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DIVISION II

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STATE OF WASHINGTON

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46786-1-II

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

NICHOLAS F. CONKLIN,

Appellant,

v.

LISA CHRISTENSEN,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. STATEMENT OF THE CASE

1. Nick Conklin and Lisa Christensen were formerly married. They had a child, Derek Conklin, now age six (6). Derek was three (3) years old when the parties dissolved their marriage. 1 RP 36
2. During the first 3 years of his life, Derek resided primarily with Lisa and was ordinary in all respects. He hit all of his physical and emotional and developmental milestones. His behavior was within the average range for children of his age. 1 RP 42 – 43. Prior to entry of the original final parenting plan in the dissolution action, Derek was potty trained and was not showing violent tendencies. 1 RP 45.
3. The parties could not reach an agreement on a final parenting plan and were Pro Se in their dissolution trial. A final parenting plan was entered in December 2010 providing for Derek to reside equally with both parties. 1 RP 40 – 41.
4. Upon entry of the shared residential schedule beginning in January 2011, Derek began to exhibit behavioral problems. 1 RP 45 - 46. Initially after entry of the equally shared parenting plan, Derek's behavior in pre-school and daycare was erratic. In pre-school and daycare beginning in January 2011, Derek would alternate between aggressive behavior (e.g., hitting, punching and biting) and being scared or fearful (e.g., hiding under tables). 1 RP 103.

5. Due to Derek's behavior in pre-school and daycare Lisa began to be concerned as Derek approached the commencement of Kindergarten in September 2012. Lisa requested co-parent counseling with Nick so that the parents could be unified in their approach to Derek's unique needs. Nick was resistant to co-parent counseling. Lisa filed a motion requesting the court compel Nick to engage in co-parent counseling. The court granted the request, and beginning in the Fall 2012, the parties began court ordered co-parent counseling. Nick continued to be resistant in the co-parent counseling process and refused to fully engage or cooperate. 1 RP 105.
6. Derek's problematic behavior increased in severity and frequency after entry of the equally shared parenting plan. 1 RP 139. By the time Derek entered Kindergarten in September 2012, Derek had begun wetting himself and receiving discipline notices from his daycare for intentional violence and defiance. 1 RP 106. Derek's Kindergarten teacher, who had 30 years of classroom experience, said Derek was unable to concentrate and found his behavior to be "abnormal" for a five year old boy. 1 RP 82, 89. Derek's Kindergarten teacher testified Derek was impulsive and hurt people, even intentionally slamming another child's fingers in a door. 1 RP 83 – 84. Derek left bruises, scratches and marks on his teacher because he was physically

assaultive and could not pull himself together when he was angry. 1 RP 84. Derek threw chairs and intentionally attempted to destroy property in Kindergarten. 1 RP 85. Derek made sexual statements concerning his father which his teacher, who had 30 years of experience teaching, found shocking. 1 RP 87. Derek was actually suspended from Kindergarten on two occasions. 1 RP 89.

7. Lisa tried many interventions to help Derek with his struggles. Lisa took Derek for ADHD testing. 1 RP 107. Lisa took Derek to appointments with his primary care physician. 1 RP 107. Lisa took Derek for an assessment at Seattle Children's hospital. 1 RP 107 – 108. Lisa attended parent-teacher conferences. 1 RP 107. Nick was resistant to the interventions. 1 RP 108. None of the interventions Lisa undertook helped Derek improve his behavior in school or control his emotions while Derek was residing equally with both parents.
8. Nick resisted co-parent counseling. 1 RP 140 – 141. Nick even told Derek that the co-parent counselor, Dr. Alyssa Ruddell, was mean and should not be trusted. 1 RP 139. After Nick told Derek not to trust Dr. Ruddell, Derek would no longer talk in co-parent counseling. 1 RP 139, 109 - 110. Nick continued to resist co-parent counseling and Derek's negative behaviors continued to escalate, so the co-parent counselor recommended an experimental change to the residential

schedule from equally shared to having Lisa more as a primary parent. Exhibit 14. Nick would not agree to change the parenting plan, even as an experiment, so Lisa filed a Petition for Modification of Parenting Plan on May 17, 2013. CP 63 – 69.

9. After filing a Petition for Modification of the Parenting Plan, Lisa became concerned that Nick had sexually abused Derek. 1 RP 121 – 122. On May 30, 2013, Lisa found Derek in the bathroom with his finger in his bottom covered in feces. 1 RP 120 – 121. Derek told Lisa Nick had inappropriately touched him in a sexually abusive manner. 1 RP 120 - 122. Contact between Nick and Derek was suspended pursuant to Motion for Ex Parte Restraining Order filed by Lisa on June 4, 2013. CP 101 – 105. There has been no contact between Nick and Derek since June 2013. 1 RP 124. CP 101 – 105, 159 – 161.
10. Law enforcement and CPS investigated the allegations of sexual abuse. There was a forensic interview by the Kent Police Department and a physical examination at Mary Bridge Children's Hospital. CP 153; 1 RP 123 – 124; CP 166 – 167. Derek made a disclosure of inappropriate touching by his father in the forensic interview, but concerns about Lisa's initial leading questions and Derek's age and demeanor resulted in a decision not to prosecute by law enforcement. 1 RP 127. CPS closed the case since Derek was in counseling, was in

daily contact with mandatory reporters and was subject to an active Superior Court (custody) case with a GAL appointed on his behalf. 1 RP 126 – 127.

11. Derek made three additional disclosures of sexual abuse. One disclosure was made at the YMCA, when he claimed a cousin had sexually abused him. 1 RP 129.
12. Derek made two other disclosures of sexual abuse to his counselor Amy Crook in the course of treatment. Ms. Crook had concerns Derek had suffered a traumatic event from the very beginning of her work with him, based upon his attitude, demeanor, lack of trust and behavioral problems. 1 RP 56 - 57. Derek disclosed in his first session with Ms. Crook that his father “touches my peter with his peter.” 1 RP 59. Derek was guarded during much of his initial therapy with Ms. Crook but was emphatic throughout treatment that he hated his father because of “mean touches.” 1 RP 59 – 61.
13. During the lengthy time Derek went to therapy with Ms. Crook, he became less guarded, more trusting and was more willing to share his feelings with Ms. Crook. 1 RP 57 - 58; 65 - 66. Eventually Derek came to the point he could describe his feelings and experiences in his own words. 1 RP 68 – 69. Derek communicated to the therapist that he liked her and that they had a good relationship. 1 RP 53. Over

time, Derek's relationship with his therapist became less guarded and one that is "therapeutic and that [Derek] can move in addressing and talk about things the he needs." 1 RP 65.

14. After developing that trusting therapeutic relationship, Derek again disclosed to Ms. Crook in therapy that his father touched "my peter to his peter." Derek further described the abuse in more detail in the second disclosure to Ms. Crook, saying that his father put his peter and his finger inside his butt. 1 RP 67 – 68. After the second disclosure and after Amy Crook developed a trust relationship with Derek where he was able to share with her in his own words, Ms. Crook, was able to diagnose Derek with post-traumatic stress disorder. 1 RP 69 - 70.
15. Ms. Crook testified the aggression, difficulty in potty training, hyperarousal, disruptive behavior, hypervigilance, difficulty concentrating, irritability and outburst behavior Derek was exhibiting both at home and at school are consistent with symptoms of other children who have been victims of sexual abuse. 1 RP 70.
16. Throughout the process, the father refused to take a polygraph or any psychological evaluative assessment which would evaluate sexual abuse risk factors regarding the father. 1 RP 128.
17. About six months after contact between Derek and his father was first eliminated pursuant to court order in the modification action, Derek

started 1st Grade at Alpac Elementary in September 2013. At the start of 1st grade, Derek's behaviors were, as they had been in Kindergarten, extremely concerning to his classroom teacher and administration. 1 RP 92 – 94. Derek continued in counseling and the school and mother worked closely together. Derek's counselor also attended strategy meetings for designing a plan for Derek to succeed in school. 1 RP 70; – 71, 94 - 96. Derek's behavior was up and down during the first half of the 2013/2014 school year, but his behavior steadily improved over the second half of the 2013/2014 school year. 1 RP 95 - 97.

