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NO. 64114-0-I

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

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In Re Marriage of

KENNETH B. KAPLAN,

Appellant/Cross Respondent,

and

SHEILA D. KOHLS,

Respondent/Cross Appellant.

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**BRIEF OF APPELLANT**

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WIGGINS & MASTERS, P.L.L.C.  
Charles K. Wiggins, WSBA 6948  
241 Madison Ave. North  
Bainbridge Island, WA 98110  
(206) 780-5033

Attorney for Appellant

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## INTRODUCTION

This is the second appeal arising from Sheila Kohls' ("Sheila")<sup>1</sup> petition to modify the Parenting Plan entered upon the dissolution of the marriage of the parties. In the first appeal, this Court affirmed an award of attorney fees against Kenneth Kaplan ("Ken"), reversed the trial court's finding that there was no adequate cause for a hearing on the modification petition, remanded for hearing on the modification petition, and awarded appellate attorney fees to Sheila and against Ken. (Copy at CP 719-30).

On remand, Judge James Doerty heard four days of testimony and then issued his memorandum findings and order. CP 875-86. Judge Doerty found that Sheila was not credible, particularly in her insistence that Ken uses ADR as part of an intentional plan to destroy her financially. "On this key assertion Sheila is not believable." CP 877. Judge Doerty found that there had been no substantial change in the parties' ability to cooperate in ADR and that any disputes between the parties were not adversely affecting the children. CP 885-86.

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<sup>1</sup> Intending no disrespect, we refer to the parties by their first names for clarity and ease.

Ken moved for reconsideration asking the Court to award attorney fees to him. Ken also asked the Court to vacate the finding that he had been intransigent, which was the basis for the prior attorney fee award and the attorney fees on appeal awarded by this Court. Judge Doerty declined to award fees against Sheila or her counsel, but vacated the prior finding of intransigence, substituting the following language: "Upon the more thorough examination of the facts made at trial this court's prior findings regarding Mr. Kaplan are not sustainable. In proceedings before this Court Mr. Kaplan has not been intransigent." CP 967. Ken appeals and Sheila cross-appeals.

#### **ASSIGNMENT OF ERROR**

The trial court erred in refusing to award to Ken attorney fees or sanctions against Sheila or her attorney. CP 967, 968.

#### **ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did the trial court abuse its discretion in refusing to award attorney fees against Sheila under RCW 26.09.260(11)<sup>2</sup> for bringing a modification petition in bad faith where Sheila caused the entire dispute by depriving Ken of his rights to joint-decision making

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<sup>2</sup> Renumbered as subsection (13) in 2009.

under the Parenting Plan, filed false declarations, and was found by the trial court to have acted in bad faith by assuming that Ken would not comply with the provisions of the Parenting Plan?

2. Did the trial court abuse its discretion in refusing to award attorney fees against Sheila under CR 11 for making false claims in her declarations?

3. Is Ken entitled to an award of attorney fees on appeal and to recover the attorney fees he previously paid to Sheila on appeal because of the trial court's original erroneous finding of intransigence?

#### STATEMENT OF THE CASE

**A. This proceeding has its roots in Sheila's decision to hire a psychologist to treat the parties' 7-year-old daughter without Ken's approval, despite the requirement of joint decision-making in the Parenting Plan.**

The parties' marriage was dissolved in March 2005. Ken and Sheila have two children, ZK, age 10 in 2005, and IK, age 7 in 2005. CP 1. Under the Parenting Plan, the children reside with Sheila with visitation with Ken. CP 2-5. All major decisions, including non-emergency health care, are to be made jointly. CP 8-9. The Parenting Plan includes ADR: "[m]ediation, and if no agreement is reached, arbitration by Larry Besk, or another agreed individual," CP 9, subject to review in superior court. CP 10.

Three months after the Parenting Plan was entered by the Court, Sheila and Ken met with IK's teacher and other school staff who recommended counseling for IK. 4 RP 52-53.<sup>3</sup> Ken met with the school counselor the next day and obtained some names for he and Sheila to call as possibilities as a counselor for IK. 6 RP 66. Instead, Sheila unilaterally selected Dr. Suzanne Engelberg, PhD. without telling Ken or giving him an opportunity to investigate her and set an appointment for June 29, 2005. Ex. 18. Five days before the appointment, Sheila faxed a handwritten note to Ken at the Lane Powell law firm where he was a partner addressed, "Dear Co-Parent: Mr. K. Kaplan." *Id.* Sheila told Ken she had made the appointment with Dr. Engelberg and concluded, "If there is a disagreement on your part, please respond in writing by Monday 6/28, 5:00 pm as we will need dispute resolution services." *Id.*

Sheila's fax was Ken's first notice that Sheila had hired Dr. Engelberg. Ken immediately called Engelberg's office but was unable to reach her (a fact confirmed in Engelberg's files). 6 RP 71-72. Ken finally reached Engelberg on the following Monday or Tuesday, June 27 or 28. *Id.* at 72. Ken told Engelberg about their

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<sup>3</sup> The volumes of the Report of Proceedings are not consistently paginated and this brief refers to each volume by the day of the month of trial, e.g., 4 RP 52-53 is the May 4, 2009 transcript.

experiences with IK and asked Engelberg for a CV and for references. *Id.* at 72. Ken asked Sheila to delay the appointment for one week, but Sheila objected because he had not responded in writing as she had demanded in her faxed note. *Id.* at 76. Both Ken and his attorney sent letters to Sheila's attorney, Mary Wechsler, asking that the appointment be postponed until Ken could evaluate Engelberg's qualifications and discuss the protocol to be followed in counseling. Ex. 19, 21. Sheila declined Ken's request and the appointment proceeded. 6 RP 76.

Ken was advised to move for a contempt order for Sheila's violation of the joint decision making provisions. 6 RP 81. He declined because he didn't want to fight and Engelberg had told him that she would only have four sessions with IK. *Id.* at 79, 81. Engelberg gave two references, each of whom Ken called twice, but the references never returned the calls. *Id.* at 79. Ken's attorney Mark Olson advised Sheila's attorney Mary Wechsler that, "Mr. Kaplan will allow Suzanne Engelberg to be a therapist concerning issues mentioned by [IK's] teachers over the course of the next four weeks . . . ." Ex. 22. Olson set forth conditions that the counseling would be for therapeutic purposes only, that Engelberg would share any information with Ken and Sheila jointly,

and that Engelberg would disclose any information she received from anyone other than the parents or IK. *Id.* Wechsler drafted a counter-proposal, but it was rejected by Engelberg as unworkable. Ex. 25.

Despite Ken's limited agreement that the counseling could continue for four weeks, Engelberg continued to treat IK long after the first four weeks. 6 RP 85-87. Ken paid his share of the counseling costs even though Engelberg was not covered by his insurance. *Id.* at 87-88. He asked Sheila to try and find someone covered by insurance, with experience in ADD and ADHD. *Id.*

After ten months of counseling, Ken's attorney Olson wrote to Sheila's attorney Wechsler that Ken would not pay for further counseling with Engelberg, reminding her that Engelberg had assured Ken that if she had not "worked it out" with IK in four weeks, Engelberg would not continue the counseling. Ex. 60. Wechsler responded that Sheila believed that Engelberg was helping IK, Ex. 62, to which Olson replied that Ken's impression from IK's teachers was the counseling did not assist IK and that Engelberg had never accomplished anything she had told Ken she was doing. Ex. 63.

Wechsler threatened to move for contempt, Ex. 65, and Olson suggested arbitration. Ex. 69. Wechsler responded, "Sheila . . . is willing to go to mediation." Her letter continued, "Larry Besk is available to mediate the issue," listing available dates. Ex. 70. Three subsequent letters between counsel refer to mediation. Ex. 72, 73, 74. On August 15, the mediator's office confirmed "a four hour **mediation** with Lawrence Besk" on August 30, enclosing an agreement for mediation.<sup>4</sup> Ex. 75 (emphasis supplied).

On August 16, Wechsler sent a letter referring to the process for the first time as a "mediation/arbitration." Ex. 76. Wechsler intended to call two witnesses, including Engelberg. *Id.* Ken attempted to contact Sheila's witnesses, but they were unavailable. 6 RP 257-58. Ken's witnesses were also unavailable. *Id.* Olson objected to arbitration because the parties had agreed to mediate at Wechsler's insistence, which could not be converted unilaterally into arbitration. Ex. 77. He offered the choice of having the agreed-to mediation set for August 30 or canceling the mediation and proceeding to arbitration on "a new date when both sides are ready." *Id.* He also advised that he would need a continuance of

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<sup>4</sup> In a previous arbitration, Besk had sent the parties a different agreement specifically for arbitration. 6 RP 256.

the August 30 date if they were to arbitrate in order to prepare expert witnesses and schedule possible lay witnesses. *Id.*

Wechsler immediately wrote the mediator asking for confirmation that they would immediately arbitrate if the mediation failed. Ex. 79. The mediator responded that he would proceed with arbitration on the same day if the mediation failed. Ex. 83. Olson responded that Ken would proceed with all issues except arbitration of Engelberg's counseling, because Olson was not prepared for Sheila's new witnesses, but if Sheila insisted on arbitrating the Engelberg issue on August 30, Olson would be forced to cancel the hearing. Ex. 84. Sheila insisted on proceeding with arbitration, Ex. 85, Ken was forced to cancel, Ex. 87, and the arbitrator charged Ken the cancellation fee.

