

FILED
COURT OF APPEALS
DIVISION II

2012 NOV 27 PM 1:03

NO. 44037-7-II [ACCELERATED]

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

STATE OF WASHINGTON
BY  DEPUTY

In re the Marriage of:

BANDANA WAIKHOM,

Appellant.

v.

JOHN WALLACE LUCKWITZ,

Respondent.

BRIEF OF APPELLANT

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033
Attorney for Appellant Waikhom

pm 11-26-12

TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR.....	2
ISSUES RELATED TO ASSIGNMENTS OF ERROR	3
STATEMENT OF THE CASE	5
A. The parties' relationship was plagued with difficulty from the beginning.	5
B. Difficulties and discord increased when their son was born.....	6
C. The parties' relationship deteriorated further, they separated in 2006, and Waikhom and S relocated in 2008.	7
D. After a verbally and emotionally abusive marriage, Waikhom needed to limit her communications with Luckwitz.	9
E. When the parties divorced, S was a shy, positive child, who calmed easily when he became upset.....	10
F. The parenting evaluator recommended that S reside primarily with Waikhom, who had always been S's primary parent.	13
G. The court placed S with Waikhom and appointed a parenting coordinator.	14
H. After Luckwitz's visitation began, S markedly declined emotionally and behaviorally.....	16
PROCEDURAL HISTORY	19
ARGUMENT	25
A. Standards of Review.	25
B. The court erroneously refused to decline jurisdiction, where Waikhom and S had lived in Ohio for almost four years, Luckwitz has a residence in Ohio and visits monthly, and all relevant third-party witnesses are located in Ohio.....	26

1.	S has resided in Ohio for four years, heavily favoring Ohio Jurisdiction.	28
2.	The distance between Washington and Ohio favors Ohio jurisdiction, where Luckwitz has significant contacts with Ohio that Waikhom lacks in Washington.....	29
3.	The parties' financial resources minimally favor Ohio jurisdiction.	30
4.	The nature and location of the evidence required to resolve the modification heavily favors Ohio jurisdiction.	31
5.	Each State's ability to decide this matter and familiarity with the matter are neutral factors.	33
C.	There was (at least) adequate cause to warrant a hearing on Waikhom's motion to modify.....	35
D.	The trial court erroneously refused to consider Clarke's reports addressing the parties' communication and S's turmoil.	40
E.	The court erroneously ordered the parties to communicate more, even though every expert involved in this matter opined that increased communication would harm S.	42
	CONCLUSION.....	44

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>In re Marriage of Greenlaw</i> , 123 Wn.2d 593, 869 P.2d 1024 (1994).....	25
<i>In re Marriage of Kinnan</i> , 131 Wn. App. 738, 129 P.3d 807 (2006)	26
<i>In re Marriage of Lemke</i> , 120 Wn. App. 536, 85 P.3d 966, <i>rev. denied</i> , 152 Wn.2d 1025 (2004).....	36, 40
<i>In re Marriage of Mangiola</i> , 46 Wn. App. 574, 732 P.2d 163 (1987), <i>overruled on other grounds by In re Parentage of Jannot</i> , 149 Wn.2d 123, 65 P.3d 664 (2003).....	36
<i>In re Marriage of Parker</i> , 135 Wn. App. 465, 145 P.3d 383 (2006)	36
<i>In re Marriage of Roorda</i> , 25 Wn. App. 849, 611 P.2d 794 (1980)	36
<i>In re Parentage, Parenting, and Support of A.R.K.-K.</i> , 142 Wn. App. 297, 174 P.3d 160 (2007)	27
<i>Sales v. Weyerhaeuser Co.</i> , 138 Wn. App. 222, 156 P.3d 303 (2007)	26
STATUTES	
RCW 26.09.260	35
RCW 26.09.270	36
RCW 26.09.270(3)	35
RCW 26.27.070	26
RCW 26.27.111	32

RCW 26.27.261 26

RCW 26.27.261(1) 27

RCW 26.27.261(2) 28, 34

RCW 26.27.261(2)(a) 28

RCW 26.27.261(2)(b) 29

RCW 26.27.261(2)(c) 29

RCW 26.27.261(2)(d) 30

RCW 26.27.261(2)(e) 28

RCW 26.27.261(2)(f) 31

RCW 26.27.261(2)(g) 33

RCW 26.27.261(2)(h) 34

RCW 26.27.261(3) 28

RCW Chapter 26.27 27

INTRODUCTION

Appellant Bandana Waikhom and the parties' son S relocated to Ohio during the parties' highly contentious dissolution. S's adjustment was typical – at first. But after John Luckwitz began one-week-per-month visits during the school year, S markedly declined, and was eventually expelled from school. The parenting coordinator, and S's school principal, psychiatrist, and therapist, all agree that the residential schedule is causing S's turmoil.

Waikhom moved to modify the parenting plan and concurrently moved the court to decline jurisdiction in favor of Ohio. Waikhom and S had lived in Ohio for four years, Luckwitz has an Ohio residence, and all evidence aside from Luckwitz's testimony is located in Ohio. But the trial court maintained jurisdiction.

Yet having done so, the court ruled that there was not adequate cause for a hearing on Waikhom's modification motion, where S's school principal and medical experts did not provide declarations. But the parenting coordinator's reports state his opinion, and the shared opinions of all experts involved in S's care, that the residential schedule is damaging S. Along with Waikhom's sworn statements, this is more than adequate cause.

This child is in crisis. This Court should reverse.

ASSIGNMENTS OF ERROR

1. The trial court erroneously found that absent declarations from all experts involved in S's care, there was not adequate cause for a hearing on Waikhom's motion to modify the parenting plan, and erroneously denied her adequate cause motion. CP 446-48.

2. The court erroneously refused to consider the court-appointed Parenting Coordinator's May 2012 Report and Recommendations supporting Waikhom's modification petition. CP 443-445.

3. The court erroneously found that lack of communication was a cause of S's turmoil, erroneously ordered the parties to directly communicate with one another, and erroneously ordered the Parenting Coordinator to adopt a plan for direct communication. CP 444.

4. The court erroneously found that there was no basis to decline jurisdiction, denying Waikhom's motion for an order declining jurisdiction. CP 449-50.

5. The court erroneously entered a supplemental order governing the parties' communications. CP 501-02.

6. The court erroneously denied Waikhom's motion for reconsideration. CP 503-07.

7. The court erroneously found that the Parenting Coordinator's July 11 letter contained new evidence, and erroneously refused to consider the letter. CP 503-07.

8. The court erroneously awarded Luckwitz fees regarding the reconsideration motion. CP 506.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the court erroneously maintain jurisdiction where: (a) Waikhom and S have lived in Ohio for four years; (b) Luckwitz has a residence in Ohio, residing there one week each month during the school year; (c) all relevant third-party witnesses reside in Ohio, including the Parenting Coordinator, and S's school teachers and principal, doctors, therapists, and grandparents on both sides; and (d) Ohio is plainly an adequate forum capable of determining whether modification is warranted?