18. By the time of trial, Derek's behavior at school, though still below average for his age and gender, had been substantially better. Derek's outbursts are less frequent and not as severe. Finding of Fact 2.2(E) at CP 224 (“[Derek] is still struggling in school in terms of behavior and toilet training, but the degree of violence exhibited by Derek has lessened. Derek is academically performing better and is more emotionally stable in class now than he was prior to the initiation of this action.”) Derek has established a trust relationship with his classroom teacher. Lisa and his classroom teacher implemented a “ticket” reward system which was meaningful and motivational for Derek. Most importantly, when Derek had an emotional breakdown or outburst, it was less severe and he could self-recover without ruining

his entire day. Derek is performing well in all academic areas in addition to substantial improvement in his emotional and behavioral controls. Derek is reading above grade level and recently received an academic award for achievement. 1 RP 95 – 97.

19. The case was tried in June 2014. At the time Nick and Derek had not contact for more than a year. Derek’s behaviors in school and at home had substantially improved after counseling with Amy Crook and after having no contact with his father.

II. SUMMARY OF ARGUMENT

Appellant failed to comply with RAP 10.3(g) as to Assignments of Error 1, 3, 9, 10, 11, 12 and 13. Appellant also failed to expand upon or otherwise support these Assignments of Error with more than vague, cursory or unfocused analysis or argument in the remainder of his brief. Unless the court requests briefing on issues it finds meritorious, Respondent will not address these Assignments of Error.

In response to Assignment of Error 8 Respondent, it was not necessary to formally amend mother’s Petition because her Petition was legally sufficient and father had fair notice of all factual allegations.

In response to Assignments of Error 5 and 15 Respondent, the trial court applied the proper standard and followed the statutory procedure for modification of a parenting plan.

In response to Assignments of Error 2 and 6, the trial court's finding of sexual emotional abuse is supported by substantial evidence.

In response to Assignment of Error 7, the disclosures of sexual abuse by the child to his therapist were properly admitted and relied upon.

In response to Assignments of Error 4 and 14, the trial court did not improperly testify but instead attempted to deliver an adverse ruling with compassion and in a manner which motivates the losing party to comply with the orders for the future best interest of the child.

In response to Assignment of Error 16 Respondent, the trial court appropriately required the father to undergo a psycho-sexual evaluation to assess risk of future harm prior to resuming residential time between the child and father.

IV. ARGUMENT

A. Appellant Only Properly Assigned Error to a Limited Number of Findings By The Court - Assignments of Error Not Properly Identified or Argued Do Not Require A Response

Rules of Appellate Procedure (RAP) 10.3(g) provides:

Special Provision for Assignments of Error.
A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. **A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.** The appellate court will only review a claimed

error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Emphasis added.

In this case, Appellant's Assignments of Error 1 – 4 have minimal citation to the record and Appellant's Assignments of Error 4 – 16 have no citation to the record whatsoever. The Appellant's cursory and unfocused statements in the "Issues Pertaining to Assignment of Error" do not correct these defects.

The failure to cite specifically to the record as required by RAP 10.3(g) makes it difficult to ascertain precisely where the alleged error occurred or to analyze the legal basis of Appellant's allegation of error. The failure to sufficiently identify the alleged errors and concisely address them renders most of Appellant's assignments of error so deficient they cannot be considered. See, e.g., *In re Joseph P. Whitney*, 155 Wash.2d 451, 467, 120 P.3d 550 (because errors were insufficiently briefed, court declined to address them and conclude the findings were verities); *In re Estate of Lint*, 135 Wash.2d 518, 532, 957 P.2d 755 (1998) (court will not scour the record and construct arguments for Appellant).

There are some issues, which although not properly identified or cited to the record, Appellant has argued sufficiently for the issue to be identified and addressed. Each of Appellant's Assignments of Error

which are reasonably close to compliance with the RAP or which are sufficiently argued so as to allow meaningful response will be discussed.

Appellant's Assignments of Error which are so vague or lack sufficient citation to the record that responsive argument is not possible will not be addressed further unless the Court requests additional briefing. See, RAP 10.1(h) (allowing the appellate court to authorize or direct filing of additional briefs).

Assignment of Error 1: Appellant alleges the trial court erred by modifying the prior Final Parenting. Appellant cites only the Clerk's Papers which identify the former parenting plan dated December 30, 2010. That is the parenting plan modified by the trial court in the case at hand. Appellant does not specify any particular error. Assignment of Error 1 does not sufficiently identify an alleged error for response.

Assignment of Error 2: Appellant alleges the trial court erred by making findings of sexual abuse and abusive use of conflict in Paragraphs 2.1 and 2.2 of the Final Parenting Plan entered July 11, 2014, at CP 52. Appellant's Assignment of Error 2 will be responded to below.

Assignment of Error 3: Appellant alleges the trial court erred by modifying child support after modifying the parenting plan. Appellant only identifies the first page of the Order of Child Support dated July 11, 2014, at CP 208 in support of his alleged error. There is no identification

or argument of specific error within the Order. Appellant's Assignment of Error 3 does not sufficiently identify an alleged error for response.

Assignment of Error 4: Appellant alleges the trial court erred by testifying at trial. No specific citation to the record is given; however, sufficient information is provided to locate and identify the alleged error. Appellant's Assignment of Error 4 will be responded to below.

Assignment of Error 5: Appellant alleges the trial used the wrong standard, or failed to follow the statute, for modification of a parenting plan. No specific citation to the record is given. Appellant's Assignment of Error 5 will be responded to below.

Assignment of Error 6: Appellant alleges the trial court erred by making RCW 26.09.191 findings without admissible evidence to support the findings. No specific citation to the record is given. This is duplicative of Appellant's Assignment of Error 2 without any meaningful distinction. Appellant's Assignment of Error 6 will be responded to below in conjunction with the response to Assignment of Error 2.

Assignment of Error 7: Appellant alleges the trial court erred by admitting hearsay "from the child and psychologist/counselor Alyssa Ruddel, Ph.D. and others." No specific citation to the record is given, either in the Assignment of Error or in the argument portions of the brief. Appellant never identifies precisely what statements he alleges to be

hearsay or why the court erred in admitting specific hearsay statements. This Assignment of Error is too vague and devoid of citation to the record to direct Respondent to the objectionable statement for a fair response. Therefore, Respondent will not respond to Assignment of Error 7 regarding unspecified hearsay by the mother or the co-parent counselor Dr. Ruddell.

Notwithstanding the inability to respond to generalized allegations of error by admitting unspecified hearsay, the father has assigned error to the findings of sexual abuse by the father. In making the findings of sexual abuse, the trial court did properly rely upon the hearsay statements of the child regarding sexual abuse by the father made to the child's therapist Amy Crook. Argument will be presented regarding why it was proper for the trial court to admit and rely upon the child's statements to his therapist describing sexual abuse by the father.

