66213-9

66213-9

NO. 66213-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Marriage of Bubernak

IRENE C. BUBERNAK,

Appellant,

v.

THOMAS G. BUBERNAK,

Respondent

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

The Honorable Michael J. Fox, Judge

APPELLANT'S BRIEF

NANCY HAWKINS
Attorney for Appellant

6814 Greenwood Ave. N.
Seattle, WA 98103
(206) 781-2570

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Other Jurisdictions

Statutes

Court Rules and Other Authorities

I. INTRODUCTION

Irene Bubernak, the Appellant, appeals the rulings of the trial court that were contained in Findings of Fact and Conclusions of Law (Supp. CP) and the Decree of Dissolution (Supp. CP), the Parenting Plan (CP 81-91), and the Order Denying Reconsideration (CP 177-178).

II. ASSIGNMENTS OF ERROR

1. In Finding of Fact No. 2.19, the trial court erred in the terms of the Parenting Plan and Supplemental Order on Parenting Plan. CP 81-91; Supp. CP ____.
2. The trial court erred in concluding that the Motion for Reconsideration was not timely made and further erred in finding that nothing warranted reconsideration. CP 177-178
3. The trial court erred when it denied the wife's motion for a new trial. CP 177-178.
4. The trial court erred when it denied wife's motion to vacate judgment. CP 177-178.
5. The trial court erred when it assessed sanctions against wife. CP 177-178.

Issues Pertaining to Assignments of Error

1. Whether in determining a parenting plan the trial court adequately considered that the mother had been the primary care provider for the child throughout his life and that the father's employment required him to travel 25% of the time.
2. Whether in determining a parenting plan the trial court adequately considered that the father had a history of emotional abuse and failed to complete domestic violence treatment.
3. Whether the trial court abused its discretion by failing to make a finding of a history of domestic violence under RCW 26.09.191 when the only domestic violence expert to testify stated that the father had engaged in domestic violence.
4. Whether the trial court abused its discretion by awarded the mother less residential time than requested by the father or recommended by the parenting evaluator.
5. Whether the trial court erred in awarding sole decision-making to the father absent any findings that require limitations on joint decision-making

6. Whether the trial court abused its discretion when it stated that the mother should have increased time and involvement with the child "in the future" but failed to provide a mechanism for implementing such increased time and involvement.
7. Whether the trial court maintained a fair trial in violation of Canon 3(A)(2), Code of Judicial Conduct given the obvious and significant physical and emotional impairment of the mother's trial counsel.
8. Whether a motion for reconsideration and/or new trial is timely if filed within ten days of the entry of the Final Parenting Plan.
9. Whether the trial court erred in denying the mother's motion for reconsideration and/or new trial and the motion to vacate judgment in light of the substantial irregularities of the trial and impairment of counsel
10. Whether the trial court erred in awarding sanctions against the mother for timely filing post-decree motions for relief.

III. STATEMENT OF THE CASE

A. Procedural History

Irene Bubernak filed a Petition for Dissolution with King County Superior Court on December 2, 2008. CP 1-6. Restraining orders were put in place at that time and remained through trial. CP 11-13. Exhibit 15. A temporary order re residential schedule was entered on December 15, 2008 which provided for the parties' child to live primarily with the mother and to reside with the father every Thursday and alternate weekend. Exhibit 18. CP 24-35. A permanent (one year) Order for Protection was entered against the husband. Exhibit 20. This order provided that the *"Respondent committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of petitioner...."* Exhibit 20. As a result numerous restraints were put on the husband. These or similar orders were renewed periodically and remained in case until trial. Doug Bartholomew was appointed to conduct a domestic violence risk assessment. Exhibit 18.

After several continuances, the dissolution trial began on June 15, 2010, resumed on June 16, 2010 and then was adjourned

until resuming on August 2, 2010. Trial concluded on August 12, 2010 and an oral decision was entered immediately thereafter.

B. History of the Parties.

Irene and Tom Bubernak were married on September 1, 1996. They had a son, Sean, aged six at the time of trial. Sean was born on March 15, 2004 by cesarean section. CP 16. Irene stayed home with Sean for four months on maternity leave. RP, June 15, 2010, p. 151-152. Irene returned to work but did not work full time for the following two years. RP June 15, 2010, p. 151, line 19-20. Tom Bubernak took two weeks off after the child's birth and returned to work thereafter. RP, June 15, 2010, p. 152. His job involved significant travel, 20-25% of the time, with trips lasting up to three months in duration. RP, June 15, 2010, p. 154. Supp CP.

The parties' marriage was problematic with each party having complaints about the other which could not be resolved through years of marital counseling. RP, June 16, 2010, p.196-7. Irene Bubernak filed for dissolution on December 2, 2008. Her attorney was Janis Dyer. CP 1-6.

The parenting plan litigation was immediately marked by many allegations and counter-allegations with multiple witnesses on either side. The parties also had significant financial assets.

Although the case was clearly going to be contested and need substantial attention, Ms. Dyer did not attend to the case. In the first few months of the case, Ms. Dyer went on multiple vacations and, as a result, was not available to adequately represent Ms. Bubernak. CP 22-23, 36-39. In fact, she vacationed immediately after the dissolution was filed when she filed a Notice of Absence for the period December 17, 2008 through January 5, 2010. CP 22. Temporary orders were entered on December 15, 2008. Virtually no action was taken until February 11, 2009 when an agreed order appointing a parenting evaluator was entered. Ms. Dyer filed a Confirmation of Issues on March 23, 2009 which represented that no scheduling issues existed. She then filed another Notice of Absence of Counsel for the period April 17, 2009 through April 20, 2009 and May 12 through May 21, 2009. CP 36. A status conference was held on April 24, 2009 at which it was determined that the case was not on track. Ms. Dyer did not appear for this status conference. Supp. CP.

Mr. Bubernak filed a motion in May of 2009 (during one of Ms. Dyer's scheduled vacations) and scheduled a hearing for June 2, 2009. Supp. CP. His motion was filed on May 19, 2009 even though he knew, through the previously file Notice of Absence of

Counsel, that Ms. Dyer was not available. CP 36. Supp. CP. The time between the requested hearing date and Ms. Dyer's scheduled return from vacation was largely filled with the Memorial Day weekend.

Unfortunately, Ms. Dyer did not timely return from her May 2009 vacation in Palm Springs. She was involved in a very serious car accident on May 16, 2009. RP, August 10, 2010, p. 388. Another attorney, unfamiliar with the case, assisted in the preparation of a response to the motion. The hearing was ultimately heard on June 5, 2009. Supp. CP. Ms. Dyer could not assist Ms. Bubernak in any manner or attend as she was still in Palm Springs undergoing medical treatment. RP, June 15, 2010, p. 114, line 4-7. Ms. Bubernak did not know the attorney who assisted in Ms. Dyer's absence. When Ms. Dyer's office determined that she would not be returning any time soon, another Notice of Unavailability was filed for the period June 26, 2009 through July 20, 2009. CP 37. Even the other attorney who had briefly assisted in June was then not available and she filed a Notice of Absence for the period July 6, 2009 through July 12, 2009 and August 3, through August 11, 2009. By this point, Ms.

