FILED

JAN 29 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 304426

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of: AMY V. LANE

Appellant,

v.

DAVID RYAN LANE

Respondent.

BRIEF OF RESPONDENT

ROBERT W. SEALBY, WSBA #21330
CARLSON, MCMAHON & SEALBY, PLLC
Attorneys for Respondent
37 South Wenatchee Avenue, Suite F
Wenatchee WA 98801
509-662-6131

FILED

JAN 29 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 304426

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of: AMY V. LANE

Appellant,

v.

DAVID RYAN LANE

Respondent.

BRIEF OF RESPONDENT

ROBERT W. SEALBY, WSBA #21330
CARLSON, MCMAHON & SEALBY, PLLC
Attorneys for Respondent
37 South Wenatchee Avenue, Suite F
Wenatchee WA 98801
509-662-6131

TABLE OF CONTENTS

		PAGE
I.	INTRODUCTION	1
II.	STATEMENT OF CASE	3
	A. Procedure	3
	B. Facts	6
III.	SUMMARY OF ARGUMENT	11
IV.	ARGUMENT	12
	A. Standard of Review	12
	B. The Trial Did Not Err in its Decision Regarding Ms. Holcomb's Motion for Reconsideration	14
	C. The Trial Court Did Not Err in Finding a Substantial Change in Circumstance and Entering a Temporary Parenting Plan That is in the Best Interest of the Children	16
	D. The Trial Court Did Not Err in Implementing a Temporary Parenting Plan That Was in the Best Interest of the Children	20
	E. The Trial Court Did Not Abuse its Discretion by Ordering the Temporary Parenting Plan Remain in Effect Despite Having Vacated the Adequate Cause Determination on Procedural Grounds	24
	F. The Trial Court Did Not Err in Concluding There Was no Irregularity in the Proceedings	28

TABLE OF CONTENTS CONTINUED

PAGE

G. The Trial Court did Not Abuse its Discretion in Entering a "50-50" Temporary Parenting Plan Based on the Facts Presented to it, the Volume of Pleadings Before the Court and the History of the Litigation 30

H. This Court Should Award Attorney's Fees to Mr. Lane..... 31

V. CONCLUSION 32

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

PAGES

Barefield v. Barefield, 69 Wn.2d 158,
417 P.2d 608 (1966) 14, 15, 16

Bower v. Reich, 89 Wn.App. 9, 964 P.2d 359 (1997) 18, 24, 25, 26

Fairfax v. Simpson, 170 Wn.App. 757,
286 P.3d 55 (2012) 13

In Re Jannot, 110 Wn.App. 16, 37 P.3d 1265 (2002) 13

In Re Marriage of Hoseth, 115 Wn.App. 563,
63 P.3d 164 (2003) 13, 17, 18, 31

In Re Marriage of Littlefield, 133 Wn.2d 39,
940 P.2d 1362 (1997) 30

In Re Marriage of Possinger, 105 Wn.App. 326,
19 P.3d 1109 (2001) 22, 27

In Re Parentage of Schroeder, 106 Wn.App. 343,
22 P.3d 1280 (2001) 13, 27, 30

Kinnan v. Jordan, 131 Wn.App. 738, 129 P.3d 807 (2006) 32

Little v. Little, 96 Wn.2d 183, 634 P.2d 498 (1981) 21

Loveless v. Yantis, 82 Wn.2d 754, 513 P.2d 1023 (1973) 28

Marriage of Mangiola, 46 Wn.App. 574, 732 P.2d 163 (1987) 19

Wilcox v. Lexington Eye Inst., 130 Wn.App. 234,
122 P.3d 729 (2005) 13

TABLE OF AUTHORITIES CONTINUED

WASHINGTON STATE STATUTES

	PAGES
RCW 26.09.002	22
RCW 26.09.004	21
RCW 26.09.140	31
RCW 26.09.187 (3)	16, 18, 19, 21, 23, 30
RCW 26.09.191	30
RCW 26.09.197	16, 27
RCW 26.09.260(2)(d)	19

COURT RULES

	PAGES
RAP 18.1 (a) (d)	31

I. INTRODUCTION

This Appeal stems from a Petition for Modification of a Parenting Plan filed in Chelan County Superior Court by Respondent, Mr. David Ryan Lane. After a hearing on June 3, 2011, where Appellant, Ms. Amy Virginia Holcomb, was afforded sufficient notice and opportunity to prepare, the Trial Court found Adequate Cause for the Modification. The Trial Court also entered a joint custody Temporary Parenting Plan that it viewed to be in the best interest of the parties' two children based on concerns the Court had for the children. The Temporary Parenting Plan provided for a "50-50" custody between Mr. Lane and Ms. Holcomb. Ms. Holcomb filed a Motion for Reconsideration.

On Reconsideration, the Trial Court vacated its previous Adequate Cause finding, but did not dismiss Mr. Lane's Petition for Modification. The Trial Court ordered that the "50-50" Temporary Parenting Plan it had previously ordered would remain in effect as it was in the best interest of the children. Ms. Holcomb filed a Notice of Appeal of the Superior Court's Order Granting in Part and Denying in Part her Request for Reconsideration. During the pendency of this Appeal, Ms. Holcomb also filed a Motion to Stay the Temporary Parenting Plan that was denied by the Division III Court of Appeals Court Commissioner.