Assignment of Error 8: Appellant alleges the trial court erred granting mother's petition when she did not amend her Petition after disclosures of sexual abuse by the father were made while the modification action was pending. Appellant's Assignment of Error 8 will be responded to below.

Assignment of Error 9: Appellant alleges the trial court erred by admitting and considering testimony by the mother and her witnesses that

was not admissible under ER 602, 702, and 802. No specific citation to the record is given. In the body of the brief, Appellant never identifies precisely what statements he alleges to be inadmissible or why the Evidence Rules he mentions operate to preclude admission of any specific statements. Appellant's Assignment of Error 9 does not sufficiently identify an alleged error for response.

Assignment of Error 10: Appellant alleges the trial court erred by "finding the mother credible." No specific citation to the record is given. In the body of the brief, Appellant never identifies precisely what statements should not have been found credible. Appellant does not cite any portion of the record supporting his contention she had a "pattern" of attempting to mislead the court. Appellant's Assignment of Error 10 does not sufficiently identify an alleged error for response.

Assignment of Error 11: Appellant alleges the trial court erred by "not finding the mother to be disingenuous." It is impossible to respond to a generalized attack on credibility without specific citation to the record. Appellant's Assignment of Error 11 does not sufficiently identify an alleged error for response.

Assignment of Error 12: Appellant alleges the trial court erred by "not finding the mother coached the child." This is duplicative of Assignment of Error 10 and 11 with identical deficiencies. Appellant's

Assignment of Error 12 does not sufficiently identify an alleged error for response.

Assignment of Error 13: Appellant alleges the trial court erred by “denying any father/child contact.” No specific citation to the record for this alleged error is given. This Assignment of Error actually misstates the record. The trial court did not permanently deny contact between the father and child. The trial court clearly stated contact between father and Derek could potentially be re-established after the father underwent a psycho-sexual evaluation. Finding of Fact 2.2(H) and (I) at CP 225 states:

At present, no visitation between Derek and father is appropriate because Derek is substantially traumatized and is expressing feelings of hate toward his father. Derek is communicating he wants no contact with this father. This has been a pattern in Derek’s therapy for some time now and the continued pattern is very troubling.

The court needs to retain jurisdiction in this case to review the results of a psycho-sexual evaluation of the father. Derek needs to be in significant counseling. Depending upon the results of the psycho-sexual evaluation the court will determine if there should be therapeutic reunification counseling. The only proper way to resume visitation would be for the father to first demonstrate he is not a risk to the child through a psycho-sexual evaluation and then to begin contact with Derek in a therapeutic setting so that Derek is not further traumatized or caused long-term permanent harm by contact with his father.

Findings of Fact 2.2 (H) and (I) at CP 225.

The trial court contemplates re-establishing contact between Derek and the father if a psycho-sexual evaluation determines there is not a risk of future harm to Derek. Therefore, Appellant's Assignment of Error 13 will not be responded to below.

Assignment of Error 14: Appellant alleges that the trial court erred by relying on its own expert opinion. No specific citation to the record is given, but this is generally duplicative of Appellant's Assignment of Error 4. Therefore Appellant's Assignment of Error 14 will be responded to in conjunction with the response to Assignment of Error 4.

Assignment of Error 15: Appellant alleges the trial court erred by "modifying when there was no substantial change of circumstances." No specific citation to the record is given. This is essentially duplicative of Appellant's Assignment of Error 5. Therefore Appellant's Assignment of Error 15 will be responded to below in conjunction with the response to Assignment of Error 5.

Assignment of Error 16: Appellant alleges that the trial court erred ordering the father to undergo a polygraph and psycho-sexual evaluation. No specific citation to the record is given but sufficient information is provided to identify the alleged error without undue inconvenience. Appellant's Assignment of Error 16 will be responded to below.

B. Amendment of Pleadings Was Not Required.

1. Appellant Did Not Raise This Issue at the Trial Level.

Nick never raised the issue of insufficient pleadings in the proceedings below. Issues generally cannot be raised for the first time on appeal. Rule of Appellate Procedure (RAP) 2.5(a)(2); *Mukilteo Retirement Apartments, LLC v. Mukilteo Investors LP*, 310 P.3d 814, 176 Wn.App. 244 (Div. 1 2013). Because Nicholas did not raise the issue at the trial level, he has waived the objection on appeal. *In re Glasmann*, 286 P.3d 673 (2012); *State v. Thorgerson*, 172 Wash.2d at 443, 258 P.3d 43; *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

2. The Petition for Modification Was Legally Sufficient and Appellant Had Fair Notice of All Factual Claims Supporting the Petition.

Lisa's Petition for Modification of the Parenting Plan was legally sufficient. Washington rules of rules of pleading are liberal. *Chen v. State*, 937 P.2d 612, 86 Wn.App. 183 (Div. 2 1997). The rules are intended to ensure the pleadings give notice to the court and the opponent of the general nature of the claim asserted. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wash. App. 18, 23-25, 974 P.2d 847, 850-51 (1999); *Lewis v. Bell*, 45 Wash.App. 192, 197, 724 P.2d 425 (1986).

Inexpert pleading is permitted although insufficient pleading is not. *Lewis*, 45 Wash.App. at 197, 724 P.2d 425. "A pleading is insufficient

when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.” *Lewis*, 45 Wash.App. at 197, 724 P.2d 425. A complaint must at least identify the legal theories upon which the plaintiff is seeking recovery. *Molloy v. City of Bellevue*, 71 Wash.App. 382, 385, 859 P.2d 613 (1993).

In this case, Lisa’s Petition was sufficient. Nicholas was on notice of all legal theories and factual reasons supporting the legal claims long before trial. Lisa’s Petition was originally filed on May 17, 2014. CP 63 - 69. In her Petition, Lisa stated:

The custody decree/parenting plan/residential schedule should be modified because a substantial change of circumstances has occurred in the circumstances of the children or the other party and the modification is in the best interests of the children and is necessary to serve the best interests of the children. This request is based on the factors below.

The children’s environment under the custody decree/parenting plan/residential schedule is detrimental to the children’s physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children.

CP 65 -66

This allegation refers directly to RCW 26.09.0260(1) and 2(c). Lisa’s Petition filed May 17, 2013, referred to Nick’s abusive use of conflict and refusal to co-parent as the factual basis to support this modification. On June 4, 2013, Lisa filed and served upon Nick

subsequent declarations that stated an additional factual basis for her Petition, that is, Derek's disclosure of inappropriate sexual contact by Nick. CP 101 - 105. But Lisa's June 4, 2013, affidavits did not change the legal claim stated in the Petition.

Lisa's Petition stated the parenting plan should be modified because there had been a substantial change in circumstances which created a detrimental home environment for the child under the prior parenting plan. The new facts stated in declarations filed June 4, 2013, were still a substantial change in circumstance which created a detrimental home environment for the child under the prior parenting plan.

Subsequent to Lisa's June 4, 2013, affidavit, Nick extensively litigated the claims of sexual abuse. On August 5, 2013, Nick was present in court and signed the order establishing Adequate Cause for Lisa's Petition, and signed the Order re Scope of GAL Investigation, which included direction to the GAL to investigate allegations of sexual abuse in Nick's home. CP 162 - 164. Nick filed a Motion for Revision of that Order and was served with Lisa's Response to the Motion for Revision filed on August 14, 2013, which included detailed analysis of the claims of sexual abuse. CP 165 - 168. Nick filed a Trial Brief on April 21, 2014, which included analysis and argument regarding the sexual abuse allegations. CP 177 - 189.

modification of parenting plans codified in RCW 26.09.260 and RCW 26.09.270. See, e.g., Brief of Appellant page 7, 15 and 19-23.