Wechsler then unilaterally contacted the mediator and learned that September 15 was available. Ex. 89. Ken's attorney was in trial in Tacoma on that day. 6 RP 270. Ken decided to handle the hearing himself, *id.* at 271, but declined to arbitrate or mediate the Engelberg counseling issue as the witnesses could not be contacted or refused to be interviewed absent subpoenas. *Id.* Olson wrote to Wechsler declining to arbitrate the Engelberg issue (Ex. 90):

Mr. Kaplan will not present for arbitration or discuss in mediation his objections to Dr. Engelberg at this time and he will pay her past fees as set forth in the court orders subject to other offsets owed by Ms. Kohls to Mr. Kaplan.

Wechsler insisted on proceeding on September 15 with the Engelberg issues. Ex. 91. Olson proposed an informal meeting among the parties and their counsel to seek “some common ground that will save the parties time and money.” Ex. 92. Instead, Wechsler responded that Ken had cancelled a mediation/arbitration, which was not accurate as Sheila’s attorney had unilaterally scheduled: (1) an arbitration instead of mediation as agreed; and (2) at a date and time to which Ken had never agreed. 6 RP 274. Sheila’s attorney continued (Ex. 93.):

Your letter said you were withdrawing objections. At this point, we will assume that she’ll continue counseling and Mr. Kaplan will pay his share including back payments. It’s not acceptable to charge any offsets, unless they are agreed. If there is a problem with payments, we will bring this to court.

The recitation that Ken was “withdrawing objections” to Engelberg’s counseling is false because Ken’s attorney’s letter had stated that Ken would not arbitrate or mediate “his objections to Dr. Engelberg at this time . . . .” Ex. 90. Moreover, every document concerning Engelberg clearly notes Ken’s continued objections.

Around September 11, Ken asked for copies of Engelberg’s statements with an updated balance. 6 RP 276. On September

26, fifteen days later, Engelberg faxed Ken copies of all statements for the year, showing a balance owed as of September 14 in the amount of \$1,120. Ex. 95. Ken called Sheila on Friday, September 29 to discuss child care arrangements and told her that he would pay Engelberg's bill the first of the month when he paid his bills. 6 RP 277.

Monday October 2, was the Yom Kippur holiday. *Id.* On Tuesday October 3, Ken was served personally with a motion for contempt. 6 RP 278. Ken immediately wrote checks to Engelberg for her outstanding balance and to Sheila to reimburse her for payments she made to Engelberg to cover Ken's share of Engelberg's counseling fees. Ex. 99. Sheila's attorney agreed to strike the contempt motion, subject to the stipulation that Sheila could request attorney fees at a later date. 6 RP 280-81. Ken agreed. *Id.*

**B. Sheila petitioned to modify the Parenting Plan to deprive Ken of any decision making regarding the children; the Superior Court found no adequate cause for a modification hearing, but awarded \$5,785.90 in attorney fees to Sheila for Ken's "intransigence."**

In November 2006, Sheila petitioned for modification of the Parenting Plan, CP 26, asking the Court to deprive Ken of any decision-making and give Sheila total decision-making power. CP

41. Sheila verified the petition under penalty of perjury, including the claimed substantial change of circumstances (CP 31):

Mr. Kaplan has consistently abused his joint decision making power showing a complete lack of awareness and sensitivity to the children's needs and appears to want to only harass the Respondent and cause additional litigation.

See Declaration of Sheila Kohls, filed herewith, for details.

Sheila's declaration in support of the petition recited that their divorce was contentious and the Ken was intentionally harassing Sheila and costing her money. CP 104. Sheila stated, "Ken made his intentions clear in March of 2005 when he told me point blank: 'This will never be over until I get what I want and you don't have a penny left.'" *Id.*

Sheila's first allegation of Ken's alleged intentional harassment was that Ken had claimed that the mediated Parenting Plan incorrectly denied Ken overnight visitation with the children every Wednesday during the summer. CP 104. Four years later, after the four day trial on remand, Judge Doerty would find that Sheila's claim was totally incorrect, that the relief sought by Ken was for weekly Wednesday visitation (not weekly Wednesday overnight visitation), that Ken's pursuit of this relief was not an abuse of the Court process, that it did not support Sheila's claim for modification, did not show that Ken was out to ruin her financially,

and does not support Sheila's claim that Ken frustrates ADR. CP 878.

Sheila's declaration also complained about Ken's objections to Dr. Engelberg. CP 107-11. Sheila claimed that when she scheduled the first appointment with Dr. Engelberg, "Ken knew the situation was urgent, but he did nothing." CP 108. Sheila complained about Ken's decision to stop paying Engelberg. *Id.* Sheila claimed that her attorney set a "mediation/arbitration" to resolve the Engelberg issues, CP 109, never acknowledging that the ADR was scheduled as a mediation, and that Sheila's attorney attempted to unilaterally add arbitration only two weeks before the ADR, as explained above. Instead, Sheila simply recited that Ken "unilaterally cancelled at the last minute." CP 109-10.

Sheila asserted, "Ken then sent a letter saying he 'withdrew his objection to Dr. Engelberg,' and he would pay his share of the treatment costs subject to some kind of offset." CP 110. This assertion is contrary to the letter sent by Ken's counsel in which he stated that, "Mr. Kaplan will not present for arbitration or discuss in mediation his objections to Dr. Engelberg at this time and he will pay her past fees as set forth in the court orders subject to other offsets owed by Ms. Kohls to Mr. Kaplan." Ex. 90.

Sheila complained about Ken's payment of Engelberg's fees after being served with the contempt motion, CP 110, but she omitted the fact that as soon as he received a current statement from Dr. Engelberg, Ken told Sheila he would pay Engelberg's outstanding bill, and was served with the contempt motion after a three day weekend, as discussed above.

Four years later, Judge Doerty would find at the remand trial that there was no emergency justifying Sheila violating the joint decision requirement in unilaterally selecting Engelberg. CP 883. Judge Doerty found that Ken agreed to IK counseling with Engelberg "for an interim period of four weeks if some of his concerns could be addressed . . . ." CP 884. He found that a great deal of the delay in resolving the Engelberg issue "was because of the lawyers." CP 881. Judge Doerty observed, "[i]ronically while a significant part of this trial is about Sheila's assertions that Ken from the beginning set out to ruin her financially by overuse of ADR, in the March 2007 decision Ken was chastised for not bringing issues to the mediator sooner." CP 881.

Ken opposed Sheila's petition for modification with his own declaration and a memorandum of law arguing that Sheila's petition failed to pass the threshold adequate cause requirement. CP 198,

257. Ken argued that Sheila's petition was a preemptive attack to divert attention to the fact that Sheila violated the Parenting Plan by starting IK on therapy with Engelberg over Ken's objection. CP 262. Ken opposed putting IK on drugs without a diagnosis. CP 263. Ken argued that Sheila brought the petition in bad faith and asked for attorney fees under RCW 26.09.260, which authorizes fees for seeking modification of a parenting plan in bad faith. CP 267.

Commissioner Lori Smith heard the matter on the family motion calendar and denied Sheila's petition for a lack of adequate cause. CP 270, 273. However, Commissioner Smith awarded fees to Sheila in the amount of \$5,785.90. CP 273. These were the fees claimed by Sheila for bringing the contempt motion against Ken. CP 279.

Sheila moved to revise the ruling that there was no adequate cause for a hearing on modification. CP 274. Ken moved for a revision of the attorney fee award and the denial of his attorney fees for defending against the modification action. CP 283.

The motions for revision were heard by Judge James Doerty. CP 579. Judge Doerty denied Sheila's motion to revise on the ground that Sheila had failed to demonstrate a substantial

change of circumstances. CP 580. Judge Doerty affirmed the Commissioner's award of attorney fees, stating, "[a]lthough a contempt finding was avoided by the Petitioner's last minute compliance with the order his intransigence is well documented in the record."<sup>5</sup> *Id.* Judge Doerty denied attorney fees to both sides for the motions to revise. *Id.*

**C. Both parties appealed and this Court reversed and remanded for a trial of Sheila's modification petition and awarded to Sheila fees on appeal.**

Both parties appealed. CP 583, 590. The parties' appellate briefs in the prior appeal were introduced into evidence in the remand trial. Ken argued that the evidence failed to support a finding of intransigence. Ex. 203 at 1-10, 30-42.

Sheila's appellate brief repeated and elaborated upon Sheila's statements in her declaration in support of modification, many of which were found by Judge Doerty in the remand trial to be false. Sheila's brief claimed that shortly after the Parenting Plan was entered, Ken "sought every Wednesday overnight with the children during the summer." Ex. 213 at 4. In the remand trial, Judge Doerty found that this was a mischaracterization of Ken's

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<sup>5</sup> As explained *infra*, Judge Doerty withdrew this finding in the remand hearing.

argument, which is simply that he was entitled to visitation every Wednesday during the summer. CP 878.

Sheila's appellate brief argued that prior to the first appointment with Engelberg, Ken had the opportunity to investigate but "did nothing." Ex. 213 at 8-9. But as Ken testified at the remand hearing, Engelberg's own notes show that Ken contacted her several times prior to the scheduled appointment, asked for references, and that the references failed to return his calls. 6 RP 77, 79. Judge Doerty found on remand that there was no emergency justifying Sheila unilaterally selecting Engelberg as IK's counselor and that Ken was not unreasonable in his objections to Engelberg. CP 883-84.

Sheila's appellate brief recites that she had intended "to submit the matter of the daughter's counseling for mediation, and if there was no agreement ask the arbitrator to make a ruling." Ex. 213 at 9. In fact, Ken first requested arbitration of the Engelberg issue, Ex. 69, Sheila would not agree to arbitration, Ex. 70, 72, 73, and the mediator confirmed mediation and enclosed a mediation agreement for the parties to sign, not an arbitration agreement. Ex. 75.

