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NO. 66213-9-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

IRENE C. BUBERNAK, Appellant,

v.

THOMAS G. BUBERNAK, Respondent.

On Appeal from King County Superior Court
The Honorable Michael J. Fox, Judge

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases **Page**

Statutes and Court Rules **Page**

I. INTRODUCTION

Thomas Bubernak, the Respondent, respectfully seeks a denial of Appellant's appeal and asks that the Court affirm the Superior Court Orders issued by the Honorable Michael J. Fox whose ruling reflects that he properly applied RCW 26.09.184 and RCW 26.09.187 and whose orders were based on the testimony presented at trial including the testimony of the agreed upon and Court ordered Parenting Evaluator, all of the child's teachers, the parties, and other witnesses, as well as documentary evidence presented at trial, including a thorough parenting plan evaluation report.

II. APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the Superior Court properly entered a Parenting Plan that established the father as the primary custodial parent, consistent with the historical parental responsibilities prior to the dissolution action and in consideration of the testimony of the parenting evaluator and the child's teachers and other witnesses that the father was the parent consistently able to meet the child's needs and when the Superior Court properly considered all admissible evidence and testimony in making its findings. (Appellant's Assignment of Error 1.)

2. Whether the Superior Court properly denied Wife's untimely Motion for a new trial and or to vacate judgment and ordered sanctions for the same when the Wife did not timely bring the motion and further denied her motion for failure to state a basis on which the requested relief could be granted and when the Court properly made its determination of the parenting plan on reliance of the statutory factors set forth in RCW 26.09.187 and in consideration of the evidence presented at trial and did not rely or consider any alleged lack of professionalism by Jan Dyer the then attorney for Appellant, Irene Bubernak. (Appellant's Assignment of Error 2-5.)

III. STATEMENT OF THE CASE

The Respondent is Tom Bubernak ("Tom") and the Appellant is Irene Bubernak ("Irene")[1]. Irene filed her Notice of Appeal on November, 5, 2010. This appeal arises out of the entry of a Final Parenting Plan by the honorable Michael J. Fox after over 6 days of trial in King County Superior Court and the subsequent denial of the Appellant's Motion for New Trial and Vacation of Judgment. The procedural history and substantive facts underlying the outcome of the trial and the entry of the Parenting Plan are further detailed below.

[1] For ease of reference, Respondent will refer to the parties by first-name.

A. PROCEDURAL HISTORY

Irene filed for dissolution on December 2, 2008 with Jan Dyer as her attorney of record. CP 1-6. Petitioner began this case by making false allegations of Domestic violence and filing false statements by witnesses that she later admitted she never reviewed. CP 526; RP June15, 2010, pp.173-174. Petitioner, at the same time she filed for divorce, filed for a Domestic Violence Order for Protection and removed the parties' son from his home without any notice to the father and without taking any personal belongings for the child. CP 212; RP June 15, 2010, p.164. The evidence in this case clearly demonstrated that Tom was shocked to find Irene and their son gone and called hospitals and the police to ensure they were safe. CP 212; RP August 12, pp. 783-784.

Irene filed a Motion for Domestic Violence Protection Order and a Motion for Temporary Orders. In response to Irene's Motion for a Domestic Violence Protection Order, Tom strenuously objected to the contents of her declarations, which, at best, showed that the parties had a bad marriage, but were also full of false and unsubstantiated allegations. CP378; CP 458. Commissioner Lori K. Smith erred on the side of caution and despite Tom's adamant denials of any DV, and in the absence of any declarations corroborating domestic violence, entered an order for protection against Tom. CP 24. Tom was also ordered to submit to an

evaluation by Doug Bartholomew. CP 34. Tom requested that Irene undergo a DV evaluation based on violent actions she had committed during the marriage (and witnessed and described in declarations submitted in support of Tom), but that request was denied. CP 383,388; CP 408-410; CP 412-414.

Tom considered a motion for revision to address the request that Irene undergo a DV evaluation, but decided that he would keep costs down and cooperate with a DV evaluation as he did not feel he had anything to hide and that he would go through the process and the truth of the matter would come to light. RP August 11, 2010, p. 713. Justice did not prevail and instead a terribly one-sided and sloppily written report was issued. Shortly thereafter, it was discovered that Irene's expert, in 35 years of issuing reports in cases similar to Tom's had never not found Domestic Violence RP June 15, 2010 pp. 95-96. The Trial Court noted the following with regard to Doug Bartholomew's report:

> *He seems to move from a predetermined result to a preconceived conclusion. He finds credible everything Irene and her collateral sources report and discredits virtually everything Tom and his collateral sources, including neutral professionals, have reported to him.* RP August 12, 2010, p. 783.