The procedure for modification of a parenting plan has two steps.

In re Marriage of Zigler, 154 Wn.App. 803, 809, 226 P.3d 202 (2010).

First, RCW 26.09.270 provides:

A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his 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.

Under this statute, the party moving to modify a parenting plan must submit an affidavit showing “adequate cause” for modification. *Zigler*, 154 Wn.App. at 809. The trial court will allow a hearing (trial) on the Petition for Modification only if the affidavit establishes adequate cause. RCW 26.09.270; *In re Custody of T.L.*, 165 Wn.App. 268, 275, 268 P.3d 963 (2011).

In this case, Lisa filed her Petition on May 17, 2015. CP 63 – 69. Lisa supplemented her petition with declarations and other information regarding sexual abuse with an affidavit on June 4, 2014. CP 101 – 105. A hearing on the basis of affidavits was held and a Court Commissioner entered an order finding adequate cause on August 5, 2013. CP 163 – 164. The Appellant then moved to Revise the Court Commissioner’s order and Lisa responded to the Motion for Revision pointing out all of the facts contained in the affidavits that support her requested modification. CP 165 – 168. The trial court did not revise the finding of adequate cause.

The court relied upon many affidavits in making the finding of adequate cause.¹ CP 165 – 168. The allegations in the affidavits included how Derek’s emotional and behavioral problems had gotten progressively worse (to the point of shocking for a Kindergarten age child) since entry of the equally shared parenting plan expanding Derek’s time with his father, that the father had resisted co-parenting counseling, that the father refused to be candid about his older son’s juvenile behaviors similar to those now exhibited by Derek (and that same older son’s conviction for a sexual abuse), Derek’s behaviors at home and at school consistent with

¹ These affidavits included but were not limited to: Lisa’s declaration filed 5/17/2013, co-parent counselor letter/recommendations filed 5/17/2013, disciplinary reports from Derek’s school filed 5/17/2013, declaration of Derek’s school teacher filed 5/17/2013 and 7/11/2013, Lisa’s declaration filed 6/4/2013, police report filed 7/11/2013, medical documents filed 6/27/2013 and Lisa’s declaration filed 6/26/2013.

victims of sexual abuse and Derek's disclosure to his counselor and law enforcement of sexual contact by his father. There is no question that inappropriate sexual contact by the father, or in the father's home by someone other than the father, would support a modification of the parenting plan. This is evidence sufficient to support a finding on each fact Lisa had to prove to modify the parenting plan. *Lemke*, 120 Wn.App. 536 at 540. The finding of adequate cause complied with the statutory procedure and was appropriate in light of the evidence.

Second, if the moving party establishes adequate cause and the court holds a full hearing, RCW 26.09.260(1) provides:

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.

Thus the trial court may modify the existing parenting plan only if it finds based on new or previously unknown facts there has been a substantial change in the circumstances of the child or the nonmoving party and that the modification is in the child's best interest and necessary

to serve the best interests of the child. RCW 26.09.260(1); *Zigler*, 154 Wn.App. at 809; *George v. Helliard*, 62 Wn.App. 378, 382-83, 814 P.2d 238 (1991). As pointed out throughout Appellant’s brief, the purpose of these procedures is to “protect stability by making it more difficult to challenge the status quo.” *In re Parentage of C.M.F.*, 179 Wn.2d 411, 419-20, 314 P.3d 1109, 1113 (2013). **Although Appellant states the trial court should make findings under RCW 26.09.260(1), Appellant ignores the trial court’s specific findings made in compliance with RCW 26.09.260(1).** The required findings by the trial court were made in the Order re Modification of Parenting Plan / Judgment. CP 222 – 227.

Paragraph 2.2 at CP 223, Line 17 finds:

The custody decree/parenting plan/residential schedule should be modified because a substantial change of circumstances has occurred in the circumstances of the children or the nonmoving party and the modification is in the best interest of the children and is necessary to serve the best interest of the children. This finding is based on the factors below:

The children’s environment under the custody decree/parenting plan/residential schedule is detrimental to the children’s physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children.

The following facts, supporting the requested modification, have arisen since the decree or plan/schedule or were unknown to the court at the time of the decree or plan/schedule:

Paragraph 2.2 at CP 223, Lines 17 – 25

The trial court then goes on to make 11 more specific findings in Paragraphs lettered A – K explaining the specific facts supporting the modification that had arisen since entry of the prior parenting plan. CP 224 – 225. **Appellant assigned error to none of the findings in the Order re Modification/Adjustment of Custody Decree/Parenting plan/Residential Schedule at CP 223 – 225.** Issues to which an appellant does not assign error are treated as verities on appeal. *Francis v. Washington State Dept. of Corrections* 178 Wash.App. 42, 52, 313 P.3d 457, 462 (Div. 2, 2013); *Davis v. Dep't of Labor & Indus.*, 94 Wash.2d 119, 123, 615 P.2d 1279 (1980). **Hence, Appellant not only ignores the findings made by the trial court as it relates to RCW 26.09.260(1) but they must be treated as verities on appeal.**

The procedure may have been an unpleasant experience for Appellant and Appellant obviously disagrees with the court's findings, but Appellant misstates the record by alleging the trial court did not follow the statutory procedure and make required findings. Brief of Appellant page 19 (“[the trial court] was supposed to make findings of facts and conclusions of law that there were actually a factual substantial change of circumstances and that a modification was warranted, under RCW 26.09.270”).

Brief of Appellant complains at various places that at some unspecified point in time, the trial court stated it was looking out for the best interests of the child. See, e.g., Brief of Appellant pages 7 and 15. Appellant did not provide any citation to the record, so the quotation to which he refers could be examined for context.

It is possible Appellant is referring to a portion of the trial court's oral comment on August 29, 2014, when ruling on Appellant's first Motion for Reconsideration. In argument on the motion for reconsideration, Appellant reminded the trial court it had recently been reversed by the Court of Appeals in a different case. 8/29/2014 VR page 5. In response to Appellant's reference to reversal on another case, the court distinguished the other case because it dealt with financial provisions of a child support order and did not "have anything to do with" a case involving a parenting plan. 8/29/2014 VR page 8. The trial court then stated that in the instant case involving a parenting plan: "I have to look out for the best interest of the child." 8/29/2014 VR page 9.

There is nothing inappropriate in the court's consideration of the best interest of the child even in a modification proceeding. Indeed, the court's primary concern, when establishing or modifying parenting plans, is to ensure that the best interests of the children are met. RCW 26.09.002; *In re Marriage of Stern*, 57 Wn.App. 707, 712, 789 P.2d 807 (1990). The

modification statute applicable to this action specifically requires consideration of the best interest of the child. See, RCW 26.09.260(1) (requiring that after finding a substantial change occurred, the court must consider whether “modification is in the **best interest of the child** and is necessary to serve the **best interests of the child.**” Emphasis added.)

D. Standard of Review

Having established that the trial court followed the statutory procedure and applied the appropriate standard, a trial court's parenting plan is reviewed for an abuse of discretion. *In re Marriage of Chandola*, 180 Wash. 2d 632, 642, 327 P.3d 644, 649 (2014), *as corrected* (Sept. 9, 2014), *reconsideration denied* (Sept. 10, 2014). Abuse of discretion occurs only if a decision was manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Katare*, 175 Wash.2d 23, 35, 283 P.3d 546 (2012); *In re Marriage of Littlefield*, 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997).

