

62439-3

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No. 62439-3-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

VALERIE ANN PENNINGTON

Appellant,

vs.

JOHN PENNINGTON, JR.

Respondent.

AMENDED BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

- A. The Court erred by failing to uphold the monitoring provisions contained in the Final Parenting Plan;
- B. The Court erred by failing to implement RCW 26.09.191 assessment protocol prior to entry of Final Parenting Plan;
- C. The Court erred by failing to convene an adequate cause evidentiary hearing prior to entry of the final Parenting Plan;
- D. The Court erred and expressed judicial bias by commenting upon King County D.V. No-Contact Order, and presiding over further proceedings after recusal;
- E. The totality of the record below mandates a change of venue and allowance of appellant's Petition for Modification.
- F. Discretionary Review pursuant to RAP 2.3 should be allowed.

1. STATEMENT OF THE CASE

Respondent is currently the petitioner in an ongoing dissolution action in King County Superior Court (CP Vol. II 246-268). The dissolution was precipitated by incidents of domestic violence (CP Vol. I 168-183). Said dissolution action was commenced prior to the finalization of the instant parenting plan on September 8, 2008 (CP Vol. I 88-96).

As a result of respondent's wife's allegations (CP Vol. I 168-183) of domestic violence, she was able to secure the current King County Domestic Violence No-Contact-Order (CP Vol. II 246-281). Additionally, the King County Prosecutor's Office brought formal criminal charges against Respondent for Assault IV, D.V. and Harassment, D.V. (CP Vol. I 59-75) prior to the finalization of the parenting plan on September 8, 2008.

Appellant learned of the above during the Spring and Summer of 2008 prior to the entry of the instant Parenting Plan. Prior to the entry of the final Parenting Plan, appellant filed pleadings with supporting documentation that raised the above-referenced issues

of ongoing domestic violence (CP's Vol. I 52-56, Vol. I 76-83, Vol. I 59-75, Vol. I 97-100, Vol. I 168-183, Vol. I 184-192, Vol. II 196-209, Vol. II 210-211, Vol. II 246-281, Vol. II 295-300, Vol. II 301-305, Vol. II 306-308, Vol. II 309-310, Vol. III 413-417, Vol. III 418-420, Vol. III 421-425, & Vol. III 426-427). Appellant also sought formal modification of the then-existing parenting plan prior to September 8, 2008. No substantive evidentiary hearing was ever convened with regard to any of the pleadings, although appellant had sought implementation of RCW 26.09.191 limitation provisions. No evidentiary hearing was ever held.

Review of the Findings of Fact and Conclusions of Law (CP Vol. VI 1104-1152) in the underlying proceeding establishes that the parties were married May 4, 1991 and separated January 13, 2005. They have a five-year old daughter. During the majority of the parties' 14-year marriage, petitioner was a stay at home mother. She was the child's primary parent. Respondent is currently a resident of King County, Washington. Petitioner has been a resident of Clark County, Washington since the commencement of the initial dissolution action in 2005. The dissolution trial lasted 22 days between October 31, 2005 and November 23, 2005. Findings

of Fact and Conclusions of Law and Order was entered on February 7, 2006 (CP Vol. VI 1104-1152).

At the time the dissolution proceeding was initiated, respondent was the then appointed Region 10 Director for Federal Emergency Management Administration (FEMA) (CP Vol. I 59-75). At the time of trial, respondent was the Emergency Management Director for Snohomish County (CP Vol. I 59-75).

Appellant was awarded initial temporary custody of the child at the commencement of the action (CP Vol. VI 1104-1152). Thereafter, due to Appellant's violation of an order requiring that she relocate to Snohomish County, respondent was awarded temporary custody of the child (CP Vol. VI 1104-1152). Respondent was ultimately awarded custody of G.A.P. at the conclusion of the proceedings (CP Vol. VI 1104-1152).

At time of trial, both parties sought residential limitations against the other pursuant to RCW 26.09.191. The court found statutory limitations relating to both parties. (CP Vol. VI 1104-1152). Due to the child's tender years at the time the proceeding concluded, combined with the petitioner's longstanding bonding and relationship with child, the Court mandated "monitoring provisions" to allow for petitioner's increased visitation time with the child. (CP

Vol. VI 1104-1152). Said parenting plan “monitoring” provision was structured to minimize the potential for future harm that would not be in the child’s best interests (CP Vol. VI 1104-1152). The monitoring provisions were never implemented, although the court had previously ruled that it would select the monitor if the parties could not agree, as will be established below.