While Ms. Holcomb assigns several points of error to the Trial Court's Order Granting in Part and Denying in Part her Request for Reconsideration, two (2) issues are before this Court. First, whether the Trial Court committed error on November 8, 2011 by denying Ms. Holcomb's Motion to Dismiss the Petition to Modify. Secondly, whether the Trial Court abused its discretion by ordering the "50-50" Temporary Parenting Plan that had been entered into previously remain in effect because it was in the best interest of the children.

Ms. Holcomb requests that this court dismiss Mr. Lane's Petition for Modification "on substantive and procedural grounds." (Brief of Appellant, at page 45). She further requests this court vacate the "50-50" Temporary Parenting Plan despite the Trial Court finding it was in the best interest of the children and despite a denial of her Motion to Stay the Temporary Parenting Plan.

During the course of this Appeal, Ms. Holcomb filed a Motion to Stay Enforcement of the Temporary Parenting Plan. Her Motion to Stay was filed on November 2, 2012 (17 months after the Trial Court entered the current "50-50" Temporary Parenting Plan).

Ms. Holcomb requests this Court dismiss Mr. Lane's Petition for Modification despite the fact that on December 14, 2012, in response to Appellant's Motion to Stay Enforcement of the Temporary Parenting Plan,

the Court of Appeals Commissioner denied Ms. Holcomb's Motion to Stay finding "given the fact the Temporary Parenting Plan has been in place for 17 months, the injury suffered by her if a stay were not imposed is less than the injury to Mr. Lane and the children if a stay were imposed . . ."

The Trial Court did not err in denying Ms. Holcomb's Motion to Dismiss the Petition to Modify. Further, the Trial Court did not abuse its discretion by ordering the "50-50" Temporary Parenting Plan remain in effect despite its decision to vacate the Adequate Cause finding. Accordingly, the decisions of the Trial Court should be affirmed.

Should this Court determine there was procedural error, the appropriate remedy would be a remand to the Trial Court for a proper Adequate Cause hearing.

II. STATEMENT OF CASE

A. Procedure.

On June 26, 2006, the Chelan County Superior Court entered a Final Parenting Plan after the dissolution between Ms. Holcomb and Mr. Lane was finalized. (CP 1-10). While several proceedings that related to the dissolution and the custody of Mr. Lane and Ms. Holcomb's children were held thereafter, this instant matter stems from a Petition for Modification of the Parenting Plan instituted by Mr. Lane in May of 2011.

On May 20, 2011, Mr. Lane filed a Summons and Petition for Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule. (CP 66-73). In addition, Mr. Lane filed a Motion and Declaration for Temporary Order, requesting approval of the Parenting Plan proposed by Mr. Lane, and to set the summer 2011 Residential Schedule. (CP 74-76).

On May 24, 2011, Ms. Holcomb was served by registered process server at her residence a Summons and Petition for Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule and Notice of Hearing for Adequate Cause. (CP 257). The Declaration of Service reflects that on May 24, 2011 Ms. Holcomb was served with a Declaration of David Ryan Lane (CP 77-212); Declaration of Jamie Lane (CP 215-227); Declaration of Alyssa Lane (CP 228-233); and Declaration of Robert Sealby (CP 234-256) as well. The Declaration of Service reveals that Ms. Holcomb received Notice of the Hearing for Adequate Cause Determination to be held June 3, 2011, at 8:30 a.m. (CP 213-214).

On June 3, 2011, after Motion and extensive hearing, the Trial Judge found Adequate Cause and orally adopted Mr. Lane's proposed Parenting Plan. (CP 383-388). Subsequently, a presentation hearing was held on August 10, 2011 to enter the "50-50" Temporary Parenting Plan.

(CP 411). By August 10, 2011, 427 documents had been filed in this matter for consideration by the Trial Court. (CP 411). At this August 10, 2011 hearing, the parties disputed the form of the Proposed Order Re Adequate Cause. (CP 304-307, CP 411). After making several factual findings, the Trial Court entered the Temporary Parenting Plan (retroactive to June 5, 2011) as well as the Order Re Adequate Cause. (CP 344-357, 383-388). Ms. Holcomb filed a Motion for Reconsideration on August 19, 2011. (CP 358-359).

On November 8, 2011, the Trial Court granted, in part, and denied, in part, Ms. Holcomb's Motion for Reconsideration. (CP 427-431). The Trial Court found the parents have a history of conflict and lack of cooperation. (CP 429). Further, the Trial Court expressed continued concern about the welfare of the children. (CP 429). In addition, the Trial Court justified that it entered the Temporary Parenting Plan because of the emergency that existed based upon the evidence presented. (CP 429-430).

Moreover, the Trial Court denied Ms. Holcomb's Motion to Dismiss Mr. Lane's Petition to Modify the Parenting Plan (CP 431) and ordered that the Temporary Parenting Plan that had been entered previously (orally on June 5, 2011) was to remain in effect. (CP 430). The Court also noted at the August 10, 2011 hearing that Ms. Holcomb had adequately responded to the substance of Mr. Lane's Petition and

commented that after reviewing all the supplemental submissions by Ms. Holcomb, the Court still found Adequate Cause and that the "50-50" Temporary Parenting Plan orally ordered on June 3, 2011 was in the best interest of the children.