Trial courts are given broad discretion in matters dealing with the welfare of children. *In re Marriage of McDole*, 122 Wash. 2d 604, 610, 859 P.2d 1239, 1242 (1993); *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Cabalquinto*, 100 Wash.2d 325, 327-28, 330, 669 P.2d 886 (1983).

Although there is a strong presumption favoring continuity in a child's life, a trial court may modify a parenting plan if a substantial change has occurred in the circumstances of the child or the nonmoving party and such modification is necessary to serve the best interests of the child. RCW 26.09.260(1). *Velickoff v. Velickoff*, 95 Wash. App. 346, 352-53, 968 P.2d 20, 23 (1998).

The appellate court should uphold the trial court's findings of fact if supported by substantial evidence. *McDole*, 122 Wash.2d 604, 859 P.2d 1239. *Chapman v. Perera*, 41 Wash.App. 444, 704 P.2d 1224. The trial court's findings of fact will not be reversed if they are supported by substantial evidence. *Id.* (citing *Ferree v. Doric Co.*, 62 Wash.2d 561, 568, 383 P.2d 900 (1963)). "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. *Id.*

E. There Is Substantial Evidence Supporting the Trial Court's Findings Regarding Sexual Abuse

The Appellant argues substantial evidence does not support the trial court's finding of sexual abuse. Assignments of Error 2 and 6. Brief of Appellant pages 14 - 20. This allegation is apparently based upon: (1) Appellant's belief that the mother and witnesses who testified on mother's behalf are not credible. Assignments of Error 9 - 12. Brief of Appellant pages 19 - 20. And: (2) Appellant's belief hearsay evidence was improperly admitted at trial. Brief of Appellant at page 19.

1. Credibility Determinations Should Not Be Disturbed On Appeal.

Findings regarding credibility should not ordinarily be disturbed on appeal. RAP 2.5, *In re A.V.D.*, 62 Wash. App. 562, 815 P.2d 277 (Div. 1 1991); *State v. Vazquez*, 66 Wash. App. 573, 832 P.2d 883 (Div. 2 1992). Credibility determinations fall within the sound discretion of the trial court and are not generally reviewed. *In re Marriage of Rich*, 80 Wn.App. 252, 259, 907 P.2d 1234 (1996). As long as substantial evidence supports a finding, it does not matter that other evidence may contradict it. *In re Marriage of Burrill*, 113 Wn.App. 863, 868, 56 P.3d 993 (2002). In this case, Appellant's arguments appear to mostly consist of statements asserting Appellant's disagreement with the trial court's findings. Appellant has not identified any persuasive reason or analysis to reverse the trial court's determination on credibility. Appellant's conclusory statements attacking the trial court's determination of credibility should be rejected.

2. The Trial Court Properly Admitted and Relied Upon The Child's Disclosure of Sexual Abuse to His Therapist.

Substantial evidence supports the trial court's finding of sexual abuse because the child's therapist testified that the child made disclosures of sexual abuse and that the child was acting in a manner consistent with sexually abused children.

The trial court was entitled to rely on the disclosures to the therapist because statements to a medical professional for purposes of

treatment and diagnosis are excluded from the hearsay rule.

ER 803(a)(4) states:

The following are not excluded by the hearsay rule,
even though the declarant is available as a witness

...

Statements for Purposes of Medical Diagnosis
or Treatment.

Statements made for purposes of medical diagnosis
or treatment and describing medical history, or past or
present symptoms, pain, or sensations, or the inception
or general character of the cause or external source
thereof insofar as reasonably pertinent to diagnosis or
treatment.

Work with a therapist qualifies as an exception to the hearsay rule
even though the therapist is not a medical doctor and even when the out-
of-court declarant is, as here, a child. *Dependency of M.P.*, 76 Wash. App.
87, 93-94, 882 P.2d 1180, 1184 (1994). See also, *In re Dependency of*
S.S., 61 Wash. App. 488, 503, 814 P.2d 204, 213 (1991) (also applying the
exception to an evaluation by a social worker).

In this case, both Lisa and Nick spoke to Amy Crook about her
treating Derek (counseling) before she started working with him and
before disclosures of sexual abuse were made to any person. 1 RP
51. The record is replete with evidence regarding Derek's troubling
behaviors prior to counseling.²

² By the time Derek entered Kindergarten in September 2012 Derek he had begun
wetting himself and receiving discipline notices from his daycare for intentional violence
and defiance. 1 RP 106. Derek's Kindergarten teacher, who had 30 years of classroom

Derek's presenting concerns to be addressed in counseling were his inability to trust authority, the fact he was highly guarded and he was experiencing severe behavioral problems in school. 1 RP 54. Derek's behavioral struggles were far more intense than the average five year old boy and the counselor was working with him to redirect himself and get back under control emotionally when he would begin to escalate a situation in school. 1 RP 56. The therapist reviewed an ADHD assessment performed by Seattle Children's Hospital and considered whether a medical concern such as ADHD or a chemical imbalance was causing Derek's fear and anxiety. 1 RP 64. The therapist attended planning and strategy meetings with Derek's school to ensure coordination of care between the interventions being utilized in the home, at school and in therapy with Derek. 1 RP 70 - 71. The therapist eventually diagnosed Derek with post-traumatic stress disorder. 1 RP 68 - 69. It is clear Derek was seeing his therapist Amy Crook for diagnosis and treatment.

experience, said Derek was unable to concentrate and found his behavior to be "abnormal" for a five year old boy. 1 RP 82, 89. Derek's Kindergarten teacher testified Derek was impulsive and hurt people, even intentionally slamming another child's fingers in a door. 1 RP 83 - 84. Derek left bruises, scratches and marks on his teacher because he was physically assaultive and could not pull himself together when he was angry. 1 RP 84. Derek threw chairs and intentionally attempted to destroy property in Kindergarten. 1 RP 85. Derek made sexual statements concerning his father which his teacher, who had 30 years of experience teaching, found shocking. 1 RP 87. Derek was actually suspended from Kindergarten on two occasions. 1 RP 89. The mother testified that she observed Derek sticking his finger into his bottom and playing with feces in an abnormal way, followed by a statement by Derek which led her to be concerned about sexual abuse by Nick. 1 RP 120 - 122. The mother also testified that she was questioned at a later date by CPS because Derek made disclosures of sexual abuse to the YMCA. 1 RP 128 - 129.

Ms. Crook testified that in her first session with Derek, he made a disclosure his father (Appellant) had touched him in a sexually abusive manner. Derek told the therapist in their first session together that his father touched his "peter" to Derek's "peter." 1 RP 59

The therapist then worked with Derek for a year before trial. 1 RP 52. Derek was at times unwilling, or unable, to verbally articulate precisely how he was feeling and he would unambiguously and consistently declare he did not want to see his father because of "mean touches." 1 RP 59 - 61. Derek frequently used play therapy to communicate fear and a need for punishment, telling the therapist on one occasion the dinosaur he was playing with needed a "time-out" and that his father needed a time out because he touches me. 1 RP 59 - 60. Derek drew a picture of his father's house in one session and wrote the words "My dad touches me. I hate my dad." 1 RP 61.