Sheila's appellate brief recited that, "[i]t took months for the parties to schedule mediation/arbitration, largely due to the father's objection to the dispute resolution process and his attempt to inject new issues for dispute resolution." Ex. 213 at 10. At the conclusion of the remand hearing, Judge Doerty found that, "[t]here has been considerable controversy and finger pointing about the delays in this particular ADR but a great deal of it was because of the lawyers, not the parties." CP 881.

Sheila's appellate brief claimed that after the second ADR date was cancelled, Ken "then sent a letter stating that he 'withdrew his objection to Dr. Engelberg' and agreed to pay his share of the treatment costs." Ex. 213 at 12. The source of this statement is the declarations of Sheila and her attorney, CP 110, 599, 640, but the actual letter sent by Ken's attorney stated, "Mr. Kaplan will not present for arbitration or discuss in mediation his objections to Dr. Engelberg at this time and he will pay her past fees . . . ." CP 633.

Sheila's appellate brief rhetorically blamed Ken's "compulsion to needlessly litigate, causing the mother to incur unnecessary attorney fees . . . ." Ex. 213 at 1. Sheila's brief charged that Ken's "litigiousness and preoccupation with engaging the mother in conflict" was the reason that the trial court found a

lack of adequate cause. Ex. 213 at 1-2. Sheila argued that she had presented a prima facie case for modification “based on the father’s abuse of the dispute resolution process, to the children’s detriment,” argued that the attorney fee award against Ken was based on Ken’s “well documented” intransigence, and asked for her own attorney fees on appeal. Ex. 213 at 26, 29-30, 36-38.

This Court’s decision is at CP 719-30. The Court accepted Sheila’s version of events, affirmed the attorney fee award against Ken, and reversed the finding that there was not adequate cause to proceed with the modification petition. The Court somewhat uncritically accepted Sheila’s version of events and ignored Ken’s evidence. For example, the Court accepted Sheila’s claim that Ken was to blame for the delay in the ADR action:

[Sheila] Kohls invoked the parenting plan’s dispute resolution process. [Ken] Kaplan refused to arbitrate issues and then cancelled the mediation and/or arbitration session the day before it was scheduled to occur. Kohls’ attorney rescheduled an appointment for two weeks later. Kaplan agreed to the date, set forth new issues to be addressed, and informed Kohls he no longer wanted to mediate or arbitrate his objections to Dr. Engelberg. He also said he would pay her past fees as set out in court orders. He did not pay.

CP 721. By relying on Sheila’s declarations, the Court was apparently unaware that Ken first proposed arbitration and that

Sheila only agreed to mediation until Sheila's attorney unilaterally converted it into a mediation/arbitration two weeks before the hearing. The Court also accepted Sheila's account that Ken withdrew his objections to Engelberg, although his attorney's letter clearly says that he did not wish to arbitrate his objections on such short notice and at this time.

This Court held that the finding of Ken's intransigence "is well documented in this record . . . ." CP 722. The Court relied on Sheila's description of the ADR process, ignoring the fact that Sheila's attorney unilaterally converted what was to be a mediation into a mediation/arbitration. CP 723. The Court also accepted Sheila's claim that Ken "withdrew his objection to I.K.'s counselor and agreed to pay his portion of treatment costs." *Id.*

This Court reversed the finding of both the Commissioner and Judge Doerty that Sheila had failed to establish adequate cause for the hearing on modification. The Court pointed to Sheila's allegation that Ken had made joint decision making unworkable (CP 727):

She alleged Kaplan abused his joint decision-making power by refusing to agree, involving their attorneys in every matter that comes up, and refusing to participate in mediation and/or arbitration as required by the parenting plan when agreement cannot otherwise be achieved.

The Court specifically pointed to the “twice scheduled then cancelled ADR proceedings that served as a basis for the trial court’s award of attorney fees for intransigence” in support of the Court’s conclusion that adequate cause was established. CP 728-29. Finally, the Court awarded attorney fees on appeal to Sheila based largely on her accusations of Ken’s “intransigence.” CP 729-30.

**D. On remand, after a four-day trial, Judge Doerty found that Sheila had fabricated claims against Ken, that Ken had acted reasonably, that there were no grounds for modification, and that Ken had not been intransigent; but Judge Doerty refused to award attorney fees to Ken.**

The remand hearing was set before Judge Doerty, who, prior to the appeal had denied revision of the Commissioner’s hearing, finding no adequate cause for a modification hearing. Sheila’s new attorney, Pat Dyer, advised Ken’s new attorney, Patrice Johnston, that Sheila intended to ask for \$150,000 in attorney fees at trial. CP 733, 735. Dyer produced a one page summary of attorney fees. CP 735; Ex. 282. Ken moved in limine for dismissal of the attorney fee claim, which had never been pled in the petition for modification or any other pleading. CP 733, 735. Ken requested attorney fees for resisting Sheila’s bad faith claim. CP 745.

Sheila opposed Ken's motion, arguing that, "[t]he very foundation of Sheila Kohls' petition is a claim that Mr. Kaplan has proceeded with four years of intentional bad faith, filing frivolous motion after frivolous motion, and that as a result, she has incurred enormous, unnecessary fees and costs." CP 807, 808.

After hearing argument, Judge Doerty ruled that he would not consider evidence of any fees incurred by Sheila prior to her filing the modification petition. RP 66-67 (4/4/09). Judge Doerty then entered a written order conflicting with his oral decision, stating that he would not consider any fees incurred by Sheila prior to the signing of the Parenting Plan. CP 862. Ken moved for reconsideration, pointing out that Judge Doerty's oral ruling and written ruling were inconsistent. CP 864. Sheila responded that Ken's motion "is a pure example of his intransigence, and is utterly lacking in any legal foundation." CP 870. Sheila asked for sanctions in order to "break this so far endless cycle of intransigence." *Id.*

Judge Doerty granted Ken's motion for reconsideration for clarification, adhering to his oral ruling that he would not consider any sanctions prior to the filing of the petition for modification. CP 873.

Ken's trial memorandum requested an award of attorney fees for the necessity of defending against a meritless case. CP 782. During the trial, having heard Sheila's testimony and her attorney's arguments, Ken asked for an award of attorney fees under CR 11 because there was no basis for the modification petition or the arguments and testimony. 12 RP 117-18. Ken's attorney asked for fees in her closing argument. 13 RP 54.

Judge Doerty heard four days of testimony, primarily from the parties. Over 300 exhibits were submitted by the parties and Judge Doerty read half before trial and half of them after trial. 13 RP 57.

Judge Doerty issued a 12 page detailed set of Memorandum Findings And Petition To Modify Parenting Plan. CP 875-86. A copy of the memorandum findings is appended to this brief for the convenience of the Court. Judge Doerty began by finding that Sheila was less credible than Ken. (CP 876):

This court judges credibility based on the witness's memory, responsiveness, whether the answers are reticent or forthcoming, demeanor, consistency within the testimony, motive or interest in the outcome, and contradiction (impeachment). Based on these factors Sheila is less credible than Ken.

Judge Doerty found that Sheila “lied to the court about communication methods” when she testified that she refused to use email as ordered by the mediator because she is not good with computers. *Id.* Judge Doerty noted that Sheila’s testimony was “often histrionic and exaggerated . . . .” *Id.* Judge Doerty found that Sheila was “not believable” on her key point to remove any decision making power from Ken (CP 876-77):

Certainly in a trial such as this it is to be expected that neither party’s recollection is perfect, or that their testimony is entirely free from a self-serving viewpoint. Some issues with Ken’s credibility were pointed out in trial. However, Sheila’s case for modifying the parenting plan turns in large part on her insistence that Ken uses the ADR and court process as part of an intentional plan to destroy her financially. She testified that Ken told her he would do this. Ken testified that early on he told her he was concerned that their disagreements and cost of lawyers would send them both into poverty. On this key assertion Sheila is not believable.

Judge Doerty rejected “Sheila’s assertion that ‘the ink had barely dried on the parenting plan’ when Ken was in court over a non-existent scrivener’s error.” CP 877. Sheila mischaracterized the issue raised by Ken, which was “not about more overnights, it was about a reoccurring ten day gap in seeing the children” through it. CP 878. Judge Doerty found that Ken’s pursuit of this relief was not an abuse of court process, did not support Sheila’s case to

modify, does not show that he was out to ruin her financially, and did not support Sheila's contention that Ken frustrates the ADR provisions. *Id.* Judge Doerty rejected Sheila's claim that, "Ken is trying to wreck me financially." CP 878. He found that Ken never told Sheila that "he will make sure that all of her settlement money is spent on legal issues" and Ken's conduct of post-parenting plan litigation is not a plan of "economic coercion as a form of domestic violence." *Id.*

Judge Doerty rejected Sheila's theory that Ken was out to ruin her as a "fabrication" (CP 879):

Sheila repeated her theory that this was part of Ken's alleged scheme to ruin her financially. The implication in her pleadings was that this was established fact. It was never established. Until now it has never been specifically addressed by a mediator or the court. It was not a basis for this court's award of attorney fees in the trial *de novo* segment. Now that it has finally been the subject of a trial this court rejects the theory as a fabrication by Sheila often repeated by her lawyers with no evidence, merely her assertion.