The Trial Court did not dismiss the Modification action. (CP 431). The Trial Judge did not rule that there was no Adequate Cause either. (CP 430). Rather, the Trial Judge vacated the previous Adequate Cause determination on procedural grounds—leaving it open to be revisited at a later date. (CP 430). Moreover, on August 10, 2011, the Trial Court specifically ordered that the "50-50" Temporary Parenting Plan was to remain in effect. (CP 430).

B. Facts.

The facts set forth in Appellant's Brief, although contested to some extent, may assist this Court by providing context surrounding the dispute between Ms. Holcomb and Mr. Lane. The issues before this Court, however, are whether the Petition for Modication should be dismissed and whether the "50-50" Temporary Parenting Plan should be vacated.

On June 3, 2011, after Motion and extensive hearing, the Trial Judge found Adequate Cause and orally adopted Mr. Lane's proposed Parenting Plan. (CP 383-388). At the June 3, 2011 hearing, the Judge noted more than 400 documents had been filed in the case since its

inception. (CP 410). The Trial Judge expressed grave concern for the children's well being while residing in their mother's house. (CP 410). The Trial Judge further acknowledged that neither parent was without fault. (CP 410). The Trial Judge found that the actions of the parents affected their children. (CP 410). Further, while he could not stop their actions, the Trial Judge found that entering a new Temporary Parenting Plan would buffer these actions and better protect the children. (CP 410). As a result, on June 3, 2011, the Trial Judged orally approved a Temporary Parenting Plan that contained a "50-50" split custody arrangement for the children. (CP 348-57) Subsequently, a presentation hearing was held on entry of the Temporary Parenting Plan on August 10, 2011. (CP 411).

By August 10, 2011, 427 documents had been filed for consideration by the Trial Court. (CP 411). After reviewing Declarations submitted in support of Adequate Cause, Declarations filed in opposition to Adequate Cause, together with the additional pleadings filed during the pendency of the case and the court's history of presiding over numerous hearings involving the parties and the issue of placement of the children, counseling of the children, and Ms. Holcomb's refusal to participate in family counseling, despite Court order to do so, the Trial Court determined Adequate Cause existed for a full hearing to be held on Mr.

Lane's Petition for Modification of the Parenting Plan. (CP 384-85). Further, on August 10, 2011, when entering the Order Re: Adequate Cause, the Trial Court made the following findings:

(1) The parties had been unable to communicate during the course of 11 years (CP 386);

(2) The parties' inability to communicate affected their children (CP 386);

(3) Declaration of the daughter provided evidence that the children wanted to spend more time with their father (CP 386);

(4) The mother's abusive use of conflict created a detrimental environment for the children in the mother's household (CP 386);

(5) The mother's repeated requests that the police respond to the father's house without cause was not in the children's best interest (CP 386);

(6) The mother's refusal to return the children to their father for his visitation was not in the children's best interest (CP 386);

(7) The mother's insistence in calling the police without just cause was not in the best interest of the children (CP 386);

(8) The mother's disparaging remarks against the father in the presence of the children were not in the children's best interest (CP 386);

(9) The mother's admitted paranoia about the father in the children's presence was not in the best interest of the children (CP 386);

(10) The mother's significant other's disparaging remarks about the father in the children's presence was not in the best interest of the children (CP 386);

(11) The mother's comments to the children about child support were not in the best interest of the children (CP 386);

(12) The reduction of stress on the children by instituting a 50-50 shared parenting plan was in the best interest of the children (CP 387); and

(13) Implementation of a 50-50 shared parenting plan on a week-on, week-off schedule would buffer the actions of the parents and would be in the best interest of the children. (CP 386)

Notably, the Trial Court also concluded that the children's best interest would be served by a modification of the Parenting Plan, that the present environment in the mother's home was detrimental to the children's well-being, and that the harm caused by a change of custody would be outweighed by the advantage of a change in custody. (CP 386).

Moreover, at the August 10, 2011 hearing, the Trial Court did not disturb the Temporary Parenting Plan it had orally approved on June 3, 2011. (CP 386). Rather, the Trial Court found it would be in the best

interest of the children to keep the Temporary Parenting Plan in effect and the Trial Court entered a Temporary Parenting Plan containing a "50-50" residential schedule retroactive to June 5, 2011. (CP 348-357; (CP 386-87). Subsequently, Ms. Holcomb filed the Motion for Reconsideration that precipitated this appeal. (CP 358-59).

On November 8, 2011, the Trial Court granted in part and denied in part Ms. Holcomb's Motion for Reconsideration. (CP 427-31). At this time, the Trial Court found the parents had a history of conflict and lack of cooperation. (CP 429). Further, the Trial Court expressed continued concern about the welfare of the children. (CP 429). In addition, the court justified that it entered the Temporary Parenting Plan because of the emergency situation that existed for the children based upon the evidence presented. (CP 429-30).