Ten months after the court ruled that it would select a monitor it struck the monitoring provision, over the objection of appellant. Thirty-one months after the court’s decision was filed, the final parenting plan was entered on September 8, 2008 over the objection of the appellant (CP Vol. I 88-96). Appellant sought review to this Court. (CP Vol. I 57-58). Prior to the September 8, 2008 hearing, appellant had filed numerous motions relating to respondent’s post dissolution marital concerns. (CP’s Vol. I 52-56, Vol. I 59-83, Vol. I 59-75, Vol. I 97-100, Vol. I 168-183, Vol. I 184-192, Vol. II 196-209, Vol. II 210-211, Vol. II 246-281, Vol. II 295-300, Vol. II 301-305, Vol. II 306-308, Vol. II 309-310, Vol. III 413-417, Vol. III 418-420, Vol. III 421-425, & Vol. III 426-427).

During the pendency of the instant appeal, further proceedings were held in the court below. (CP Vol. I 11, Vol. II 1167-1170, Vol. I 12, & Vol. I 13-15). Appellant sought discretionary review to this

Court. (CP Vol. VII 1163-1166). Discretionary review was granted. As such, this Court is being asked to analyze the trial court's failure to implement monitoring provisions contained in the parenting plan. Additionally, this Court is being asked to review the application of RCW 26.09.191 limitation provisions that were being sought by appellant prior to entry of the final parenting plan on September 8, 2008.

Furthermore, appellant is requesting that this Court review the instant record to analyze the claims set forth in appellant's above-stated Assignments of Error.

2. ARGUMENT

A. The Court abused its discretion and erred by failing to uphold the monitoring provisions contained in the Parenting Plan.

Although appellant had been the primary parent the majority of the child's life, respondent was granted temporary custody in August, 2005 (CP Vol. VI 1104-1152) and designated the primary parent at the conclusion of the proceeding (CP Vol. VI 1104-1152). As a result of these outcomes, the court was well aware of the impact the parenting arrangements had, and would have on the child. The court was aware that such impact raised current and

future considerations relating to the best interests of the child contained in RCW 26.09.002.

The court generated extensive findings of fact and conclusions of law in its final Order (CP Vol. VI 1104-1152). The court indicated that “. . . from the evidence, that because Petitioner has been a primary caretaker, a permanent parenting plan based solely on RCW 26.09.191 limitations may potentially lead to future harm that is not in the best interests of the child or parties.” (CP Vol. VI 1104-1152). Due to the court’s expressed concerns relating to the best interests of the child and parties, a dynamic expanding visitation scheme was adopted by the court (CP Vol. VI 1104-1152). Paragraph 6 (i) of said findings contains monitoring provisions (CP Vol. VI 1104-1152). As articulated at hearing on September 29, 2006, there was never any incentive for respondent to agree on a process for the implementation of this provision. (RP at 18-28). The court’s order mandated that it would select a monitor. (See attachment to CP Vol. III 501-515). As such, RCW 26.09.002’s statutory considerations relating to the best interests of the child was never fulfilled. The monitoring provision was the subject of much discussion at hearings held on September 29, 2006 (RP at 1-74), November 17, 2006 (RP at 1-60), October 26,

2007 (RP at 1-27), and March 31, 2008 (RP at 1-25). At hearing held on August 4, 2008, the court discusses amendments/corrections to the parenting plan relating to the failed implementation of this provision (RP at 2-3, 21-22).

Contained in the monitoring provision was the court's expression of its clear intent that the "child shall be monitored and evaluated at each stage of this visitation schedule to insure the schedule has no impact on the child's development" (CP Vol. VI 1104-1152). This fact was reiterated at the hearing held on September 29, 2006 (RP at 14). The court never learned what impact the visitation schedule had on the child. The court understood the dynamics of the case and should not have been surprised that the parties never reached agreement on who would be the monitor. That is why the court ruled that it would ultimately make that decision. Appellant made good faith efforts to implement the monitoring provisions (CP's Vol. V 864-874 & Vol. V 920-976, Vol. V 904-919, Vol. V 878-903, Vol. IV 701-712). At hearing on November 17, 2006 the Court entered an Order indicating "That the parties shall submit additional names of proposed child monitors to the court by Monday, November 27th. (See attachment to CP Vol. III 501-515). Said order reflects the court's ruling that if no further

names are presented, the court will pick the child monitor from the names already presented . . . “ (RP at 14). The November 17th ruling was consistent with the Court’s intent that the “child shall be monitored and evaluated at each stage of this visitation schedule to insure the schedule has no impact on the child’s development” (CP Vol. VI 1104-1152).