Judge Doerty rejected Sheila's testimony that disputes raised by Ken are not really "disputes" but are "frivolous" and a "non-issue under the parenting plan." CP 880. "The court admits bafflement by this argument. How can one parent deny that the other is in disagreement?" *Id.* The "histrionic exaggeration" that Ken refused

to participate in mediation/arbitration in any way that allows it to work and that Ken “manufactures conflicts” are “not supported by the evidence.” *Id.*

Judge Doerty also rejected Sheila’s argument that Ken had acted unreasonably with respect to the issue that triggered this modification petition, the dispute over the selection of Engelberg to counsel IR. Judge Doerty found that, “[t]here was no emergency justifying Sheila violating the joint decision requirement for health care in unilaterally selecting Engelberg.” CP 883. Sheila’s unwillingness to delay IR’s counseling for one week because Ken did not ask her in writing as she demanded was “unreasonable.” CP 884. Nonetheless, Ken agreed to allow Engelberg to counsel IR “for an interim period of four weeks if some of his concerns could be addressed.” *Id.*

Judge Doerty found that Ken was not responsible for a great deal of the delay in the ADR process over the Engelberg issue (CP 881):

In the spring of 2006 Sheila initiated ADR on [IK] continuing with Engelberg and payment of her fees. There has been considerable controversy and finger pointing about the delays in this particular ADR but a great deal of it was because of the lawyers, not the parties. Sheila’s lawyer added two school district employees as witnesses with minimal notice during the summer break rightly necessitating

a postponement. Sheila's lawyer then rescheduled that postponed ADR without consulting with Ken's lawyer about the new date. Both lawyers had vacations. Ultimately this issue and others were resolved in March 2007 (EX 148). Ironically while a significant part of this trial is about Sheila's assertions that Ken from the beginning set out to ruin her financially by overuse of ADR, in the March 2007 decision Ken was chastised for not bringing issues to the mediator sooner.

Judge Doerty found that the parties had successfully participated in ADR on a number of other issues. CP 881-83. Based on this evidence, Judge Doerty found that, "[t]his history does not establish that ADR is not working as intended." CP 882. Difficulties with ADR have not adversely impacted the children. CP 884-85. The children are well cared for with "a life rich with recreational activities, material and spiritual support, excellent education, and loving, attentive parents." CP 885.

Finally, Judge Doerty concluded that there had been no fundamental change in the parties' ability to cooperate in parenting decisions from what was anticipated at the time of the original Parenting Plan. CP 885-86. Sheila's testimony that 12 years of marriage to Ken justified her expectation that Ken would not adhere to a court-ordered parenting plan is "bad faith," and has proven self-fulfilling, coloring Sheila's attitude toward Ken and his actions. CP 885. Judge Doerty concluded (CP 886):

The relief Sheila has petitioned for is not supported by the evidence. The modification to impose some sort of time limit on decision making proposed by Ken does not seem workable given the diversity of decisions that will need to be made. The court has no other modification ideas that would be likely to work any better than the current parenting plan provisions, therefore

The Petition to Modify the Parenting Plan is herewith DENIED. Each party is responsible for their own attorney fees.

Ken moved for reconsideration seeking an award of sanctions against Sheila's trial counsel, Jan Dyer. Ken relied in part on his CR 68 pre-trial offer to settle with Sheila. He also asked for CR 11 sanctions. Dyer opposed Ken's request on the ground that both she and Sheila believed that proceeding to trial "was the sole way available to end Mr. Kaplan's pervasive and long-standing pattern of intransigence and decision making under the parenting plan." CP 928. Judge Doerty denied the motion to award sanctions, but granted the motion to modify the Court's prior finding about Ken's intransigence (CP 967):

The Motion to Reconsider making findings regarding his court's prior finding that "Mr. Kaplan's intransigence is well documented in the record" is GRANTED. The following finding is substituted "Upon the more thorough examination of the facts made at trial this court's prior findings regarding Mr. Kaplan are not sustainable. In proceedings before this court Mr. Kaplan has not been intransigent."

## ARGUMENT

**A. The trial court abused its discretion in refusing to award attorney fees against Sheila under RCW 26.09.260(11) for bringing a modification petition in bad faith.**

**1. A party may be liable for attorney fees or for bad faith for: prelitigation misconduct; procedural bad faith; and substantive bad faith.**

The Legislature has provided that a court “shall assess” attorney fees against a party bringing a motion to modify a parenting plan in bad faith: “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 26.09.260(11) (now subsection (13)). Judge Doerty found that Sheila “lied to the court,” CP 876, that Sheila’s claim that Ken was out to ruin her financially was “a fabrication”, CP 879, that her accusation that Ken refuses to participate in ADR in any workable way is a “histrionic exaggeration,” CP 880 and that Sheila’s expectation that Ken would refuse to adhere to a court ordered parenting plan is “bad faith.” CP 885.

Taken as a whole, Judge Doerty’s findings compel the conclusion that Sheila brought her petition for modification in bad faith. Having made the findings that show bad faith, Judge Doerty

abused his discretion in failing to award sanctions to Ken. This Court should reverse and remand for an award of fees with appropriate findings of fact on the following issues: a refund to Ken of the attorney fees paid to Sheila pursuant to the trial court's original order; a refund to Ken of the appellate fees awarded by this Court in the prior appeal; and attorney fees for resisting this entire modification proceeding, from the filing of the petition until the ultimate conclusion.

This Court reviews the trial court's refusal to award attorney fees for abuse of discretion. ***Recall of Pearsall-Stipek***, 136 Wn.2d 255, 265, 961 P.2d 343 (1998)

The Legislature has limited a party's ability to seek modification of a parenting plan by requiring an adequate cause hearing based on affidavits before the case can proceed to a hearing on the merits. RCW 26.09.270. But this protection can be circumvented or undermined if the petitioner submits false pleadings and declarations in support of the petition. Accordingly, the Legislature has made it possible for the nonmoving party to recover attorney fees if the moving party has proceeded in bad faith.

The Legislature did not define “bad faith,” but ***Black’s Law Dictionary*** defines bad faith as “[d]ishonesty of belief or purpose <the lawyer filed the pleading in bad faith>.” ***Black’s Law Dictionary*** 159 (9<sup>th</sup> Ed., Garner Ed., 2009). Our Court of Appeals has fleshed out three different types of bad faith in a case discussing the inherent power of the court to impose attorney fees as a sanction for bad faith litigation:

In the federal courts, three types of bad faith conduct have warranted attorney's fees: (1) prelitigation misconduct; (2) procedural bad faith; and (3) substantive bad faith. Jane E Mallor, Punitive Attorneys' Fees for Abuses of the Judicial System, 61 N.C.L. REV. 613, 632-46 (1983); Note, Attorneys' Fees-Nemeroff v. Alberson and the Bad Faith Exception to the American Rule, 59 TUL. L. REV. 1519, 1524 (1984).

***Rogerson Hiller Corp. v. Port of Port Angeles***, 96 Wn. App. 918, 927, 982 P.2d 131 (1999), *rev. denied*, 140 Wn.2d 1010 (2000). Sheila committed all three types of bad faith conduct in these proceedings.

**2. Sheila is guilty of prelitigation bad faith misconduct.**

Sheila committed prelitigation bad faith misconduct, which “refers to ‘obdurate or obstinate conduct that necessitates legal action’ to enforce a clearly valid claim or right.” ***Rogerson Hiller Corp.***, 96 Wn. App. at 927 (quoting Mallor, *supra* at 632.) Mallor

explains that courts “have a strong interest in promoting the efficient use of their resources by punishing and deterring unwarranted use of the courts.” Mallor, *supra* at 637. Sheila was guilty of prelitigation misconduct by depriving Ken of his right to participate in deciding on counseling for IK and deciding on the identity of the counselor. Ken immediately began researching Dr. Engelberg’s qualifications as soon as Sheila informed him that she had already made an appointment for IK to meet with Engelberg.

Judge Doerty found that Sheila acted unreasonably when she insisted on proceeding with counseling because Ken did not respond to her in writing as she demanded. CP 884. He also found that there was no emergency justifying Sheila’s violation of the joint decision requirement. CP 883. Ken declined to fight immediately over the issue, 6 RP 81, but after ten months of counseling declined to pay for Engelberg’s future fees unless ordered. Ex. 60, 63. Ken suggested through his attorney that the parties arbitrate the issue, Ex. 69, but Sheila chose mediation, Ex. 70, 72, 73, 74, only to unilaterally convert the mediation into a mediation/arbitration two weeks before the hearing. Ex. 76. Judge Doerty found that the delay and proceeding with ADR was largely the result of the lawyers’ calendars, not Ken or Sheila. CP 881.

Sheila's violation of the Parenting Plan ultimately led Sheila to petition for modification in order to eliminate Ken's right to participate in any decision making. CP 107-11. Accordingly, this entire proceeding can be traced back to Sheila's denial of Ken's right to participate in decision making.

**3. Sheila committed procedural bad faith.**

Sheila also committed procedural bad faith, which refers to "vexatious conduct during the course of litigation." *Rogerson Hiller Corp.*, 96 Wn. App. at 928 (quoting Mallor, *supra* at 644.) The *Rogerson Hiller* court listed the following types of procedural bad faith conduct: "dilatatory tactics during discovery, failure to meet filing deadlines, misuse of the discovery process, and misquoting or omitting material portions of documentary evidence." 96 Wn. App. at 928. Sheila acted in bad faith during the ADR process when she initially rejected Ken's proposal to arbitrate the Engelberg issue, and insisted on mediation, only to make a tardy demand for arbitration/mediation when it was too late for Ken to prepare for arbitration. Ex. 76, 77. Sheila's rejection of Ken's proposal to proceed with all issues except arbitration of Engelberg's counseling forced Ken to cancel the hearing and pay the cancellation fee. Ex. 84, 85, 87. Sheila then created another problem by unilaterally

rescheduling the mediation/arbitration for a date when Ken's attorney was in trial in Tacoma, without coordinating the date. Ex. 89; 6 RP 270-72.

Sheila's procedural bad faith continued when she petitioned for modification, "misquoting or omitting material portions of documentary evidence." *Rogerson Hiller Corp.*, 96 Wn. App. at 928. Judge Doerty found that in her declaration in support of modification, Sheila "mischaracterizes" Ken's complaint about the initial Parenting Plan. CP 878. Sheila claimed in her declaration that after failing to persuade Ken to agree to continue paying Engelberg, "I finally had to have my attorney set a mediation/arbitration to resolve any issue of choice of therapist pursuant to our parenting plan." CP 109. The documentary evidence shows that this is false. Ken's attorney Olson proposed arbitration, Ex. 69, but Sheila would only agree to mediation, Ex. 70, tardily demanding arbitration only two weeks before the hearing. Ex. 76.