After a year in therapy, Derek made a second disclosure of sexual abuse to the therapist. Derek told the therapist Appellant touched his "peter" to Derek's "peter" and Appellant put his "peter" and his finger into Derek's butt. 1 RP 67 - 68. The therapist testified since Derek was more comfortable speaking to her and was able to communicate how he was feeling and his experiences in his own words she was able to diagnose him with post-traumatic stress disorder. 1 RP 68 - 69.

The child's therapist, Amy Crook, has extensive experience working with children who have been sexually abused. 1 RP 50 - 51. The therapist could also confirm after a year of work with Derek that his symptoms were consistent with those exhibited by other sexually abused children. 1 RP 69 - 70. These symptoms included problems with potty training at a developmentally abnormal age (two times Derek actually had urination accidents in the therapist's office), aggressive behavior, hyper-arousal, disorganization, frightening dreams, nightmares of trauma, intrusive memories, repetitive play of a monster chasing Derek, avoidance, outbursts alternated by shutting down, and how guarded he was overall in talking about his father. 1 RP 68 - 70.

When relying upon child hearsay through a therapist, some cases have required additional evidence the child understood the purpose of the therapeutic nature of the sessions. See, e.g., *State v. Carol M.D.*, 89 Wash. App. 77, 86, 948 P.2d 837, 842 (1997) *review granted, cause remanded sub nom.*, *State v. Doggett*, 136 Wash. 2d 1019, 967 P.2d 548 (1998) (record should demonstrate child made statements with understanding that they would further the diagnosis and possible treatment of the child's condition.).

Even though Derek was young at the time of treatment, it is clear Derek understood he was working with Ms. Crook to address emotional

and behavioral problems he was experiencing. The therapeutic nature of the relationship became more and more clear during the year they worked together.

Derek was often guarded and unwilling to talk about his feelings in the sessions, particularly in the early stages of treatment. 1 RP 60 - 61. Derek became more open and talkative in the therapy as he gained trust with the therapist. 1 RP 57 - 58; 66. Derek eventually communicated to the therapist he liked her. 1 RP 53. Eventually Derek felt he could "talk about things he needs." 1 RP 65.

Derek knew that Ms. Crook was meeting with his school teachers to help formulate a plan to behave better in school. Derek and Ms. Crook specifically talked about her participation in advance. 1 RP 70 - 71.

Derek knew Ms. Crook may testify in court. Derek understood his words to the therapist would be "big together"³ so he could tell her anything he wanted. 1 RP 66.

Early in the therapeutic process, his answers were silly; however, as the relationship progressed and Derek began to trust and understand the purpose of therapy, he was able to work with the therapist in a meaningful way, including making specific statements disclosing sexual abuse by his

³ This was the description the child therapist used to help Derek feel safe talking about his feelings and to overcome his initially guarded presentation.

father. 1 RP 67. All of these facts show Derek understood he was working with Ms. Crook to diagnose and treat his emotional and behavioral problems.

The purpose of Derek's work with Ms. Crook was diagnosis and treatment. Derek understood therapy was to help him address the issues he was having in school and the nightmares, feelings and other emotions he was experiencing. Derek made two specific disclosures of sexual abuse to his therapist during treatment. 1 RP 59, 67 – 69. These are reliable disclosures made to a therapist by a child who understood the purpose of the statement. They fall squarely within the ER 803(a)(4) exception. It was proper for the trial court to admit and rely upon the disclosures to the therapist. There is substantial evidence supporting the trial court's findings and these findings should not be disturbed on appeal.

3. Appellant's Citations to the Preliminary GAL Report Should be Stricken Because It Was Not Admitted For Consideration by the Trial Court

Appellant references a Preliminary GAL Report. Brief of Appellant pages 12 – 13. The GAL never made a final report and her preliminary report was not admitted at trial. The GAL did not testify at trial. The GAL did not complete the investigation because Nick never paid court ordered fees to the GAL.

In the Preliminary GAL report, there is discussion of a disclosure of sexual abuse Derek made to the Mother (not to the therapist). The Preliminary GAL report states:

Further discussion of the circumstances giving rise to the allegations is respectfully deferred pending further investigation.

CP 35.

Prior to making the Preliminary Report, the GAL wanted, but had not been able, to talk to the child's counselor. CP 32 (Item 9). The GAL did not discuss the disclosures of sexual abuse made by Derek to his therapist during the course of treatment. The GAL wanted to talk to Derek's counselor and requested the court order the parties to pay additional fees in part so she could do so. CP 38 – 39

In the Preliminary GAL Report, the GAL said investigation was necessary. CP 30 – 47. The GAL stated:

I am requesting authorization for up to twelve hours of additional time to speak with the child's counselor; speak with school personnel; obtain and review any evaluation reports which may be issued; speak with the evaluators; supplement my contacts with the parties; and submit a final report.

CP 38 - 39.

Because of the need for additional investigation by the GAL, the court ordered each party to pay additional GAL fees. Lisa paid her share

of the court ordered fees, but Nick failed to pay his share of the court ordered fees. 1 RP 129 - 130.

Nick did not comply with the court's order to pay additional GAL fees, so the GAL did not complete the investigation.

Derek made two disclosures of sexual abuse to his counselor, including a second more specific disclosure of sexual abuse after developing a trust relationship with the therapist. 1 RP 59, 67 – 68; Finding of Fact 2.2(B) and (F) at CP 224. Because Nick never paid his share of the court-ordered GAL fees, the GAL was unable to discuss these disclosures with the counselor.

Derek began experiencing academic and behavioral success in school after contact with his father was suspended. 1 RP 95 – 97; Finding of Fact 2.2(E) at CP 224. Because Nick never paid his share of the court-ordered GAL fees, the GAL was unable to discuss this success with the classroom teacher.

But both Derek's counselor and school teacher were contacts the GAL believed were necessary for a final report. CP 38 - 39. The GAL was unable to finish the investigation and make a final report because Appellant refused to comply with the court's order for additional fees. Appellant may not now cite an incomplete and preliminary (by its own terms) report of GAL which was not admitted at trial.

The Preliminary GAL Report was not admitted at trial. The GAL did not testify at trial. All of Appellant's references to the preliminary GAL Report should be stricken because it was not included in the record reviewed by the trial court. RAP 2.5; *Southcenter View Condo. Owners' Ass'n v. Condo. Builders, Inc.*, 47 Wash. App. 767, 770-71, 736 P.2d 1075, 1077 (1986); *Grobe v. Valley Garbage Serv., Inc.*, 87 Wash.2d 217, 228-29, 551 P.2d 748 (1976). See also, *State v. Bradfield*, 29 Wash. App. 679, 630 P.2d 494 (1981) (refusing to consider prosecutor's opening statement not in record); *State v. Bugai*, 632 P.2d 917, 30 Wn.App. 156 (1981) (not considering affidavits appended to appellate brief but never submitted to trial court because "[i]n accomplishing its work, this court must confine itself to the record for knowledge of the case."). *State v. Wilson*, 75 Wash.2d 329, 332, 450 P.2d 971 (1969) ("[i]f the evidence is not in the record it will not be considered.").

F. The Trial Court Did Not Improperly Testify At Trial.

Appellant's Assignment of Error 4 is the trial court erred by testifying at trial. At page 15 of Appellant's brief, Appellant alleges the trial court violated various Rules of Evidence in comments responding to Appellant's argument about false allegations of sexual abuse.