Bubernak had been without her counsel continuously for three months.

Ms. Dyer continued to have medical problems but did not disclose to Ms. Bubernak the extent of her problems. CP 123-127. In September of 2009, the case was reassigned to Judge Doerty from Judge Clark (after the husband filed an Affidavit of Prejudice.) Supp. CP. Without any notice to or agreement by Ms. Bubernak, in September of 2009, Ms. Dyer's office filed an Affidavit of Prejudice against Judge Doerty. Supp. CP. Ms. Bubernak learned later this was due to Ms. Dyer's problems working with Judge Doerty. The case was reassigned to Judge Lum who set a pre-trial conference. In October of 2009, Ms. Dyer filed a Motion for Continuance of the Trial Date. CP 40-43. For this motion, she did not disclose any current future disability or unavailability, only her past injury. Based on her counsel's request for a short continuance of only three months (from November to February), Ms. Bubernak believed that her counsel would be fully available for discovery, settlement conference preparation, settlement conference, trial preparation and trial. This was not the case. Ms. Dyer filed another Notice of Unavailability for the period December 28, 2009 through January 19, 2010. CP 53. Judge Lum set another pre-trial conference for

January 22, 2010. Ms. Dyer filed another Motion for Continuance. CP 54. In her declaration, Ms. Dyer admitted that she had been unable to work since Thanksgiving. CP 55-58. The court continued the trial to April 19, 2010. CP 59-61.

In March of 2010, the trial was continued again to June 1, 2010 due to problems with witness reports. CP 64-68. This was the first continuance that was not directly due to Ms. Dyer's vacations or injury. Of course, the delay in witness reports was indirectly due to Ms. Dyer's unavailability and lack of attention to the case.

Even with this additional continuance, Ms. Dyer was again unable to do any significant work on this case. She broke her injured leg on April 30, 2010 and required another surgery. She was out of the office for another three weeks, barely returning in time for the mediation. She submitted no substantive materials for the settlement conference and did not even substantively communicate with Ms. Bubernak about the settlement conference until that day. CP 125. Ms. Dyer admitted to the wife, that she had not read the materials submitted by the husband. At the conference, Ms. Dyer pressured Ms. Bubernak into a settlement of the property/debt at this conference claiming that a settlement was

necessary to be able to get a continuance of the trial as to parenting issues so that discovery could be conducted as to parenting.[1] CP 128.

Once the property issues had been decided, Ms. Dyer moved for another trial continuance. Clearly not prepared for trial, in May of 2010, Ms. Dyer asked for a continuance to September 13th or 20th of 2010. In this May 2010 motion, she disclosed for the first time details of her latest medical crisis. Even before the motion was heard, she filed a Notice of Absence for the period August 7 through September 7, 2010. CP 69. The court denied the request for a three month continuance but continued the case for two weeks to June 14, 2010. CP 70-71.

Ms. Dyer failed to cooperate with the required Joint Statement of Evidence prompting a complaint by opposing counsel. Supp. CP. By contrast, the husband's counsel submitted exhibits on time along with a proposed parenting plan, proposed order of child support with worksheets, husband's financial declaration and a trial brief. These were never provided to the wife until the day of trial. Although the parenting plan was the primary issue for the trial,

[1]Ms. Bubernak is not seeking to set aside the CR2A agreement despite the circumstances.

Ms. Dyer never submitted a proposed Parenting Plan, proposed Order of Child Support/Worksheets or trial brief. CP 73-79.

Trial began on June 15, 2010. The court placed strict time constraints on each side's testimony of only seven hours per party and monitored them throughout the trial. RP, June 15, 2010, p. 6; RP, August 9, 2010, p. 252 and RP, June 15, 2010, p. 187. Often these scheduling/timing issues were done off the records. RP, August 9, 2010, p. 251. Even so, Ms. Dyer didn't know how much time she had left when the case resumed. RP, August 9, 2010, p. 252-253.

Ms. Dyer was obviously unprepared and the court was obviously irritated with her for that lack of preparation. Her exhibits were provided late. She attempted to question witnesses regarding documents and yet did not have copies of those documents for the court and counsel. RP, June 15, 2010, p. 48; RP, June 15, 2010, p. 140, l. 16-23. The court commented on the delay caused by the lack of prior exchange of documents. RP, June 15, 2010, p. 48. This issue arose again that day with Ms. Dyer admitting that she had not yet submitted a proposed parenting plan for the trial and she was *"a little behind."* RP, June 15, 2010, p. 127, lines 1-21.

The husband had named the wife's therapist on his witness list but Ms. Dyer did not object to this witness until the witness appeared to testify on June 15, 2010. This objection and argument used up a valuable portion of the wife's allotted trial time.

The trial transcript is replete with inappropriate behavior by Ms. Dyer. Ms. Dyer repeatedly ignored or argued with the trial judge as he attempted to encourage her towards a particular line of testimony that he deemed more relevant. RP, June 15, 2010, p. 61-62. She improperly interrupted opposing counsel's cross-examination. RP, June 15,, 2010, p. 96, line 1. She argued with the court after evidentiary rulings. RP, August 9, 2010, p. 268-9. She even argued after winning evidentiary rulings. RP, August 9, 2010, p. 317. She argued with the court when she attempted to impeach the husband's testimony through inappropriate means. RP, August 9, 2010, p. 333. She didn't listen to trial testimony. RP, August 9, 2010, p. 286-287. She directed questions at opposing counsel rather than the trial judge. RP, August 9, 2010, p. 288; RP, August 9, 2010, p. 334. She was sarcastic to opposing counsel during trial. RP, August 9, 2010, p. 334. She was sarcastic to the husband during her cross-examination of him and responded sarcastically to the trial judge's question of her during that

testimony. RP, August 9, 2010, p. 346. She was confused about dates. RP, June 16, 2010, p. 229, line 7-25 and p. 230, line 1-2. She was confused about exhibits. RP, August 9, 2010, p. 289. Ms. Dyer spontaneously told the court that she was not fit for trial on that first day:

> *And I'm going to just get to the court right off the top. Massive amounts of general anesthesia around the 1st of May, I have very bad memory problems from two weeks before and the two weeks after. So from about April 15th to May 15th, you can tell me anything happened and I don't really know a lot, and I apologize, lawyers should know. I've got staff around me trying to do the best I can.*

RP, June 15, 2010, p. 104, line 7-14. This was the first time that the wife was informed that Ms. Dyer's injuries affected her mental capacity. CP 124.

During trial, Ms. Dyer admitted to Ms. Bubernak that she was taking narcotics during trial and not able to do her job and stated, *"You don't want me here today."* CP 126.

The trial resumed on June 16, 2010. On the record, the husband's counsel disclosed a back injury suffered that morning. RP, June 16, 2010, p. 192, p. 9. Yet she ably continued her work as counsel for husband. By contrast, Ms. Dyer was repeatedly confused over evidence, particularly relevant dates. RP, June 16, 2010, p. 229. After two hours of testimony on June 16, 2010, the trial was adjourned to August 2, 2010. The court stated that this

was due to physical and medical problems with both counsel. RP, June 16, 2010, p. 246-7.