Sheila recited in her declaration that Ken sent a letter saying he "withdrew his objection to Dr. Engelberg," CP 110, which is plainly contrary to the letter from Ken's attorney Olson saying that Ken would not arbitrate his objections to Dr. Engelberg "at this

time.” Ex. 90. Finally, Judge Doerty found that Sheila’s allegation in her declaration supporting allegation supporting modification that Ken was out to ruin her financially was “a fabrication by Sheila often repeated by her lawyers with no evidence, merely her assertion.” CP 879. Sheila repeated many of these false statements in a subsequently filed declaration. CP 699-704.

Sheila’s misrepresentations became the basic framework for her appellate brief, which repeated and amplified on her statements. Ex. 213 at 1-12. This Court relied on these falsehoods in ordering the modification hearing. CP 723-24, 728-29.

**4. Sheila committed substantive bad faith.**

The Court of Appeals has described the third form of bad faith misconduct: “Substantive bad faith . . . occurs when a party intentionally brings a frivolous claim, counterclaim, or defense with improper motive.” *Rogerson Hiller Corp.*, 96 Wn. App. at 929. Judge Doerty found that Sheila had acted in bad faith in filing this petition (CP 885):

Sheila testified that her twelve years of marriage to Ken justifies her anticipating that Ken would refuse to adhere to a court ordered parenting plan. This is bad faith. It also means that one of the parties, did not expect the other to cooperate. As noted above this has proven self-fulfilling. It colored Sheila’s attitude towards the parties situation after the parenting plan was entered, as illustrated by her

addressing FAXs and messages to Ken as “Dear Co-parent”.

Judge Doerty found that Sheila’s central theory that Ken was out to ruin her financially was as “fabrication.” CP 879. On one particular point, Judge Doerty found that Sheila “lied to the Court,” CP 876 and that Sheila mischaracterized Ken’s position in the first dispute that arose under the Parenting Plan. CP 877-78. In addition, Sheila repeatedly misquoted or mischaracterized Ken’s positions and communications throughout the litigation.

Not only did Judge Doerty find that Sheila was not credible and the Ken was more believable than Sheila, he found that she had acted in bad faith and that she had fabricated the central claim on which she based her petition. This is substantive bad faith.

**5. The Court should reverse and remand for the award of bad faith attorney fees against Sheila and in favor of Ken.**

The Court is well aware that adequate cause hearings on petitions for modification are handled on motion calendars, often by over-worked family law commissioners. Hard-working commissioners and judges barely have time to read the briefs and memoranda submitted to them, let alone sort through lengthy declarations and attachments to determine the truth or falsity of a declarant’s characterization of prior pleadings and correspondence.

When these abuses are allowed to go unchecked, our family law courts will inevitably be led into erroneous and unfair decisions in a significant number of cases. This in turn increases motions for revision by superior court judges and appeals by this Court, all wasting a great deal of scarce judicial resources and the assets of the parties. This Court is also inevitably led into misunderstandings of the facts, resulting in unfair decisions and unnecessary remands. Left unchecked, each abuse of the judicial process inevitably leads to more abuses.

If this case does not demonstrate bad faith, it is hard to know when the Court would ever find bad faith. Judge Doerty found that Sheila's central theory of the case was a fabrication, that Sheila had lied, that Sheila was not credible, and the evidence shows that Sheila and her attorneys repeatedly mischaracterized prior pleadings and correspondence. These false characterizations were easily verifiable simply by looking at the letters sent by Ken's trial counsel. No one can reasonably read a letter that says that Ken "will not present for arbitration or discuss in mediation his objections to Dr. Engelberg at this time", Ex. 90, and honestly say that Ken was "withdrawing objections," Ex. 93, or that Ken "sent a letter stating that he 'withdrew his objection to Dr. Engelberg' . . ." Ex.

213 at 12. These dishonest statements became the basis for this Court's erroneous conclusion that, "Kaplan then withdrew his objection to I.K.'s counselor . . . ." CP 723.

At the very minimum, this Court should order Sheila to disgorge the attorney fees for trial and appellate proceedings previously paid by Ken based on his alleged intransigence, a finding which was withdrawn by Judge Doerty as "not sustainable." CP 967. Instead, Judge Doerty found that, "[i]n proceedings before this court Mr. Kaplan has not been intransigent." *Id.*

The Court should also award to Ken all attorney fees incurred in pursuing this appeal, as well as attorney fees incurred in prior proceedings leading up to this appeal.

**6. The Court should also award bad faith attorney fees against Sheila's attorney on remand, Jan Dyer.**

Bad faith attorney fees should also be assessed against Sheila's counsel for the remand hearing, Jan Dyer. Dyer advised Ken's counsel on remand Patrice Johnston, that Sheila intended to request at least \$150,000 in attorney's fees at trial. CP 735. Ken moved in limine to preclude this claim on the grounds that the only proof submitted prior to trial was a one-page summary of attorney fees and most of the fees arose out of the dissolution and post-

dissolution proceedings in which fees had either been denied or in some cases granted (and paid). CP 735-45. Ken requested an award of fees for the necessity of bringing the motion in limine. CP 745. Sheila's response to the motion was to attack Ken for what she characterized as an "ongoing pattern of abusive use of litigation, and financial harassment of Sheila Kohls which have made it impossible to exercise joint decision-making in any rational sense and have produced devastating financial consequences for Sheila Kohls." CP 807. Sheila accused Ken of filing frivolous motions whose only purpose was to drain her finances and delaying the mediation/arbitration process for the sole purpose of increasing Sheila's attorney fees. CP 807-08.

Having heard argument, Judge Doerty ruled that he would only consider fees incurred after Sheila filed the modification petition. RP 66-67 (4/4/09). Unfortunately, Judge Doerty's written order inconsistently stated that he would only consider fees "arising from proceedings commenced after the Parenting Plan was signed." CP 862. Ken moved for clarification asking Judge Doerty to conform his written ruling to his oral ruling. CP 864. Sheila's attorney Dyer responded that Ken's motion for clarification was "a pure example of his intransigence, and is utterly lacking in any legal

foundation.” CP 870. But Judge Doerty granted Ken’s motion, changing it to read that he would not consider claims for “sanctions prior to the filing of the Petition for Modification.” CP 873.

Finally, when Ken moved for reconsideration seeking an award for sanctions against Sheila’s trial counsel, Jan Dyer, Dyer opposed Ken’s request on the ground that both she and Sheila believed that proceeding to trial “was the sole way available to end Mr. Kaplan’s pervasive and long-standing pattern of intransigence in decision making under the parenting plan.” CP 928. This response was in bad faith in light of Judge Doerty’s written decision finding that Sheila’s claims were false.

For all these reasons, the Court should award sanctions against Ms. Dyer as well as Sheila.

**B. The trial court abused his discretion in refusing to award attorney fees against Sheila under CR 11 for making false claims in her declarations.**

The same false pleadings and declarations that show bad faith also justify sanctions in the form of attorney fees under CR 11. In addition, Sheila’s attorney for the remand hearing, Jan Dyer, should be sanctioned for proceeding to trial without having conducted a reasonable investigation, which would have disclosed the falsity of Sheila’s allegations. This Court reviews the trial

court's refusal to impose sanctions under CR 11 for abuse of discretion. **Biggs v. Vail**, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)

CR 11 provides that a party or attorney's signature certifies that a pleading is well grounded in fact, warranted by existing law, and not interposed for an improper purpose:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Our Supreme Court has explained the purpose of CR 11:

The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, \_\_\_ U.S. \_\_\_, 112 L. Ed. 2d 1140, 1160, 111 S. Ct. 922 (1991). Both the federal rule and CR 11 were designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." 3A L. Orland, Wash. Prac., Rules Practice 5141 (3d ed. Supp. 1991). CR 11 requires attorneys to "stop, think and investigate more carefully before serving and filing papers." See Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983). "[R]ule 11 has raised the consciousness of lawyers to the need for a careful pre-filing

investigation of the facts and inquiry into the law." Commentary, Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1014 (1988).

**Bryant v. Joseph Tree, Inc.**, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992).

This Court has noted that, "[t]he revised rule now imposes an objective, rather than a subjective, standard of reasonableness; an attorney's good faith no longer provides a shield against CR 11 sanctions." **Miller v. Badgley**, 51 Wn. App. 285, 299-300, 753 P.2d 530 (1988), *rev. denied* 111 Wn.2d 1007 (1988).

Sheila's false statements in her declarations and pleadings violated CR 11. A reasonable inquiry would have revealed that the following statements were false:

- ◆ Sheila claimed that she had her attorney set a mediation/arbitration to resolve the Engelberg counseling issue, CP 109, but the correspondence shows that Ken's attorney Olson proposed arbitration, Ex. 69, but Sheila would only agree to mediation, Ex. 70, only changing to arbitration two weeks before the hearing. Ex. 76.
- ◆ Sheila claimed that Ken "withdrew his objection to Dr. Engelberg," CP 110, which is contradicted by Olson's letter saying Ken would not arbitrate his objections to Engelberg "at this time." Ex. 90.
- ◆ Sheila's central claim that Ken set out to ruin her financially was "a fabrication." CP 879.
- ◆ Sheila mischaracterized Ken's position in the first dispute that arose under the Parenting Plan. CP 877-78.