Appellant uses quotation marks to highlight certain statements as apparent quotations in his brief, but Appellant provides no specific

citations to the record for the quotations. Upon examination of the record, the following comments by the trial court appear to be the basis of

Appellant's contention:

Right now there are no visits that would be appropriate, because your child is significantly traumatized. He's talking about you as the mean person and that he hates you, and that he doesn't want to have anything to do with you. That has been his pattern now for quite some time with his current therapist, and it is very, very troubling and concerning. You made some statements about the prevalence of sexual assault or sexual abuse allegations in the court system. Quite honestly, if you look at nationwide statistically, it's less than five percent of child custody cases have those kinds of allegations raised in them.

On this docket in the two years that I did it, I can't think of a case that I did a trial where there were sexual assault allegations against a child. So it's not as prevalent as you claim. Certainly when they arise during the course of a custody battle, they are more suspicious because you don't want to have one parent gain an advantage over the other by those allegations. But this more than just allegations arising in a custody case. They predate the custody modification significantly and they are ongoing. The most recent one now is the expansion based upon I guess the familiarity of the child with the therapist of some more what would appear to be disclosures or discussions of inappropriate contact.

Appellant's argument is cursory and unfocused. At page 15 of his Brief, Appellant simply states, without any meaningful analysis or argument, that the trial court violated ER 602, 605 and 701. His claims should be rejected for the following reasons.

ER 602 and ER 702 both relate to the competency of a witness. Here the judge was not a formal witness, so these Rules of Evidence are inapplicable.

ER 605 prohibits a judge from acting as a witness. Appellant inaccurately alleges the trial court acted as a witness. Appellant's contention is inaccurate because the trial court was not testifying.

It is not impermissible for a judge to reference personal experience when making a ruling. See., e.g., *Fernando v. Nieswandt*, 87 Wash.App. 103, 940 P.2d 1380 (1997) (trial judge's reference to personal experience placing a child in a car seat was permissible); *State v. Grayson*, 154 Wash.2d 333, 111 P.3d 1183 (2005) (even though trial court was reversed the Supreme Court noted “[o]ur judiciary benefits from and relies upon judges who have studied and become learned in the law and whose personal experiences have taught them a practical understanding of the world we live in and how people live, work, and interact with the world around them.”)

The statement Appellant alleges to be testimony by the trial court was made when the court was explaining in a compassionate way why it was rejecting the arguments of Appellant at trial. This is not acting as a witness and is not a violation of any of the rules cited.

Appellant's objection highlights the difficulty every judge faces when trying to maintain the separation of his or her personal knowledge and experience from the evidence in the record. This quandary was thoroughly discussed in a recent Division 3 case and is applicable here. *In re Estate of Hayes* states:

Competing interests surface when addressing whether a judge may rely on personal experience when finding facts. On the one hand, the judicial system hopes for a judge possessing experience and knowledge of the workings of the world and the cogs of his community rather than a judge with a vacuumed mind. Agricultural settings, such as Lincoln and Grant Counties, would probably prefer trial judges to enjoy a background in farming and agricultural law. In turn, the two counties might expect the judge to rely on this background. After all, judges do not leave their common experience and common sense outside the courtroom door.

...

We do not believe the legislature intended that judges leave their knowledge and understanding of the world behind and enter the courtroom with blank minds. Judges are not expected to leave their common sense behind. Nor do we believe the legislature expected judges to hold hearings on whether fire is hot or water is wet. We prize judges

for their knowledge, most of which is obtained outside of the courtroom.

In re Estate of Hayes, 342 P.3d 1161, 1177-78
(Wash. Ct. App. 2015)

The rationale of *Hayes* is highly applicable in the instant case.

First and foremost, the portion of the oral decision objected to by the Appellant does not demonstrate a hidden or undisclosed preconception, or a bias, prejudice, or any other impropriety. The trial court acknowledged that, although it is a small percentage, there are cases of false sexual abuse. 2 RP 266. The trial court also acknowledged there is heightened concern for false accusations of sexual abuse in cases where there is a current custody action pending. (“Certainly when [sexual abuse allegations] arise during the course of a custody battle, they are more suspicious because you don’t want to have one parent gain an advantage over the other by those allegations.” 2 RP 266.

Hence the trial court recognized false accusations of sexual abuse do occur and had not prejudged the case. The court gave extra scrutiny to the possibility in light of the pending custody action. But even though the court considered these possibilities which Appellant urged at trial, the court found the evidence did not support a finding of false accusations of sexual abuse.

Second, a trial court may draw from its own common sense and experience to explain and amplify a decision with illustrations, analogies or anecdotes to help parties understand a ruling.

In cases such as this, where a parent exhibits extreme acrimony toward the other parent, engages in *ad hominem* attacks and finger-pointing and involving allegations of sexual abuse, the courtroom is highly charged with emotions. The trial court is faced with the unenviable task of motivating a recalcitrant or difficult party to act in the best interest of their children while delivering a ruling adverse to that party.

The trial court expressed very serious concerns about the evidence against Appellant. At the same time the trial court tried to encourage Appellant to act in the child's best interest by undergoing the evaluation necessary to develop a plan for reunification. As established by *Hayes*, 342 P.3d at 1178, judges do not leave their common sense and experience at the door of the courtroom. We value judges for their knowledge and understanding of the world, most of which is gained outside of the courtroom. In this case, the court was delivering an adverse ruling to Appellant. The court provided information to Appellant which was derived from the court's personal experience with the goal of motivating Appellant to move forward in a way that would be positive and productive for his child. This was not testimony in violation of ER 605.

The trial court explained his decision was based upon the evidence, not some preconceived notion or hidden agenda. The trial court did not say false allegations of sexual abuse do not take place. To the contrary, the court acknowledged that such false allegations do take place on rare occasions. The court simply noted such allegations are not as common as Appellant alleged in argument without any support in the record. For all of these reasons, the trial court did not improperly act as a witness and Appellant's argument should be rejected.

G. The Trial Court Properly Required a Psycho-Sexual Evaluation to Assess Risk of Future Harm to Child Before Beginning Reunification Therapy and Visitation

The trial court made findings pursuant to RCW 26.09.191(2)(a)(ii) because the child disclosed the father had touched him in a sexually inappropriate manner. Final Parenting Plan Finding 2.1, CP 200. Order re Modification, Finding 2.2(B) and (F). CP 224. The court then appropriately ordered limitations reasonably calculated to address the identified harm. *In re Marriage of Katare*, 125 Wn. App. 813, 826, 105 P.3d 44 (2004).

The limitation was to delay contact between Derek and Nick until completion of a psycho-sexual evaluation primarily based upon the following:

1. Derek made disclosures of sexual abuse by his father to a trained professional and the signs of sexual abuse are significant. Order re Modification, Finding 2.2(B) and (F). CP 224

2. The father has ignored the warning signs inherent in Derek's behavior. Order re Modification, Finding 2.2(D) CP 224
3. Derek is substantially traumatized and is expressing feelings of hate toward his father and that he wants no contact with his father. Order re Modification, Finding 2.2(H). CP 225

RCW 26.09.191(2)(a) and (m)(i) authorizes such limitations:

The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to **protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time.** ... The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or **completion of relevant counseling or treatment.**

Emphasis added.

There is a risk of future harm because Derek disclosed sexual abuse, his behavior showed signs of sexual abuse, Nick ignored the warning signs of sexual abuse, and Derek has been substantially traumatized and is expressing hate and desire to have no contact with his father. The child's therapist testified the results of a psycho-sexual evaluation would be helpful in assessing the level of contact Derek and Nick should have. 1 RP 72 – 73. For all of these reasons, the trial court ordered a psycho-sexual evaluation to assess the level of risk of future harm if Derek has contact with Nick again. Order re Modification, Finding 2.2(G). CP 225. The trial court ordered a psycho-sexual evaluation to

assist in development of an appropriate therapeutic reunification plan between Derek and Nick. Order re Modification, Finding 2.2(I). CP 225 These treatment requirements are within the trial court's sound discretion under RCW 26.09.191(2)(a) and (m)(i).