Trial resumed on August 9, 2010 with the husband's testimony. During his testimony, Ms. Dyer argued with the judge even when he ruled favorable on her objection. RP, August 9, 2010, p. 317. During Ms. Dyer's cross-examination of the husband, she was admonished for being sarcastic. RP, August 9, 2010, p. 334 and 346. The following morning, Ms. Dyer was more specifically admonished by the trial judge for unprofessional conduct the day before.

> *Yesterday's cross-examination of Mr. Bubernak was so over the top that I wanted to put this on the record and frankly your advocacy style, Ms. Dyer, has got to change if you're going to be persuasive with me. This is not helpful at all. Now, don't know if any other judges have ever said this to you on the record, but if you conduct other cross-examinations like this one we started yesterday with continued sarcasm, interrupting, a tone of voice that is hostile in the extreme, I am sure that other judges have had the same reaction.*

RP, August 10, 2010, p. 375.

Ms. Dyer responded with personal attacks against the judge and a motion for the judge to remove himself from the case. RP, August 10, 2010, p. 375-382. After a break, Ms. Dyer continued. She launched into a complaint of her own medical problems over

the past 15 months, including four surgeries and continued pain and disability. RP, August 10, 2010, p. 383. She went on to complain about problems keeping her business afloat and attempted to unilaterally withdraw from the case. RP, August 10, 2010, p. 385. Ms. Dyer had an emotional breakdown in court and began to cry. CP 168. She said she would cry through the rest of the trial and would not be able to stop. RP, August 10, 2010, p. 385. She asked for a continuance to September 3, 2010 so that she could take a three week vacation and recover. RP, August 10, 2010, p. 386. She engaged in a verbal battle with opposing counsel over whose medical problems created more pain. RP, August 10, 2010, p. 388. Ms. Dyer told the court, in effect, that she was not able to physically or emotionally act as counsel and asked again for permission to withdraw. RP, August 10, 2010, p. 389. The court denied the motion to continue and the motion to withdraw. Ms. Dyer's response was completely inappropriate. To her client, in a voice audible to the record, she stated, "*I just got an automatic right to appeal the whole case. I mean, really, you just got a big right to appeal your case.*" RP, August 10, 2010, page 390, lines 17-19. For the rest of that day, Ms. Dyer continued to act inappropriately. She directed her staff to take notes. RP, August

10, 2010, p. 391, line 7. She asked her staff to call another attorney, Veronica Freitas, to *"get her down here, get her down here."* RP, August 10, 2010, p. 399, lines 14-17.[2] She continued using a sarcastic tone despite the court's admonition. RP, August 10, 2010, p. 406, line 19-25. She even admitted being sarcastic and said *"my sarcasm I think is warranted in this regard."* RP, August 10, 2010, p. 474, line 8-9. Her cell phone rang in court with *"barking sounds"* and she failed to turn it off. RP, August 10, 2010, p. 419, line 16-20. She made gratuitous statements about the witness' children outside the scope of any evidence submitted. RP, August 10, 2010, p. 411-12. Quite disturbingly, for hours, Ms. Dyer audibly sobbed during opposing counsel's questioning of the parenting evaluator. CP 168. RP, August 10, 2010, p. 395, line 21; p. 936, line 1,5,8; p. 397, line 1, 10, 13, 16, 20, 24; p. 401, line 9; p. 404, line 13; p. 405, line 9. Ms. Dyer informed the court that she was trying to get substitute counsel. RP, August 10, 2010, p. 432, lines 6-15. Ms. Dyer repeatedly disturbed the trial by crashing furniture. RP, August 10, 2010, p. 406, line 12, p. 433, line 25 and p. 488, line 16. At one point, she even left the courtroom during

---

[2] Ms. Freitas did not appear for Ms. Dyer at trial.

trial leaving Ms. Bubernak without counsel during testimony. CP 169.

Most disturbingly, that night or early the next morning, Ms. Dyer made a veiled threat against the trial judge through an ex parte note in which she made reference to a Biblical quote, in effect, *"words wound and you will die young."* CP 127, 169.

After being denied her request to withdraw and denied her request for a trial continuance, Ms. Dyer simply abandoned the case. Despite a two month adjournment since the wife's prior testimony, and having not responded to the husband's testimony in any manner, Ms. Dyer immediately rested her case without calling any further witnesses. RP, August 9, 2010, p. 251. Ms. Dyer failed to call a single rebuttal witness, not even Ms. Bubernak who wanted to testify in rebuttal. CP 170. Instead, Ms. Dyer complained about herself again, describing her condition as *"pain, pain, pain."* RP, August 11, 2010, p. 720, line 25.

Oral argument took place on August 12, 2010. In that oral argument, Ms. Dyer even stated that she didn't remember the testimony of witnesses due to her memory loss caused by her surgical anesthesia. RP, August 12, 2010, p. 735. After the court's ruling, Ms. Dyer again argued with the judge in an unprofessional

manner including a personal attack on the judge and another motion for the judge to be removed from the case. RP, August 12, 2010, p. 800-804.

It is without question that Ms. Dyer suffered serious injuries in an automobile collision shortly after the dissolution was filed. The seriousness of her injuries and the extent of her disability were not disclosed to Ms. Bubernak. CP 123 and 124. In fact, Ms. Dyer's office affirmatively represented to Ms. Bubernak over the entire period of representation that Ms. Dyer and her office would be able to properly represent her. CP 124. These representations were in contrast to the facts and Ms. Dyer's own representations to the court.

Ms. Bubernak did not want any delays in her case. CP 126. Significant delays and continuances pursued by Ms. Dyer or her office were initiated by Ms. Dyer in order to facilitate Ms. Dyer remaining as attorney in this matter so she could earn substantial fees. Ms. Dyer did not explain to Ms. Bubernak the detriment to her of such continuances or delays nor did anyone from her office. Ms. Dyer did not disclose the level of her disability and, in particular, her ongoing mental impairment. Only at the trial itself and too late to do anything about it, Ms. Bubernak learned that Ms. Dyer was out of

control emotionally, impaired by narcotics and ill-prepared for trial. CP 125 and 126.

Ms. Dyer failed to submit a proposed parenting plan for trial. She failed to prepare witnesses for testimony. She failed to call rebuttal witnesses, including Ms. Bubernak, although requested to do so. This was particularly inappropriate since the husband was able to testify as to all of the wife's testimony in his direct testimony and even had two months to prepare due to the adjournment of the trial. RP, August 9, 2010, p. 258-263, 275.

Ms. Dyer failed to conduct herself in a professional manner before and during trial. CP 125. She also physically assaulted and/or threatened to physically assault opposing counsel. CP 124.

Ms. Bubernak was appalled at Dyer's actions. But, not being an attorney, she did not understand that she had a right to complain or seek a change of counsel. CP 124. After trial and before presentation, Ms. Dyer was fired by Ms. Bubernak and replaced with Nancy Hawkins.

