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Court of Appeals  
Division III  
State of Washington

No. 32431-1-III

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

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In re the Custody of

Z.C., Child

MELISSA ENGLAND  
Appellant

and

DALEENA AND RICHARD VAUGHN  
Respondents

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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OPENING BRIEF OF APPELLANT

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## I. INTRODUCTION

This case involves a child born in 2005 to a single mother, his father having died of leukemia during the mother's pregnancy. The mother, who had a history of abusing drugs, accepted help from her family in the aftermath of the birth and the loss of her partner. Her sister took a prominent role in caring for the child. When the mother and sister came into conflict over the child, the sister sought custody and a decree was entered by agreement. The court ordered the state to intervene and provide services, but the state failed to do so. Nevertheless, the mother redressed her drug issues and has been drug-free since the child was two and a half. She has a good job as a legal secretary for a prominent law firm, a good home near an excellent school, and a stable, productive and healthy life. However, her sister has consistently and vigorously resisted reuniting mother and child. The mother has returned to court again and again to regain her child, facing obstacles familial, financial, professional, and procedural. Most recently, the trial court declined to modify the nonparental custody decree, on the mother's petition, and, in doing so, either failed to apply Washington law correctly or failed to uphold the mother's constitutional rights, or both. The mother seeks relief in this Court.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying adequate cause for modification of the nonparental custody decree.

2. The trial court erred by entering the following:

2.5.1 Adequate cause for hearing the petition has not been established.

2.5.2 The court finds that Ms. England's prolonged sobriety and improved living situation does not constitute adequate cause for a major modification under the applicable statutory law and case law.

2.5.3 The court finds that there is no substantial changes of the circumstances of the child with regard to the allegation in the petition that the child's environment under the custody degree/parenting plan/residential schedule is detrimental to the child'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 child.

2.5.4 The court finds the recent Supreme Court opinion in *In re Custody of BMH*, 179 Wn.2d 224 (2013), to be distinguishable and unpersuasive [in] regard to mother's burden to demonstrate adequate cause as noted in paragraphs 2.5.2 and 2.5.3 herein.

CP 255.

3. The mother moves for a change of venue to her county of residence.

4. The mother moves for an award of attorney fees on appeal.

*Issues Pertaining to Assignments of Error*

1. Where a nonparental custody decree was entered by agreement, meaning that a trial court never resolved disputed facts or concluded that the petitioner had demonstrated the extraordinary circumstances needed to justify nonparental custody, does the usual modification standard apply, requiring a substantial change of circumstances in the child or the custodian?

2. Regardless of whether the nonparental custody decree results from agreement or adjudication, does the modification standard impose an unconstitutional burden on a parent in a dispute over custody with a nonparent where the concerns giving rise to nonparental custody have been completely remediated?

3. Alternatively, does the mother's complete remediation of her drug issues constitute a change of circumstances in the child, in that he has a parent able to care for him and state policy favors reunification of the family?

4. Where the mother alleges the custodian interferes with visitation granted her with her child and isolates the child from the family and disparages and otherwise tries to alienate the child

from the mother, do these facts present adequate cause to proceed to modification?

5. Given the protracted history of litigation in this case, including the failure of the first judge to recuse himself despite his professional relationship to one of the custodians, should venue in this case be transferred from Asotin County to King County, where the mother lives?

6. Should the mother receive her fees under RCW 26.10.180?

### III. STATEMENT OF THE CASE

Melissa is 39 years old and works as a legal secretary in Seattle at Schwabe, Williamson & Wyatt. CP 104-106, 107-109, 119-120, 128. Nine years ago, she learned she was pregnant; on the same day, her partner died of leukemia. CP 16, 123, 273, 416. She abstained from drugs and six months later gave birth to a healthy son. CP 16, 420. The child's name ("Z.C.") honors the parents' relationship by incorporating the father's name, thereby also reflecting his Persian/Italian ancestry.<sup>1</sup> CP 123, 128, 273.

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<sup>1</sup> This brief will not refer to either the child or the father by name, in an effort to protect the child's privacy.

At the time, Melissa was clean and sober, after a decade of methamphetamine abuse. CP 420. According to a chemical dependency evaluator, Melissa used drugs as a method of self-medicating “the depression and grief issues” for which she had not then been treated. CP 30. She relapsed in the wake of her partner’s death and after the child’s birth, periodically resuming drug use while also pursuing treatment and otherwise trying to cope as a single parent. CP 16, 420. When Z.C. was two and a half, Melissa entered and completed a year-long treatment program in Seattle. CP 123-24, 373-374, 416-418. She has been drug free since May 2008. Id.

As Melissa struggled during the child’s infancy, she nevertheless provided for her child’s needs, as his medical check-ups indicate. CP 291-314. He is, for example, described on June 27, 2006, as a “thriving infant.” CP 313.

Melissa also relied on her family and friends for support. CP 420-422. Her sister, Daleena Vaughn, and her mother, Jamie Tedrick, helped care for Z.C., but quickly, conflict developed between Melissa and her sister. See, e.g., CP 265, 275-76. Accusations flew back and forth and Daleena and her husband petitioned for nonparental custody, to which Melissa responded.

CP 1-5, 8-10 264-280.<sup>2</sup> In early August, when Z.C. was nearly a year old, the court temporarily placed him in the Vaughns' care and appointed a guardian ad litem. CP 6-7, 11-14.<sup>3</sup> After a complete investigation, the GAL submitted a report recommending immediate reunification of mother and child.<sup>4</sup>

The GAL thoroughly reviewed Melissa's history and concluded her now intermittent drug use did not render her an unfit parent. CP 30. The GAL urged treatment for the underlying causes, noting further that other of Melissa's behaviors, problematic in the Vaughns' view, could be explained by grief and depression. CP 31.

The GAL noted Daleena seemed adamantly to be seeking a permanent placement of the child with her, rejecting any plan that would work toward rehabilitation and reunification of parent and

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<sup>2</sup> Daleena was familiar with family court litigation, having been involved in a long-running custody battle with her first husband, which included multiple abuse referrals to the Department of Children and Family Services, and involved in an apparently contested adoption of her second husband's nephew. CP 640-642, 706-743.