The Trial Court denied Ms. Holcomb's Motion to Dismiss Mr. Lane's Petition to Modify the Parenting Plan (CP 431), vacated the Order concerning Adequate Cause (CP 430), and ordered that the Temporary Parenting Plan that had been entered into previously on August 10, 2011 was to remain in effect (CP 430). The Trial Court did not vacate the findings it made on August 10, 2011. Notably, the modification action was not dismissed. (CP 431). The Trial Judge did not rule that there was no Adequate Cause, but rather vacated its previous Adequate Cause

determination — leaving it open to be revisited at a later date. (CP 430). Moreover, the court specifically ordered that the "50-50" Temporary Parenting Plan was to remain in effect. (CP 430).

Since June 5, 2011, the parties have followed the "50-50" Temporary Parenting Plan (which was memorialized in writing and entered on August 10, 2011) and the children have spent an equal amount of residential time with each parent.

III. SUMMARY OF ARGUMENT

The Trial Court was not required to vacate the Temporary Parenting Plan merely because it vacated the Adequate Cause finding on November 8, 2011. The Temporary Parenting Plan was found to be in the best interests of the children and, therefore, ordering that the Temporary Parenting Plan remain in effect was a proper exercise of the Trial Court's discretion.

Further, because the Trial Court's decision to vacate the Adequate Cause finding was not a substantive evaluation on the merits of Mr. Lane's Petition to Modify, but rather rooted in procedure, its denial of Ms. Holcomb's Motion to Dismiss was appropriate. The Trial Court merely reversed its earlier denial of a request for a continuance by Ms. Holcomb and thus also vacated the previously entered finding of Adequate Cause. This did not amount to a ruling that Mr. Lane failed to meet his burden of

demonstrating the existence of a substantial change of circumstances and that the modification was in the best interest of the children.

Rather, the Trial Court merely provided Ms. Holcomb additional time to prepare for an attempt to rebut Mr. Lane's Petition. Moreover, assuming *arguendo* a procedural deficiency deprived Ms. Holcomb of substantial justice, the appropriate remedy at this juncture would be remand to the Trial Court for an appropriate Adequate Cause Determination.

In sum, the Trial Judge, who is intimately familiar with all the circumstances surrounding this dispute, acted within his sound discretion by ordering that the Temporary Parenting Plan remain in effect because it is in the children's best interest. It was in the children's best interest not only on June 5, 2011, but continued to be in the children's best interest on November 8, 2011, and currently as well. This decision should not be disturbed now.

If any relief should be afforded to Ms. Holcomb by this Court, a remand for an Adequate Cause Determination is the appropriate relief.

IV. ARGUMENT

A. Standard of Review.

Generally, "[m]otions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a

trial court's ruling absent a showing of manifest abuse of discretion." Wilcox v. Lexington Eye Inst., 130 Wn.App. 234, 241, 122 P.3d 729 (2005). "A trial court abuses discretion when its decision is based on untenable grounds or reasons." Id.

Further, "a superior court's rulings with respect to a parenting plan [are reviewed] for abuse of discretion." In re Marriage of Hoseth, 115 Wn.App. 563, 569, 63 P.3d 164 (2003). A court has "broad equitable power" to implement placement decisions. Fairfax v. Simpson, 170 Wn.App. 757, 765, 286 P.3d 55 (2012). Accordingly, appropriate deference should be given to the trial judge's discretion concerning child placement dispositions. See In Re Parentage of Schroeder, 106 Wn.App. 343, 349, 22 P.3d 1280 (2001) ("Because of the trial court's unique opportunity to observe the parties, the appellant court should be 'extremely reluctant to disturb child placement dispositions.'") (citations omitted); In Re Jannot, 110 Wn.App. 16, 19-20, 37 P.3d 1265 (2002). "Parenting plans, and particularly custody of children, are matters that are very individual . . . Deference to a trial judge's discretion recognizes that there must be 'individual agent' in the administration of justice." (citation omitted).

B. The Trial Did Not Err in Its Decision Regarding Ms. Holcomb's Motion for Reconsideration.

Ms. Holcomb cites Barefield v. Barefield, 69 Wn.2d 158, 417 P.2d 608 (1966) to support her position that deficiencies in service prior to the Adequate Cause Hearing prevented her from having a fair hearing, and thus rendered the trial court's decision contrary to law. In Barefield, however, the trial court improperly relieved the father from the burden of having to demonstrate fitness as a parent. Id. at 163. The trial court in Barefield also deprived the mother of any opportunity to rebut the father's demonstration of fitness. Id. at 163. This is not the case here as Mr. Lane was not relieved of any burden, and Ms. Holcomb was provided an opportunity to present evidence or otherwise rebut Mr. Lane's Petition.