Ms. Dyer continued her unprofessional actions. She refused to approve a substitution of counsel and refused to provide any of the file upon request. CP 136. Ultimately, she provided part of the file when the Washington State Bar Association intervened but,

even now, has not provided the rest of the file. The Washington State Bar Association has been asked to assist the wife in obtaining the needed documents but they have been only partially successful. CP 136.

A Final Parenting Plan was entered on October 8, 2010. CP 81-91. The Parenting Plan was harsh when considering the evidence presented at trial. There was considerable evidence that the wife was the primary care provider for the child prior to separation. She took a four month maternity leave after his birth then worked only part-time for two years. RP, June 15, 2010, p. 151, line 13-20. By contrast, the husband never reduced his work schedule other than the two weeks immediately following the wife's cesarean section. RP, June 15, 2010, p. 152, line 12-20. She breast fed and used a breast pump for feeding. RP, June 15, 2010, p. 153, line 1-15. The husband traveled for work 20-25% of the time and even did so for two weeks almost immediately after the child's birth. RP, June 15, 2010, p. 154, line 2-17. By contrast, the wife did not travel for her job and she even changed positions to avoid any travel. RP, June 15, 2010, p. 154, line 18-25 and p. 155, line 1-9.

The mother described her positive attitude towards parenting, her variety of activities with her child and how close they were. RP, June 15, 2010, p. 158, line 13-25 and p. 159, line 1-21.

There was considerable testimony by the wife that the husband had committed controlling behavior and domestic violence against her, some in the presence of the child, and posed a risk of continuing such behavior even around the child.

The wife consistently described many acts of controlling behavior and several acts of physical domestic violence by the husband during the marriage. Exhibit 23.

The wife described how she cared for the child when he was very ill in 2007, how she was up with him for 48 straight hours and how the husband refused to do so for a few hours so she could rest thereafter. RP, June 15, 2010, p. 132, line 5-25 and p. 133-134. She went on to describe how he pinned her against the bookcase and acted like he was going to hit her. RP, June 15, 2010, p. 135, line 1-9. She further described how upset she was. RP, June 15, 2010, p. 135, line 10-13.

The wife described another incident in which the husband grabbed her arm and would not let go even though she was telling him that he was hurting her, ultimately leaving bruises on her arm.

RP, June 15, 2010, p. 137, line 7-22. The husband claimed she threw a knife at him when she only threw a small paring knife into the sink and walked away from an argument. RP, June 15, 2010, p. 136, line 14-25 and p. 137, line 1-6.

The wife expressed her concerns that the husband would react negatively to the child acting independently just as the husband did with her when she tried to express her own feelings and thoughts or act in a flexible manner. RP, June 15, 2010, p. 143, line 2-23. She expressed concern that the husband's negative statements and actions towards her were influencing the child. RP, June 15, 2010, p. 144-146.

The wife testified that the husband criticized her decisions regardless of what she chose and had no flexibility. RP, June 15, 2010, p. 128, line 17-25. She described his refusal to discuss decisions with her as her reason for preferring sole rather than joint decision-making but stated that she would have more hope if he engaged in treatment. RP, June 15, 2010, p. 129, line 1-12. She described how he refused to contribute to the child's daycare, including before and after school care. RP, June 15, 2010, p. 106, line 2-17.

There was also considerable expert testimony that the husband had committed controlling behavior and domestic violence and posed a risk of continuing such behavior even around the child.

The wife's counselor, Marian Hilfrink, testified. She had significant and extensive experience assessing domestic violence allegations and treating victims and perpetrators. Exhibit 11. Dr. Hilfrink testified that the mother was thoughtful and caring and hardworking. RP, August 10, 2010, p. 568. She further testified that the mother, despite stressors in her life, could handle being a single parent. RP, August 10, 2010, p. 658-9. She also testified that the mother was very clearly a victim of domestic violence. RP, August 10, 2010, p. 569-570. She further testified that the mother had not embellished the domestic violence. RP, August 10, 2010, 572-573. She testified that the mother suffered from PTSD due to the domestic violence. RP, August 10, 2010, p. 581-582. She made recommendations as to programs that would benefit the mother (as a victim of domestic violence), the father (as the perpetrator of domestic violence and inappropriate parenting) and the child (as the witness to domestic violence and inappropriate parenting by the father). RP, August 10, 2010, 575-578. Dr. Hilfrink contradicted many of the assertions in the parenting

evaluation that had been alleged by the father against the mother including the claim that the mother was overly tired and had fought with her mother. RP, August 10, 2010, p. 578-580. She testified that the parenting evaluation had incorrectly described the mother's use of anti-depressants. RP, August 10, 2010, p. 589-590. She described the mother as situationally depressed rather than clinically depressed. RP, August 10, 2010, p. 605-606. She also testified as to the mother's improvements over time. RP, August 10, 2010, p. 593. In fact, these improvements took place after the parties' separation and while the mother was clearly the child's primary care provider (pursuant to the temporary orders in place.)

Doug Bartholomew, a licensed mental health counselor with a specialty in domestic violence cases for almost thirty years, testified and submitted a report. RP, June 15, 2010, p. 14-100; Exhibit 9. He had extensive experience assessing domestic violence allegations and treating victims and perpetrators. Exhibit 12. Mr. Bartholomew ran a State of Washington certified program treatment program for persons with abusive and controlling behavior. RP, June 15, 2010, p. 16, line 19-23. He had been appointed to perform a domestic violence risk assessment by the court earlier in the proceeding when the court was considering the

protection order portion of the case. RP, June 15, 2010, p. 17, lines 2-3. The risk assessment was to determine if the father had committed domestic violence, whether there was a risk to the child and to recommend treatment, if necessary. RP, June 15, 2010, p. 18, lines 17-19.

Mr. Bartholomew testified that he used the same definition for domestic violence published by the Office of the Administrator of the Courts in the Judges Manual and that this was the standard in King County Superior Court. RP, June 15, 2010, p. 22, lines 2-3.

Mr. Bartholomew testified that it was credible to assume that the husband had done a number of abusive things. RP, June 15, 2010, p. 25, line 12-3. He described the husband walking out of a social engagement and being jealous of the wife's attention to her car: an antique Corvette. RP, June 15, 2010, p. 33, line 17-23. He controlled or attempted to control the family members allowed to visit the family home. RP, June 15, 2010, p. 33, line 24- p. 34, line 2. He micromanaged the wife even to the extent of giving her notes for her daily activities. RP, June 15, 2010, p. 36, line 14-17. These included things like getting the mail and how long she brushed her teeth. RP, June 15, 2010, p. 86, line 13-16. He described the wife

as being afraid of the husband, RP, June 15, 2010, p. 77, line 16-24.

Mr. Bartholomew testified about a physical incident in which the husband held the wife's arms until he left bruises. He described that the husband's version was that he did so in self-defense and the wife's version was that it was to control her. RP, June 15, 2010, p. 37. He testified that, because the husband did not see his actions as abusive, there was the risk of further things like that happening. RP, June 15, 2010, p. 38, line 12 through p. 39, line 4 and RP, June 15, 2010, p. 70.