<sup>3</sup> The order appointing the G.A.L. identifies the legal standard as "best interests of the child." CP 12.

<sup>4</sup> A redacted version of the G.A.L. report appears at CP 15-37. Among the omitted material is information critical of the Vaughns, including an "extensive" history with DCFS involving conflicts over children. The report was redacted pursuant to an "agreed" order of the court on the motion of the G.A.L. CP 617-619, 620. The complete report appears at CP 622-645.

child. CP 34; see, also CP 324, 329, 335 (asking court to terminate Melissa’s rights if she does not get her act together in six months).<sup>5</sup>

The GAL concluded the Vaughns did not demonstrate the “extraordinary circumstances” necessary to justify a nonparental custody order. CP 20. Rather, the GAL strongly recommended the child be “returned to his mother’s care immediately, in order to minimize the damage to the mother-child bond beyond what has been unavoidably inflicted already.” CP 20. The GAL was very concerned about the effect on the child of long-term separation from his primary attachment figure, Melissa. CP 35. He concluded the child’s “developmental needs demand that the transition occur immediately.” CP 35. Even if there were grounds for nonparental custody, he “could not support any proposed final order that does not address the conditions under which custody will transition back to the natural mother, ...” CP 34.

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<sup>5</sup> By contrast, RCW 13.34.180(1)(e) gives a parent twelve months in which to get help, with services being offered the parent, before creating a rebuttable presumption favoring termination:

A parent’s failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided.

Reunification did not happen. The court twice ordered the matter converted to a dependency, but nothing happened. CP 39. Melissa herself sought to have the state provide “family reunification services,” but the Vaughns opposed this effort and the state declined to assist. CP 317-322, 324-325. Melissa continued nonstop her efforts to regain custody of her child and the Vaughns continued to oppose her.

Various orders were entered over the years. In January 2007, the court entered a “temporary nonparental custody order” presented it by the parties. CP 39. This order left the child with the Vaughns but granted the mother frequent visitation. CP 39. (In this same order, the court ordered the matter converted to a dependency. *Id.*) See, also, CP 45-46, 70-71, 663-664 (stipulated order directing overnight visitation). Melissa also repeatedly agreed to various mechanisms to monitor her drug use and mental health and other voluntary restrictions (e.g., excluding from her home anyone but family members when the child was present). See, e.g., CP 45, 50, 337-338.

A trial was scheduled for March 2008, and some testimony was taken at that time, but, ultimately, the parties negotiated a settlement, which resulted in final orders. CP 58-62; 63-67, 665-

666. Melissa continued to struggle in her recovery and felt she could not continue to litigate with her sister and take care of herself. CP 124. She decided to stop fighting and to focus on treatment for her drug problem, expecting her sister to return her son once she turned her life around. Id.

The findings from 2008 indicate they are entered by agreement and that adequate cause is “agreed.” CP 60. In a section entitled “Best Interest of the Child,” the finding appears as follows:

It is in the best interest of the child(ren) to be placed in the custody of the petitioner(s), and at this time: ... The child(ren) have not been in the physical custody of either parent since August 3, 2006 because: The natural father is deceased. The natural mother has a current drug problem that places the child in danger.

CP 60. The decree awards custody to the Vaughns, based on this “best interests of the child” finding and, in a section called “Limitations on Visitation,” the plan limits the mother’s visitation, as follows:

The mother has taken the child with her while she was selling or using drugs. The child was found with methamphetamines in his system.<sup>6</sup> The Respondent is going to enter a treatment center for addicts. Until the mother is clean from drugs, visitations shall be supervised.

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<sup>6</sup> Nothing in the record suggests any harm to the child from this exposure. See, e.g., CP 291-314. The child was and remains by all accounts healthy.

CP 60; see, also, CP 61 (court's conclusion of law that "It is in the best interests of the child to reside with" the Vaughns). The order conditions mother's time with the child on various requirements related to drug use and contemplates her entry into treatment. CP 64-65. It also contemplates substantial increases in residential time upon successful treatment. CP 54.<sup>7</sup> Melissa understood this agreement to be temporary, a bridge to her eventual reunification with her child. CP 124. Ten days later, she moved to Seattle, entered her treatment program and has been drug-free ever since. See, e.g., CP 143, 442, 443.

Despite her successful recovery, Melissa's visitation with her son did not increase as described in the 2008 order. CP 374-375. Nevertheless, she has maintained her relationship with her son, exercising visitation with him as much as possible, despite the distance between her residence in King County and her sister's home in Asotin County (drive time equals twelve hours) and despite what she described as her sister's obstructive behavior. CP 68-72,

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<sup>7</sup> At the time of this order, the child was two years old and Local Rule 15 provides for residential time four hours, twice per week. Alternating weekends from Friday at 5:00 p.m. to Sunday at 5:00 p.m., with alternating holidays and two non-consecutive weeks during the summer, with an increase at three to two non-consecutive two weeks in the summer. At five years old, residential time increases to include half of summer and alternating Spring Breaks. See *Appendix Local Rule 15 for Asotin County*. These increases were never implemented.

370-372, 373-382, 420-422. Her sister even resisted telling the child Melissa was his mother, leading to confusion. CP 375. Daleena disagrees with Melissa that Z.C. would benefit from counseling and will not take him. CP 127. Daleena wanted to change the child's name and uses "Vaughn" as the child's last name. CP 237-239, 744-745. She and her husband declare they are Z.C.'s parents. CP 229. Presumably, they receive Z.C.'s survivor benefits arising from his father's death. CP 279.

The residential schedule was modified by agreement in 2011. CP 72-78. This plan appears to be temporary, in that it contemplates a review within several months, following a visit to the mother's home by the custodian. CP 75. No review apparently happened.<sup>8</sup> In May, 2012, with new counsel, the mother moved for modification. CP 401-406. The mother described how her son had resided with her sister by agreement, one that she understood as temporary, and that she wanted him returned to her custody. CP 415-417. She proposed a gradual transfer of residential time from her sister to her, culminating after three months in return of the child to her full-time custody and in dismissal of the nonparental

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<sup>8</sup> This parenting plan does not comply with the mandatory form and is otherwise irregular. This plan also provides for a review of the child's living arrangements within five years, without explaining what that means. CP 75.

custody petition. CP 407-414, 416. She recited the history of the proceedings to date, observing that a court had never adjudicated the grounds for nonparental custody. CP 416-498. She relied, in part, on *In re the Custody of T.L.*, 165 Wn. App. 268, 268 P.3d 963 (2011). CP 499-509.