2. Did the court erroneously refuse to consider the Parenting Coordinator's report supporting Waikhom's petition to modify, where the order appointing the Parenting Coordinator authorizes him, among other things: (a) to consult with family members, others, and any professional working with S, including

his doctors, therapists, and School principal; (b) to gather information on the services S receives; and (c) to provide recommendations for new or modified parenting provisions?

3. Did the court erroneously deny Waikhom a hearing on her modification petition, where Waikhom, the Parenting Coordinator, S's school principal, and all of his doctors and therapists agree (a) that S has declined emotionally and behaviorally since Luckwitz started visitation of one-week-per-month during the school year; and (b) that the residential schedule is causing S's decline?

4. Did the court erroneously refuse to consider the Parenting Coordinator's July 2012 letter, where the letter directly responds to the court's order requiring the Parenting Coordinator to file a report with the court addressing the parties' communication problems and S's turmoil, and where the letter largely repeats opinions expressed in the Parenting Coordinator's prior report?

5. Did the court erroneously award Luckwitz fees incurred in responding to Waikhom's motion for reconsideration, where Waikhom's motion was based on good faith – and correct – arguments?

STATEMENT OF THE CASE

A. The parties' relationship was plagued with difficulty from the beginning.

The parties met in a Bachelors of Science/Medical Degree program in 1986. CP 32. They began dating in 1987, and became "very serious . . . very quickly." *Id.* They began cohabitating in 1992, and were married in 1996. CP 11.

Luckwitz describes the relationship as "immature," explaining that neither party had a prior significant relationship. CP 25. This led to "unhealthy communication patterns" and a "fiery" relationship from the beginning. *Id.*

Difficulties emerged early on when the parties completed medical school. CP 32. Waikhom was ranked sixth in their class, so would have her choice of residency. *Id.* Luckwitz was not highly ranked, so would have much less control over his future. *Id.* The parties agree that they were sexually "mismatch[ed]," leading to "considerable dissatisfaction and discord." CP 25.

Relationship stress increased when the parties finished their training, and began establishing their practices and starting a family. CP 25. Luckwitz was accepted into an anesthesiology program in Pittsburgh, and Waikhom agreed to go, though it was

“not her top choice.” CP 32. In Pittsburgh, Waikhom suffered a serious back injury, and has suffered ever since. *Id.*

Waikhom believes the relationship fell apart when the parties moved to Oregon in 1999 for her fellowship. CP 31, 33. Although her fellowship was a positive experience, conflict arose when Luckwitz found a position in Eugene he wanted to pursue. CP 33. Waikhom’s fellowship agreement included a non-compete clause, preventing her from working in Eugene. *Id.* When it came out that Waikhom intended to break the non-compete, the fallout was difficult and humiliating. *Id.* Luckwitz also angrily confronted Waikhom’s program head, causing even more conflict. *Id.*

As Waikhom cut ties with the fellowship program, Luckwitz worked for two weeks in Utah. CP 33. As a result of that brief position, Luckwitz became embroiled in a prolonged court case, also increasing family stress. *Id.* And the parties continued to relocate, also increasing marital discord. CP 33-34.

B. Difficulties and discord increased when their son was born.

When Waikhom became pregnant in late 2002, the parties together decided that they wanted her to be available to S when he was young. CP 11. Waikhom stopped working in 2003, when the

parties moved to Vancouver, Washington, so that Luckwitz could accept a job at the Southwest Washington Medical Center and Pain Clinic. CP 11, 24. S was born that August. CP 22.

After S was born, Waikhom suffered from post-partum depression. CP 26. S had difficulty nursing and was colicky, and Waikhom blamed herself. *Id.* She became conflicted about staying at home full time or returning to work. *Id.* This too contributed to relationship stress. *Id.*

By the time S was three-months old, Waikhom felt sad, depressed, isolated, and alone. CP 35. Luckwitz was putting in long days at work and was stressed. *Id.* After a fight one evening, Luckwitz told Waikhom to get a job. *Id.*

Waikhom felt pressured to return to work, but did not want to move again. *Id.* She could not find a job locally, placing additional strain on the marriage. *Id.* She studied ophthalmology to keep up to date, and considered a career change. *Id.*

C. The parties' relationship deteriorated further, they separated in 2006, and Waikhom and S relocated in 2008.

The parties' discord worsened between 2004 and 2006. CP 27. By winter 2005 (when S was 18-months old), the parties'

arguments had deteriorated into “screaming matches.” CP 35
Waikhom would often just extricate herself, leaving the house. *Id.*

Luckwitz began an affair in January 2006, and the parties separated for two weeks after he told Waikhom. CP 27, 35-36. They then lived in the same house for most of 2006, sleeping separately. CP 27. Luckwitz moved out in October 2006. *Id.*

The parties hid the separation from S for about a year. CP 27, 36. Luckwitz would come to the family home before S woke, so they could eat breakfast together before Luckwitz left for work. *Id.* He returned after work to help put S to bed, and stayed with S most Saturdays and Sundays as well. *Id.*

Waikhom decided to start looking for work again in summer 2007, when she knew that the marriage was broken. CP 13. To obtain hospital privileges, Waikhom had to get recertified by the American Board of Ophthalmology. CP 13-14. This was a “formidable task” since she had been out of practice for over five years. CP 13.

Luckwitz filed for divorce in December 2007. CP 12. The parties agreed to a residential schedule, but Waikhom found it painfully difficult to co-parent with Luckwitz. CP 16.

Despite many efforts, Waikhom could not find work in the Portland, Oregon or Vancouver, Washington areas. CP 50. In August 2008, before the dissolution was finalized, Waikhom obtained the court's permission to relocate with S to Cincinnati Ohio, where she had found a new job. CP 180, 205. Waikhom moved for work, not to keep S and Luckwitz apart. CP 50, 205. Both the maternal and paternal grandparents and other family are located within five hours of Cincinnati. CP 37, 43.

D. After a verbally and emotionally abusive marriage, Waikhom needed to limit her communications with Luckwitz.

The relationship was marked by Luckwitz's verbally and emotionally abusive behavior, which became prominent in 2000. CP 12. Throughout the marriage and during the dissolution process, "[c]onversations with [Luckwitz were] complicated, manipulative, degrading, and full of conflict." *Id.* Communication deteriorated to the point that the parties rarely spoke. CP 28.

Mark Girard, Luckwitz's therapist, opines that Luckwitz presents paranoid features and narcissistic tendencies. CP 46. He struggles with emotional connections and has difficulty empathizing with others. *Id.* At times, he has "short lived anger outbursts" and abuses alcohol. *Id.*; see also CP 24.