Even a cursory review of the correspondence and prior pleadings would have revealed that Sheila's statements were false. These assertions violated CR 11, and Judge Doerty abused his discretion by failing to award CR 11 sanctions against Sheila.

Judge Doerty concluded, "[b]ut for the Court of Appeals requiring a hearing on Sheila's modification petition, the absence of any real current issues, and Ken's offer of judgment there would be CR 11 grounds for the court to order Sheila to pay Ken's attorney fees for this proceeding." CP 882. This Court's prior decision actually reinforces the need for CR 11 fees because this Court was misled by Sheila's falsehoods, which magnified the damage to Ken by triggering the trial on remand. Excusing Sheila from CR 11 falsehoods because of this Court's opinion actually rewards Sheila for violating CR 11.

Although Judge Doerty's sentence is awkwardly phrased, it appears that Judge Doerty meant that "the absence of any current issues" and Ken's offer of judgment would have compelled CR 11 sanctions absent this Court's prior opinion. Ken's offer of judgment would have given Sheila a reasonable part of the relief she sought—a limitation on Ken's participation in decision-making in addition to \$5000 in attorney fees and other relief. CP 929-31.

Sheila's pursuit of the modification petition with false evidence in the absence of any real issue, particularly after Ken's offer of judgment, cries out for the imposition of CR 11 sanctions in the form of Ken's attorney fees.

**C. This Court should award to Ken fees on appeal as well as a refund of the fees he paid to Sheila for the prior appeal.**

Judge Doerty believed that this Court's prior decision requiring a hearing on Sheila's modification petition precluded him from ordering Sheila to pay Ken's attorney fees. CP 882. Ken respectfully submits that Judge Doerty could have and should have awarded fees to Ken, but even if Judge Doerty did not abuse his discretion in denying fees, this Court should award fees and order a refund of the fees Ken paid to Sheila from the prior appeal.

For all the reasons previously argued, this Court was misled by Sheila's false statements and fabrications into ordering the remand hearing and awarding fees to Sheila in the prior appeal. This Court should hold that Sheila's bad faith pursuit of this modification action requires an award of fees to Ken or this appeal as well as a judgment against Sheila for the attorney fees previously paid to Sheila by Ken for the first appeal, plus interest. RCW 26.09.260(11) (now renumbered subsection (13)).

Even if there were no statute or court rule that would authorize this Court to sanction Sheila for her falsehoods, the Court has “inherent equitable powers authorize the award of attorney fees in cases of bad faith.” *Pearsall-Stipek, supra*, 136 Wn.2d at 266-67; *State v. S.H.*, 102 Wn. App. 468, 473, 8 P.3d 1058 (2000). The Court should award attorney fees for this reason alone.

If this Court finds that Ken was entitled to attorney fees in the trial court, the Court should also award attorney fees on appeal. *Cf. Mahler v. Szucs*, 135 Wn.2d 398, 432, 957 P.2d 632 (1998). If the Court remands to Judge Doerty to determine whether Ken is entitled to attorney fees, the Court should similarly award fees to Ken, or else direct Judge Doerty to make a determination of fees.

### CONCLUSION

Expectations of honesty in family law cases have ebbed so low that Judge Doerty felt constrained to observe, “[c]ertainly in a trial such as this it is to be expected that neither party’s recollection is perfect, or that their testimony is entirely free from a self-serving viewpoint,” adding that Sheila’s testimony failed even this mildly dishonest standard. CP 876-77. This Court based its decision on Sheila’s dishonesty and fabrications and Ken has paid the price.

The Legislature has said, "Enough!", calling for sanctions for bad faith modification petitions. Lawyers and litigants will compromise the truth unless this Court heeds the Legislature's command and calls for a sea change by raising the acceptable standards of honesty in family law. The Court should take the first step by sanctioning Sheila.

RESPECTFULLY SUBMITTED this 18 day of February 2010.

WIGGINS & MASTERS, P.L.L.C.



Charles K. Wiggins, WSBA 6948  
241 Madison Avenue North  
Bainbridge Is, WA 98110  
(206) 780-5033

**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 18 day of February 2010, to the following counsel of record at the following addresses:

Appellant

Kenneth B. Kaplan  
6811 – 50<sup>th</sup> Avenue NE  
Seattle, WA 98115

Respondent Pro Se

Sheila Kohls-Kaplan  
7035 – 51<sup>st</sup> Ave NE  
Seattle, WA 98115

Respondent Trial Counsel

Jan Dyer  
Dyer & Primont  
503 Twelfth Avenue East  
Seattle, WA 98102



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Charles K. Wiggins, WSBA 6948  
Attorney for Appellant

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

<p>In re the marriage of  <b>KENNETH KAPLAN</b>    Petitioner    And  <b>SHEILA KOHLS (fka KAPLAN)</b>    Respondent</p>	<p>No 04-3-01252-3 sea  MEMORANDUM FINDINGS AND ORDER  ON PETITION TO MODIFY PARENTING  PLAN  Clerk's action required</p>
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This matter came before the court for trial on Sheila Kohls' Petition to Modify the 2005 Parenting Plan. The court heard testimony from the parties and witnesses May 4, 5, 6 and 12, 2009. Closing arguments were heard on May 13<sup>th</sup>. The court has considered some 300 exhibits and taken notice of the legal record prior to the filing of the modification petition.

The court dissolved the marriage of Sheila Kohls and Kenneth Kaplan in 2005. Their agreed parenting plan gave them joint decision-making power on major decisions for their son, Zachary and their daughter, Idalia. The parenting plan requires "mediation, and if no agreement is reached, arbitration by Larry Besk, or another agreed individual."

Sheila subsequently petitioned the court to modify the parenting plan. A commissioner on the family law motions calendar found lack of adequate cause. On revision this court also found lack of adequate cause and sustained the commissioner's order for Ken to pay Sheila \$5,785.90 in attorney fees. Both parties appealed. On April 28, 2008 the Court of Appeals reversed and remanded for a hearing on the modification petition, COA No. 59612-8-1. The appellate court found that "notwithstanding the agreed mechanism for resolving disputes over parenting by ADR, there is evidence in the record that this mechanism may not be working as intended. Moreover, there is evidence in the record that the delays caused by the alleged ineffectiveness of the mechanism may have an adverse impact on the children."

04-3-01252-3 Findings on Dismissal

1

1 The appellate court also found that "there may be a fundamental change in the ability of the  
2 parties to cooperate from that anticipated in their agreed parenting plan. If so, the provisions of RCW  
3 26.09.187 may also support modification of the agreed plan"

4 Neither party has proposed any change in the residential provisions of the parenting plan.  
5 Therefore the applicable standard is substantial change of circumstances and whether any resulting  
6 adjustments to the plan are in the children's best interests. RCW 26.19.206 (10)

7 **Findings regarding credibility:**

8 This court judges credibility based on the witness's memory, responsiveness, whether the  
9 answers are reticent or forthcoming, demeanor, consistency within the testimony, motive or interest in  
10 the outcome, and contradiction (impeachment). Based on these factors Sheila is less credible than Ken.  
11 Some of the evidence the court relies on to reach this finding include the following.

12 Sheila's testimony did not always address facts; she testified about her feelings of Ken being  
13 consistent in co-parenting with the way he was during 12 years of marriage (EX 260) and the stress and  
14 frustration of co-parenting. Sheila lied to the court about communication methods. She testified that the  
15 first time she heard that sending personal dispute related FAXs to Ken's law office was an issue or  
16 caused problems for him at work, was during this trial. She testified that she refuses to use email as  
17 ordered by the mediator because she can't type and is not good with computers. This is contradicted by  
18 other evidence such as EX s 228, 254, 257 & 257. Sheila's testimony was often histrionic and  
19 exaggerated for example when she testified "not a single month has gone by without some ADR  
20 dispute" or Ken's objections to Dr.Dassel was "last minute sabotage". Her assertion that Ken  
21 fabricated an issue under the CR 2A is not supported by the facts as discussed below.

22 Certainly in a trial such as this it is to be expected that neither party's recollection is perfect, or  
23 that their testimony is entirely free from a self-serving viewpoint. Some issues with Ken's credibility  
24 were pointed out in trial. However, Sheila's case for modifying the parenting plan turns in large part on  
25 her insistence that Ken uses the ADR and court process as part of an intentional plan to destroy her  
26 financially. She testified that Ken told her he would do this. Ken testified that early on he told her he

1 was concerned that their disagreements and cost of lawyers would send them both into poverty. On this  
2 key assertion Sheila is not believable.

3 **Abusive use of conflict:**

4 Sheila asserts in various ways that Ken generates conflict and abuses the conflict resolution  
5 mechanism. This court understands "abusive use of conflict" to mean the involvement of the children  
6 in the parents' conflicts, such as attempting to turn a child into an ally, involve the child in a parental  
7 decision, having the child be an oral messenger or badmouthing the other parent as specifically  
8 prohibited in this parenting plan (EX. 13, sec. 3.14 (h) & (i)). This court's understanding is based on the  
9 inclusion of "abusive use of conflict" in discretionary restrictions sections of the parenting statute,  
10 RCW 26.09.191 (3) (e) which requires that the abusive use of conflict "creates a danger of serious  
11 damage to the child's psychological development". The standard is high because some conflict  
12 between even married parents is inevitable. Although Sheila has involved the children in parental  
13 disagreements more than Ken (EX 64), there is no evidence of serious damage to these children's  
14 psychological development in this case.

15 Other forms of related conflict issues not directly involving the children are asserted by Sheila  
16 to be abusive use of process. She complains of intransigence or frivolous litigation and abuse of  
17 financial matters, both discussed below.