The Vaughns opposed modification as lacking adequate cause. CP 79-89, 510-512. Essentially they argued the parenting plans previously ordered were not temporary and that changes in the mother's circumstances did not justify modification. *Id.*

The court denied adequate cause. CP 90-91.

The mother directed her attorney to appeal, but her attorney failed to do so. CP 539. She learned later the attorney was in the midst of disciplinary proceedings; several months later, the attorney resigned her license in lieu of disbarment. *Id.*; CP 609-616.

The mother also discovered the judge who denied adequate cause, and had signed most of the other orders throughout the proceedings, had represented Daleena in her contentious divorce and custody dispute. CP 537-539, 640-642.<sup>9</sup> When this information came to light, the judge recused himself. CP 541,

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<sup>9</sup> This is the same judge who signed an order permitting the redaction of the Guardian ad Litem report so that it omitted portions critical of his former client. CP 640-642.

543, 563. The mother then sought an order vacating the orders the judge had signed, based both on the judge's conduct and the failure of her attorney to file the notice of appeal, as directed. CP 540-541. A visiting judge denied her motion. CP 94-96.

Two months later, Melissa moved again to modify the parenting plan. CP 97-101. She argued that the changes she made in her life satisfied adequate cause and that custody with her sister was detrimental to the child. CP 122-179. Numerous friends and coworkers corroborated Melissa's account of her stable, healthy, and productive life circumstances. CP 102-121. Her mother, Jamie Tedrick, who was initially supportive of Daleena, now supported Melissa; she described how Daleena's withholding of Z.C. from Melissa had divided the family. CP 181-186. She expressed the opinion that if she had simply reported Melissa to the state, Melissa would have earned back her little boy years ago. CP 185. She described the harms to Z.C. from being kept from his mother, including how he seems afraid of the Vaughns, especially afraid of expressing his feelings for his mother. CP 181-186; see, also CP 129, 422. She fully supported reunification of mother and child, declaring, "Z.C. deserves to be raised by his only parent for

the remainder of his childhood.” CP 185. In response, Daleena said her mother has “a tendency to lie and manipulate.” CP 228.

At a hearing on the motion, the judge noted the constant tug-of-war over the years and the stress that it causes, though declined to find the conflict was a substantial change of circumstances. RP 28-29. The Vaughns argued the mother “simply can’t argue that the substantial change of circumstances is mom’s becoming fit.” RP 21. The court declined to “plow new ground” by holding the mother’s changed circumstances justified modification. RP 12, 25. The court held “the fact that Ms. England is now a fit parent or could be a fit parent, or is showing herself to be a fit parent, is not a substantial change of circumstances.” RP 28. The court denied adequate cause and entered orders accordingly. CP 254-256.

The mother timely appealed. CP 257-263.

#### IV. ARGUMENT

##### A. THE STANDARD OF REVIEW.

This case arises at the intersection of the nonparental custody and modification statutes. The issues are predominantly legal. Accordingly, the standard of review is *de novo*. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 343, 227 P.3d 1284 (2010) (meaning of statute is a question of law); see, also, *In re*

*Dependency of M.S.R.*, 174 Wn.2d 1, 13, 271 P.3d 234, 241 (2012) (whether a statute is constitutional is a question of law we review *de novo*).

The issue regarding whether the mother demonstrated adequate cause based on the detrimental environment prong is a mixed question of fact and law, which is also reviewed *de novo*. *In re Custody of B.M.H.*, 165 Wn. App. 361, 381, 267 P.3d 499, 509 (2011), *affirmed in part and reversed in part, on other grounds*, at *In re Custody of B.M.H.*, 179 Wn.2d 224, 236-239, 315 P.3d 470 (2013). In review of the trial court's adequate cause order, the alleged facts should be viewed in the light most favorable to the petitioner. *In re Marriage of Lemke*, 120 Wn. App. 536, 541-542, 85 P.3d 966 (2004); *see, also, In re Parentage of L.B.*, 155 Wn.2d 679, 684 n.2, 122 P.3d 161 (2005) (using this standard in *de facto* parent petition by analogy to CR 12(b)(6) motion).

B. THE COURT IMPROPERLY DENIED ADEQUATE CAUSE.

Here the mother appeals from an order denying adequate cause for her petition to modify the nonparental custody order, which has kept her and her son apart for years.

Nonparental custody is an extraordinary remedy, since it abridges a parent's constitutional right. *B.M.H.*, 179 Wn.2d at 236-

239 (available only in extraordinary circumstances); see, *Troxel v. Granville*, 530 U.S. 57, 77, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (the United States Supreme Court has “long recognized” 14<sup>th</sup> Amendment protects “a parent’s interests in the nurture, upbringing, companionship, care, and custody of children”); *In re Luscier*, 84 Wn.2d 135, 137 and 139, 524 P.2d 906 (1974) (declaring under Const. art. 1 § 3 that Washington courts are “no less zealous in their protection of familial relationships”).

Washington law permits nonparental custody because the statute, as interpreted, protects the parent’s right by imposing on petitioners a heavy substantive burden, which must be satisfied by clear and convincing evidence. *B.M.H.*, 179 Wn.2d at 236 (petitioner must prove unfitness or detriment to the child’s growth or development); *In re Custody of C.C.M.*, 149 Wn. App. 184, 205, 202 P.3d 971, 981 (2009) (proof by clear and convincing evidence).

In short, a parent is entitled to a presumption that placement of a child with the parent serves the child’s best interests. *In re Custody of Shields*, 157 Wn.2d 126, 146, 136 P.3d 117, 127 (2006). Thus, nonparental custody operates in the same plane as other state actions infringing upon a parent’s constitutional right to the care and custody of a child, such as dependency proceedings.