The trial court further stated that the report is "sloppily written, his logic weak, and his assessment rife with inconsistency and bias." Id.

Moreover the trial court found that Doug Bartholomew's report was carelessly put together despite making very serious findings. RP August 12, p. 785. Finally, the trial court concluded:

> "In 22 years on the bench, I have never reviewed any expert report such as this. It is internally inconsistent, not at all neutral, and so sloppily drafted that the author never even proofread it, as he admitted. Consequently, I give no credence to the Bartholomew report." RP August 12, 2010, pp. 785-786.

Notably, putting aside the fact that the Court gave no weight to Bartholomew's report, it is telling that even Bartholomew did not make any restriction recommendations with regard to Sean and Tom and in fact, made no findings of domestic violence under 26.50.010. TE 9. He found that it was impossible to determine who was credible regarding the allegations of use of physical force, but found that Tom preserving the community funds and submitting a self-evaluation of Irene's to the Court (under seal) was domestic violence. TE 9. Despite Doug Bartholomew's failure to find DV under the statutory guidelines and despite his conclusion that no restrictions were needed with regard to Sean, Irene nonetheless used Mr. Bartholomew's finding as a hammer throughout the litigation and also made false allegations regarding Tom's parenting. The trial court specifically found that the Domestic Violence allegations were unfounded and that Tom did not commit domestic violence in the

relationship as defined by State Law based on the testimony of both parties, the parties' joint counselor, and in light of other evidence in the case. RP August 12, 2010, p. 782.

Temporary Orders: The Court below did not find Doug's report to be dispositive as to parenting. It nonetheless, apparently in an effort to be conservative and in a drastic change from the historical parenting entered a 60/40 schedule in Irene's favor, wherein Tom had Sean unsupervised Thursday through Monday every other weekend and then alternate Thursday overnights to return to school the next day. CP 34-35. The Court also ordered that the Irene could pick up one-half of Sean's belongings but she failed to do so. CP 32; RP June 15, 2010, p. 164.

The Court further ordered that the parties agree on a parenting evaluator. Jennifer Keilin was court appointed in February 2009. RP August 10, 2010 p. 395.

The parenting evaluator was assigned to investigate and advise as to parenting. She issued her report on May 10, 2010. RP August 10, 2010, p. 396. The parenting evaluator, after conducting an exhaustive 15 month forensic investigation that included collateral contacts submitted by *both* parties and interviews with teachers and caregivers, and a thorough review of all pleadings, stated that the child is more bonded with Tom and that Tom is the parent best able to meet the child's needs. CP 722-723. As a

basis for her report, she interviewed both parents and observed them with the child and interviewed the child. Id. The father's assertion that the mother did not make Sean a priority is not only supported by the collaterals, but also supported by Sean's own statements to the evaluator. The evaluator reported that Sean told her:

> *everything at Tom's house was fun, while Irene's house had "not so much" things to play with and they would just sit around "doing nothing." He recalled doing one fun thing with Irene, going to the park but stated they left right after they arrived.* CP 713.

In addition, the evaluator spoke with 10 collaterals. CP 725-737. She also reviewed all of the pleadings in the case. RP August 10, 2010 p. 397. She spent over a year on the report, beginning the interviews in June of 2009 and completing the report in May of 2010. RP August 10, 2010 p. 398. The resulting report awarded primary custody to the father for objective reasons as discussed further below.

As set forth in Petitioner's brief, trial began on June 15, 2010, resumed for a partial day on June 16, 2010 and was adjourned until August 2, 2010. In addition to the parties and the evaluator, three other witnesses testified regarding parenting. Irene called the Director of Sean's pre-school from when the parties were together, Sarah Ducette, who described that Irene was consistently late dropping Sean off despite

requests to be timely. RP June 16, 2010, p.224-226. Tom called Jenn Mathis, a mutual friend and neighbor of the parties during marriage who had known the parties for 6 years. RP August 10, 2010, p. 548. She was equally close to both parties at the time of the dissolution. Id at 552. She testified to Tom's strengths as a parent. Id, pp.549-550.

Tom called Nancy Burza, Sean's Kindergarten teacher post-separation. RP August 10, 2010, p. 532. The teacher testified:

> *Sean seemed to be a little bit more stressed on the days that mom brought him to school. It took him a little bit longer to get into the routine of the day and to kind of get acclimated for what was happening at school.* Id. at 534.

She also testified that homework did not get turned in on time when Sean was with Irene. Id at 536. She testified that Irene struggled with getting Sean to school in the mornings. Id at 537. Ms. Burza testified that Sean told her that Irene was "a little bit mean." Id.