18 Another form of abusive use of conflict could be the intentional and inappropriate involvement  
19 of others. Sheila has not specifically asserted this but Ken asserted in about her in his testimony. On  
20 many occasions Sheila has sought to involve others in her disagreements with Ken: the FAXs to the  
21 mail room at his law office and her assertion that "Ken is not an involved father" to many individuals  
22 (Keyes, Engelberg, Fong, Zipperman, some people involved in school applications), and inflammatory  
23 messages to Ken's family and friends (EX 69) are examples.

24 Allegations of abuse of the court process include Sheila's assertion that "the ink had barely  
25 dried on the parenting plan" when Ken was in court over a nonexistent scrivener's error. In testimony  
26

1 May 4<sup>th</sup> and earlier declarations in the record Sheila mischaracterizes his issue as demanding that the  
2 summer Wednesday mid-week visits all be overnights. The issue Ken raised (ECR doc. No. 81) was  
3 that the parenting plan reduced Wednesdays to alternate weeks contrary to what the parties' settlement  
4 letters had proposed (ECR doc. No. 90), contrary to what Judge Pekelis wrote would be included  
5 (Wednesday evenings, EX 1) and contrary to what the children were used to (ECR doc. No. 22).  
6 Further Ken complained that the parenting plan as drafted injected regular ten day intervals when he  
7 would not see his children. Ken asserted that this was contrary to their best interests as identified by Dr.  
8 Wieder. The issue was not about more overnights, it was about a reoccurring ten day gap in seeing the  
9 children. (ECR doc. Nos. 79, 81). The trial court's order denying Ken's motion to set a trial on this  
10 parenting plan issue does not include factual findings on this dispute. In view of the substantial  
11 reduction in Ken's residential time between Ken's proposed parenting plan (ECR doc. No. 5) and the  
12 final parenting plan, a reasonable understanding from Judge Pekelis that Wednesdays were included,  
13 Dr. Wieder's recommendations, RCW 26.09.070(3) and that ultimately this issue was settled in  
14 negotiation in Ken's favor (EX 56) Ken's pursuit of this relief was not abuse of the court process. It  
15 does not support Sheila's case to modify. It does not show he was out to ruin her financially. It does not  
16 support Sheila's contention that he frustrates the ADR provisions.

17 Sheila filed for contempt on the Engelberg fees claiming "Ken is trying to wreck me  
18 financially". The first time Sheila asserts this theory in the record appears to be her April 26, 2005  
19 letter to mediator Pekelis (EX 292). This court finds based upon Sheila's overall lack of credibility  
20 that Ken never told her "he will make sure that all her settlement money is spent on legal issues". The  
21 facts do not support this theory of abuse. The contempt motion was withdrawn when Ken paid the fees.  
22 This court further rejects Sheila's related testimony on rebuttal that the expenses of ADR and post  
23 parenting plan litigation are part of a pattern of Ken's economic coercion as a form of domestic  
24 violence. The trial was the first time in the long sad history of this case that Sheila asserts domestic  
25 violence.. Domestic violence through economic coercion is entirely unsupported by the facts. That it  
26 comes up now is evidence in support of Ken's view that Sheila clings to the conflict unable to move

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1 on. Sheila's need to cling to the conflict is further evidenced by her response to Ken's CR 68 offer of  
2 judgment discussed below.

3 Sheila filed her Petition to Modify November 22, 2006. At this point there had been *one* ADR,  
4 delayed initially by Sheila's lawyer's actions although later Besk chastises Ken for not pursuing the  
5 issue pro-actively. In the modification petition Sheila raises the ADHD medication issue which had  
6 never been to ADR.

7 Sheila appeals denial of adequate cause; Ken appeals attorney fee award.

8 Ken files for trial *de novo* of the May 15, 2007 arbitration decision. This court dismissed the  
9 trial *de novo* on procedural grounds and awarded Sheila attorney fees. This court then denied a motion  
10 for reconsideration, awarding Sheila attorney fees. In both the motion to dismiss and response to the  
11 motion for reconsideration Sheila repeated her theory that this was part of Ken's alleged scheme to ruin  
12 her financially. The implication in her pleadings was that this was established fact. It was never  
13 established. Until now it has never been specifically addressed by a mediator or the court. It was not a  
14 basis for this court's award of attorney fees on the trial *de novo* segment. Now that it has finally been  
15 the subject of a trial this court rejects the theory as a fabrication by Sheila often repeated by her  
16 lawyers with no evidence, merely her assertion. The evidence at this trial establishes that during the  
17 marriage Sheila intentionally did not participate in business matters. This court did not find  
18 intransigence or bad faith regarding the trial *de novo*. The procedural issues were not frivolous. The  
19 factual issue for which testimony was sought was the nature of Idalia's medical diagnosis and the  
20 appropriateness of treatment by stimulant medication. This is a very contentious and controversial  
21 subject in general and especially so in parental disagreements. In this instance Ken's concerns were  
22 well taken.

23 The next court "event" is February 1, 2008 when Ken files a motion to enforce regarding the  
24 provision for the children's passports. There had been previous difficulties with travel plans. The time  
25 remaining before Ken's trip to Mexico with the children ran up against the notice requirement on the  
26 family law motions calendar. Sheila could have provided the documents earlier and chose not to do so.

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1 The "court event history" as this decision identifies it consists of three court actions initiated by  
2 Ken and two initiated by Sheila. All of the attorney fee awards favored Sheila and none of the issues  
3 were frivolous or made in bad faith. This record does not support abuse of the court process. Ken's  
4 intransigence as noted in the record was thoroughly reviewed by the Court of Appeals. It has been  
5 previously resolved by court orders and is insufficient basis to deprive him of decision making.  
6

7 **The modification petitioner (Sheila) has not proved that that the agreed mechanism for**  
8 **resolving parenting disputes by ADR is not working as intended .**

9 The parenting plan requires that the purpose of the ADR mechanism is "to resolve  
10 disagreements about carrying out this parenting plan, (EX 13 p.9). Both Ken and Sheila have invoked  
11 the ADR process. Sheila testified that Ken's "disputes" are not really "disputes", that they are  
12 "frivolous" (ECR doc. 145). Examples include Sheila's refusal to discuss alternatives to Engelberg for  
13 Zach ("it is not a parenting plan issue") or Sheila's insistence that middle school applications (resolved  
14 by Besk) are a "non-issue under the parenting plan". The court admits bafflement by this argument.  
15 How can one parent deny that the other is in disagreement? Sheila is frustrated that Ken injects a  
16 "laundry list" of disagreements into the dispute process she apparently believes that only certain  
17 parenting disagreements are subject to the ADR provision. Ken is frustrated by the inability for him  
18 and Sheila to "have a conversation", as demonstrated by her refusal to use e-mail, sending personal  
19 FAXs to his work place or have joint discussions about Idalia with her counselor because she doesn't  
20 want to talk to Ken directly (EX 23).

21 In fact some of the issues Ken submitted to ADR were rejected as not needing a mediator's  
22 decision; some were resolved in Ken's favor, some were resolved in Sheila's favor; some were  
23 identified as enforcement issues. This underscores that the histrionic exaggeration of Sheila's  
24 assertions that Ken has "absolutely refused to participate in the mediation/arbitration process in any  
25 way that allows it to work (ECR doc. 165) and that "he manufactures conflicts" are is not supported by  
26 the evidence.

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1 Sheila complains that Ken won't participate in ADR but also complains that he abuses ADR in  
2 order to ruin her financially. She complains that Ken always involves lawyers in their disagreements  
3 while not hesitating herself to involve her own lawyers (EX 36). The evidence does establish that  
4 Sheila refuses to follow the resolutions and directives of the ADR provider: substituting her version of  
5 Zach's middle school application after Besk picked Ken's or refusal to use email as directed by Slusher  
6 (EX 261) are examples

7  
8 When Sheila raised the issue of Engelberg counseling Zach Ken responded within a week (EX  
9 35 - 39). Sheila requested ADR on the issue (EX 37). This issue was mediated promptly. Ken  
10 prevailed. Issues about school applications, summer camps and tutoring were addressed. Sheila  
11 prevailed on summer camp. A procedure for school applications was designed by Besk. Tutoring was  
12 not decided.

13 In the spring of 2006 Sheila initiated ADR on Idalia continuing with Engelberg and payment of  
14 her fees. There has been considerable controversy and finger pointing about the delays in this particular  
15 ADR but a great deal of it was because of the lawyers, not the parties. Sheila's lawyer added two  
16 school district employees as witnesses with minimal notice during the summer break rightly  
17 necessitating a postponement. Sheila's lawyer then rescheduled that postponed ADR without  
18 consulting with Ken's lawyer about the new date. Both lawyers had vacations. Ultimately this issue  
19 and others were resolved in March of 2007 (EX 148). Ironically while a significant part of this trial is  
20 about Sheila's assertions that Ken from the beginning set out to ruin her financially by overuse of  
21 ADR, in the March 2007 decision Ken was chastised for not bringing issues to the mediator sooner.

22 In January 2006 the parties made an effort to have a short mediation with Besk without  
23 involving their lawyers. Sheila's lawyer cancelled this ADR (EX49).

24 On May 17, 2007 was an ADR decision about extracurricular activities, school changes,  
25 counseling and make-up time (EX 171, EX 168).

26 In August 2007 ADR addressed continuing with Engelberg for Idalia and obtaining an updated  
evaluation for Zach.

1 In September of 2007 Ken wanted Besk to decide some remaining issues still pending from  
2 March, 2007 on the documents without oral argument (EX 148) to expedite the resolution and save  
3 money. Sheila denied there were any pending decisions and disqualified Besk for the future (EX 212).  
4 There were in fact pending issues and on the most significant, (changing therapists without a complete  
5 evaluation), Ken prevailed. This is another example of Sheila claiming there are no disputes when there  
6 are in fact disputes. This has delayed ADR and made it more expensive.