Co-parenting was also extremely difficult for the parties. CP 16. Waikhom feels that Luckwitz refused any opportunities she provided to work together, instead responding with criticism, rebukes, and verbal abuse. *Id.* Luckwitz blames Waikhom, telling S that Waikhom does not like Luckwitz and wants to keep S away from him. CP 39, 43.

Luckwitz has repeatedly proven that he does not respect Waikhom's boundaries. CP 12. Thus, Waikhom chooses to limit communication and to communicate through third-parties where possible. *Id.*

E. When the parties divorced, S was a shy, positive child, who calmed easily when he became upset.

S was five when he and Waikhom relocated to Ohio in August 2008. CP 22, 180.¹ In the 2009 parenting evaluation, Luckwitz described S as a shy child who tested boundaries in an age-appropriate manner. CP 28-29. He was more comfortable with adults than with kids, but was becoming more outgoing. CP 28. S was "methodical" to such a degree that Luckwitz described him as mildly obsessive-compulsive. *Id.* Although "generally . . .

¹ S was 6 when the parenting plan was finalized in January 2010. CP 54.

positive,” S could be short-tempered and moody, but was “easy to deescalate.” CP 28-29.

When he was very young, Waikhom noticed that S was unusually sensitive to sensory stimuli. CP 15. He received speech therapy, as he made certain developmental errors with increased frequency and had trouble with some basic sounds. CP 29. S was also assessed for occupational therapy due to an unspecified coordination disorder. *Id.* During the dissolution, Luckwitz stated that he would not take S to occupational therapy. *Id.*

The parenting evaluator found that S is “at least above average intelligence.” CP 42. He responded to the evaluator in a “developmentally well-developed, mature, and appropriate manner.” *Id.* S reported that he enjoyed spending time with each parent, and had a number of friends. CP 43.

In early 2009, S began seeing Dr. Sara Knox, a child and adolescent psychiatrist and psychoanalyst. CP 45. Knox collaborates with S’s occupational therapist and his child psychiatrist (who manages S’s medication), and routinely confers with the Principal at S’s private school, Cincinnati Country Day School. CP 229. Knox and S developed a strong connection. CP 38.

Knox described S as “intellectually well developed and precocious,” but also as having social difficulties. CP 45. S presented with considerable separation anxiety and distress over the dissolution process and “where he would be.” *Id.* At times, he regressed when he became anxious or distressed. *Id.*

Knox reported that S was attached to both parents, but more so to Waikhom, stating that S “presents with considerable fear of losing [Waikhom].” *Id.* Both parents blamed the other for S’s distress, and both presented as anxious. *Id.* S was “attuned to this and . . . impacted by it.” *Id.*

Once in Cincinnati, S also began seeing occupational therapist Joyce Ravery. CP 49. She diagnosed S with sensory-processing disorder, attention difficulties, “[h]ypotonic” (low or loose) muscle tone, and “praxis” (difficulty with motor planning, sequencing, and execution). *Id.*

S’s school principal, Jennifer Aquino, described S much in the same terms as Knox: “intellectually advanced, but immature in terms of his emotional and social development.” CP 48. S had a very special relationship with Cincinnati Country Day School, its staff, and Aquino. CP 157-58. The school was his “refuge.” CP

158. S expressed that he was concerned about whether he would continue to go there. CP 38.²

S's adjustment at school, both in terms of the divorce and the relocation, were "typical." CP 48. At times S was apprehensive and nervous about would pick him up from school. *Id.* He tested limits, and at times got aggressive with Waikhom. *Id.* His inattention and anxiety increased on days Luckwitz picked him up for weekend visits, and it took S "a couple of days to get back to his normal self." *Id.*³ Although the adjustment had not been easy for S, Aquino emphasized that it was not "'out of the range' of that typically observed." *Id.*

F. The parenting evaluator recommended that S reside primarily with Waikhom, who had always been S's primary parent.

Parenting evaluator Harry Dudley opined that the marriage was "dysfunctional," with levels of antipathy that could have reached emotional abuse. CP 49. Dudley described S as "an intelligent but anxious youngster," who "readily picks up the distress and negative affect of both parents, contributing to his anxiety." CP

² A few times, S took items from school, which Knox attributed not to anti-social behavior, but to anxiety about his attachment to the school and stability. CP 38.

³ Luckwitz had weekend visits until the final parenting plan was entered in January 2010. CP 29.

49-50. S was attached to both parents, but primarily with Waikhom, consistent with Waikhom having been his primary parent. *Id.*

Waikhom has “taken excellent care of [S], for whom she is his primary attachment figure.” *Id.* She relocated for work, not to frustrate S’s relationship with Luckwitz. CP 50, 205. Thus, Dudley recommended that S continue living primarily with Waikom, having visitation with Luckwitz in Cincinnati two weekends per month. CP 51-52.

Dudley recommended joint decision-making, despite the parties’ “profound difficulties communicating.” CP 50. To help the parties, Dudley recommended that the court appoint a parenting coordinator who could work with the parties to implement the parenting plan. CP 51.

G. The court placed S with Waikhom and appointed a parenting coordinator.

The trial court (The Honorable James Rulli) entered a final parenting plan in January 2010, awarding Luckwitz one-week-per-month in Cincinnati. CP 56.⁴ In March 2010, the court appointed Parenting Coordinator Brett Clarke, MSW, of Cincinnati, whose “primary role” was to assist the parties with determining the precise

⁴ Luckwitz’s visitation starts on Saturday and ends on Sunday. CP 56. The brief refers to this visitation as one week for ease of reference.

residential schedule. CP 63-64. The court also ordered that Clarke “may coach and educate” the parties about how to better communicate about S. CP 59-60, 64-65. Specifically, Clarke’s objectives were to help the parties resolve disagreements and make recommendations relating to (*id.* at 65):

- ◆ Implementation of the parenting plan;
- ◆ Requests to deviate from the parenting plan or the usual method of transferring S;
- ◆ Communication; and
- ◆ Extracurricular activities, educational options, and health-care issues.

The order appointing Clarke gave him the authority to :

- ◆ Consult with S’s medical providers, other professionals, family members, and others with information about the parties or S;
- ◆ Gather information on services S received; assess services available to S, and coordinate services between households;
- ◆ Make recommendations regarding parenting-plan disputes, new or modified parenting-plan provisions;
- ◆ Make recommendations regarding medical care and services S received, new services, and coordinating services between households; and
- ◆ Monitor compliance with Clarke’s recommendations.

CP 66-67.

