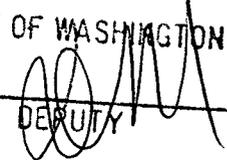


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COURT OF APPEALS  
DIVISION II

2015 DEC 24 AM 11:08

STATE OF WASHINGTON

BY    
DEPUTY

No. 47809-9-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

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In re: Marriage of Gray

MICHAEL KENICHI GRAY, Petitioner,

v.

SARA JUNE GRAY, Respondent

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APPELLANT'S OPENING BRIEF

---

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5/18/15  
P.M. W.D.

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## **ASSIGNMENT OF ERROR & ISSUES**

### **A. Assignments of Error**

1. The trial court erred in denying the Petitioner's counterclaim to modify the current Parenting Plan on May 18<sup>th</sup>, 2015.

2. The trial court erred in denying the Petitioner's Motion for Reconsideration on July 2<sup>nd</sup>, 2015.

3. The trial court abused its discretion and failed to limit provisions and impose restrictions in the Parenting Plan pursuant to RCW 26.09.191(3)(e).

4. The trial court abused its discretion and failed to provide for the children's best interest pursuant to RCW 26.09.002, RCW 26.09.004, RCW 26.09.184(g), RCW 26.09.260(1).

5. The trial court abused its discretion by not applying the standards set forth in RCW 26.09.260(2)(c).

6. The trial court erred by discounting the substantive and relevant evidence presented in this case and at trial.

7. The trial court erred by failing to acknowledge Ms. Gray's admittance of abusive use of conflict by avoiding the averments of the counter complaint in her answer.

**B. Issues pertaining to the Assignments of Error**

1. Was the evidence provided in this case adequate to support Mr. Gray's counterclaim?

(Assignment of Error #1, #2, #6)

2. Was the evidence provided in this case and the testimony of Ms. Gray at trial relevant to apply the standards set forth in the statute?

(Assignment of Error #3, #4, #5, #6)

3. Was Ms. Gray's acknowledgement of the counter complaint and avoidance of admitting or denying the allegations an admittance pursuant to CR 8(d)?

(Assignment of Error #7)

4. How was the evidence Mr. Gray provided and accepted by the trial court, which mirrors case law mentioned in trial, insufficient to prove an abusive use of conflict committed by Ms. Gray?

(Assignment of Error #7, #8)

#### **Statement of the Case**

The parties were married February 8<sup>th</sup>, 2008. The separation occurred March 11<sup>th</sup>, 2011 according to the Petition for Dissolution filed March 25<sup>th</sup>, 2011 and the Findings of Fact signed May 11<sup>th</sup>, 2012.

The Parenting Plan, which was approved February 1<sup>st</sup>, 2012 *CP 39-52*, has been motioned for modification twice by Ms. Gray. The first time was March 31<sup>st</sup>, 2014, just days after Mr. Gray initiated mediation with Ms. Gray through Pierce County Center for Dispute Resolution on March 21<sup>st</sup>,

2014 CP 72. Ms. Gray also obtained a temporary restraining order at that time for the children against Mr. Gray based on allegations deemed to be unfounded by Child Protective Services CP 2-3.

Ms. Gray had the children questioned by their pediatrician on April 14<sup>th</sup>, 2014 who stated their son, E.G, did not disclose any information CP 6-10. Ms. Gray also had the children begin to see a Licensed Mental Health Counselor Associate on April 29<sup>th</sup>, 2014 about the matter for several sessions. The children never disclosed anything negative about Mr. Gray.

The court ordered on May 28<sup>th</sup>, 2014 that the restraints against Mr. Gray remain in place and regular visitation would not resume again until June 30<sup>th</sup>, 2014, a total of 91 days from the beginning of the restraints. This modification was dismissed being that adequate cause was not found and the court ordered mediation take place.

Mediation occurred on June 26<sup>th</sup>, 2014 with the parties not coming to any sort of agreement.

Ms. Gray petitioned to modify the parenting plan again on September 5<sup>th</sup>, 2014 *CP 25-54*. Ms. Gray's basis for modifying the plan did not meet the standard for a substantial change in circumstance pursuant to 26.09.260. Ms. Gray did not object to Mr. Gray's relocation when she was notified in 2012, nor is the non-custodial parent's relocation a matter of discussion pursuant to RCW 26.09.480(1).