Thereafter, at hearing on October 26, 2007, the Court admonished the appellant, and shifted the burden of selection of an agreed monitor to appellant 10-plus months after it ruled it would make the determination (RP at 1-27). Both parties reminded the court of its November 17, 2006 ruling. The court struck the monitoring provision, sua sponte, without further explanation and declined further jurisdiction (RP at 14 & 16-18). Said ruling contradicted the prior ruling of the court – that it would pick the child’s monitor. As such, this ruling violates RCW 26.09.002 statutory considerations relating to the best interests of the child.

Had the court, as ruled upon, selected the required monitor, it would have had the ability to police the post decree impact of the dissolution upon the child. During the interim period between appellant’s divorce and the court’s entry of the parenting plan on September 8, 2008, respondent’s personal life spiraled into further

chaos. The monitor could have kept a pulse on the parties parenting and visitation dynamics during said period. During said period, respondent courted and married the current Ms. Pennington. During said period, they filed for divorce as a result of incidents of domestic violence.

Here, the court's sua sponte removal of the monitoring was in error. Said ruling constituted an abuse of its discretion, and violation of its own order. A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds. See Marriage of Kinnan, 131 Wn. App. 738, 750 (2006) (citation omitted). Here, the trial court's record of its wavering back-and-forth on the monitoring provision is manifestly unreasonable. The court's violation of its own order, followed by shifting the burden of compliance on appellant, was untenable.

B. The Court erred by failing to implement RCW 26.09.191 assessment protocol prior to entry of the Final Parenting Plan;

As a result of respondent's wife's allegations of domestic violence, she was able to secure the current King County Domestic Violence No-Contact-Order (CP Vol. II 246-281). Additionally, the King County Prosecutor's Office brought formal criminal charges against Respondent for Assault IV, D.V. and Harassment, D.V. (CP

Vol. I 59-75) Those charges are still pending! It should be contemplated that (1) separation anxiety associated with a child's initial loss of a life-long primary parent via divorce, (2) combined with the respondent's introduction of a new woman into the household that ultimately bonds with and becomes the child's stepmother, and (3) the child's additional loss of the stepmother's relationship, via domestic violence and divorce, will have a negative impact upon the child's mental health and emotional well-being. Such reasoning was documented by way of expert opinion that was before the court prior to September 8, 2008 (CP's Vol. V 770-773 & Vol. I 166-167).

Appellant learned of the marital discord during the Spring and mid to late Summer of 2008 prior to the entry of the final parenting plan on September 8, 2008. Prior to said hearing, appellant filed pleadings with supporting documentation that raised the above-referenced issues of post dissolution domestic violence, as well as physical and emotional harm to the child (CP's Vol. I 101-112, Vol. V 770-773, Vol. I 166-167, Vol. I 168-183, Vol. I 193-195, Vol. II 196-209, Vol. II 284-286, Vol. II 301-305, & Vol. III 428-430). No substantive evidentiary hearing was ever convened with regard to any of the pleadings, although appellant had sought implementation

of RCW 26.09.191 screening/assessment provisions prior to the entry of the final parenting plan (CP Vol. II 301-305). Alternatively, appellant had served respondent with formal action for the modification of the then-existing parenting plan that was subsequently filed in October, 2008 (CP Vol. I 76-83).

No evidentiary hearing was ever held relating to either the RCW 26.09.191 request for screening assessment, or RCW 26.09.270 adequate cause determination. At the hearing on August 4, 2008, the court made substantive evidentiary determinations on the record (RP at 13 - 15).

The legal effect of the Respondent's post dissolution concerns cross-pollinated allegations against him that had been raised by appellant and founded by the court in the underlying dissolution action (CP Vol. VI 1104-1152). In its findings, the court chronicled past incidents of respondent's assaults upon appellant, as well as his abusive use of conflict (CP Vol. VI 1104-1152). The alleged post dissolution discord, and issuance of the King County D.V. Order resurrect the pre-dissolution findings of the court. At the August 4, 2008 hearing, the court specifically noted its findings relating to respondent's anger problems (RP at 14). In light of the court's acknowledgement of respondent's founded anger problems,

and the existence of the King County D.V. order, it still substantively determined on August 4th that respondent's past and ongoing anger concerns did not amount to domestic violence (RP at 14, 19). The court formulated this mind-set, even after previously having made specific trial findings that respondent was controlling and had exhibited incidents of angry outbursts (CP Vol. VI 1104-1152).