However, unlike with a dependency action, no mechanisms exist in nonparental custody proceedings to promote family reunification. See, e.g., RCW 13.34.025 (coordination of services); RCW 13.34.090 (rights to counsel, to be heard, etc.); RCW 13.34.092 (right to counsel); RCW 13.34.180 (regarding provision of services). Unlike with nonparental custody, the orders entered in a dependency action are subject to modification upon a showing of a change of circumstances, without regard to whose circumstances have changed. RCW 13.34.150. These mechanisms serve the state's policy of protecting the family unit. RCW 13.34.020.<sup>10</sup>

There is no reason a family involved in a nonparental custody action should be any less valued. Rather, “[m]aintaining the family unit should be the first consideration in all cases of state intervention into children’s lives.” *In re Dependency of K.N.J.*, 171 Wn.2d 568, 575, 257 P.3d 522, 527 (2011) (internal citations omitted). Yet, as it now stands, nonparental custody decrees

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<sup>10</sup> The statute declares the policy:

The legislature declares that the family unit is a fundamental resource of American life, which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized.

RCW 13.34.020.

effectively work a permanent deprivation of a parent's rights because of the modification standard. *C.C.M.*, 149 Wn. App. at 204; see, also, *E.A.T.W.*, 168 Wn.2d at 344 (describing as "permanent"); but, see, *In re Parentage of J.A.B.*, 146 Wn. App. 416, 426, 191 P.3d 71 (2008) (describing nonparental custody decree as "temporary").<sup>11</sup>

For the reasons set forth below, the statute must allow a path back to custody for parents, without the current impediments, in order to harmonize the statute with state policy and to correct the constitutional infirmity.

C. BECAUSE NO COURT EVER ADJUDICATED THE MOTHER TO BE UNFIT OR THAT CUSTODY WAS DETRIMENTAL TO THE CHILD, THE MODIFICATION STANDARD DOES NOT APPLY.

Recently, Division Three observed that another important protection inherent in nonparental custody cases is the adjudication of facts by a judge, a hallmark of due process. *In re Custody of T.L.*, 165 Wn. App. 268, 268 P.3d 963 (2011). In addressing itself to a parent's effort to modify a nonparental custody order, the Court

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<sup>11</sup> The court in *J.A.B.* was contrasting a parent's right with the right conferred by a nonparental custody decree and described the latter as follows:

A nonparent custody order confers only a temporary and uncertain right to custody of the child for the present time because the child has no suitable legal parent. When and if a legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child.

146 Wn. App. at 426.

held that “where a parent’s liberty interest was *not* protected in the initial custody action, ... it must be recognized in the modification proceeding.” 165 Wn. App. at 283.

In *T.L.*, the mother also had a substance abuse problem and also accepted help from her family to take care of her child. She agreed to an order granting custody to the grandmother, but the findings supporting the order were neither clearly adopted by the mother nor sufficient to establish unfitness or actual detriment. When her effort to regain custody was impeded by the modification standard, the Court found constitutional error.<sup>12</sup>

This case is no different. A trial court never adjudicated Melissa to be unfit or that custody with her would be detrimental to Z.C.’s growth or development. Indeed, the G.A.L. opined to the contrary. Melissa entered into agreed orders, but those orders do not include the requisite findings under the statute for an award of nonparental custody nor facts sufficient to support such findings. CP 58-62, 63-67. They do not even refer to the relevant legal standard. CP 60 (“best interest”). The mere fact of Melissa’s drug addiction is not enough, as *T.L.* demonstrates. Indeed, parents undergoing temporary or remediable problems – whether financial,

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<sup>12</sup> The court addressed this error even though it was raised for the first time on appeal. *T.L.*, 165 Wn. App. at 284.

physical, or psychological, demonstrate parental responsibility when they accept help in caring for their children, as Melissa did. See, e.g., *In re Marriage of Taddeo-Smith and Smith*, 127 Wn. App. 400, 110 P.3d 1192 (2005) (mother sought father's help while she recovered from injuries). In other words, parents who get help when they need it do not thereby relinquish their rights. Certainly nothing in the nonparental custody proceedings gives notice of such a deprivation. As the Court noted in *T.L.*, there is an "incongruity between the protections of parents' rights provided elsewhere and the fact that the modification process and standards ... fail to consider them at all." 168 Wn. App., at 284. For these reasons, as in *T.L.*, the modification standard does not apply to impede modification where the findings are not the result of a contested hearing and made by the court.

Even if not constitutionally compelled, this principle is simply sensible, as recognized in other cases holding that if the court did not undertake an independent evaluation of the facts and statute, modification is permitted without a change of circumstances. See, e.g., *In re Rankin*, 76 Wn.2d 533, 537, 458 P.2d 176 (1969) (default custody decree); *Timmons v. Timmons*, 94 Wn.2d 594, 617 P.2d 1032 (1980) (uncontested custody decree); *Pippins v. Jankelson*,

110 Wn.2d 475, 754 P.2d 105 (1988) (stipulated child support order) (superseded by statute in respect of unrelated issue, as recognized by *State v. Cooperrider*, 76 Wn. App. 699, 887 P.2d 408 (1994); accord *In re Marriage of Schumacher*, 100 Wn. App. 208, 213, 997 P.2d 399, 403, (2000). Properly, these cases elevate substance over form, recognizing both that the paramount concern in these proceedings is the welfare of the child and that, unless a court has an “opportunity to pass upon adequately presented evidence,” there can be no presumption that the child’s interests have been protected. *Rankin*, 76 Wn.2d at 537 (internal citation omitted). In short, purely as a procedural matter, the modification standard is unhelpful and inapplicable in this context. (For this reason, it is not clear whether the court in *T.L.* had to reach the constitutional issue.)

Admittedly, Melissa has made a similar argument before, in 2012. CP 401-406, 499-509. The court denied adequate cause and Melissa directed her attorney to appeal, but the attorney did not, being in the midst of disciplinary proceedings that resulted in losing her license to practice law. CP 539. In 2014, the trial court noted the previous action, but, after arguments by Melissa that additional harm had occurred in the intervening two years, the court

did not hold the 2012 petition precluded Melissa's second petition. RP 10, 28-29. Accordingly, this Court may address the issue. That it should do so is further compelled constitutionally, just as the court in *T.L.* recognized. *Custody of T.L.*, 165 Wn. App. at 284; RAP 2.5(a)(2) and (3). The interests at stake have, in this case, repeatedly received inadequate procedural protections, with the consequence being this long, unwarranted separation between mother and child.