Regarding communication, the parties were permitted to communicate with Clarke, and Clarke with them, *ex parte*. CP 67. Clarke could speak directly to Waikhom or Luckwitz without counsel

present. *Id.* And Clarke could have *ex parte* communications with professionals involved in the matter, such as S's psychiatrist and Principal. *Id.*

The order also directed Clarke not to disclose the content of conversations with the parties, except where necessary to communicate with the parties or any third parties Clarke was working with. CP 67. The court later clarified this provision to apply only to conversations between Clarke and the parties. CP 111-12. Thus, Clarke could disclose his own conversations with third parties, but not any communications between Waikhom or Luckwitz and a third party. *Id.*

H. After Luckwitz's visitation began, S markedly declined emotionally and behaviorally.

As Luckwitz began exercising one-week-per-month visitation with S during his second-grade year (fall 2010), S started demonstrating behavioral and emotional problems. CP 157-162, 203. Although S enjoys Luckwitz's visits, he is also "afraid" of Luckwitz, feels manipulated by him, and mistrusts him. CP 160. Luckwitz isolates S, encouraging him not to trust those who are trying to help him. *Id.* S has "tremendous fear" that he will disappoint Luckwitz and lose his love. *Id.*

When this visitation started, S began having significant problems at school. CP 149, 157, 158. As these problems increased, Waikhom, school staff, and S's therapist and psychiatrist collaborated extensively to stabilize his behavior and help him succeed. CP 149, 157. But S, an exceptionally bright child, was unable to sustain any improvement, ultimately causing the school to expel him. CP 48, 149, 157.

Expulsion was a "severe and reluctant action," as the school's staff and faculty genuinely care about S. CP 149. This was naturally very hard on S, and his "very positive relationship with the school has made his inability to control his behavior during the last few years all the more striking." CP 149, 158.

Waikhom "clearly documented" that S's behavior has become "markedly worse." CP 157. Clarke's report makes abundantly clear that he and S's Principal and health-care providers unanimously agree that the residential schedule is the cause of S's dramatic emotional and behavioral decline:

- ◆ The prevailing view amongst the professionals involved in the child's life is "that the existing arrangement has been harmful, and that [S]'s behavioral difficulties at school over the course of the past two years have been evidence of this." CP 159.

- ◆ Both Aquino and Knox cited the residential schedule as the likely cause of S's behavioral difficulties in the last two years. CP 158.
- ◆ "Both Ms. Aquino and Dr. Knox were clear in their belief that this schedule has been detrimental to [S], and that the anxiety it has caused him has contributed significantly to the behavioral changes they have seen in him during that two-year period." CP 158-59. Their perspectives on this matter were "remarkably similar." CP 159.
- ◆ S's psychiatrist agrees that S "has been suffering tremendously under the strain of the existing arrangement." CP 159. He does not think that medication alone will alleviate S's difficulties, citing the strain S is feeling from the existing residential and decision-making arrangements. CP 160.
- ◆ In sum, "it is the unanimous opinion of the professionals involved with [S] that the existing arrangement is emotionally and psychologically unsustainable for this child." CP 160-61 (emphasis in original).

S is "suffer[ing] internally" and has been "developmentally crippled" in the past few years. CP 159. All involved professionals agree that S cannot manage "the constant shifting from mother's world to father's and back again." CP 158-59. This marks a "repeated loss" of his parents that S simply cannot tolerate. *Id.*

Clarke reiterated the same in subsequent reports:

- ◆ That S's "disruptive, insistent, and enraged behavior stems in part from his identification with [Luckwitz's] anger and frustration (which Father often does not hide from [S])."
- ◆ That whatever Waikhom contributes to S's problems, it is in no way comparable to Luckwitz's contribution.

- ◆ That the residential schedule is contributing to S's emotional stress and to his behavioral problems that led to his expulsion.
- ◆ That the residential schedule should be modified to eliminate the monthly visits during the school year.

CP 489-500; see also CP 451-57.⁵

PROCEDURAL HISTORY

The court entered a final parenting plan on January 5, 2010, and entered the remaining final orders three months later. CP 54-62, 72-76, 77-81, 97-105, 115. The parenting plan awarded Luckwitz specific blocks of visitation from January through August 2010, and awarded him one-week per month beginning when the school-year started in fall 2010. CP 55-56, 74.

Shortly after their divorce was finalized, the parties litigated the confidentiality provision in the order appointing the Parenting Coordinator, Clark. CP 111-12. On January 14, 2011, the court clarified that Clarke could report on his conversations with third parties, so long as he did not include conversations between third parties and Waikhom or Luckwitz. *Id.*

One week later, Luckwitz moved (for the first time) to remove Clarke, claiming that he was ineffective. CP 133-35. The same

⁵ As discussed *infra*, the trial court (the Honorable Gregory Gonzales) erroneously struck the PC's July report, finding that it contains new evidence that Waikhom could have presented earlier. CP 505.

day, Waikhom filed a motion for relief from a stipulation the parties attached to the final child support order, which would have required her to produce personal contact information for a childcare provider, against the childcare agency's policy. CP 122-23. Following these and other post-trial motions, the honorable James E. Rulli denied Luckwitz's motion to terminate Clarke. CP 63, 175-76.

In April 2011, Waikhom filed a motion asking the Clark County Superior Court to decline jurisdiction, so that any future disputes would be resolved in Ohio, where Waikhom, S, Clarke, and S's medical providers, teachers, friends and grandparents were located. CP 203. No motions were pending at the time. *Id.* Judge Rulli denied Waikhom's motion to decline jurisdiction on June 2, 2011, finding that the court was familiar with the matter, that S visits Luckwitz in Washington "during certain school breaks," and that financial circumstances did not affect the court's ruling as both parties had the means to travel. CP 139-40.

About a year passed without any further litigation. Then in May 11, 2012, Waikhom moved to modify the parenting plan, asserting that S had markedly declined emotionally and behaviorally since Luckwitz began one-week-per-month visits. CP

141-45, 147-50. Supporting her petition, Waikhom filed the following substantial evidence:

- ◆ A letter from S's school, dated April 18, 2012, explaining that the school would not re-enroll S for the following school year, citing "disciplinary issues." CP 153.
- ◆ Her motion and declaration to establish adequate cause, explaining that S's emotional and behavioral health had declined significantly since Luckwitz began one-week-per-month visits in Ohio. CP 147-50, 220-21.
- ◆ Clarke's report stating that in his opinion, and the shared opinion of the professionals involved with S, the residential schedule was negatively impacting S's mental health, causing his emotional and behavioral decline. CP 157-62.

Waikhom simultaneously moved to transfer the case to a new judge, believing that Judge Rulli was biased. CP 154-55. The modification petition was assigned to the Honorable Gregory Gonzales. CP 448.

On June 8, Waikhom asked Judge Gonzales to decline jurisdiction. CP 180-83, 202-09. She requested an adequate cause determination on her motion to modify the parenting plan. CP 194. She concurrently filed a motion for a temporary order permitting S to continue therapy with Knox and prohibiting either party from taking S to a new provider absent the other parent's consent. CP 228-32.

Luckwitz cross-petitioned for a major modification, asking the court to designate him the new primary residential parent. CP 170-

74. He moved a second time to have Clarke removed as the parenting coordinator, and moved *in limine* to prevent the court from reviewing Clarke's May 2012 report. CP 175-77, 340-66.