The relevance of such past and post dissolution allegations, is set forth in RCW 26.09.191(2)(a)(ii). Said provision states that a “parent’s residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct . . . (ii) physical, sexual, or a pattern of emotional abuse of a child”

RCW 26.09.191(4) states that “in cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties.¹ In the context of the entire statute, the purpose of the screening - assessment requirement is to give the court professional psychological advice to implement the

¹RCW 26.09.191(2)(iii) addresses restrictions based on a “history of domestic violence,” which was alleged by Appellant, and is now alleged by Respondent’s wife.

requirement under RCW 26.09.191(m); that restrictions be reasonably calculated to protect the child from physical, sexual, or emotional abuse or harm. RCW 26.09.191(m) compels the court to forecast the potential harm of contact between a child and an allegedly abusive parent. The court must use a screening/assessment as part of its forecast. The practical effect of RCW 26.09.191(m) and RCW 26.09.191 is to require that a relevant assessment be conducted to determine if the alleged abuse did occur, and whether it can be mitigated and therefore residential time should go forward, with or without limitation as the court finds appropriate. The screening/assessment provision is a legislative mandate that guarantees that relevant evidence will be brought before the court. Because the screening/assessment is now statutorily required and the Final Parenting Plan had not been entered in the instant dissolution prior to September 8, 2008, the court was statutorily mandated to deliberate on the alleged post dissolution limitation allegation between respondent, his wife, and the child.

Appellant made the above-reasoning very clear at a hearing held on July 17, 2008 (RP at 2-6), as well as the hearing held on August 4, 2008 (RP at 17-18). The Court's denial of appellant's

motion for a screening/assessment may arguably violate the child's and appellant's due process, and fundamental parental rights.

RCW 26.09.191 now makes the screening/assessment mandatory!

As such, it was error for the Court to deny screening/assessment prior to the entry of the Final Parenting Plan on September 8, 2008.

The plain language of § 4 of the statute refers to "allegations" under RCW 26.09.191(2)(a)(ii) and (iii) rather than proof of abuse. As such, the provision takes effect when the allegations are made, not when they are proven. Such requirement is unambiguous. As such, the court's reasoning articulated at the August 4, 2008 hearing was erroneous (RP at 4, 6, 19-20). "An unambiguous statute is not subject to judicial construction." See State v. Watson, 146 Wn.2d 947, 954-55, P.3d 66 (2002). When faced with an unambiguous statute, the legislature's intent is derived from the plain language alone. See Waste Mgmt. of Seattle, Inc., v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 629, 869 P.2d 1034(1994).

Furthermore, because RCW 26.09.191(2)(a) (ii) and (iii) applies to temporary parenting plans as well as permanent parenting plans, there is the implication that the screening/assessment will apply at any stage of the proceeding where abuse is alleged as grounds for restricting residential time.

Again, the court's reasoning at the August 4, 2008 hearing was erroneous (RP at 6). Prior to the court's amendments to the parenting plan of August 4th and September 8th, it would seem that it would have benefited from a post dissolution assessment due to the constellation of similar allegations by two (2) wives - one ex - one current!

C. The Court abused its discretion and erred by failing to convene an evidentiary hearing relating to an adequate cause determination;

Appellant asserts that the court's failure to make an adequate cause determination was an abuse of its discretion. A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds. Kinnan, supra, at 750. Here, the denial of an evidentiary hearing relating to appellant's petition for modification was manifestly unreasonable and was predicated upon untenable grounds

RCW 26.09.260 sets forth the relevant procedure for the Modification of parenting plan or custody decree. The statute dictates that a modification action must be predicated 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". The new facts must present a substantial change in the

circumstances of the child or the nonmoving party that establish modification is in the best interest of the child and is necessary to serve the best interests of the child. Id.

At hearing on July 17, 2008 appellant asserted that respondent's post decree marital concerns raised allegations that the child's present environment was detrimental to her physical, mental, and emotional health (RP at 2-22). As such, the court should have convened an evidentiary hearing prior to its recusal on September 8, 2008. Here, petitioner presented competent evidence that respondent had experienced a substantial change of circumstances flowing from his post dissolution marital and parenting concerns. (CP's Vol. I 101-112, Vol. V 770-773, vol, I 166-167, Vol. I 168-183, Vol. I 193-195, Vol. II 196-209, Vol. II 284-286, Vol. II 301-305, & Vol. III 428-430). The current allegations of domestic violence were supported by the existence of the King County D.V. Order (CP Vol. II 246-281). Said allegations were further supported by the still pending criminal proceedings against the respondent (CP Vol. I 59-75). The declaration of respondent's current wife presented compelling evidence relating to respondent's substantial change in circumstances. Her declaration was under oath, and presented competent evidence that the parties' child was

a witness to the post decree acts of domestic violence (CP Vol. I 168-183). Said declaration specifically articulated the emotional harm to the child and set forth with particularity an incident(s) of child abuse (CP Vol. I 168-183). The declarations of Dr. Burlingame and Dr. Lyons presented expert opinion relating to the modification factor that the child's present environment was detrimental to her physical, mental, and emotional health (CP's Vol. V 770-773 & Vol. I 166-167). Ann Pennington's declaration supported this factor, as well. The totality of this information relating to respondent's post dissolution problems formed the basis for petitioner's petition for modification. (CP Vol. I 76-83).