Ms. Holcomb was, in fact, provided ample opportunity to respond to the Petition filed by Mr. Lane. Ms. Holcomb was personally served well in advance of the Adequate Cause hearing. The documents provided to Ms. Holcomb provided her notice that Mr. Lane intended to modify the Parenting Plan. Mr. Lane set forth the grounds upon which he sought modification and provided supporting declarations as well. Mr. Lane's declaration states that he intended to ask the Trial Court to modify the current custody arrangement to joint ("50/50"), if not, full custody to him. See (CP 78: "I feel that I have no choice but to ask for full custody . . . CP

90-91: "Once Mr. Madsen told Ms. Holcomb that he felt it would be good for the kids if we started split custody, she once again defied the court's order and refused to see Mr. Madsen, despite the courts (sic.) directions to do so." CP 99: "I see no reason why we should not follow Dr. Madsen's suggestion and start joint custody." CP 101: "I just ask you to please make the right decision and grant me joint custody of my kid . . .").

Instead of preparing her rebuttal and gathering evidence, Ms. Holcomb instead arrived at the Adequate Cause Hearing unprepared and requested a continuance. At this time, the Trial Judge expressed concern for the children's well being while residing in their mother's house. (CP 410). Further, it is not as if the Trial Judge had not considered any evidence surrounding the dispute prior to the June 3, 2011 hearing. In fact, the Judge noted that several hundreds of documents had been filed in the case since its inception. (CP 410). After finding the actions of the parents affected their children and expressing concern that further continuation of this dispute would only harm the children more, the Trial Judge denied Ms. Holcomb's request for a continuance (CP 410).

Accordingly, Barefield is distinguishable for several reasons. Not only did the court not address the issue of a temporary parenting plan in Barefield, but Mr. Lane was not improperly relieved of meeting any burden and Ms. Holcomb was provided notice of the hearing in advance

and opportunity to respond. Moreover, in Barefield, the appropriate remedy was a further hearing. Id. at 165. Should Ms. Holcomb demonstrate an irregularity in the proceeding, the proper remedy would be remand for an appropriate Adequate Cause Determination by the Trial Court.

Barefield does not stand for the proposition that this Court should vacate the Temporary Parenting Plan orally ordered by the Trial Court on June 3, 2011 and subsequently reaffirmed by the Trial Court on August 10, 2011. Notwithstanding any procedural inadequacy alleged by Ms. Holcomb, after reviewing extensive evidence and the voluminous Court file, the Trial Judge exercised his sound discretion by entering a Temporary Parenting Plan he found to be in the children's best interest. This Court should not disturb that ruling now.

C. The Trial Court Did Not Err in Finding a Substantial Change in Circumstance and Entering a Temporary Parenting Plan That is in the Best Interest of the Children.

RCW 26.09.197 contains the criteria for issuance of a Temporary Parenting Plan and directs the Trial Court to also consider "the factors used to determine residential provisions in the permanent Parenting Plan."

RCW 26.09.187 contains the criteria for establishing a permanent Parenting Plan. RCW 26.09.187(3)(a)(v)(vi) sets forth factors the Court

shoulder consider when making residential provisions for each child, stating:

> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
>
> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

In regards to modification of a parenting plan, one parent's new relationship may be considered in finding a substantial change in circumstances. This is the case because a new relationship may provide a more inviting environment for the child. See In Re Hoseth, 115 Wn.App. 563, 572, 64 P.3d 164 (2003) (commissioner did not abuse discretion by noting "a new domestic partner was certain to have an impact on [the child]"). Here, one ground for a change of circumstance of the children is that Mr. Lane entered into a new domestic relationship and had another child. As described in Hoseth, that Mr. Lane entered into a new relationship affects the children as well. The new environment with a new sibling is more inviting.

Ms. Holcomb erroneously contends that Hoseth stands for the proposition that Mr. Lane's new relationship may support a minor modification, but will not support a major modification. (Brief of

Appellant, at pages 32-33). Ms. Holcomb is correct, however, insofar as she recognizes the statutory standards governing a minor and major modification distinguish between changes that affect the moving party, the child, or the non-moving party. See, e.g., Bower v. Reich, 89 Wn.App. 9, 18, 964 P.2d 359 (1997) (noting that for a minor modification, a substantial change in moving party's circumstances is enough; however, a major modification requires a substantial change in the child or non-moving party's circumstances). Hoseth, however, would seem to contradict Ms. Holcomb's argument that Mr. Lane's new wife would be a "change in Mr. Lane's circumstances, not the mother's or the children's." (Brief of Appellant, at page 32).

After all, the Hoseth Court recognized "a new domestic partner was certain to have an impact on [*the child*]," and "[the father's] new domestic situation could be characterized as a substantial change." Id. at 572. (emphasis added). The declaration of the parties' daughter indicating she wanted to spend more time with her new sister (CP 230) confirms the new environment with Mr. Lane was positive and more inviting as well. The Trial Court did not err in considering Mr. Lane's the new daughter as a relationship constituting a substantial change in circumstances which is permitted pursuant to RCW 26.09.187(3)(a)(v).

Likewise, Ms. Holcomb's reliance on Marriage of Mangiola, 46 Wn.App. 574, 732 P.2d 163 (1987), is misplaced. In Mangiola, the evidence considered by the court included an affidavit by the mother containing only "vague and general allegations" that the children were unhappy. Id. at 578. In this case, the parties' daughter clearly stated her wishes explicitly in a declaration. (CP 228-233). Simply stated, she wanted to spend more time with her father. (CP 233) ("All I want is to be with my dad more than 10 days a month."). This supports entry of the Temporary "50-50" Parenting Plan pursuant to RCW 26.09.187(3)(a)(vi) and supports the Trial Court's consideration of the daughter's wishes when determining there was a substantial change in circumstances of the parties' daughter.