Judge Gonzales denied Luckwitz's motion to terminate Clarke. CP 444. Having already read Clarke's report, the court denied Luckwitz's motion *in limine*. CP 443. But Judge Gonzales stated that he did not consider Clarke's report in denying Waikhom's adequate cause motion or as it concerned any change to S's residential placement. CP 443-44.

Judge Gonzales denied Waikhom's motion to decline jurisdiction. CP 449-50. He ruled that there was not adequate cause for a hearing on Waikhom's modification motion, finding that "there is not enough information from sources such as the child's mental health therapist and child psychiatrist to conclude that the existing residential schedule is causing the deterioration in the child's emotional and behavioral health." CP 447, FF 2.5.1.

Judge Gonzales found that the parties' lack of communication was "a cause" of the disputes raised in the cross-petitions for modification. CP 444. He ordered the parties to "begin communicating directly with each other." CP 444. He ordered Clarke to file a new report by August 21, 2012, (1) "[c]reat[ing] a

plan for improved communication between the parties;” (2) summarizing the issues the parties should work on; (3) defining communication problems; and (4) providing information as to why he thinks S “is in turmoil.” *Id.*

Clarke submitted a letter to Judge Gonzales on July 11, 2012. CP 451-56. At the outset, Clarke explained that although the court had given him until August 21, he felt the issues the court tasked him with needed to be addressed sooner. CP 451.

Clarke repeated the same concerns he had raised before regarding the source of S’s turmoil, unequivocally stating, again, that the residential schedule was harming S. CP 452. Clarke explained, again, that after following S for the past 2.5 years and talking extensively with his doctors, therapists, and Aquino, it “became clear” that the residential schedule was contributing to S’s turmoil and misbehavior. *Id.* S’s increased stress before Luckwitz’s weeklong visits is well-documented. *Id.* S feels pressured to adopt Luckwitz’s world-view and fears his father’s anger. *Id.* S feels like he is choosing one parent over the other, causing “tremendous inner conflict.” *Id.*

Clarke addressed at length Judge Gonzales’ misunderstanding that the parties’ lack of communication is causing

reconsideration. CP 503-06. He excluded Clarke's July 11 letter, finding that it contained new evidence that could have previously been submitted. CP 505. He awarded Luckwitz fees. CP 506.

Yet based on Clarke's July letter, Judge Gonzales entered a supplemental order on its own motion directing the parties not to communicate in "controlling, emotionally abusive, angry or insistent" manner. CP 501. Judge Gonzales' order denying reconsideration "clarif[ied]" the order requiring the parties to directly communicate to mean that the parties should work toward direct communication. CP 505.

Clarke subsequently submitted a third letter, on August 21, 2012 (the court-ordered date). CP 489-99. This letter was substantively no different than his July 11, 2012 letter. *Compare* CP 451-56 *with* CP 489-99. But in the August 2012 letter, Clarke resigned, where it appears that Luckwitz lodged a formal complaint against him. CP 497-98. Waikhom timely appealed. CP 508-09.

ARGUMENT

A. Standards of Review.

A trial court may decline to exercise jurisdiction if it determines that it is an inconvenient forum and that a court located in another state is the more appropriate forum. *In re Marriage of*

S's turmoil. CP 452-53. Although improved communication seems like an "obvious" way to ease S's tension, every professional that has been involved with the parties and with S for the past few years, including Clarke, thinks that more communication between the parties would make things worse, particularly for S. CP 452.

The parties' emotionally abusive marriage taught Waikhom that she must construct clear, firm boundaries with Luckwitz in order to maintain a safe physical and emotional space for herself and for S when he is with her. CP 453. Experience suggests that Luckwitz will take advantage of any mandate to increase communication to involve Waikhom in a repetition of the harmful dynamic that contributed to the divorce in the first place. *Id.* Increased communication is likely to increase the parties' tension and to worsen S's feeling of being caught between two worlds. *Id.* In short, the parties' lack of communication is not a cause of S's problems, but a symptom. *Id.*

Waikhom moved for reconsideration, based in part on Clarke's July 1, 2012 letter. CP 458-64. Luckwitz asked Judge Gonzales to disregard Clarke's letter, claiming that Clarke failed to comply with the court's order instructing him to file a new report. CP 479-86. Judge Gonzales denied Waikhom's motion for

Greenlaw, 123 Wn.2d 593, 869 P.2d 1024 (1994) (discussing former RCW 26.27.070); **Sales v. Weyerhaeuser Co.**, 138 Wn. App. 222, 227-28, 156 P.3d 303 (2007); RCW 26.27.261. Generally, the moving party gets to choose the forum. **Sales**, 138 Wn. App. at 228. This Court "will rarely disturb the plaintiff's forum choice." 138 Wn. App. at 228.

This Court reviews for an abuse of discretion trial court rulings on a motion to dismiss based on inconvenient forum. *Id.* This court also reviews for an abuse of discretion a trial court's determination as to whether there is adequate cause for a hearing on a petition to modify a parenting plan. **In re Marriage of Kinnan**, 131 Wn. App. 738, 750, 129 P.3d 807 (2006). A court abuses its discretion if its order is manifestly unreasonable or based on untenable grounds. **Sales**, 138 Wn. App. at 228; **Kinnan**, 131 Wn. App. at 750.

B. The court erroneously refused to decline jurisdiction, where Waikhom and S had lived in Ohio for four years, Luckwitz has a residence in Ohio and visits monthly, and all relevant third-party witnesses are located in Ohio.

When Waikhom asked Judge Gonzales to decline jurisdiction, and to allow the Hamilton County, Ohio, court to resolve her modification petition, she and S had lived in Ohio for

four years. The parenting coordinator, and S's medical providers, school teachers and staff, friends, and grandparents on both sides, are all located in Ohio. And Luckwitz maintains a residence in Ohio, living there one-week each month. These factors weigh heavily in favor of Ohio jurisdiction, and there is no compelling reason to keep this matter in Washington. This Court should reverse.

A Washington court with jurisdiction over child-custody determinations under RCW Chapter 26.27 "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." RCW 26.27.261(1); *In re Parentage, Parenting, and Support of A.R.K.-K.*, 142 Wn. App. 297, 306, 174 P.3d 160 (2007). Before doing so, the court "shall consider whether it is appropriate for a court of another state to exercise jurisdiction" based on the following factors:

- (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (b) The length of time the child has resided outside this state;
- (c) The distance between the court in this state and the court

in the state that would assume jurisdiction;

- (d) The relative financial circumstances of the parties;
- (e) Any agreement of the parties as to which state should assume jurisdiction;
- (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

RCW 26.27.261(2). If a Washington court determines that it is an inconvenient forum and that the foreign state court is more appropriate, then the court "shall" stay the proceedings so long as it will be promptly commenced in another state. RCW 26.27.261(3).