RCW 26.09.270 sets forth the relevant standard for adequate cause determinations as follows:

Child custody — Temporary custody order, temporary parenting plan, or modification of custody decree — Affidavits required. A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his motion, an affidavit setting forth facts supporting the requested order or modification . . . The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

Considering the weight of appellant's evidence of respondent's post dissolution substantial change in circumstances, no judicial officer of the Snohomish County Superior Court set a date for an evidentiary hearing, although appellant requested the same at hearing on July 17, 2008 (RP at 14-20).

Here, the court committed error by failing to convene an evidentiary hearing. The court's holding in In Re Parentage of M.F., 141 Wn. App. 558, 170, P.3d 601(2007) is illustrative. There, the Court granted discretionary review and stated:

The party petitioning for modification must submit an affidavit supporting the requested modification, and the nonmoving party may file opposing affidavits. Unless the court finds that the affidavits establish adequate cause for a full hearing of the modification petition, the court shall deny the petition. A court may not modify a parenting plan unless it finds (1) that there has been a substantial change in the circumstances of the child or the nonmoving party, (2) modification is in the best interests of the child, and (3) modification is necessary to serve the best interest of the child . . . Moreover, the court failed to make any of the statutorily required findings for adequate cause. Failure to apply the modification requirements of RCW 26.09.260 constitutes an abuse of discretion. We must reverse.

Id. at . . .

Here, the Orders of the Commissioner and the Judge are silent with regard to any judicial consideration of adequate cause,

or made any adequate cause determinations mandated by RCW 26.09.070 (CP's Vol. I 11 & Vol. I 12). The court commissioner's Order indicates that there has been no substantial change in circumstances since September 8, 2008 (CP Vol. I 12). The court's Order simply affirms the prior ruling (CP Vol. I 11).

Appellate Courts addressing modification actions have consistently made similar rulings. See In Re The Parentage of L.R.J., 110 Wn. App. 16, 37 P.3d 1265 (2002). There, the court indicated:

This test for a change in custody has been summarized into four elements, all of which must be met in order to justify the modification: (1) There has been a change in circumstances. (2) The child's best interests will be served by modification. (3) The present environment is detrimental to the child's well-being. (4) The harm caused by the change in custody is outweighed by the advantage of a change in custody . . . And so there must be some prima facie showing of each element. The court should require something more than unsupported conclusions . . . And the information considered in deciding whether a hearing is warranted should be something that was not considered in the original parenting plan . . . Certainly, documented supported claims of physical, sexual, or emotional abuse warrant a full hearing . . . Here, the trial judge simply checked off on a form which said that there had not been an adequate showing to warrant a hearing . . . He did this no doubt because the standard of review required that we review everything again anyway. We, accordingly, reverse and remand for the court to articulate on the

record reasons for denying a full hearing in this instance.

Id. at . . . Here, the record below is void of any process or procedure that allowed for the application of the mandated modification requirements of RCW 26.09.260.

Similarly, in Kinnan, supra, the court stated:

Here, the court failed in its application and interpretation of RCW 26.09.270. First, the court never made a finding that "adequate cause" existed for modification of the parenting plan. In other words, we have no record of adequate cause . . . We review this court's adequate cause determination for abuse of discretion . . . A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons . . . In this case, the court gave no reasons for whether adequate cause existed. And although RCW 26.09.270 does not require a court to enter written findings of fact and conclusions of law, the court nonetheless must decide whether adequate cause existed. Without any reasons for whether adequate cause existed, we cannot say that the court based its decision on tenable grounds or reasons. Thus, we hold that the trial court abused its discretion.

Kinnan at 750.

Finally, RCW 26.09.002 establishes relevant policy considerations associated with the best interests of the child as follows:

. . . 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 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 . . . required to protect the child from physical, mental, or emotional harm.