7 In November 2008 Sheila refused ADR on the modification petition because it would have cost  
8 each of them 50% rather than proportional shares. (EX 253, 254). Ken prevailed on other issues (EX  
9 261 p.3).

10 The court is mindful of RCW 5.60.070. Since effective use of ADR is a central issue in this  
11 proceeding counsel and the court agreed at an earlier pretrial hearing that there would be disclosure and  
12 consideration of the pretrial mediation pursuant to subsection its (1) (a). EX 266 establishes that on  
13 January 14, 2009 Ken made a CR 68 offer of judgment *yielding sole health care decision making to*  
14 *Sheila*. This offer was rejected. Sheila insisted on this trial. But for the Court of Appeals requiring a  
15 hearing on Sheila's modification petition, the absence of any real current issues, and Ken's offer of  
16 judgment there would be CR 11 grounds for the court to order Sheila to pay Ken's attorney fees for this  
17 proceeding.

18 This history does not establish that ADR is not working as intended. The statutory intent is that  
19 parties will not address parenting disagreements in court but in a less formal decision making  
20 environment, less constraining, and more thorough than motions calendars. Perhaps, with the benefit  
21 of hindsight, a parenting coach might have been an alternative approach but there is no way of  
22 concluding that it would have been less expensive or less stressful. Many issues of significant impact  
23 on these children have been effectively addressed in ADR. Difficulties, delays and expenses have been  
24 caused by both parties.  
25  
26

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1           **The modification petitioner has not proved that the delays caused by the alleged**  
2 **ineffectiveness of the ADR mechanism have an adverse impact on the children.**

3           **Zachary:**     There is almost no evidence, certainly no persuasive evidence supporting this  
4 assertion with respect to Zach. The basis of Sheila's claim appears to be that Ken objected to selecting  
5 Engelberg as Zach's counselor. Ken prevailed on that issue. It took less than a month to resolve.  
6 Ken's objections to and lack of confidence in Engelberg are reasonable. She had been unilaterally  
7 selected in violation of the parenting plan. She was not covered by his insurance. Several professionals  
8 including Engelberg and mediator Besk noted the importance of a provider that "both parents have  
9 confidence in" (EX 247). Idalia herself had concerns about her brother being around her counseling  
10 (EX 307). Ken's doubt that Zach needed counseling was also reasonable. Ken's parenting history on  
11 the issue of counseling and ADHD medications for Zach is contrary to Sheila's assertions (EX 313).  
12 Sheila wanted Zach in counseling because he asked for it and she wanted to be responsive. Ken  
13 concluded that Zach most likely asked for it because he was bored waiting at his sister's sessions,  
14 possibly envious. Zach's ensuing ten sessions suggests that Ken's view was the more realistic. EX  
15 36 - 39 do not prove that Ken sabotages the children's treatment, but rather that Sheila becomes  
16 quickly frustrated when Ken disagrees with her. This is an example of Sheila's difficulties with co-  
17 parenting, not an example of a parenting plan that needs modification.

18           **Idalia:** Black's Law Dictionary, 4<sup>th</sup> ed. defines "emergency" as "A sudden unexpected  
19 happening; an unforeseen occurrence or condition." There was no emergency justifying Sheila  
20 violating the joint decision requirement for health care in unilaterally selecting Engelberg. Idalia's  
21 treatment needs were specifically anticipated concerns in the parenting plan provision about therapy  
22 (EX 13, sec. 3.14(n)). Counseling had been worked out by the parents for both children previously; so  
23 had ADHD medication for Zach. Sheila testified on cross examination that both she and Ken knew  
24 about the school conference about Idalia's behavior three weeks before but that *neither* of them came  
25 with counselor names. This is inconsistent with her assertion that there was an "emergency". The  
26 history of the counseling provided, mostly in the form of "play therapy", and the issues addressed

1 likewise is evidence that this was a routine situation, not an emergency. Engelberg in her deposition  
2 describes Idalia as a child "withdrawn" and having "social difficulties", not as a child in crisis.  
3 Sheila's unwillingness to delay the start of Idalia's counseling a week because Ken didn't ask in  
4 writing as she told him to do was unreasonable. Notwithstanding Sheila's intentional violation of the  
5 joint decision making requirement Ken agreed to Idalia staying with Engelberg for an interim period of  
6 four weeks if some of his concerns could be addressed (EX 22). Ken's requested that Engelberg's  
7 discussions about Idalia be with both parents jointly, which Sheila refused because she didn't want to  
8 talk to him (EX 23).

9 Sheila complains that Ken does not administer the children's' ADHA medication on his  
10 weekends as evidenced by teachers' reports of their behavior on Monday. There are several possible  
11 reasons for Monday morning behavior, including the transition from the alternate parent. This claim  
12 has not been proven. The assertion is additionally problematic because Sheila testified on cross  
13 examination that she herself does not follow the medication regimen prescribed by Dr. Varley in 2008.  
14 Sheila administers the medication as she perceives it is needed, situationally. Ken's assertion is  
15 credible that he did not know that Sheila gave the school Idalia's medications to administer until she  
16 testified to this at trial. This is another example of Sheila not following the parenting plan.

17 Co-parenting has been a heavy burden for Sheila. Her distress is notable throughout the history  
18 of the dissolution and parenting plan. It is obvious in her testimony. The history of the marriage itself  
19 is largely unknown to this court, however in the parenting evaluation Dr. Wieder observed issues with  
20 Sheila letting go of control over the children (EX 167). The vocational assessment recommended that  
21 Sheila receive another two years of once-weekly psychotherapy to help with the anticipated transition  
22 (EX 309). Apparently Sheila did some therapy and clearly acknowledged the need for more in rebuttal  
23 testimony. Sheila testified that the extreme stress she experiences could not but effect the children.  
24 This is a Sheila problem not a parenting plan problem. There is very little evidence that the children are  
25 adversely impacted by the difficulties with the ADR mechanism. Both had special learning needs  
26 during the marriage. These needs were addressed by their parents in appropriate and effective ways.

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1 Although there is evidence that both parents may have exposed the children to more of their  
2 disagreements than is optimal, and that each child continues to have some special needs the evidence  
3 that they have been harmed by the joint decision making or the ADR process is not persuasive. These  
4 children are very well cared for. They have a life rich with recreational activities, material and spiritual  
5 support, excellent education, and loving, attentive parents. Furthermore the last disputes about joint  
6 health care seems to have been two years ago.

7 **Is there a fundamental change in the ability of the parties to cooperate from that**  
8 **anticipated in their agreed parenting plan sufficient to modify the plan pursuant to RCW**  
9 **26.09.187?**

10 The court understands the decision on appeal as requiring a hearing on whether there is a  
11 fundamental change in the ability of the parties to cooperate from that anticipated in their parenting  
12 plan applying the provisions of RCW 26.09.187. Section 187 does not address modification or  
13 adjustment of parenting plans. Section 187 does address the criteria for ordering ADR other than court  
14 action, and for allocation of decision making. Reading both statutes together this court must first  
15 determine whether there is a fundamental change in the parties ability to cooperate from that  
16 anticipated in the agreed plan, and if so whether the proposed adjustments to ADR or allocation of  
17 decision making are in the children's best interests.

18 Sheila testified that her twelve years of marriage to Ken justifies her anticipating that Ken  
19 would refuse to adhere to a court ordered parenting plan. This is bad faith. It also means that one of the  
20 parties, did not expect the other to cooperate. As noted above this has proven self-fulfilling. It colored  
21 Sheila's attitude towards the parties situation after the parenting plan was entered, as illustrated by her  
22 addressing FAXs and messages to Ken as "Dear Co-parent". As Dr. Wieder anticipated in his  
23 parenting evaluation making the change from *de facto* decision maker to co-parenting was difficult for  
24 Sheila. The issue is not whether one of the parents is exceptionally stressed. The issue is what is in the  
25 children's best interests? Public policy recognizes the fundamental importance of the parent-child  
26 relationship with each parent, RCW 26.09.002. All parts of a parenting plan including shared decision

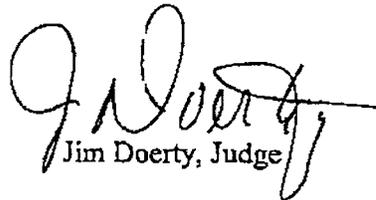
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1 making should be considered in terms of fostering the relationship with both parents. Sheila herself  
2 recognizes this. She testified about her wish that Ken be an involved father and a participant in her  
3 children's lives several times. She also wants Ken to parent her way. That such involvement is a  
4 source of stress and frustration for her does not diminish the importance and value to the children of  
5 shared decision making. The parenting plan anticipated that the parents share decision making about  
6 health care and education. These children are well cared for in both regards. The outcomes are  
7 successful in both regards. There have been many joint decisions other than the disputed ones. The  
8 parenting plan's overall history and the evidence at this trial show a demonstrated ability and desire to  
9 cooperate with one another, which is the only RCW 26.09.187 factor at play in this case. There is no  
10 fundamental change in the ability to cooperate from what was anticipated. It has been difficult which  
11 was anticipated. But for this trial on a petition filed four years ago the more recent parenting history  
12 may even suggest a trend towards improvement.

13  
14 The relief Sheila has petitioned for is not supported by the evidence. The modification to  
15 impose some sort of time limit on decision making proposed by Ken does not seem workable given the  
16 diversity of decisions that will need to be made. The court has no other modification ideas that would  
17 be likely to work any better than the current parenting plan provisions, therefore

18 The Petition to Modify the Parenting Plan is herewith DENIED. Each party is responsible for  
19 their own attorney fees.

20 DONE this 8<sup>th</sup> of June, 2009

21  
22   
23 Jim Doerty, Judge  
24  
25  
26

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