1. S has resided in Ohio for four years, heavily favoring Ohio Jurisdiction.

Factors (a) and (e) are inapplicable here. Although the marriage was verbally and emotionally abusive, the parenting evaluator found that it did not rise to the level of domestic violence. CP 49; RCW 26.27.261(2)(a). The parties have not agreed on which state should exercise jurisdiction. RCW 26.27.261(2)(e).

Factor (b) weighs heavily in favor of Ohio jurisdiction. When Waikhom filed her motion to modify the parenting plan and asked the Washington Court to decline jurisdiction so that the motion could be determined in Ohio, she and S had lived in Ohio for four years – nearly half of S's life. CP 22, 203. S was only five when he moved to Ohio, so had not even begun school in Washington. 148, 203. He began Kindergarten shortly after moving to Ohio. *Id.*

2. The distance between Washington and Ohio favors Ohio jurisdiction, where Luckwitz has significant contacts with Ohio that Waikhom lacks in Washington.

The considerable distance between Ohio and Washington favors Ohio jurisdiction. RCW 26.27.261(2)(c). Waikhom's only home is in Hamilton County, Ohio, where this matter would be heard if the Washington courts decline jurisdiction. CP 204. Luckwitz maintains a residence in Hamilton County, where he resides one-week-per-month when he exercises visitation with S. CP 203, 205. Luckwitz and Waikhom are both from Ohio, attended medical school there, and have friends and extended family in Ohio, including their parents. CP 203. In short, it is far easier for Luckwitz to litigate in Ohio than for Waikhom to litigate in Washington.

3. The parties' financial resources minimally favor Ohio jurisdiction.

The parties' relative financial resources also favor Ohio jurisdiction, although this factor is minimally significant where both parties have substantial resources. RCW 26.27.261(2)(d). Waikhom, an ophthalmologist, was a stay-at-home mom for four years, and reentered the workforce when she relocated to Ohio. CP 205. She earned \$131,000 in 2011, and receives a \$7,000 monthly payment from Luckwitz to equalize the property distribution per the dissolution decree. CP 93, 205. Luckwitz, an anesthesiologist, earned \$566,453 in 2009, \$628,910 in 2008, and \$692,809 in 2007. *Id.* Luckwitz refused to file more recent W-2s, but claims that his income has recently declined. CP 303-04.

Judge Rulli ruled that the parties each have "substantial income," concluding that RCW 26.27.261(2)(d) was not a significant factor. CP 140. Judge Gonzales simply agreed with Judge Rulli, stating nothing about any of the statutory factors. CP 449-50. While Waikhom agrees that both parties have "substantial income," it is far more difficult financially and otherwise for her to litigate in Washington than it is for Luckwitz to litigate in Ohio. Waikhom is S's primary caretaker and does not have a home or family in Washington, making travel here far more difficult and expensive

than it is for Luckwitz to come to Ohio, where he has a home and family.

4. The nature and location of the evidence required to resolve the modification heavily favors Ohio jurisdiction.

The nature and location of the evidence required to resolve Waikhom's modification petition is all located in Ohio, with the exception of Luckwitz's testimony. RCW 26.27.261(2)(f). Waikhom moved to modify the parenting plan because S has emotionally and behaviorally declined markedly since Luckwitz began one-week-per-month visitation two years ago. CP 157-58, 203. Parenting Coordinator Brett Clarke unequivocally opined that in his professional opinion, and in the shared opinion of every involved professional, Luckwitz's visitation is the cause of S's decline. CP 158-61, 451-57, 489-500. Clarke is located in Ohio, and his testimony is plainly relevant despite the fact that he was forced to step down after Luckwitz filed a complaint against him. CP 203, 498.

Judge Gonzales found Clarke's report lacking, ruling that adequate cause could be met only by hearing directly from the professionals involved in S's life, not from Clarke. CP 447; RP 4, 9, 30. Again, however, S's mental-health therapist, occupational

therapist, psychiatrist, pediatrician, and school teachers and staff are all located in Ohio. CP 204, 205-06. It is contradictory for Judge Gonzales to recognize the importance of testimony from the professionals with knowledge of S's decline, but yet refuse to allow Ohio to resolve this matter.

Procuring evidence from these valuable witnesses would be "extremely difficult and expensive," and may even be impossible. CP 182-83, 205-06. It is "highly unlikely" that S's doctors and school personnel would voluntarily testify in Washington. CP 206. If they do not, Waikhom would be forced to register and file orders in Ohio to compel their testimony and to subpoena evidence. *Id.* These witnesses would also have to be deposed in Ohio, but flown to Washington to testify, at considerable expense. *Id.* And the statute permitting telephonic testimony does not compel it, but in any event, telephonic testimony from these critical witnesses is not nearly as effective as live testimony. *Id.*; RCW 26.27.111.

Clarke too is a critical witness and also resides in Ohio. CP 203. His written report is not nearly as effective as his live testimony would be. CP 206.

S's friends and family also live in Ohio, including his paternal and maternal grandparents. CP 203. Waikhom's parents, Ohio

residents, would testify on her behalf, but traveling to Washington is becoming more difficult as they age. CP 206.

All evidence relevant to Luckwitz's counter-petition for custody is also located in Ohio. CP 204. Luckwitz agrees that there has been a substantial change in S's circumstances, claiming that S's "environment" with Waikhom is detrimental. CP 171-73. His counter-petition is based entirely on claims that Waikhom refuses to communicate with Luckwitz and that S has had "twenty nannies since he has been in Cincinnati." CP 172-73. Waikhom denies these assertions, and correctly pointed out that evidence pertinent to their resolution is located in Ohio. CP 204, 225.

In short, aside from Luckwitz, who has a home in Ohio, no material witnesses are located in Washington. CP 205-06. Luckwitz does not disagree, but suggests that witnesses can testify by deposition or phone. CP 237. Again, however, this does not equal live testimony.

5. Each State's ability to decide this matter and familiarity with the matter are neutral factors.

Each State's ability to decide the modification petition is a neutral factor. RCW 26.27.261(2)(g). Washington is plainly capable of deciding a motion to modify parenting. Waikhom filed a declaration from Ohio attorney Adrienne Roach, whom Waikhom

has retained in case jurisdiction is transferred to Ohio, explaining that Ohio too is perfectly capable of resolving the matter expeditiously. CP 213-14. Roach explained that proceeding in Ohio is “relatively simple.” CP 214.

Each State’s familiarity with the matter is also a neutral factor. RCW 26.27.261(2)(h). Judge Gonzales did not preside over the dissolution proceedings, but began presiding over this matter when Waikhom filed her modification petition. CP 81, 446-48. Roach was “completely confident” that the Ohio court would “thoroughly familiarize itself with the case expeditiously.” CP 214.