Here, no judicial officer made any findings relating to the best interests of the child (CP Vol. I 11 & Vol. I 12). As held by the court in Kinnan, supra, such omissions require reversal. There, the court stated:

Furthermore, in examining the court's findings of fact and conclusions of law, we find no reference to the criteria in either RCW 26.09.260 or RCW 26.09.191. Specifically, we find no reference to the best interests of the children in either the court's findings of fact or conclusions of law. . . "Failure by the trial court to make findings that reflect the application of each relevant factor is error."

Kinnan, supra, at 752.

D. The Court erred and expressed judicial bias by commenting upon King County D.V. No-Contact Order, and presiding over further proceedings after recusal.

During the hearing held on August 4, 2008, the Court questioned the legitimacy of respondent's King County Superior Court's D.V. Order (RP at 13-15). Thereafter, on September 8, 2008, the court, sua sponte, recused itself, ostensibly due to concerns associated with language in petitioner's supporting

declaration (RP at 3-5). The court, after recusal, entered the final parenting plan over the objection of appellant (RP 2-8).

While no formal motion for recusal was filed on September 8, 2008, under the circumstances of the court's sua sponte recusal, appellant accepted the same, and immediately, thereafter, objected to its presiding over further proceedings that day. Over appellant's objection, the court entered further orders. (RP at 1-30).

A trial court's denial of a motion that it recuse are reviewed for abuse of discretion. See Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wn. App. 836, 840, 14 P.3d 877 (2000). Due process, the appearance of fairness, and canon 3(D)(1) of the Code of Judicial Conduct (CJC) require that a judge disqualify from hearing a case if that judge is biased against a party or if his or her impartiality may be reasonably questioned². Wolfkill 103 Wn. App. at 841 (2000); see also, State v. Dominguez, 81, Wn. App. 325, 328, 914 P.2d 141(1996). The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case. See State v. Carter 77 Wn. App. 8, 12, p.2d 1230, review denied, 126 Wn.2d 1026(1995) (quoting State v.

² Here, the court articulates on the record of the September 8th hearing that it felt

Post, 118 Wn.2d 596, 618, 826 P.2d (1992). Evidence of a judge's actual or potential bias is required. Post, *supra*, at 619. Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. See State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013 (1995). Here, appellant can present competent evidence that the judge who presided over her dissolution proceeding was biased. Post, *supra*, at 619. Appellant directs this Court's attention to evidence that the trial court flat-out refuted the legitimacy of respondent's King County Superior Court's No-Contact Order at hearing on August 4, 2008. (RP at 13).

Here, it is clear that the judge showed bias when he refuted the legitimacy of the King County D.V. Order against the Respondent. Why would a sitting judge question the evidence ruled upon by a court of competent jurisdiction in a neighboring County? Why would a sitting judge not afford full faith and credit to the judicial determinations of a court of competent jurisdiction. The court's comments at the August 4, 2008 hearing are of record (RP 13-20). The record shows the judge's bias towards the respondent

that its impartiality could be questioned (RP at 3-5).

irregardless of the fact of the existing King County D.V. Order. Still blinded by the snapshot of the trial, the court was simply convinced that respondent was not a threat to the child.

This portion of the record shows judicial bias because it would cause a reasonably prudent and disinterested person to conclude that the judge was biased in favor of respondent and that, as a result of this bias, the appellant did not obtain a fair, impartial, and neutral hearing. See Bilal, *supra*, at 722.

Additionally, bias is established as a result of the court's September 8, 2008, sua sponte, recusal and re-appearance, over the objection of appellant, at a subsequent hearing on December 5, 2008. Commissioner's rulings are subject to revision by the superior court. See RCW 2.24.050; see also Const. Art. IV, 23. On revision, the superior court reviews both the commissioner's findings of fact and conclusions of law de novo based upon the evidence and issues presented to the commissioner. See In re Marriage of Moody, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999); State v. Wicker, 105 Wn. App. 428, 433, 20 P.3d 1007 (2001). Once the superior court makes a decision on revision, "the appeal is from the superior court's decision, not the commissioners. See State v. Hoffman, 115 Wn. App. 91, 101, 60 P.3d 1261 (2003).

Here, on revision, the court was reviewing the same evidence and pleadings that it had previously expressed reservations on at hearing on August 4, 2008 (RP at 1-15), as well as prior to its sua sponte recusal on September 8, 2008. (RP at 1-29). The court never reached the merits of petitioner's motions on September 8th. Review of the commissioner's Order establishes that adequate cause was denied due to the fact that no substantial change in circumstances had occurred since September 8, 2008 (CP Vol. I 12). Said analysis fails to take into consideration the substantial pleadings that had been filed prior to and after September 8, 2008 (CP's Vol. I 101-112, Vol. V 770-773, Vol. I 166-167, Vol. I 168-183, Vol. I 193-195, Vol. II 196-209, Vol. II 301-305, & Vol. II 284-286). The appellant's motion that respondent submit to RCW 26.09.191 assessment was predicated upon the domestic violence evidence that was learned of prior to the September 8th hearing. Additionally, the record establishes that respondent had then-pending criminal charges in King County District Court as of September 16, 2008. (CP Vol. I 59-75).