The court did however grant adequate cause on October 9<sup>th</sup>, 2014 and Ms. Gray attempted to temporarily change the parenting plan on several occasions without success. The summons and petition that Ms. Gray filed September 5<sup>th</sup>, 2014 were improperly served on Mr. Gray in accordance with CR 4(d) by being served to Mr. Gray electronically and not in person. The commencement of the

case began when Mr. Gray filed an Acceptance of Service on April 3<sup>rd</sup>, 2015.

Mr. Gray also filed his Response and supporting documents the same day. Before serving Ms. Gray with these filings, amended versions were filed on April 22<sup>nd</sup>, 2015. Ms. Gray was served with the amended and the initial filings the same day in accordance with CR 15(a). A Settlement Conference was held as scheduled on May 5<sup>th</sup>, 2014 with Judge Hickman with no resolution.

Judge Arend , who was initially presiding over the case, was unable to hear the matter the day of trial being that the Court was currently in trial on another case. The case was immediately referred to Judge Nevin, who after briefly addressing the parties, resumed trial after a short recess. After hearing testimony from both parties and evidence provided by Mr. Gray, the Court denied both Motions to Modify the Parenting Plan *CP 286, CP 121-126*.

Mr. Gray filed a Motion for Reconsideration and Declaration in Support on May 27<sup>th</sup>, 2015 CP 287. Ms. Gray filed an untimely Reply to the Motion on June 17<sup>th</sup>, 2015. The Court allowed a continuance being that Mr. Gray had insufficient time to respond. Both parties provided another declaration regarding the matter prior to the Court hearing the matter on July 2<sup>nd</sup>, 2015. The Court's decision after hearing testimony from both parties was that his ruling would stand and the Motion for Reconsideration was denied.

### **ARGUMENT**

The Court's ruling to deny the counterclaim to modify the current Parenting Plan and the Motion for Reconsideration were inconsistent and contradictory to the substantial evidence provided to the Court. Substantial evidence is found if "it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise" *In Burrill v. Burrill*, 56 P.3d 993, 113 Wash. App. 863 (Ct. App. 2002); *In*

*In MATTER OF MARRIAGE OF SADETTANH v.*

*SADETTANH, No. 68052-8-1 (Wash. Ct. App. Jan. 7, 2013).*

A trial court's rulings dealing with the provisions of a parenting plan are reviewed for abuse of discretion *In re Marriage of Littlefield, 940 P.2d 1362, 133 Wash. 2d 39 (1997); In Marriage of Kovacs, 854 P.2d 629, 121 Wash. 2d 795 (1993)*. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In Marriage of Kovacs, 854 P.2d 629, 121 Wash. 2d 795 (1993); In Wicklund, 84 Wash.App. at 770 n. 1, 932 P.2d 652; In re Marriage of Littlefield, 940 P.2d 1362, 133 Wash. 2d 39 (1997)*.

At the reconsideration hearing, the Court misquoted RCW 26.09.260(1) "A Court may modify a child custody decree or parenting plan if it finds there has been a substantial change in circumstances of the child with the nonmoving party and that the modification is in the best interest of the child. And, three, modification is necessary to

*serve the best interests of the child.*" The statute states that on a basis of facts that have arisen since the prior decree or plan, 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 it is in the best interest of the child.

The substantive evidence provided throughout the filings and testimony support Mr. Gray's request to modify the current parenting plan under RCW 26.09.260(2)(c) by placing restrictions in the parenting plan pursuant to 26.09.191(3)(e). If the court finds that the child's present environment is detrimental to the child's physical, mental, or emotional health, a change of environment outweighs the advantage of a change to the child. It is presumed that the best interest of the child is served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical,

mental, or emotional harm *In Marriage of Kovacs*, 854 P.2d 629, 121 Wash. 2d 795 (1993).

The child's "present environment" would pertain to the one being provided to the child by the residential parent *Ambrose v. Ambrose*, 67 Wn. App. 103, 834 P.2d 101 (1992).