D. EVEN IF *T.L.* DID NOT CONTROL, THE MODIFICATION STATUTE CANNOT BE CONSTITUTIONALLY APPLIED TO FACTS SUCH AS PRESENTED HERE.

Even if *T.L.* did not apply, the modification statute is unconstitutional as applied to the facts of this case for a different reason. In making this challenge, Melissa takes issue with Division Two's contrary conclusion, where it held that a parent's petition to modify a nonparental custody order must satisfy the modification statute, specifically, the parent must establish a substantial change in the circumstances of the child or the custodians. *In re Custody of B.R.S.H.*, 141 Wn. App. 39, 49, 169 P.3d 40 (2007). This is wrong for the following reasons.

First, it bears noting that "the paramount goal of child welfare legislation is to reunite the child with his or her legal parents, if

reasonably possible.” *In re Dependency of J.H.*, 117 Wn.2d 460, 476, 815 P.2d 1380 (1991). It also bears noting the complicated history of the nonparental custody statute. Its substantive standard, contained in RCW 26.10.100, which on its face required only a best interests standard, was interpreted by the court to require a showing of harm, i.e., proof of the parent’s unfitness or proof of detriment to the child’s growth or development. *In re Custody of R.R.B.*, 108 Wn. App. 602, 613, 31 P.3d 1212, 1218 (2001) (noting body of law incorporated into the statute by legislative re-enactment).<sup>13</sup> Otherwise, the statute would be unconstitutional. *Custody of Shields*, 157 Wn. 2d at 150.

The protections in the statute were enhanced in 2003, again with the purpose of protecting the family unit. *E.A.T.W.*, 168 Wn.2d at 342. Abuses prompted the insertion of an adequate cause requirement (RCW 26.10.032) to prevent burdening parents and children with intrusive investigations and useless hearings in meritless nonparental custody actions. *See, e.g., In re Custody of Nunn*, 103 Wn. App. 871, 14 P.3d 175 (2000). The adequate

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<sup>13</sup> The statute also includes a standing requirement, which petitioners must establish by “declaring” either that the child is not in a parent’s custody or that neither parent is a suitable custodian. RCW 26.10.032(1). *See, E.A.T.W.*, 168 at 345 (standing is separate from adequate cause).

cause provision, like its counterpart in the modification statute (RCW 26.09.270), interposes a substantive threshold as a mechanism for expediently dismissing meritless petitions so as to protect “the integrity of the family.” *In re Marriage of Adler*, 131 Wn. App. 717, 724, 129 P.3d 293 (2006).<sup>14</sup>

These examples illustrate how the court and the legislature have taken pains to protect parents’ rights in nonparental custody proceedings. While Melissa does not challenge the statute facially, her case exposes the need for an additional protection. Here, the problem can be traced to the importation of a standard that applies between parents, i.e., the modification standard of RCW 26.09.260, without adequately protecting parents in custody disputes with nonparents. Indeed, in opposing and denying modification, the Vaughns and the trial court both relied on cases dealing with modification disputes between parents. See, CP 204-205; RP 21, 24, alluding to *Schuster v. Schuster*, 90 Wn.2d 626, 585 P.2d 130

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<sup>14</sup> The legislative history reflects this concern, noting that a threshold determination:

should be made as early as is practicable under the circumstances of each case, so as to minimize unwarranted state interference with the integrity of the family.

House Bill Report, HB 1720, at 2.

(1978); *McCray v. McCray*, 56 Wn.2d 73, 350 P.2d 1006 (1960).

As the Supreme Court recently noted, “[t]he nonparental custody statutes are designed to address situations wholly different from a divorce.” *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644, 646 (2014).

Despite this substantially different context, the nonparental custody statute merely directs parent-petitioners for modification on a nonparental custody decree to the Parenting Act. See RCW 26.10.190(1), directing to RCW 26.09.260. The Parenting Act prohibits modification unless a court 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.

RCW 26.09.260(1). This statute implements Washington policy in favor of custodial continuity. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993) (custodial changes are viewed as highly disruptive to children). However, because there is an equality of liberty interests as between the parents, the modification statute simply does not account for the superior right a parent has

over a nonparent or for the state's policy favoring reunification of the family unit.

The dependency statute does not make that mistake, but permits modification upon a change of circumstances wherever it arises. RCW 13.34.150. Even the Parenting Act permits a minor modification to proceed on petition of a parent restricted under RCW 26.09.191(2) or (3), so long as the parent “demonstrates a substantial change in circumstances specifically related to the basis for the limitation.” RCW 26.09.260(7) (emphasis added). And the nonparental custody statute permits an expansion of a parent's visitation on similar grounds. RCW 26.10.160(4). Yet, here, Melissa, the child's only living parent, has no avenue by which to regain custody of her son. Simply, there is no mechanism for reuniting this family.

Unquestionably, when Melissa accepted her family's assistance in 2006, and when she agreed to the custody decree, she could not know that she would be foreclosed from reuniting with her child. Even Division One does not think that is the outcome in such cases. *J.A.B.*, 146 Wn. App. at 426 (“When and if a legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child.”). Certainly,

Melissa can in no way be deemed to have waived her constitutional right as a parent. See *City of Seattle v. Klein*, 161 Wn.2d 554, 559, 166 P.3d 1149 (2007) (“waiver” is the “act of waiving or intentionally relinquishing or abandoning a known right ... or privilege.” [internal citation omitted]).

This is but one of the reasons the court in *B.R.S.H.* was wrong to hold a parent’s constitutional right is sufficiently protected in the initial custody proceeding. 141 Wn. App. at 49. In *B.R.S.H.*, of course, the court relied on the fact that nonparental custody had been fully litigated to a conclusion determined by a neutral arbiter, which is not the case here.<sup>15</sup> Regardless, even where grounds for nonparental custody have been found, based on substantial evidence and according to the judge’s discernment, that cannot mean the parent’s permanent exile from a custodial relationship with the child. Rather, the constitution requires that if the circumstances of the parent change, as they did here, the parent must be permitted to seek reunification of the family without satisfying the Parenting Act’s modification standard.

