

WECHSLER BECKER, LLP

By:   
Michael W. Loudon, WSBA #24452  
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APPELLANT'S RESPONSE TO MOTION ON THE  
MERITS  
Page 1

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STATE OF WASHINGTON

DECLARATION OF SERVICE

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

That on November 26, 2012, I arranged for service of this Response to the Motion on the Merits, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 26<sup>th</sup> day of November, 2012.

  
Abby Esteban