Mr. Bartholomew testified that the husband was not credible since he claimed to be caught off guard about the dissolution even though they had significant marital problems and the husband had even threatened to divorce her and take Sean. RP, June 15, 2010, p. 41, line 12-24. He also said the husband was not credible since he initially denied taking half of the parties' money and then later admitted it. RP, June 15, 2010, p. 42, line 1-3. By contrast, Mr. Bartholomew found the wife to be credible. RP, June 15, 2010, p. 42, line 22-25 and p. 43, line 1. He described the husband's actions as shifty sands or "crazy-making." RP, June 15, 2010, p. 43-44.

Mr. Bartholomew was very critical of the husband for getting access to his wife's private papers and attempting to provide them to him for the evaluation. RP, June 15, 2010, p. 45-52.

Mr. Bartholomew detailed in his testimony and, more specifically, in his report the statements of many lay people who described the husband and his behavior and related various examples of controlling and/or abusive behavior. RP, June 15, 2010, p. 59-64. He also noted that many of these behaviors happened in front of the child. RP, June 15, 2010, p. 65, line 5-7. He also testified that the husband demonstrated no boundaries as to what he would do in front of the child. RP, June 15, 2010, p. 71, line 1-16.

Mr. Bartholomew noted that the marriage counselor incorrectly claimed that abusers/batterers were a personality type and that the husband was not that type rather than looking at his actual behavior. RP, June 15, 2010, p. 30-31.

Mr. Bartholomew testified that the husband needed domestic violence treatment for his behavior so that it would change and without treatment, it could escalate to violence. RP, June 15, 2010, p. 70, line 1-15; p. 72, line 2-19 and Exhibit 9.

Prior to the receipt of Mr. Bartholomew's report, the husband began domestic violence treatment at Family Services. Exhibit 10. However, he was determined not to be amenable to treatment and dismissed from the program. Exhibit 10.

The parties' marital counselor, Joan Oncken testified as to their counseling sessions and her observations. She testified that she had provided information to the various evaluators in the case: Maiuro, Bartholomew and Keilin. RP, June 16, 2010, p. 197, line 17-25. She confirmed that the wife had alleged physical abuse by the husband. RP, June 16, 2010, p. 207, line 8-15 and p. 208, line 2-8. She testified that the husband lacked insight, self-awareness and had difficulty getting in touch with his deep feelings. RP, June 16, 2010, p. 203, line 5-11. She admitted that her comment to Dr. Maiuro that the wife had trouble with her son was not based on any personal observation since the child was never there for their counseling. RP, June 16, 2010, p. 203, line 17-22. She admitted that her comment to Dr. Maiuro that the wife had trouble in her employment and had changed jobs was only an allegation by the husband. RP, June 16, 2010, p. 204, line 4-21. She admitted that these changes of employment were due to the wife's desire to be closer to home because of her son. RP, June 16, 2010, p. 215, line

16-25 and p. 216, line 1-3. In fact, the wife had a long (over twenty year) history of employment with Boeing beginning in January of 1989. Exhibit 204.

Sarah Ducette, the director of the child's pre-school, testified that the mother was the parent that dropped the child off and picked him up. RP, June 16, 2010, p. 220, line 23-25 and p. 221, line 1-2. She testified there was not a problem with the mother dropping the child off late during the year prior to the dissolution. She testified that the mother did so at times during the year after the separation but that the mother kept the school informed about when to expect the child. RP, June 16, 2010, p. 218, line 8-25 and p. 219, line 1-16. She further testified that this was daycare and not school and it was only a request that the child be there at a certain time. RP, June 16, 2010, p. 225, line 19-21. She further testified that the child was difficult and acting out at times and that the mother handled such situations appropriately and was always very kind, very gentle, reassured him that she loved him and would be back later. RP, June 16, 2010, p. 221, line 3-25 and p. 222, line 1-12.

The court appointed Jennifer Keilin parenting evaluator in February of 2009. Exhibit 21. Her report was finally issued in May of 2010. Exhibit 217. Ms. Keilin observed the wife with the child

and was extremely positive about the mother/child relationship concluding that "a number of parenting strengths were observed and no significant concerns were noted." Exhibit 217. In a second lengthy observation, she made the same conclusion after describing the session in detail. Exhibit 217. During her observations with the child and the husband, the evaluator was also positive but noted that on one occasion the child was subdued and on the other he wouldn't answer personal questions. Exhibit 217. During her interviews with the parents, she found the husband to be controlling at times with little insight into his own behavior. Exhibit 217. She also found that the husband did engage in behavior similar to controlling, coercive violence, which is defined as a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners. She further found that he engaged in two minor acts of physical aggression as well as some coercive controlling behavior, including criticism, belittling and persistent requests that wore the wife down. She noted Dr. Maiuro's (the husband's second opinion evaluator) finding of domestic violence and his recommendation that the husband engage in intervention services (treatment.)

Ultimately, the parenting evaluator concluded that neither parent's time should be limited under RCW 26.09.191; both parents have generally good parenting skills and that, although there were some concerns about each, no concerns rose to the level of recommending significantly limited time. She reported that the child was doing well in his school near the mother's home and had adjusted to the move to the home the mother had purchased from her mother's estate and that he was familiar with it.

Various recommendations were made for each parent to improve on the issues described in her report. They included domestic violence treatment by the husband and counseling by the wife. She recommended joint decision-making.

The husband's testimony was not credible in many respects. Although the wife was home for four months after the child's birth and then worked part-time for two years, incredibly, the husband claimed he did all of the household chores and performed more care of the child than the wife did. RP, August 9, 2010, p. 256-7. He even claimed he did most of the diaper changing and all of the bathing of the baby. RP, August 9, 2010, p. 259. This description of his involvement with the baby was utterly inconsistent with the testimony that he worked full-time and travelled 25% of the time.

Although the husband had told the parenting evaluator that the wife was too involved with her parents' dissolution, he admitted at trial that this dissolution occurred six years earlier. RP, August 9, 2010, p. 256.

The husband testified that the wife loves her son, makes him happy and they did many creative and fun things together. RP, August 9, 2010, p. 264-5.

The wife described her history of providing primary care for her son and an excellent relationship with her son. While there was some contrary evidence (common in contested custody actions), the court found that *"both parents here are capable of caring for their six-year-old son. Both parents have their own strengths as parents and both have their own weaknesses as parents just as all of us who are parents do".* RP, August 12, 2010, p. 4, line 1-4. The court found no limiting factors against the wife.

Incredibly, with those facts and those findings, the trial court then granted the wife extremely minimal time with the child. In fact, such time was less than that requested by the husband or recommended by the parenting evaluator.

The trial judge stated that he wanted changes and improvements in <u>each</u> parent and made reference to future

changes to the parenting plan after such changes and improvements.