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<sup>15</sup> Not only have the orders been entered by agreement, the incorrect legal standard is cited in the pleadings and in the court’s orders. See, e.g., CP 12, 60 (citing “best interests”). This raises additional concerns. See, *Custody of Shields*, 157 Wn.2d at 149-150 (reversing trial court order granting nonparental custody based on best interests standard).

To the extent this change raises concerns about abusive litigation, the statute already protects against bad faith petitions. RCW 26.10.190(2). Likewise, adequate cause serves to prevent a useless trial. What is changed is the substance of what may be proved to satisfy the substantial change of circumstances standard: a parent may prove the change is in herself.

The presumption against modification, appropriate and beneficial as between parents, is unconstitutional as applied here between a nonparent and a parent – a parent who has never been found to be unfit and who long ago remedied any concerns about her ability to care for her child and who has never given up on her efforts to reunite with her son. Under these circumstances, the child must be returned to the mother and the custody decree vacated.

E. THE TRIAL COURT ERRED WHEN IT FOUND NONPARENTAL CUSTODY WAS NOT DETRIMENTAL TO THE CHILD'S GROWTH AND DEVELOPMENT OR THAT MELISSA'S FITNESS WAS NOT A CHANGE OF CIRCUMSTANCES IN THE CHILD'S LIFE.

The court also denied adequate cause on Melissa's claim that the custodial environment was detrimental to Z.C. and impliedly rejected her argument that her recovery constituted a change of circumstances in the child's life. CP 255; RCW

26.09.260(2)(c). The court ruled flatly there was no substantial change of circumstances justifying modification.<sup>16</sup> The court was incorrect.

To establish adequate cause for modification, the statute requires a petitioner to “set[ ] forth facts supporting” the modification. RCW 26.09.270. The statute does not establish a quantum for this proof, but merely requires the petitioner to file “an affidavit setting forth facts supporting the requested order or modification.” RCW 26.09.270. On its face, this is not a heavy burden.<sup>17</sup> Rather, the alleged facts must simply be of a kind that, “if

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<sup>16</sup> The court’s finding, at CP 255, follows:

2.5.3 The court finds that there is no substantial changes of the circumstances of the child with regard to the allegation in the petition that the child’s environment under the custody degree/parenting plan/residential schedule is detrimental to the child’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 child.

<sup>17</sup> The Supreme Court has not adopted a formulation for the burden of proof that appears in some cases, that adequate cause means “something more than prima facie allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change.” This formulation first appeared in *In re Marriage of Roorda*, 25 Wn. App. 849, 852, 611 P.2d 794 (1980) and, then, in *In re Marriage of Mangiola*, 46 Wn. App. 574, 577, 732 P.2d 163 (1987). It has been repeated in the Court of Appeals since then. However, both *Roorda* and *Mangiola* have been overruled because the Court of Appeals reviewed adequate cause determinations in those cases *de novo*, instead of with deference to the trial court’s fact-finding. Moreover, the phrase “prima facie allegations” seems to be a mash-up of “prima facie” proof and “more than mere allegations,” and does not seem particularly helpful. It does not appear to have ever been used by the Supreme Court.

*true*, will establish a prima facie case supporting the requested order.” *Custody of E.A.T.W.*, 168 Wn.2d at 346 (emphasis added).<sup>18</sup> In other words, the alleged facts should be viewed in the light most favorable to the petitioner. *Marriage of Lemke*, 120 Wn. App. at 541-542. The facts must be proved at a trial on the merits. *E.A.T.W.*, 168 Wn.2d at 348 n.5.

Melissa alleged facts sufficient to justify a trial on the basis of detriment to Z.C. She described how her sister has attempted to displace her as Z.C.’s mother. CP 134-135. She described how Daleena uses one excuse after another to impede the mother’s time with the child. CP 133-134 (Daleena claiming Z.C. cannot fly to Seattle because children are “lost” by airlines); 135-136 (refusing any additional time); 138-139 (not telling Melissa when Z.C. was in Seattle visiting aunt and telling him not to tell Melissa). Despite that the 2008 order contemplated substantial increases in time, once Melissa beat her drug addiction, Daleena resisted that, prompting a motion for contempt. CP 370-371, 374-375. She described how Daleena disparages her and other family members to Z.C. CP 132.

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<sup>18</sup> *E.A.T.W.* involved the adequate cause requirement for nonparental custody, not modification, but the court noted, “[t]hrough these are different statutes, their overlapping subject matter and language strongly suggest the legislature intended their identically-worded show cause requirements to be the same...” 168 Wn.2d at 348.

She described how Daleena has isolated the child from the grandmother, because the grandmother has promoted reunification, and how the family has ruptured. CP 132, 133. She described how the child is afraid to express his love and affection for fear of angering Daleena and is otherwise fearful of Daleena. CP 132, 136. Melissa described how she set up an “app” so that she and Z.C. could text one another and how, upon discovering it, Daleena deleted Melissa’s profile. CP 137. Melissa further alleged her sister engaged in the abusive use of conflict and keeps information about Z.C. from her. CP 137-138, 139-140. Finally, Melissa alleged it was detrimental to Z.C. to keep him from his mother. CP 140-141.

These facts, if proven, establish an actual detriment to the child’s growth and development. State policy declares as much, placing enormous significance on preservation of the family unit. See, e.g., RCW 13.34.020, RCW 74.14A.010. By extension, it is fair to say, destruction of the family unit is, presumptively, a grievous harm. The Court likewise has concluded that severing a child’s relationship with a parent will cause detriment. See *Velickoff v. Velickoff*, 95 Wn. App. 346, 355, 968 P.2d 20 (1998) (“An effort by one parent to terminate the other parent's relationship with a

child can be considered detrimental to the child” justifying modification of residential schedule). In short, the necessity of family to a child is “well-established.” *M.S.R.*, 174 at 20.