In short, S’s four-year residency in Ohio and the location of nearly all of the evidence in Ohio strongly favor Ohio jurisdiction. None of RCW 26.27.261(2)’s factors favor Washington jurisdiction. This Court should reverse.

For the same reasons discussed above, Waikhom plainly had good reason to ask Judge Gonzales to reconsider his incorrect decision maintaining jurisdiction. Even if this Court concludes that Judge Gonzales properly exercised his discretion, there is no basis for awarding Luckwitz fees in responding to this point. CP 507. Here too, this Court should reverse.

Finally, if this Court holds that Washington is an inconvenient forum, then it need not reach the remaining issues. This Court should reverse with instructions to enter an order declining jurisdiction and “stay[ing] the proceedings upon condition that a child custody proceeding be promptly commenced in” Ohio. RCW 26.09.270(3). Waikhom has retained counsel in Ohio and is prepared to proceed there immediately. CP 213-14.

C. There was (at least) adequate cause to warrant a hearing on Waikhom’s motion to modify.

For the past two years, Waikhom has watched S markedly decline to the point that his behavioral difficulties forced the school he dearly loves to expel him. Still, “behavioral difficulties” does not accurately capture what is happening to S, who has “suffered internally” to the point that he has been “developmentally crippled in recent years.” CP 159. This is a child in crisis, but Judge Gonzales refused to even hear out his concerned mother, despite the fact that she has the support of the parenting coordinator and the child’s medical providers and school staff. This Court should reverse.

To obtain a hearing on a motion to modify a parenting plan under RCW 26.09.260, the moving party must make a threshold showing that there is “adequate cause for hearing the motion.”

RCW 26.09.270; *In re Marriage of Mangiola*, 46 Wn. App. 574, 577, 732 P.2d 163 (1987), *overruled on other grounds by In re Parentage of Jannot*, 149 Wn.2d 123, 126-27, 65 P.3d 664 (2003); *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966, *rev. denied*, 152 Wn.2d 1025 (2004). “Adequate cause” is “something more than prima facie allegations, which, if proven, might permit inferences sufficient to establish grounds for a custody charge.” *Mangiola*, 46 Wn. App. at 577 (quoting *In re Marriage of Roorda*, 25 Wn. App. 849, 852, 611 P.2d 794 (1980)). It “means evidence sufficient to support a finding” on the facts supporting the modification petition. *Lemke*, 120 Wn. App. at 540.

A party petitioning to modify a parenting plan must establish that there has been a substantial change in the child’s circumstances. *In re Marriage of Parker*, 135 Wn. App. 465, 471, 145 P.3d 383 (2006). A “substantial change” must be based on new facts or facts unknown to the court when it entered the prior parenting plan. *Parker*, 135 Wn. App. at 471. Unknown facts include those that the court did not anticipate when entering the prior plan. 135 Wn. App. at 471.

When S first moved to Ohio, it naturally took him some time to adjust to his new home and new school. CP 48. Shortly after

arriving in August 2008, S began kindergarten. CP 148. Principal Aquino states that S's adjustment to his parents' divorce and to his new school were "typical." CP 48. Over time, S became increasingly secure in his new environment. *Id.*

But after Luckwitz began regular one-week-per-month visitation in April 2010, S began to decline emotionally and behaviorally. CP 148-49, 157, 158-59. S's behavior became so problematic at school that his teachers and the staff put together various behavior plans to try to help him. CP 149, 157. With Waikhom's involvement, S's therapist and psychiatrist collaborated with the school to try to stabilize S's behavior. *Id.* This failed – S was unable to sustain improvement. *Id.*

Eventually, S's behavior became so bad that he was expelled from school. CP 149, 153. Aquino specifically states that the school could not re-enroll S due to "continuing disciplinary issues." CP 153. Aquino "reluctant[ly]" came to this conclusion, as she and her staff are genuinely concerned about S and have expended considerable effort on his behalf. CP 149, 157. Clarke found it particularly "striking" that S could not control his behavior enough to stay in school, where S has a very special and unique relationship with his school, particularly Aquino. CP 157-58.

Clarke, Aquino, and S's doctors and therapists agreed that S's "behavioral difficulties" in school and elsewhere are symptomatic of the harm the current residential schedule is causing. CP 157-60. But "behavioral difficulties" does not capture the extent to which S has "suffered internally" and was "developmentally crippled" in recent years. CP 159. Rather, Aquino, S's therapist (Knox), and his psychiatrist (Karacostas) agree that S "has been suffering tremendously under the strain of the existing [residential] arrangement." CP 159.

Aquino and Knox "were clear in their belief" (1) that the residential schedule is detrimental to S; (2) that the schedule is causing S significant anxiety; and (3) that the anxiety S feels "has contributed significantly" to S's behavioral problems that have manifested in the two years since Luckwitz's one-week-per-month visits began. CP 158-59. Aquino and Knox plainly see a causal relationship between the residential schedule and [S]'s emotional and behavioral decline. *Id.* In fact, Clarke could not have been more clear (CP 159-60, *emphasis in original*):

[The professionals involved in S's life agree that] the existing arrangement has been harmful, and that [S]'s behavioral difficulties at school over the course of the past two years have been evidence of this.

...

[I]t is the unanimous opinion of the professionals involved with [S] that the existing arrangement is emotionally and psychologically unsustainable for this child.

Clarke's report was based on "frequent conversations" with Knox, Karacostas, and Aquino. CP 157. The court order appointing Clarke expressly permits him to communicate *ex parte* with S's medical providers and other involved professionals and to disclose the content of his conversations with these third parties. CP 67, 111-12. And the court specifically authorized Clarke to make recommendations regarding parenting-plan disputes and new or modified parenting-plan provisions. CP 67.

Yet Judge Gonzales refused to even permit Waikhom a hearing on her modification petition, finding that "there is not enough information from sources such as the child's mental health therapist and child psychiatrist to conclude that the existing residential schedule is causing the deterioration in the child's emotional and behavioral health." CP 447, FF 2.5.1. This plainly contradicts the order appointing Clarke. *Compare id. with* CP 66, 111-12. Again, part of Clarke's job is to collect information about S and to make parenting-plan recommendations, including recommendations for modifying the plan. CP 66. And again, Clarke is permitted to disclose information gleaned from S's

doctors, school staff and others. CP 111-12. Clarke plainly did so, and his report equally plainly would support a finding that the existing residential schedule is harming S and causing his emotional and behavioral decline. **Lemke**, 120 Wn. App. at 540. This is adequate cause. *Id.*

In short, the court held Waikhom to an adequate-cause standard that is far too high. This is particularly so as Luckwitz agrees that S's circumstances have changed, but argues that it is S's "environment" with Waikhom that is detrimental. CP 172. With the parties' agreement that S's circumstances have changed, the trial court should have held a hearing to determine – and to resolve – the source of S's significant turmoil. This Court should reverse.