Ms. Holcomb also suggests the court can only consider her failure to attend a psychiatric evaluation when making its determination as to residential placement if Mr. Lane had asked the Trial Court to hold her in contempt. Although RCW 26.09.260(2)(d) provides that a court can modify a parenting plan should it have found a nonmoving parent in contempt of court at least twice within three (3) years because the parent failed to comply with the residential time provisions in the court ordered parenting plan, there is nothing preventing a court from considering a party's disobedience insofar as it may relate to the children's best interest.

Adopting Ms. Holcomb's logic — my bad behavior can only be considered by the Trial Court if Mr. Lane had asked the court to hold me in contempt — is not consistent with the principles underlying Washington's modification statutes and cases that custody litigation is harmful to children. (as emphasized in Brief of Appellant, at page 33).

Mr. Lane avoided further protracted litigation by not commencing additional contempt proceedings, although the record reflects he may have been justified. The "Mr. Lane should have asked the Trial Court to hold me in contempt" argument of Ms. Holcomb exemplifies her tendency to disregard the affect such hearings have on her children.

In sum, the Trial Court did not err in finding a substantial change in circumstances existed.

D. The Trial Court Did Not Err in Implementing a Temporary Parenting Plan That Was in the Best Interest of the Children.

Ms. Holcomb argues the Trial Court could only have found an emergency if Mr. Lane had obtained an Ex Parte Restraining Order to remove his children from Ms. Holcomb's home. (Brief of Appellant, at page 37). However, she cites no legal authority to support this position. Ms. Holcomb attempts to fault Mr. Lane for not over-utilizing litigation. Again, Ms. Holcomb demonstrates her lack of concern for the affect this dispute has on her children. Further, Ms. Holcomb proceeds to attack the

credibility of her daughter and fails to provide adequate support for why her daughter's declaration should not have been considered by the Trial Court. RCW 26.09.187(3)(a)(vi).

RCW 26.09.004 contains definitions the Court must consider in making a decision regarding a Parenting Plan. In particular, RCW 26.09.004(2)(a)(b)(c)(d) states:

> (2) "Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:
>
> (a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;
>
> (b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
>
> (c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
>
> (d) Assisting the child in developing and maintaining appropriate interpersonal relationships;

It is well-established that a court has the equitable power to make a temporary order as to child custody when it is in the child's best interest. See, e.g., Little v. Little, 96 Wn.2d 183, 195-98, 634 P.2d 498 (1981).

This is consistent with the fundamental policy that the child's best interest is of paramount importance as set forth in RCW 26.09.002.

RCW 26.09.002 states:

> Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily 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.

Further, "]t]he authority of the superior courts over matters relating to the welfare of minor children is not derived from statute alone but also from common law." In Re Marriage of Possinger, 105 Wn.App. 326, 333, 19 P.3d 1109 (2001). In her declaration, the parties' daughter stated: she loved her parents equally; she didn't like it when her parents fought; and that she wanted to spend more time with her dad because she now has a new baby sister. (CP 230). She also indicated that her mom was

interfering with her dad's visitation time. (CP 230, 231). She detailed her relationship with her parents, the anguish she felt because of the controversy, and expressed to the judge: "So please, oh please, try and understand where I'm coming from. All I want is to be with my dad more than 10 days a month." (CP 233).

Although Mr. Lane did not pursue an Ex Parte Restraining Order there was nevertheless a substantial change in circumstances. The Temporary Parenting Plan was entered after careful consideration of a voluminous record and a determination by the Trial Judge that entering the "50-50" Parenting Plan was in the children's best interest. Ms. Holcomb's contention that an emergency must be present to justify entering a Temporary Parenting Plan is unsupported by case law and contradictory to the established principle that the best interest of a child is of paramount importance.

While young adults, like the parties' daughter, may not always know what is best for them, they can still voice opinions that are valid and should be heard: opinions that ought to be considered by those around them and that ought to be considered by a court when making a determination concerning living arrangements. RCW 26.09.187(3)(a)(vi). Ms. Holcomb cites no authority to support her position that the Trial Court erred by considering the declaration of the parties' daughter.

Moreover, to the extent it has been implied by Ms. Holcomb, there is no evidence that Mr. Lane used the Petition in 2011 to harass Ms. Holcomb. Ms. Holcomb's implication that Mr. Lane brought the Petition to Modify for the purpose of harassment, coupled with her unsupported allegations that a sufficient emergency was not present and equally unavailing reasons why her daughter's own preferences should not be considered, are insufficient to demonstrate that the Trial Judge abused his discretion by implementing the Temporary Parenting Plan. If anything, the ruling of the Trial Court, as supported by the record, demonstrates Mr. Lane filed and served the Petition to Modify with the best interest of the children in mind.

E. The Trial Court Did Not Abuse its Discretion by Ordering the Temporary Parenting Plan Remain in Effect Despite Having Vacated the Adequate Cause Determination on Procedural Grounds.