In *Burrill v. Burrill*, 56 P.3d 993, 113 Wash. App. 863 (Ct. App. 2002) the court held that Cindy Burrill had engaged in abusive use of conflict with no evidence that the children had been alienated from their father, only that a danger of psychological damage exists.

*In Burrill v. Burrill*, 56 P.3d 993, 113 Wash. App. 863 (Ct. App. 2002) Cindy strenuously opposed any contact by both children with their father, supervised or otherwise, despite the fact that they were well bonded with him and enjoyed being with him. Indeed, for a period of nearly nine months, the children either did not see their father, or had very limited access to him. This severe impairment of parent/child contact, especially when considered in light of the numerous interviews A.B. was subjected to asking her about the bad things her daddy did to her, constitutes sufficient evidence from which the trial court could conclude that Cindy created a danger of serious psychological damage to the children

The danger is apparent in the letter provided by the therapist for the Gray children, Kimberly Green, LMFT. She states her opinion regarding E.G., the oldest child, *“his anxiety was an accumulation of holding in his thoughts and feelings and the stress he was experiencing due to the parental conflict.”* Also, in regards to E.G. *“consistently states over the past four month that he feels he does not get to spend enough time with his father”*. CP 24

Ms. Gray's further illustrates her abusive use of conflict in her declaration filed May 15<sup>th</sup>, 2015 *“The only area of concern that I have that a GAL would be helpful with is the domestic violence between Mr. Gray and Ms. Montgomery. However it is already a topic of discussion in Evan's counseling sessions. CPS has already completed an investigation”* CP 110.

Ms. Gray continued to discuss her unsubstantial and unfounded claims in her testimony in trial with the court on May 18<sup>th</sup>, 2015 RP 5/18/2015 49-51, CP 176-178.

Ms. Gray: *"If my kids come home to me and say, Daddy threw Sara(h) against the wall and choked her, I have an obligation to my children to report that. And I have every right to ask for a restraining order. I have no control over the people that monitor that sort of thing like CPS who do the investigations"*

The court: *"Which they did, correct?"*

Ms. Gray: *"They did do an investigation."*

The court: *"They said it was unfounded."*

Ms. Gray: *"They said it was unfounded. I can see why. Ms. Montgomery denied it and they have no choice to label that as unfounded. Now, a year later - -"*

The court: *"What evidence do you have that it happened?"*

Ms. Gray: *"I don't have physical evidence, I have the testimony of our children."*

The court: *"Actually, you don't have the testimony of your children."*

Ms. Gray: *"You're right, it is my word. And unfortunately, I had to put myself in this position. And I wish it were different, I really do. But like I said, when my child comes to me and tells me that something like this happened – and I did my own questioning with them because kids can be confused, and I wanted to make sure that they knew what they were talking about. And it got to the point where (E.G.) was upset with me because I asked him too many times, and he got mad at me and said, nobody believes me."*

Later at trial she acknowledges *"I know the law. And if I were do anything now, then I would be using abuse of*

*conflict, but I'm not. I'm simply doing what any good parent would be doing". RP 5/18/2015 51,CP 178. This contradicts her actions by addressing the unfounded claims of domestic violence in the initial intake information given to therapist Kimberly Green LMPT on November 21<sup>st</sup>, 2014 CP 301-302.*

Even after trial, Ms. Gray blatantly abuses conflict in her declaration in response to the Motion for Reconsideration on June 25<sup>th</sup>, 2015. *"He lied that the children didn't report domestic violence between him and his girlfriend. Both boys told the CPS worker and myself. (E.G.) also told my father, William Sutton, who wrote his testimony in April 2014 and filed it with the court. Just because CPS labeled a case unfounded doesn't mean it didn't happen. It just means that they couldn't prove it. My action of responsibly reporting it is not an abuse of conflict, its called parenting! The boys told 3 different people about the abuse. That is fact whether or not anyone else believes them. I do and to them, that is all that matters" CP 199.*

When Ms. Gray filed an untimely response to Mr. Gray's Reply in the form of a declaration on May 15<sup>th</sup>, 2015, she responds to the allegation of abusing conflict with the statement *"as for the accusation of abuse of conflict...again, the accusations are too numerous to respond to"* CP 110. Ms. Gray neither admits nor denies Mr. Gray's allegations in her responsive pleading. Failing to do either is an admittance of the averments pursuant to CR 8(d).