Also, the court's reappearance at the December 5, 2008 hearing, after its prior recusal, shows judicial bias because it would cause a reasonably prudent and disinterested person to conclude

that the judge was biased in favor of respondent and that, as a result of this bias, the appellant did not obtain a fair, impartial, and neutral hearing. See Bilal, supra, at 722.

E. The totality of the record below mandates a change of venue and allowance of appellant's Petition for Modification.

Respondent's employment with Snohomish County is well-documented. (CP Vol. I 59-74). He held said position during the dissolution proceedings. Respondent's high ranking employment with Snohomish County would cause a reasonably prudent and disinterested person to conclude that he would be afforded an advantageous level of credibility in the proceedings below.

The totality of the evidence below raises considerations of fundamental fairness and substantial justice. The court's comment upon the evidence at the August 4, 2008 hearing cuts to the core of considerations relating to the integrity of the judicial process. This concern, alone, meets the threshold requirement for application of the appearance of fairness doctrine. See State v. Post, supra, at 618. Evidence of a judge's actual or potential bias is now required. The doctrine has been applied when a court's decision-making procedures have created an appearance of unfairness. See Smith v. Skagit Cy. 75 Wn.2d 715, 453 P.2d 832 (1969). Here the court's

procedure was driven by its erroneous reasoning that was displayed when it impermissibly commented on the evidence during the August 4, 2008 hearing (RP at 1-15). The court conveyed a personal attitude toward the merits of the case. See State v. Hughes, 106 Wn.2d 176, 193, 721 P.2d 902 (1986). Here, the court gave no weight to the King County D.V. Order. The court commentary was tantamount to a disparagement of the integrity of the King County Superior Court. Such judicial commentary undermines the integrity of the judicial process in the eyes of the public, litigants, and their representatives. Such comment would cause a reasonably prudent and disinterested person to conclude that the judge was biased in favor of respondent. Bilal, supra at 722. Such commentary also defeats and undermines the mandate that a judge shall uphold the integrity and independence of the judiciary. Here, as in State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731(1974) "To constitute a comment on the evidence, it must appear that the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court's statements." The record below is replete with such comments.

Additionally, the instant appeal presents evidence of the following facts: (1) failure to convene an adequate cause

evidentiary hearing relating to appellants' petition for modification, (2) failure to make any findings relating to the best interests of the child prior to finalizing denial of appellant's petition for modification; (3) refusal to give weight, or recognize the legitimacy of respondent's King County Superior Court's D.V. order at hearing on August 4, 2008, (4) The court's sua sponte September 8, 2008 recusal; thereafter, presiding over the finalization of the parenting plan over the objection of appellant; and (5) the court's reappearance at subsequent hearing on December 5, 2008 over the objection of appellant after its sua sponte recusal on September 8, 2008.

F. Discretionary Review pursuant to RAP 2.3 should be allowed.

RAP 2.3(b) provides that generally discretionary review may be

accepted only in the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or

so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court;

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Under the facts of this appeal, articulated supra, the provisions of RAP 2.3(b) (1), (2), and (3) are applicable. Here, the totality of the issues raised in the instant appeal establish the basis for application of RAP 2.3. Appellant incorporates herein all the above-referenced arguments to support its assertion that the Superior Court committed: 1) *obvious error* by failing to convene an evidentiary hearing and failing to make required findings of fact associated with the underlying Petition for Modification; 2) that the *Superior Court committed probable error which substantially limited Appellant's freedom to act* when it failed to implement statutorily mandated assessment protocol prior to entering the final order, by presided at the Revision hearing over the objection of the Appellant, having previously recused itself from further proceedings, and 3) *that the proceedings below departed from the*

accepted and usual course of judicial proceedings as to call for review by the appellate court due to the court's failure to convene an evidentiary hearing and make required findings, its presiding over further hearings after recusal, and its questionable comment upon the validity of the King County Superior Court's Order.