The trial judge made many references to changes that could be made to the parenting plan in the future. He stated: *"...at the present time ...I don't think at this time that they're capable of joint decision-making."* RP, August 12, 2010, p. 15, line 13-14 (emphasis added). The judge went on to say that he hoped this would improve *"after a few months."* RP, August 12, 2010, p. 15, line 15-16 (emphasis added). The court described some personal problems that the wife had experienced and the effect they had upon her but then stated, *"[i]n years to come I wouldn't expect that that would do anything but get better."* RP, August 12, 2010, p. 17, line 3-4 (emphasis added).

The trial court described significant issues with the husband's decision-making style and personality traits and encouraged him to make changes as well. As to decision-making with his wife, the court then stated that the wife *"needed to get notice and if there really is a reason to challenge that type of thing there be an opportunity to do so."* RP, August 12, 2010, p. 18, line 14-16. The court then again said *"for the time being I think that there should be sole decision-making..."* RP, August 12, 2010, p.

19, line 2-3 (emphasis added). The trial court also indicated that changes in the minimal residential schedule given to the mother would take place in the future. The court specifically referenced the mother's weekend time ending on Sunday at 5:00 p.m. *"during this transition phase."* RP, August, 12, 2010, p. 20, line 22. He specifically stated that *"later on perhaps it could be ...Monday deliver to school, but for now I think it ought to be ...5:00 p.m. on Sundays."* RP, August 12, 2010, p. 21, line 1-4 (emphasis added.)

Despite all of these references to future changes to the parenting plan, the trial judge did not set forth any method of doing so. Stating that he would retain jurisdiction to resolve any disputes or changes to the plan due to his familiarity with the case, the judge later indicated he would be retiring shortly and be unable to do so. Supp. CP. With the parenting plan not including even a reference to future changes in the plan as described by the court in his oral ruling and with the judge's departure from the case, the wife is left with a parenting plan with minimal residential time for her and little involvement in decision-making.

The Parenting Plan that was entered also has considerable ambiguities and gaps. Those ambiguities were acknowledged, in part, at presentation and the court ordered that a supplemental

order could be entered as to at least some of the issues raised by wife's new counsel at presentation

As stated above, the wife changed counsel following the court's oral ruling and before written orders were entered. After ruling on disputed issues as to presentation of final documents, the remaining final documents were entered (Decree of Dissolution, Supp CP, and Findings of Fact and Conclusions of Law, Supp. CP. After being invited by the court at presentation to do so, the wife filed a motion and declaration regarding the parenting plan seeking a supplemental order regarding the parenting plan. CP 92-97. The court entered a minimal order providing that the mother had the right to information regarding her son but sanctioned her for requesting other relief. Supp. CP. The net result was that the court subsequently denied most of the mother's requests to resolve those ambiguities and even sanctioned her for requesting them.

The wife filed a motion and two declarations for reconsideration and/or new trial. CP 100-135. The trial court denied these motions on December 3, 2010. CP 177-178. The court even sanctioned the wife for requesting reconsideration and new trial and ruled, without explanation, that the motions were not timely. CP 179-180. This appeal timely followed.

IV. ARGUMENT

A. Standard of Review.

The determination of a parenting plan must be in the best interest of the child and based on the statutory criteria set forth in RCW 26.09.184 and 187. The trial court has wide discretion and latitude in making this determination. Marriage of Kovacs, 121, Wn.2d 795, 854 P.2d 629 (1993). However, a trial court's decision will be reversed for abuse of this discretion. The trial court's Parenting Plan in this case was not in the best interest of the child and should be reversed as an abuse of discretion.

B. The Trial Court Failed to Correctly Apply RCW 26.09.184 and 187.

The court determined that the child should reside with the father and provided for extremely limited residential time with the mother. Given the mother's history as the primary care provider, a reduction of her residential time to alternate weekends from Friday after school to Sunday afternoon and the alternate Thursday night (return to school on Friday morning) has provided for a stark and inappropriate change in the child's circumstances.

RCW 26.09.184 and .187 set forth the law the Court must apply when determining a Permanent Parenting Plan.

RCW 26.09.184 describes the objectives and terms that must be set forth in a permanent parenting plan. It provides in pertinent part as follows:

> *(1) OBJECTIVES. The objectives of the permanent parenting plan are to:*
> *(a) Provide for the child's physical care;*
> *(b) Maintain the child's emotional stability;*
> *(c) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;*
> *(d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;*
> *(e) Minimize the child's exposure to harmful parental conflict;*
> *(f) Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and*
> *(g) To otherwise protect the best interests of the child consistent with RCW 26.09.002*
>
> . . .
>
> *(4) DISPUTE RESOLUTION. A process for resolving disputes, other than court action, shall be provided unless precluded or limited by RCW 26.09.187 or 26.09.191.*
>
> . . .
>
> *(5) ALLOCATION OF DECISION MAKING AUTHORITY.*
> *(a) The plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious*

upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in RCW 26.09.187 and 26.09.191. Regardless of the allocation of decision-making in the parenting plan, either parent may make emergency decisions affecting the health or safety of the child.

(b) Each parent may make decisions regarding the day-to-day care and control of the child while the child is residing with that parent. ...

RCW 26.09.184.

RCW 26.09.187 also sets forth the criteria by which the court is to make these parenting plan determinations.

(1) DISPUTE RESOLUTION PROCESS. The court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW 26.09.191 applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process. If a dispute resolution process is not precluded or limited, then in designating such a process the court shall consider all relevant factors, including:

(a) Differences between the parents that would substantially inhibit their effective participation in any designated process;

...

(2) ALLOCATION OF DECISION MAKING AUTHORITY.

...

(b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:

(i) A limitation on the other parent's decision-making authority is mandated by RCW 26.09.191;

(ii) Both parents are opposed to mutual decision making;

(iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection.

(c) MUTUAL DECISION-MAKING AUTHORITY. Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:

(i) The existence of a limitation under RCW 26.09.191;

(ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(5)(a);

(iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a); and

(iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

(3) RESIDENTIAL PROVISIONS.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

> *(i) The relative strength, nature, and stability of the child's relationship with each parent;*
>
> . . .
>
> *(iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;*
> *(iv)The emotional needs and developmental level of the child;*
> *(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;*
>
> . . .
>
> *(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.*
> *(viii)Factor (i) shall be given the greatest weight.*

RCW 26.09.187.

As argued below, the court simply did not adequately apply the relevant statutes to the facts of this case.

1. The Trial Court's Parenting Plan Determinations Did Not Properly Consider and Apply the Statutorily Required Factors and Circumstances.

In determining the residential provisions of the parenting plan, the court did not adequately follow RCW 26.09.187.

The court was required to give the greatest weight to the relative strength, nature, and stability of the child's relationship with each parent. RCW 26.09.187 (3)(a)(viii). The credible evidence in this case supported the wife in this factor. The mother was home with this infant for months following a cesarean section. She did not work full-time for two years while the father worked full-time and traveled at least 25% of the time. For the next two years, until the parties' separation, the father continued to travel at least 25% of the time while the mother was the primary care provider. Then for the nearly two year separation, the child resided exclusively with the mother and the father had limited visitation. RP, June 15, 2010, p. 125-126. At all times before trial, the mother was the primary care provider for this child. At all times before trial, the father travelled for his work at least 25% of the time. The court's decision to remove the primary placement of this child from the mother, disrupt his life entirely, and place him instead with his father was

unconscionable, not in the child's best interests and unsupported by the bulk of the evidence.