Over the long history of this litigation, Daleena has demonstrated her determination to usurp Melissa as Z.C.’s mother. See, e.g., CP 34 (Daleena not interested in Melissa’s rehabilitation); CP 222 (“we were the first real parents”). She has acted at every turn to impede the parent-child relationship. Not only is this detrimental to Z.C. insofar as Melissa is his only living parent, but the conflict itself is destructive, forcing the child to take his feelings for his mother underground. The trial court erred when it denied adequate cause on this basis.

The court also should have granted adequate cause on the basis that Melissa’s recovery constitutes in Z.C. a change of circumstances. He has a parent fully capable of meeting his needs. The importance of this relationship is not one-sided. Z.C. has a right to his family relationship, just as Melissa does. *M.S.R.*, 174 Wn.2d at 15. The importance of the family is exalted pervasively in Washington law. The fact that his only living parent is ready, willing, more than eager to provide for him surely must be a change of circumstances in Z.C. substantial enough to justify modification.

V. MOTION FOR CHANGE OF VENUE.

Some of what accounts for the attenuated separation of mother and son may be explained by the location of the proceedings in Asotin County. For the first seven years of this litigation, unknown to Melissa, judicial decisions were being made in her case by her opposing party's former attorney. CP 541, 543, 563. Washington law justified a change of venue at that point for that reason alone. RCW 4.12.030.<sup>19</sup> See, also, CJC 2.11 (disqualification). She already had to overcome prejudice against drug addiction, assumed to be high in a rural county plagued by the problem. By the time her matter came before a new judge, she faced an even harder climb. In order to ensure the fairness of subsequent proceedings, in light of the protracted litigation in this case, Melissa respectfully asks this Court for an order changing

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<sup>19</sup> In pertinent part, the venue statute provides:

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

...

- (2) That there is reason to believe that an impartial trial cannot be had therein; or,
- (3) That the convenience of witnesses or the ends of justice would be forwarded by the change; or,
- (4) That from any cause the judge is disqualified; ... when he or she has been of counsel for either party in the action or proceeding.

(Emphasis added.)

venue to serve the ends of justice and the child's best interests.

RCW 4.12.030(2) and (3).

#### VI. MOTION FOR ATTORNEY FEES.

Melissa seeks attorney fees based on her need relative to the Vaughns' ability to pay on the authority of RAP 18.1 and RCW 26.10.080. The statute provides that:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Like its counterpart, RCW 26.09.140, this statute has as its purpose "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage." 20 Kenneth W. Weber, *WASH. PRAC., Family and Community Property Law* § 40.2, at 510 (1997). It is hard to dispute that a parent with vastly inferior resources "is at a distinct and unfair disadvantage in proceedings" pertaining to a child. *King v. King*, 162 Wn.2d 378, 417, 174 P.3d 659 (2007) (Madsen, J., dissenting). Here, Melissa has litigated for the entire life of her child, at substantial cost. Had her motion for state intervention been granted, which the Vaughns opposed, or

the court's order for same been implemented, Melissa would have received state services which would have hastened her recovery, as well as the benefit of the state's interest in reuniting the family. As her mother observed, with assistance, Melissa and her son would have been reunited years ago. CP 185; see, also, CP 141 (had Melissa chosen foster care, son would be with her now). The emotional costs of this prolonged separation cannot be compensated in this proceeding. "As any parent can attest, time lost with your child is something you can never get back." *In re Custody of A.C.*, 165 Wn.2d 568, 582, 200 P.3d 689 (2009) (Johnson, J.J., concurring). But the financial costs can be ameliorated. Melissa asks this Court to order the Vaughns to pay her fees on appeal.

## VII. CONCLUSION

The state has created a means by which petitioners may, in "extraordinary circumstances," intrude upon the constitutionally protected relationship between parent and child. However, this mechanism must accommodate parents' constitutionally protected priority right to the custody of their children. The statute does not do that here, at least as the court applied it. Melissa was never proven by clear and convincing evidence to be an unfit parent. Nor

was it proven that custody of her child with her was detrimental to the child's growth and development. The fact that she used drug does not automatically satisfy either of these standards, no more than would disability or poverty or even her status of being a one-time addict. What must be proved to justify infringement upon the parent-child relationship was not proved in this case, and for that reason alone, the custody petition should be dismissed. Even if that were not the case, Melissa's recovery, including the fact that she has been drug-free since the child was three, should satisfy the modification standard in cases of nonparental custody. For these reasons, and those argued above, Melissa England respectfully asks this Court to vacate the order denying adequate cause and to remand this case to the trial court for dismissal of the nonparental custody order or remand to King County Superior Court for further proceedings. She asks further to be awarded attorney fees.

Respectfully submitted this 10<sup>th</sup> day of September 2014.

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## APPENDIX: RELEVANT STATUTES

### **RCW 13.34.150. Modification of orders.**

Any order made by the court in the case of a dependent child may be changed, modified, or set aside, only upon a showing of a change in circumstance or as provided in RCW 13.34.120.

### **RCW 26.09.260 Modification of Parenting Plan or Custody Decree.**

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

- (a) The parents agree to the modification;
- (b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;
- (c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

(3) A conviction of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070 shall constitute a substantial change of circumstances for the purposes of this section.

(4) The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

(a) Does not exceed twenty-four full days in a calendar year;  
or

(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or

(c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests

of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

(6) The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

(7) A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191 (2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.

(8)

(a) If a parent with whom the child does not reside a majority of the time voluntarily fails to exercise residential time for an extended period, that is, one year or longer, the court upon proper motion may make adjustments to the

parenting plan in keeping with the best interests of the minor child.

(b) For the purposes of determining whether the parent has failed to exercise residential time for one year or longer, the court may not count any time periods during which the parent did not exercise residential time due to the effect of the parent's military duties potentially impacting parenting functions.

(9) A parent with whom the child does not reside a majority of the time who is required by the existing parenting plan to complete evaluations, treatment, parenting, or other classes may not seek expansion of residential time under subsection (5)(c) of this section unless that parent has fully complied with such requirements.

(10) The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child. Adjustments ordered under this section may be made without consideration of the factors set forth in subsection (2) of this section.