In Kershaw Sunnyside v. Interurban Lines, 156 Wn. 2d 253, 259, 126 P.3d 16 (2006), the court resolved a preliminary matter regarding the procedural issue relating to whether the superior court's partial summary judgment orders were properly appealable. Although the trial court certified the orders as final, the appellate court stated "While there is some doubt as to whether CR 54(b) and RAP 2.2(d) were properly invoked in this case, these issues are not jurisdictional and do not prevent us from addressing the merits. Id. at 279 (Fn 4). Indeed, appellate courts have inherent discretion to sua sponte raise issue of appealability notwithstanding the lack of finality in the underlying proceeding. See Cf. Glass v. Stahl Specialty Co., 97 Wn.2d 880-83, 652 P.2d 948 (1982)

In Department of Labor & Industries v. William Davidson, 126 Wn. App. 730, 109 P. 3d 479 (2005), the litigation focused upon court's interpretation of statutory authority and the

deference it accorded to agency action. When holding that “ that discretionary review is appropriate in this case”, the court stated “we liberally interpret the Rules of Appellate Procedure and may alter any of its provisions when necessary to promote justice and to consider cases and issues on their merits. RAP 1.2(c).” Id. at 736 - 737. Here, the totality of the instant appeal raises considerations of fundamental fairness and substantial justice.

Additionally, the instant appeal raises considerations relating to the best interests of the child that militate that discretionary review be granted. See In Re Watson, 23 Wn.App. 21, 594 P.2d (1979). There, the court stayed an order restoring custody to a parent after an absence of five years because review was warranted in the best interest of the children. See Id. at 23. The Watson court concluded “From the record before us . . . it would be in the best interests of the children to grant discretionary review pursuant to RAP 2.3(b). Id. The Watson court noted that “Although the State does not have the right to appeal the order dismissing its petition, its notice of appeal may be given the same effect as a notice for discretionary review. RAP 5.1(c).” Id. The court in Watson, having considered the limited record before it, concluded “ we find that the decision of the Superior Court

"substantially alters the status quo," RAP 2.3(b)(2), and that *in the best interests of the children this court should determine whether the trial court erred*. *Id.* (Emphasis supplied).

Indeed, the mandates of RAP 2.3 should be liberally construed. See Walden v. Seattle, 77 Wn. App. 784, 892 P.2d 745 (1995). There the court stated:

"However, in order to ensure full and adequate protection of . . . rights, we believe the discretionary review criteria in RAP 2.3(b) must be liberally applied. Therefore, in these limited circumstances, we will grant discretionary review under RAP 2.3(b)(1) or (2) if obvious or probable error is shown *regardless* of whether the error renders "further proceedings useless" or "substantially alters the status quo or substantially limits the freedom of a party to act ." RAP2.3(b)(1), (2). With these modifications, our states discretionary review procedure provides adequate review"

Id. at 789 – 790 (Emphasis original).

Further, In Marriage of Folise, 113 Wn. App. 609, 613 (2002), the court resolved the threshold issue, that the appeal should be dismissed because it was not taken from a final judgment. There, the court stated:

"It is true that the court's order below was not a final judgment Nonetheless, we conclude that discretionary review is appropriate here because . . . the trial court has "departed from the accepted and usual course of judicial proceedings" by ignoring unambiguous language in the statutory scheme and case law on the subject."

Id. at 613.

Finally, unlike the holding in Dependency of A.G., 127 Wn. App. 801, 12 P.3d 588 (2005), discretionary review is warranted under the instant facts. Citing Watson, *supra*, the court in A.G. repeated the general rule that an appeal may be treated as a motion for discretionary review under RAP 2.3(a) and (b). *Id.* at 809 (noting that the Watson court stayed an order restoring custody to a parent after an absence of five years because review was warranted in the best interest of the children). The court in A.G. held:

“Here, the underlying issue appealed does not meet the criteria set out in RAP 2.3(a) or (b) or rise to the level of any of the considerations governing acceptance of review. The case does not present any of the considerations set forth in RAP 2.3(b), *where we must determine that the superior court has committed any obvious error or probable error, departed from the usual course of judicial proceedings*”

Id. at 809 (Emphasis supplied). Conversely, here, the underlying issue associated with the instant appeal present considerations set forth in RAP 2.3(b). As such, under the facts of the instant proceeding, this court must now determine whether the superior court has committed *any obvious error or probable error, departed from the usual course of judicial proceedings.*

CONCLUSION

Based upon the foregoing legal argument, appellant respectfully prays this Court to reverse the decision(s) of the Snohomish County Superior Court denying appellant's modification action motion for change of venue and remand for further proceedings below consistent with the requested prayer for relief herein.

DATED this 29th day of September, 2009.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on the 29th day of September 2009, I arranged for service of the foregoing Amended Brief of Appellant to be delivered to the following:

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