In determining the parenting plan, the court must ascertain whether either parent or both has specific characteristics or behaviors which, under RCW 26.09.191, are harmful to the child and justify limits on that parent's contact with the child.

The wife had consistently maintained that the husband was emotionally, if not, physically abusive. She left the family home with the child out of fear. CP 18. Commissioners had consistently agreed with her concerns, entering order after order that placed the child with the wife and provided for limited time with the father. At trial, the wife testified consistent with her position during the months since separation. RP June 15, 2010, page 132-138. Further testimony established that the husband had not complied with domestic violence treatment recommendations. He had been dismissed from domestic violence treatment as not being amenable to treatment. RP, June 15, 2010, page 130, line 7-8. The wife's allegations were supported by the expert testimony of Douglas Bartholomew. RP June 15, 2010, page 25-73. The wife's allegations were initially supported by the investigation of Roland Maiuro. RP, June 15, 2010, page 13, line 5-10.

Despite all of the evidence of the husband's domestic violence, the trial court found that the husband did not commit domestic violence and therefore the court did not make adverse findings under RCW 26.09.191 as to the husband. But the court, even if it did not find that the father's acts role to the level of Section 191 findings, should not have disregarded the evidence entirely and ignored the recommendations of Dr. Maiuro and Doug. Bartholomew.

Of course, there were no allegations of domestic violence against the wife and, as such, the court did not make findings against the wife under RCW 26.09.191 either. CP 81-82. While the court did not agree with the wife's allegations of domestic violence against the husband, the court did not determine that the wife had falsified any allegation. Yet the court seemed to punish the wife for even claiming domestic violence. That punishment was, in effect, providing her with minimal time with her son. The trial court may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191. Any limitations or restrictions imposed must be reasonably calculated to address the identified harm. Marriage of Katare, 125 Wn. App. 813, 826, 105 P.3d 44 (2004).

The trial court, by providing the wife with minimal residential time improperly treated her as if such findings had been made against her. The trial court's actions were contrary to law and an abuse of discretion.

The Parenting Plan did not meet the objectives set forth in RCW 26.09.184. The child's physical care and emotional stability would have best been served by placement with the child's lifelong primary care provider.

The schedule of transfers on Sunday evenings required an in-person exchange of the child between the parents for each weekend residential time thereby increasing the child's exposure to potential harmful parenting conflict as required under RCW 26.09.184(1)(e). By contrast, even under this limited schedule, a return to school the following morning would have reduced the meetings between the parents.

The failure to provide a mechanism for changing the parenting plan in the future for the reasons the court specifically set forth failed to meet the statutory objective of RCW 26.09.184 (1)(c). The permanent parenting plan is required to *"[p]rovide for the child's changing needs as the child grows and matures, in a way*

that minimized the need for future modifications to the permanent parenting plan." RCW 26.09.184 (1) (c).

2. The Trial Court Failed to Provide for Joint Decision-Making as Required by RCW 26.09.187 (2).

The court failed to follow RCW 26.09.183 with regard to the allocation of decision-making. In fact, the trial court utterly failed to follow any statutory analysis regarding decision-making.

As already noted, the court did not make any findings under RCW 26.09.191. Thus, there was no mandatory basis for limitations with regard to joint decision-making. Yet, the court awarded sole decision-making (with some consultation with the mother) to the father even though the court made no RCW 26.09.187 or .191 findings.

The court made no findings to support a discretionary decision to support sole rather than joint decision-making. The court stated in its oral ruling that

> *I haven't seen any indication whatsoever that these parties aren't basically on the same page about the welfare of their child, where he would go to school ... there's nothing to indicate that either of them have radically different views about medical care or any other type of care that should be provide for Sean. So I'm not expecting there to be any issue there. But for the time being I think that there should be sole decision-making to be exercised by the primary residential parent, but again I expect that Tom is*

> *going to carefully consider what is communicated to him by Irene and they're going to communicate by e-mail and he should try to be flexible and adaptable as time goes on.*

RP, August 12, 2010, p. 794.

Even these comments in the oral ruling were not included in the Parenting Plan or the Findings of Fact and Conclusions of Law. Simply put, the court made no findings whatsoever to support the determination that the father should have sole decision-making, even if such decision-making had a communication/consultation with the mother component.

That the parents had engaged in contentious litigation post-separation is not a basis for determining that parents cannot make joint decisions after entry of the Decree of Dissolution. Marriage of Jacobsen, 90 Wn. App. 738, 954 P. 2d 297, rev. denied, 136 Wn.2d 1023 (1998).

Significantly, although the statute specifically gives both parents the right to make decisions as to the day-to-day care and control of the child, the court did not set this forth in the parenting plan. Similarly, although the statute specifically gives each parent the right to make emergency decisions regarding the child, the court did not set this forth in the parenting plan. These omissions

lead to some of the ambiguities that the wife tried unsuccessfully to correct in post-trial motions.

3. The Trial Court Made Reference to Increased Time and Involvement by the Mother in the Future but Failed to Include Such Terms in the Parenting Plan.

At times, in the oral ruling, the court seemed aware of the harshness of the ruling and made numerous references to improvements that would be available to the mother over time. These references are detailed in the Statement of Facts above.

Absent a mechanism that allows for a return to court for reasonable increases to the mother's residential time, as the mother makes the changes and improvements in her own life that the court encouraged her to make, the mother would have no ability whatsoever to achieve normal joint decision-making or even a Monday return to school at the end of her alternate weekend time. In addition, the parenting plan is directed to a six year old with an early bedtime and, without a reasonable mechanism for changes, no changes could be made as the child gets older. In future years, the wife needs a mechanism to demonstrate that the issues the court expressed concern about have been resolved in some manner.

A modification action would not be a sufficient remedy for the situation described above. A modification requires a demonstration of a substantial change of circumstances not contemplated at the time of the Decree of Dissolution. A child merely aging from the age of 6 may not qualify. The mother making the very changes that the court is asking of her may not qualify. Thus, although the court discussed making changes in only a few months after trial, her only remedy would be a lengthy and expensive procedure implemented multiple times in the future.

The court simply should have, at a minimum, corrected these kinds of ambiguities in its written orders. At least the court should have fully granted the mother's motion for an Order Re Adjustments to Parenting Plan.

C. The Court Failed to Act To Maintain A Fair Trial Despite Obvious and Significant Impairment by the Wife's Counsel.

That the trial court entered the draconian parenting plan, imposing a schedule of time and responsibilities so starkly different than the child's entire six years of his life and even then denied the request for a new trial, reconsideration or even the Order re: Adjustments To Parenting Plan, is quite telling. The only basis for doing so must be the court's underlying irritation with the mother's

trial counsel. The court's failure to correct the herein described wrongs was an abuse of discretion.

As stated herein, with the assistance of new counsel, the wife sought relief through a motion for reconsideration or new trial.