"In light of the Parenting Act's guiding concern for the best interests of the child, it would be absurd to hold that a court has no discretion to change a child's living arrangements until a full trial can occur." Bower v. Reich, 89 Wn.App. 9, 19, 964 P.2d 359 (1997). In Bower, the mother proposed a modification of the parenting plan based on a change of residence. Id. at 18. After a hearing, the commissioner found adequate cause and also entered a temporary order embodying a parenting

plan proposed by the mother that would authorize her and the child to move to California from Washington pending further court order. Id. After a motion for revision was filed by the father, the court vacated the order finding adequate cause and the temporary parenting plan. Id.

On appeal, the father in Bower contended that a temporary modification order should not issue automatically simply because the court found adequate cause to hear the Petition. Id. at 19. The father also argued that because the mother's proposal did "not meet the statutory requirements permitting modification," the mother and the daughter must therefore remain in Washington and comply with the existing parenting plan. Id. The Bower court expressly rejected this argument and concluded that [i]t was within the commissioner's discretion to approve the move as a temporary modification upon a showing by the mother that the temporary modification was in the child's best interest. Id. at 20. The Bower court reinstated the commissioner's order on adequate cause and the temporary parenting plan and remanded for setting a new trial date for the mother's petition for modification. Id.

Here, Ms. Holcomb makes a similar argument to that which was rejected by the court in Bower. Ms. Holcomb argues that vacating the Adequate Cause Order automatically requires that the Temporary Parenting Plan be nullified as well. As the court indicated in Bower, the

finding of Adequate Cause operates independently of a court's ability to enter a Temporary Parenting Plan. A court has the discretion to approve a temporary modification after it has been demonstrated that temporary modification would be in the best interest of the child. After all, "[i]t would be absurd to hold that a court has no discretion to change a child's living arrangements until a full trial can occur." Bower, 89 Wn.App. at 19.

Ms. Holcomb asks this Court to make a determination that the Trial Court abused its discretion when entering the Temporary Parenting Plan and then again when it elected to leave the Temporary Parenting Plan in effect despite its other rulings. She refuses to accept the Trial Court's determination that the "50-50" Temporary Parenting Plan is in the best interests of her children. In addition, Ms. Holcomb has failed to give adequate credence to the fact that Mr. Lane's Petition to Modify has not been dismissed.

Had no Adequate Cause been found, the Petition would have been dismissed. That is not the case here. Although the previous Adequate Cause Order was vacated, in effect, a ruling on Adequate Cause was reserved for a later date. The previous Adequate Cause Order was vacated on procedural grounds because the Trial Judge reversed its decision denying Ms. Holcomb's request for a continuance. The Trial Court has

not dismissed the Petition to Modify the Parenting Plan. In fact, the Trial Court specifically denied Ms. Holcomb's Motion to Dismiss. Thus, no final ruling has been made yet on whether Adequate Cause exists.

Moreover, pursuant to RCW 26.09.197, the Parenting Act establishes factors to be considered by the courts when entering a temporary or interim parenting plan, the Act "continues to give the trial court broad discretion when making [residential placements]." In Re Marriage of Possinger, 105 Wn.App. 326, 327, 19 P.3d 1109 (2001). "That where the best interests of the child requires it, the trial court is not precluded by the Parenting Act from exercising its traditional equitable power derived from common law . . . ." Id. at 336, 337.

Here, the Trial Court, after considering the voluminous record, and having had experience personally presiding over this case for several years, did not abuse its discretion when it ordered the Temporary Parenting Plan. Its decision should not be disturbed now. "Because of the trial court's unique opportunity to observe the parties, the appellant court should be 'extremely reluctant to disturb child placement dispositions.'" See, e.g., In Re Parentage of Schroeder, 106 Wn.App. 343, 349, 22 P.3d 1280 (2001).

Notably, the Commissioner of this Court exhibited appropriate reluctance by not staying the Temporary Parenting Plan when requested

by Ms. Holcomb. On November 2, 2012, Ms. Holcomb filed a Motion to Stay Enforcement of the Temporary Parenting Plan. Her Motion to Stay was filed 17 months after the Trial Court entered the current "50-50" Temporary Parenting Plan. On December 14, 2012, in response to Appellant's Motion to Stay Enforcement of the Temporary Parenting Plan, the Court of Appeals Commissioner denied Ms. Holcomb's Motion to Stay finding "given the fact the Temporary Parenting Plan has been in place for 17 months, the injury suffered by her if a stay were not imposed is less than the injury to Mr. Lane and the children if a stay were imposed . . ." (See Court Commissioner McCown's Decision dated December 14, 2012).

Ms. Holcomb has failed to demonstrate that the Trial Court abused its discretion by considering the best interest of the children and ordering the "50-50" Temporary Parenting Plan remain in effect.