The Court cited several cases at the reconsideration hearing to support their decision, many of which are in regard to matters unrelated to this case. For instance in re Marriage of Taddeo-Smith, 110 P.3d 1192, 127 Wash. App. 400 (Ct. App. 2005), the disagreement in this case was regarding the consent of the children being integrated into the noncustodial parent's home while the custodial parent was hospitalized. The Court uses this case as an example and states *"And in the case I cited to a moment ago, in Taddeo-Smith, 127 Wn. App. 400, the Court says as follow,*

*and I am summarizing and paraphrasing: Custodial changes are viewed as highly disruptive to children. There is a strong presumption in favor of custodial continuity and against modification, 127 Wn. App. Page 400.” RP 7/2/2015 29* The reasoning for a custodial change in this case is due to the current damaging environment of the custodial parent. This greatly differs from the defense in the case cited by the Court.

The Court cites *IN RE FAIRFAX*, 286 P.3d 55 (Wash. Ct. App. 2012) first, with respect to whether there has been an inclusion of admissible evidence of facts that were unknown to the Court at the time the Court imposed a prior plan to establish adequate cause *RP 7/2/2015 28*. In the case cited, a parenting plan or residential schedule had never been established, only a determination of parentage. Therefore, adequate cause was not required for the father to petition for a parenting plan and residential schedule. There was no evidence required as there was no prior plan.

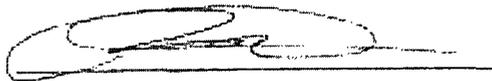
Second, the Court refers to this case with regards to determine a substantial change in circumstance *RP 7/2/2015* 29. Again, there was no residential schedule or parenting plan to defer from eliminating the possibility of requiring a change.

### **CONCLUSION**

In sum, RCW26.09.184, RCW26.09.187 and RCW26.09.191 complement each other. RCW 26.09.191(3)(e) permits a trial court to place restrictions on a parent's involvement in the child's life where there is "abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development." The statute does not require a showing of actual damage to the child's psychological development, only a danger of such damage *In re Marriage of Burrill, 113 Wn. App. 863, 872, 56 P.3d 993 (2002)*.

There is substantial evidence to prove an abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development. My claim and the substantial evidence was undisputed by Ms. Gray in her declaration and testimony. The court's decision should be altered and my proposed parenting plan filed 4/22/2015 should be adopted in the best interest of the children in accordance with RCW26.09.002 as required to protect the child from physical, mental, or emotional harm.

Respectfully submitted this 17<sup>th</sup> day of December, 2015

A handwritten signature in black ink, appearing to read "Michael Kenichi Gray", written over a horizontal line.

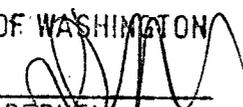
Michael Kenichi Gray

Appellant

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and.

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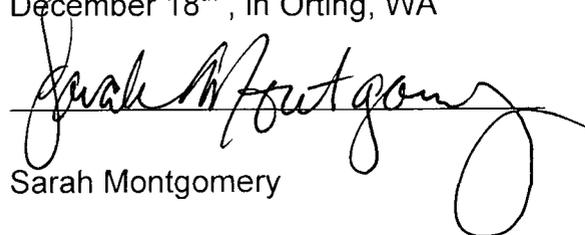
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APPELLANT'S OPENING BRIEF

Pierce Co. Superior Cause  
No. 11-3-01148-7

I certify under penalty of perjury under the laws of the State of Washington that, on the date stated below, I did the following:

On the 18<sup>th</sup> day of December 2015, I mailed by certified U.S. Mail with return receipt the Appellant's Opening Brief in the above-entitled matter to Sara Gray at the following address: 8615 185<sup>th</sup> Ave KP N Vaughn, WA 98394

December 18<sup>th</sup>, in Orting, WA

  
Sarah Montgomery