D. The trial court erroneously refused to consider Clarke's reports addressing the parties' communication and S's turmoil.

It is unclear why Judge Gonzales read, but refused to consider, Clarke's May 2012 report. CP 443-44. The order appointing Clarke plainly authorized him to gather information from S's doctors, therapists, and school staff, and to make recommendations regarding modifying the parenting plan. CP 66-67. Clarke did just that – his May report is entirely within his authority outlined by the trial court. CP 65-67.

It is equally unclear what “new evidence” Judge Gonzales thought Clarke’s July 2012 letter contained that should have been included in his May report (which Judge Gonzales declined to consider). CP 505.⁶ Judge Gonzales ordered Clarke to provide information explaining why he thinks S is in turmoil. CP 444. Clarke did so – his July letter reiterates his opinions about S that he explained in his May report: (1) that S’s behavior was fine before the existing schedule; (2) that S feels significant stress before and after his visits with Luckwitz; (3) that S feels conflicted as to his loyalty to both parents; (4) that S fears Luckwitz’s anger and fears losing his love; (5) that S feels forced to choose between his parents’ worlds; (6) that S’s “disruptive, insistent, and enraged behavior stems in part from his identification with [Luckwitz’s] anger and frustration (which Father often does not hide from [S])”; and (7) that the residential schedule is causing S’s turmoil. *Compare* CP 452 *with* CP 157-61. This is not new – it is what the court ordered – a more detailed explanation of why Clarke thinks S is in trouble. *Compare* CP 444 *with* CP 504.

⁶ While the letter itself was plainly “new,” the court ordered Clarke to submit a new report. CP 444, 460.

Clarke's opinions are based on his observations of S over a 2.5-year period, and his "frequent conversations" with the professionals most intimately involved in S's life. CP 157, 452. Again, Clarke is authorized to communicate *ex parte* with S's providers and other professionals involved in S's life. CP 67. It is perfectly natural and justifiable that the shared opinion of S's therapist, psychiatrist, and Principal, helped form Clarke's opinion.

In sum, Clarke did exactly what he is supposed to do – work with S's providers to make recommendations regarding S's welfare, even if that means modifying the parenting plan. There is no basis for rejecting Clarke's reports. This Court should reverse.

E. The court erroneously ordered the parties to communicate more, even though every expert involved in this matter opined that increased communication would harm S.

Judge Gonzales seized on the idea that the parties' lack of communication is the source of S's problems. CP 444, 501, 505. As discussed at length above, and again below, this simply is not the case. His undue focus on communication problems distracted him from the real source of S's turmoil, resulting in a series of orders that fail to help this at-risk child.

After finding that the parties' lack of communication was "a cause" of S's turmoil, he ordered the parties to "begin communicating directly with each other," and ordered Clarke to assist them in doing so. CP 444. Judge Gonzales subsequently backtracked a bit, ordering the parties not to communicate in "controlling, emotionally abusive, angry or insistent" manner, and clarifying that they should work toward direct communication. CP 501, 505. But if changes to the parties' communication dynamic were possible, they already would have been implemented. CP 452. Improved communication may seem like an "obvious" answer to S's problems, but it is not an answer at all. *Id.*

S's problems are primarily caused by the residential schedule. CP 149, 157-60, 452, 491. The parties' lack of communication is not the cause S's problems – it is a symptom. CP 453, 495. Clarke, Aquino, Knox, Karacostas (and Waikhom) agree that increased communication could harm S. CP 452.

Luckwitz is the only person claiming that S would be fine if the parties would just talk more. CP 172-73, 304. Clarke's experience is that Waikhom tries to communicate with Luckwitz in a civil, conciliatory, and factual manner. CP 453. The parties' poor communication is the result of Luckwitz's emotionally abusive,

domineering and controlling behavior. *Id.* History teaches that Luckwitz will use any mandate to increase communication to involve Waikhom in a harmful cycle of emotional abuse. *Id.*

These parties cannot be forced to interact. CP 494. And S, “a smart child[,] would be immune to any phoniness, even if [more communication] were possible.” *Id.* This is a situation in which keeping a “civil distance” is the best alternative for the parties and for S. CP 495.

Everyone involved in this matter would like for Waikhom and Luckwitz to communicate more effectively, but they cannot. CP 452. Unfortunately, this dynamic distracted from the real issue – the significant harm the residential schedule is causing to S. CP 157-60, 452. And equally unfortunate, any communication requirement will likely increase conflict and make S’s situation worse. CP 452. This Court should reverse.

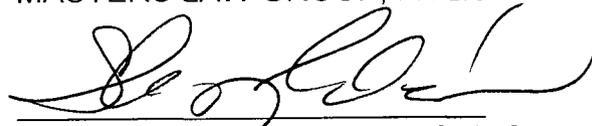
CONCLUSION

This Court should hold that Washington is an inconvenient forum, and direct the trial court to stay this matter conditioned upon Waikhom promptly commencing proceedings in Ohio. If this Court so holds, it need not reach the remaining issues. If the Court elects to reach the remaining issues, then the Court should hold that there

is adequate cause for a hearing on Waikhom's modification petition and that the trial court erroneously refused to consider Clarke's reports. Finally, this Court should reverse the fee award.

RESPECTFULLY SUBMITTED this 26th day of November, 2012.

MASTERS LAW GROUP, P.L.L.C.

A handwritten signature in black ink, appearing to read 'Kenneth W. Masters', written over a horizontal line.

Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 26th day of November 2012, to the following counsel of record at the following addresses, and emailed a copy of the foregoing **BRIEF OF APPELLANT** to appellate counsel Catherine Smith and Valerie Villacin:

Counsel for Respondent

Catherine W. Smith
Valerie A. Villacin
1109 First Avenue, Suite 500
Seattle, WA 98101-2988

Scott J. Horenstein
The Scott Horenstein Law Firm, PLLC
900 Washington Street, Suite 1020
Vancouver, WA 98660

Co-counsel for Appellant

Juliet C. Laycoe
Laycoe & Bogdon P.C.
1112 Daniele Street, Suite 100
Vancouver, WA 98660

FILED
COURT OF APPEALS
DIVISION II
2012 NOV 27 PM 1:03
STATE OF WASHINGTON
BY Shelby R. Frost Lemmel
DEPUTY


Shelby R. Frost Lemmel, WSBA 33099

RCW 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.

[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.]

RCW 26.09.270

**Child custody — Temporary custody order,
temporary parenting plan, or modification of
custody decree — Affidavits required.**

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 or her motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his or her affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall 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.

[2011 c 336 § 691; 1989 c 375 § 15; 1973 1st ex.s. c 157 § 27.]

RCW 26.27.111

Taking testimony in another state.

(1) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(2) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

[2001 c 65 § 111.]

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RCW 26.27.261

Inconvenient forum.

(1) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for dissolution or another proceeding while still retaining jurisdiction over the dissolution or other proceeding.