The trial court appropriately retained jurisdiction on this case to review what contact would be appropriate in the future based upon the results of the psycho-sexual evaluation and therapeutic reunification counseling. Order re Modification, Finding 2.2(I). CP 225. *In re Marriage of Burrill*, 113 Wn. App. 863, 872, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003); *In re Marriage of True*, 104 Wn. App. 291, 16 P.3d 646 (2000).

Relying upon *In re Marriage of Ricketts*, 111 Wn. App. 168, 43 P.3d 1258 (2002) Appellant objects to the court's order to undergo a psycho-sexual evaluation. *Ricketts* found that the plethysmograph procedure involved in a psycho-sexual evaluation was highly invasive and a violation of fundamental liberty interest. *Ricketts* at 171. From that perspective *Ricketts* stated: "the trial court abused its discretion by ordering the father to submit to a plethysmograph examination where the record reveals no finding of a compelling interest that outweighs the father's liberty interest." *Ricketts* at 173.

But *Ricketts* is distinguishable for two reasons: first, in this case, the trial court ordered the psycho-sexual evaluation **without** requiring a plethysmograph

as part of the evaluation. Final Parenting Plan dated July 11, 2014, Paragraph 3.10(2), CP 203.

In *Ricketts* the trial court ordered a full psycho-sexual evaluation including a plethysmograph. *Ricketts* at 170. The appellate court only vacated the portion of the order requiring a plethysmograph. *Ricketts* at 173 (“We vacate that portion of the order requiring John to submit to a plethysmograph examination and remand to the trial court.”) *Ricketts* does not hold that a psycho-sexual evaluation **without** a plethysmograph is impermissible. Hence, *Ricketts* is inapplicable because in this case the trial court specifically declined to order a plethysmograph as part of the psycho-sexual evaluation.

This case is also distinguishable due to the facts underlying the order for a psycho-sexual evaluation. In *Ricketts*, the order for a psycho-sexual evaluation with plethysmograph was based on “allegations” by one parent that “[the other parent] has exposed their daughter D.R., (three years old at the time) to pornography.” *Ricketts* at 170. This case is much different. Here the child has made disclosures of graphic sexual abuse to his counselor. Hence, in this case the record does show a compelling interest which outweighs the father’s liberty interest. This is not a request based solely on the allegations of one parent against another. The child has been in therapy for a year and has made disclosures to this medical professional of graphic sexual contact by the father against the child. Because *Ricketts* is factually distinguishable, a psycho-sexual

evaluation with plethysmograph could have been ordered by the trial court. Respondent urges this court to take the opportunity to clarify *Ricketts* by finding that in appropriate cases where the record reveals a compelling interest which outweighs the parent's liberty interest, a plethysmograph may be ordered.

Appellant also objects to the polygraph requirement of a psycho-sexual evaluation. His objection primarily is based upon a case indicating polygraphs are not admissible in criminal proceedings absent stipulation from both parties. Brief of Appellant, page 27. This case is distinguishable because it is a civil case. More importantly, this case is distinguishable because, despite Appellant's repeated yet inaccurate statements, the psycho-sexual evaluation with a polygraph was not ordered to determine what occurred in the past.

The psycho-sexual evaluation was ordered to assess "the risk of harm should Derek and the father have contact with each other in the future." Order re Modification, Finding 2.2(G). CP 225. Therapeutic reunification counseling will begin after Nick demonstrates "he is not a risk to the child through a psycho-sexual evaluation." Order re Modification, Finding 2.2(I). CP 225 The trial court is not using the psycho-sexual evaluation as a fact finding endeavor. The trial court ordered a psycho-sexual evaluation to assess the risk of future harm and assist the reunification therapist in working with Nick and Derek to resume visitation if it is appropriate in the future.

H. Respondent should be awarded attorney fees on appeal.

The trial court ordered Appellant to pay a portion of Respondent's attorney's fees on the basis intransigence. The court found:

The father's conduct was in bad faith and intransigent. He has ignored the obvious warning signs exhibited by Derek and has not engaged in this process in an open, honest and appropriate fashion. The father's conduct has unnecessarily increased the cost of the litigation.

Order re Modification, Finding 2.2(K). CP 225

Appellant has not assigned error to this Finding. Appellant has not assigned error to the judgment for attorney fees at CP 222 and 227.

On appeal, the Appellant is similarly intransigent. Appellant did not comply with the Rules of Appellate Procedure. Appellant misstates the record and fails to cite to the record on numerous occasions. Appellant has cited to materials not contained in the record before the trial court. Appellant has argued minor issues on appeal he did not raise at trial. Appellant has made numerous allegations with little or no meaningful analysis or argument but which Respondent must still address nonetheless.

Attorney's fees should be awarded on appeal for having to defend a frivolous appeal. RAP 18.1, RCW 4.84.185. An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. *In re Recall of City of Concrete Mayor Robin Feetham*, 149 Wash.2d 860, 872, 72 P.3d 741 (2003). Here there are no issues on which

reasonable minds can differ and the crux of the case were the disclosures Derek made to his therapist which were fully admissible and for which Appellant provided no meaningful argument against admission and the disclosures to the therapist were properly admitted because they fall squarely within the ER 803(a)(4) exception. In light of disclosures Derek made to his therapist, the other issues were totally devoid of merit.

IV. CONCLUSION

For all of the reasons set forth above, Lisa requests the trial court be affirmed and that she be awarded her fees and costs on this appeal.

DATED this 5TH day of APRIL 2015.

RESPECTFULLY SUBMITTED,



Daniel N. Cook, WSBA #34866
Attorney for Respondent Lisa Christensen

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DECLARATION OF TRANSMITTAL

STATE OF WASHINGTON

I certify under penalty of perjury that on the 5th day of May, 2015, by Ch
DEPUTY

I transmitted a copy of this RESPONDENT'S RESPONSE BRIEF to the
individuals and via the method(s) designated below:

Nicholas Conklin 22321 - 114th Pl SE Kent, WA 98032	Transmitted via: <input checked="" type="checkbox"/> First-Class US Mail <input type="checkbox"/> Facsimile to (253) 756-0355 <input checked="" type="checkbox"/> Email to nick.f.conklin@gmail.com <input type="checkbox"/> Legal Messenger for Hand Delivery
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Dated at Lakewood, Washington this 5th day of May 2015.

Sally DuCharme
Sally DuCharme, Legal Assistant

I certify under penalty of perjury that on the 5th day of May, 2015, I
transmitted a copy of this RESPONDENT'S RESPONSE BRIEF to the
individuals and via the method(s) designated below:

Original delivered to: Court of Appeals, Division II Clerk's Office 950 Broadway, Suite 300 Tacoma, WA 98402-4427	Transmitted via: <input type="checkbox"/> First-Class US Mail <input type="checkbox"/> Facsimile to (253) 756-0355 <input type="checkbox"/> Email to coa2filings@courts.wa.gov <input checked="" type="checkbox"/> Legal Messenger for Hand Delivery
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Dated at Lakewood, Washington this 5th day of May 2015.

Sally DuCharme
Sally DuCharme, Legal Assistant