CR 59 (a)(1) provides that a court may reconsider its ruling or grant a new trial in the event of *"[i]rregularity in the proceedings of the court, ...[in] any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial."* CR 59 (a)(9) further provides for such relief in the event that *"substantial justice has not been done."*

CR 60 (b)(11) also provides for relief for *"[a]ny other reason justifying relief...."* This rule is reserved for extraordinary circumstances. The outrageous actions of her counsel satisfy CR 60(b)(11).

In her motion for relief under both of these rules, the wife demonstrated considerable basis for a new trial, reconsideration and/or relief from judgment based on the conduct of Ms. Dyer and the failure of the court to protect the sanctity of the proceedings. Ms. Dyer was obviously impaired; she said so herself. The file is replete with proof of her disability. It is referenced in multiple pleadings in the case file.

The trial record demonstrates Ms. Dyer's improper actions. They are described in detail above in the Statement of Facts. In addition, in her declarations submitted with her post-trial motions, Ms. Bubernak describes disturbing statements and admissions by Ms. Dyer that further demonstrate her impairment. CP 123-128. Yet, the trial court did nothing with this information to correct the wrong and protect the sanctity of the trial and the tribunal.

The court did, briefly, admonish Ms. Dyer for a small portion of her trial misconduct but this did not change her behavior or remedy the harm. The court did nothing as Ms. Dyer's behavior escalated. The bottom line is that Ms. Bubernak was still being represented by an impaired attorney. Her case was still decided by a judge who had been personally attacked and even threatened by her counsel.

Ms. Bubernak was entitled to a trial at which order and decorum had been maintained. Canon 3(A) (2), Code of Judicial Conduct. She was entitled to a trial at which the lawyers had been patient, dignified and courteous. Canon 3 (A) (3), Code of Judicial Conduct. More importantly, she was entitled to a trial free from improper behavior by counsel. In fact, the trial court is required to take action during trial if the judge believes that an attorney's

fitness as counsel is in question. Canon 3 (C)(2). Corrective action was taken twice, first in the form of a two month recess of the trial and the second in the form of an admonishment to Ms. Dyer but this was insufficient overall. Furthermore, as other acts of misconduct occurred, the court took no action.

Ms. Dyer repeatedly violated the Rules of Professional Conduct. By sending a veiled threat to the judge ex parte during trial she sought to influence a judge by means prohibited by law. RPC 3.5 (a) and (b). By engaging in multiple acts of sarcasm, arguing with the trial judge in an inappropriate manner, repeatedly demanding the trial judge recuse himself, crying audibly during trial for hours, assaulting or attempting to assault opposing counsel, taking narcotics and a multitude of other acts described more fully in the Statement of Facts above and the Declaration of Irene Bubernak filed herewith, she engaged in conduct intended to disrupt a tribunal [in violation of RPC 3.5 (d)] and/or conduct that is prejudicial to the administration of justice [in violation of RPC 8.4 (d), (h),(i),(j),(k),(l), and (n)].

D. The Wife's Motion for Reconsideration and New Trial was Timely Filed and Should Have Been Granted.

The Final Parenting Plan was entered on October 8, 2010. CP 81-91. The wife's motion for Reconsideration and/or New Trial was filed October 18, 2010. CP 100-135. CR 59 (b) provides that motions for new trial or reconsideration shall be filed within ten days of entry of the order. CR 60 (b) provides for such motions to be filed within a reasonable time and, in some instances, within one year. Filing within ten days of entry is certainly within a reasonable time. The wife's motions were, thus, timely filed. Yet, the court in its eventual denial of the motion, ruled that the motion was not timely and even imposed sanctions against her. CP 177-180.

The trial court did not state the basis for its ruling that the motions were not timely filed. However, the husband's response to the motion for reconsideration/new trial which raised the timeliness issue makes clear that the argument is based on the belief that the ten day period began running from the court's oral statements at the end of trial rather than the entry of the formal order. This ruling is obvious error. Oral rulings can be reversed at any time prior to entry of formal orders. State v. Collins, 112 Wn.2d 303, 308, 771 P.2d 350 (1989); Marriage of Harshman, 18 Wn. App. 116, 120,

567 P.2d 667 (1977) (interpreting prior rule). CR 59 and 60 apply only to formal written orders not to oral rulings. Hubbard v. Scroggin, 68 Wn. App. 883, 846 P.2d 580 (1993).

The court went on to substantively deny the mother's motions for reconsideration and/or new trial and award sanctions on this basis as well. CP 177-180. The court abused its discretion here, as well. Ms. Dyer's level of misconduct and her emotional breakdown are sufficient to warrant a new trial. Barr v. MacGugan, 119 Wn. App. 43, 78 P.3d 660 (2003) (severe depression by attorney justified setting aside default judgment) In Re Cremida's Estate, 14 Alaska 234, 239-40, 14 F.R.D. 15 (1953) (attorney drunk during trial warranted new trial).

V. CONCLUSION.

The trial court failed to adequately respond to the obvious impairment of the wife's counsel. The court did not stop the trial or otherwise protect the sanctity of the trial itself. Proceeding when a counsel is sobbing for hours was an abuse of discretion Furthermore, to the extent the details of the wife's counsel's impairment were not fully known at trial, it was certainly established post-trial. As such the court should have granted the wife's

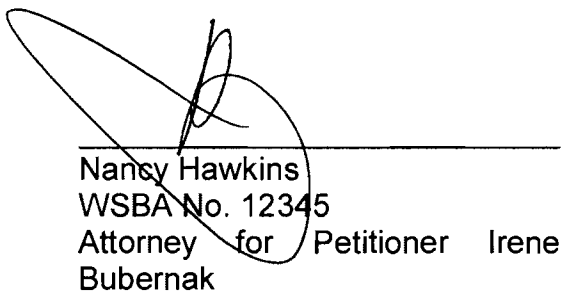
requests for a new trial and/or relief from judgment. The sanctions against her should not have been imposed; her requests were timely, appropriate and should have been granted.

The Parenting Plan entered by the court was not supported by substantial evidence, and was an abuse of discretion. Substantial justice was not done. The trial court should be reversed and this case remanded for further proceedings.

The wife should be awarded attorney fees and costs on appeal as allowed by RCW 26.09.140 and RAP 18.1.

Dated: June 24, 2011.

Respectfully submitted,



Nancy Hawkins
WSBA No. 12345
Attorney for Petitioner Irene Bubernak

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

IRENE BUBERNAK, Appellant, vs. THOMAS BUBERNAK, Respondent.	**NO. 66213-9-I** **CERTIFICATE OF SERVICE**

The undersigned certifies that on June 24, 2011, a copy of the APPELLANT'S BRIEF and CERTIFICATE OF SERVICE was sent for service by mail on the following entity/individual:

Maya Trujillo Ringe
Lasher, Holzapfel Speery & Ebberson PLLC
601 Union Street, Suite 2600
Seattle, WA 98101-4000

Court of Appeals of the State of Washington
Division One
One Union Square
600 University Street
Seattle, WA 98101-4170

DATED at Seattle, Washington, on June 24, 2011.

Nancy Hawkins