F. The Trial Court Did Not Err in Concluding That There Was no Irregularity in the Proceedings.

Failure to follow the civil rules "requiring service of motions 5 days before the time specified for the hearing" is not per se fatal. See Loveless v. Yantis, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973) (deviation from time limit may be permissible when party had actual notice and time to prepare). Here, Ms. Holcomb does not dispute she was properly served

a Summons, Petition, Notice of Hearing for Adequate Cause, Motion and Declaration for Temporary Order, and declarations in support of these Motions. She was served these documents on May 24, 2011. She was served these documents personally as verified by a registered Process Server more than five (5) days in advance of the scheduled Adequate Cause Hearing.

These documents served on Ms. Holcomb provided her ample notice of the issues to be addressed at the Adequate Cause hearing. Ms. Holcomb knew what evidence Mr. Lane was presenting in support of his position. Mr. Lane's Declaration clearly stated he would be seeking joint/full custody. (CP 78, 79, 90-91, 99, 101).

Many of the same disagreements have been ongoing since Mr. Lane and Ms. Holcomb's divorce more than a decade ago as well. To accept that a procedural irregularity deprived Ms. Holcomb of due process would be indulging an overstatement. The pleadings served on Ms. Holcomb well in advance of the hearing provided her sufficient actual notice and an opportunity to prepare. Accordingly, the Trial Court did not err in concluding that there was no irregularity in the proceedings.

G. The Trial Court did Not Abuse its Discretion in Entering a "50-50" Temporary Parenting Plan Based on the Facts Presented to it, the Volume of Pleadings Before the Court and the History of the Litigation.

A trial court has discretion to make decisions concerning the rights of custody and visitation, and its decision will not be disturbed absent an abuse of discretion. In Re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). The decision of the Trial Court that the Temporary Parenting Plan should remain in effect must be afforded appropriate deference. See, e.g., In Re Parentage of Schroeder, 106 Wn.App. 343, 349, 22 P.3d 1280 (2001).

The Trial Court also has statutory authority pursuant to RCW 26.09.187(3)(b) to enter a Parenting Plan that provides for shared placement. RCW 26.09.187(3)(b) states:

> (b) Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties' geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

In this case, the Trial Court is intimately familiar with the parties and the circumstances surrounding this Appeal. As of August 10, 2011, more than 400 documents had been filed for consideration by the Trial

Court. (CP 411). Several hearings had been held as well. In presiding over Mr. Lane's Petition to Modify, the Trial Court made several findings and stated numerous reasons in concluding that the reduction of stress on the children and buffering the actions of the parents would best be accomplished by instituting a "50-50" Temporary Parenting Plan that would be in the best interest of the children. (CP 386-387). Appropriate deference should be afforded to the Trial Judge's informed decision. Because Ms. Holcomb has failed to demonstrate the Trial Judge abused its discretion by entering the 50-50 Temporary Parenting Plan, this Court should not disturb that decision now.

H. This Court Should Award Attorney's Fees to Mr. Lane

An Appellant Court has "discretion to award attorney fees to the prevailing party after considering the financial resources of both parties." RCW 26.09.140; RAP 18.1(a)(d). See also In Re Marriage of Hoseth, 115 Wn.App. 563, 575, 63 P.3d 164 (2003).

After consideration of the parties' Financial Declarations, and Mr. Lane's need compared with Ms. Holcomb's ability to pay fees, an award of attorney fees to Mr. Lane would be appropriate.

V. CONCLUSION

Because the Trial Court did not err in its refusal to dismiss Mr. Lane's Petition for Modification on either substantive or procedural grounds, this Court should affirm the decision of the Trial Court in that regard.

Further, Ms. Holcomb has failed to make a sufficient showing the Trial Court abused its discretion by ordering the Temporary Parenting Plan and Temporary Order remain in effect. Accordingly, this decision of the Trial Court should be affirmed as well.

Alternatively, should this Court determine there were irregularities in the Trial Court's proceedings, the appropriate remedy would be a remand to the Trial Court for a proper Adequate Cause hearing. See, e.g., Kinnan v. Jordan, 131 Wn.App. 738, 755-56, 129 P.3d 807 (2006) (where irregularities in proceedings to modify a Parenting Plan were present, appropriate remedy is remand for a proper hearing).

Finally, this Court should award Mr. Lane attorney's fees on the basis of his need and Ms. Holcomb's ability to pay.

RESPECTFULLY SUBMITTED this 28th day of January, 2013.

CARLSON, McMAHON & SEALBY, PLLC

By _____
ROBERT W. SEALBY, WSBA # 21330
Attorney for Respondent

I hereby certify that on the 28th day of **January, 2013**, I caused to be served true and correct copies of **BRIEF OF RESPONDENT** upon counsel of record at the following address:

Susan Cawley
Monnette & Cawley, P.S.
630 N. Chelan Avenue, Suite A2
Wenatchee, WA 98801

by causing the same to be hand delivered at the stated address, at Wenatchee, Washington.

AND the **original** to:

Ms. Joyce Roberts
Clerk/Case Manager
COURT OF APPEALS STATE OF WA
DIVISION III
500 N. Cedar Street
Spokane WA 99201

by depositing the same in envelopes and addressing the envelopes to the stated addresses, shipping prepaid, and shipping the same via U.S. Postal Service at Wenatchee, Washington.

CARRIE M. FRANKLIN

LAN15-01093\APPEAL\PLE\BRIEF-012813