(11) If the parent with whom the child resides a majority of the time receives temporary duty, deployment, activation, or mobilization orders from the military that involve moving a substantial distance away from the parent's residence or otherwise would have a material effect on the parent's ability to exercise parenting functions and primary placement responsibilities, then:

(a) Any temporary custody order for the child during the parent's absence shall end no later than ten days after the returning parent provides notice to the temporary custodian, but shall not impair the discretion of the court to conduct an expedited or emergency hearing for resolution of the child's residential placement upon return of the parent and within ten days of the filing of a motion alleging an immediate danger of irreparable harm to the child. If a motion alleging immediate danger has not been filed, the motion for an order restoring the previous residential schedule shall be granted; and

(b) The temporary duty, activation, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer residential placement from the parent who is a military service member.

(12) If a parent receives military temporary duty, deployment, activation, or mobilization orders that involve moving a substantial distance away from the military parent's residence or otherwise have a material effect on the military parent's ability to exercise residential time or visitation rights, at the request of the military parent, the court may delegate the military parent's residential time or visitation rights, or a portion thereof, to a child's family member, including a stepparent, or another person other than a parent, with a close and substantial relationship to the minor child for the duration of the military parent's absence, if delegating residential time or visitation rights is in the child's best interest. The court may not permit the delegation of residential time or visitation rights to a person who would be subject to limitations on residential time under RCW 26.09.191. The parties shall attempt to resolve disputes regarding delegation of residential time or visitation rights through the dispute resolution process specified in their parenting plan, unless excused by the court for good cause shown. Such a court-ordered temporary delegation of a military parent's residential time or visitation rights does not create separate rights to residential time or visitation for a person other than a parent.

(13) If the court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court shall assess the attorney's fees and court costs of the nonmoving parent against the moving party.

**RCW 26.10.160 (excerpted)**

(3) Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

(4) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child. Modification of a parent's visitation rights shall be subject to the requirements of subsection (2) of this section.

(5) For the purposes of this section:

(a) "A parent's child" means that parent's natural child, adopted child, or stepchild; and

(b) "Social worker" means a person with a master's or further advanced degree from a social work educational program accredited and approved as provided in RCW 18.320.010.

**RCW 26.10.190. Petitions for modification and proceedings concerning relocation of child — Assessment of attorneys' fees.**

(1) The court shall hear and review petitions for modifications of a parenting plan, custody order, visitation order, or other order governing the residence of a child, and conduct any proceedings concerning a relocation of the residence where the child resides a majority of the time, pursuant to chapter 26.09 RCW.

(2) If the court finds that a motion to modify a prior custody decree has been brought in bad faith, the court shall assess the attorney's fees and court costs of the custodian against the petitioner.

**26.10.080. Payment of costs, attorney's fees, etc.**

The court from time to time, after considering the financial resources of all parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including

sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

The court may order that the attorney's fees be paid directly to the attorney who may enforce the order in his or her name.

### **RCW 26.09.140 Payment of costs, attorney fees**

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

### **“LR 15” (ACGCSCCLR HCCLR 15: Alternate Residential Time Guidelines)**

(A) Alternate Residential Time. In order to facilitate resolution of alternate residential time with a nonresidential parent, the parties are encourage to consider the following nonbinding guidelines depending on the child's age and geographical location of the parents, and should also consider the factors presented in the Child Centered Residential Schedules prepared by the Spokane County Superior Court Guardian ad Litem Committee and published by the Spokane County Bar Association (available for purchase through that association).

(1) Zero to Six Months. Several times a week for short durations.

(2) Six Months to One Year. Several times per week for short durations, two hours, twice per week; four hours once per week.

(3) One Year to Two Years. Four hours, twice per week; eight hours once per week. These holidays alternated each year, for eight hours each: Easter, Fourth of July, Thanksgiving, Christmas Eve, and Christmas Day, or equivalent.

(4) Two Years to Five Years. Four hours, twice per week. Alternating weekends from Friday at 5:00 p.m. to Sunday at 5:00 p.m. These holidays alternated each year: Easter, Fourth of July, Thanksgiving for two days, Christmas Eve and two days before, and Christmas Day and two days after, or equivalent. Summer: Age two, two nonconsecutive one-week blocks; age three to five, two nonconsecutive two-week blocks.

(5) Five Years and Older. Every other weekend from Friday at 5:00 p.m. to Sunday at 5:00 p.m. If Friday is a school holiday, the weekend begins Thursday at 5:00 p.m. One weekday from 5:30 p.m. to 7:30 p.m. These holidays alternated: Martin Luther King Day, President's Day, Memorial Day, Fourth of July, Labor Day, Veteran's Day, Thanksgiving from 5:00 p.m. the day before Thanksgiving Day to the following Sunday at 5:00 p.m., Christmas or winter school break in even years from 5:00 p.m. after school recesses to Christmas Eve at 8:00 p.m. and in odd years from Christmas Eve at 8:00 p.m. until 5:00 p.m. the day before school resumes.

(6) Summer and Spring Break. The summer vacation is defined as beginning 5:00 p.m. the Friday after school is out until 5:00 p.m. the afternoon before the third day before school resumes. The mid point is the number of days of this defined vacation divided by two. The parents will alternate each year the first "half" and the second "half" summer vacation. Spring break will be alternated each year from 5:00 p.m. after school is out until 5:00 p.m. the day before school resumes.

(7) Father's/Mother's Day. Every Mother's Day weekend with mother and every Father's Day weekend with father.

(8) Birthdays. Each parent will have at least four hours with the child to celebrate the child's birthday, and the parent's birthday, within two days of that birthday.

(9) Telephone Contact. Reasonable telephonic contact with the child is usually appropriate, and should be not less than once per week for each parent during that parent's nonresidential time.

(10) Different Age Groups. When children of different age groups are involved, the preference shall be to follow the guideline for the oldest child, so that the children remain together.

(11) Cancellation. The failure to pick up a child within one hour of the scheduled pickup time for a weekend will be deemed a cancellation of same.

(12) Priorities. Holidays have priority over other special occasions. Special occasions have priority over school vacations.