After six days of testimony, the trial ended on August 12, 2010 when both parties concluded their cases and the trial court issued its oral ruling. RP August 12, 2010, 778-804. The Court specifically adopted the Parenting Evaluator's findings as to the statutory factors. RP August 12, 2010 p. 789. The Court also specifically stated that the Court did not have any personal bias toward Ms. Dyer whatsoever. Id at 802. After adopting

the father's proposed parenting plan with a few minor changes, the Court advised the parties that his oral ruling had the effect of an order immediately. Id at 797. Subsequently, the petitioner set a presentation hearing wherein she tried to add additional clauses to the parenting plan. CP 92-94. The Court denied the requests except to the extent the clauses were agreed upon, noting that the father's proposed plan adequately reflected his ruling. CP 619-620. This appeal ensued.

B. HISTORY OF THE PARTIES

The parties began dating in 1994. CP 188. They were married on September 1, 1996. Id. From the outset of Sean's life, Tom was a devoted father and attended every OB/GYN appointment for the baby. CP 191. Tom was immediately a hands on father and from the outset performed the bulk of parenting functions including changing diapers, bottle feeding (to supplement breast feeding and after breast feeding ceased), taking care of Sean when he was sick, bathing him, preparing his meals, playing with him and doing his laundry. CP 192; CP 381. Tom performed 80% of the parenting functions up until the year before Irene filed for divorce when she suddenly, evidently in anticipation of filing for divorce, began to take more of an active role at which time Tom performed 60-70% of the parenting duties. CP 192. In fact, Tom specifically arranged his work

schedule so that he could pick Sean up from school/daycare Mondays through Wednesdays. CP 380. As reported by both parents, Tom took every Friday off to be with Sean effective August of 2007. RP August 11, 2010 p. 639. Tom went to every doctor appointment (but one for which he had no notice) and attended every parent teacher conference. RP August 9, 2010, pp. 259-260. Tom made Sean's breakfast every morning and packed his lunches every day. RP August 9, 2010 p. 260.

Shortly after Sean was born, Irene's parents began divorce litigation and Irene turned her attention from the child to assisting her mother with the dissolution. RP, August 9, 2010, p. 256. Tom believes that this interfered with the bonding process between Irene and Sean. It was testified to that Irene was quick to anger with Sean and was easily frustrated by seemingly simply parenting tasks such as taking a temperature or putting a car seat into the car properly. CP 398-400; RP August 10, 2010, p. 550. The joint counselor testified that during the marriage, Tom raised concerns about Irene's focus on her mother's divorce instead of Sean and Tom. RP June 16, 2010, p. 200. Tom also expressed concerns regarding her reactive temper and her tendency to yell and scream in front of Sean. RP, June 16, 2010, p. 200; see also RP August 9,2010, pp. 260-261 and pp. 285-286. After nearly three years of

counseling both parties, the counselor began to think that Irene might have a personality disorder. RP, June 16, 2010, p. 213. Irene immediately decided to end the couples counseling upon finding this out. RP August 9, 2010, p. 258.

Irene has claimed that she did not work full time for the first two years of Sean's birth. RP June 15, 2010 p. 152. This is not true. The parties employed a nanny five days a week after the initial maternity leave and Irene was away from the home 40 hours per week. RP August 9, 2010, p. 262. This was not disputed at trial. She also significantly overstated the amount of travel time for Tom following the period after Sean was born. Tom specifically limited his travel time to Monday through Wednesday so that he could be home with Sean as much as possible when he was not in school. CP 193. Irene cites to Tom's travel schedule alleging that his longest trip lasted up to three months but her own testimony indicated that the longer travel was prior to the birth of the parties' child. RP June 15, 2010, p.154. The parenting evaluator considered the amount of travel by the father and determined that it had no impact on her findings because it was not consistent with Tom's schedule since the case was initiated. CP 718; RP August 10, 2010, p.439. Tom testified that he may travel sometimes but that his schedule is flexible and

that he can manage the dates and times of travel. CP 193. He testified that on average he was out of town for 3.5 days per month since the birth of their child. RP August 9, 2010 p 366. Tom further testified he limited travel such that he was home on weekends and scheduled to have minimum impact on the family. RP August 9, 2010 pp. 366-367 and RP August 11, 2010, pp 704-705. Tom also testified to his flexibility and control over travel times. RP August 11, 2010, p. 706.

The evidence showed that Irene was never comfortable caring for Sean on her own and always had to have her mother present if Tom did have to travel to assist her with parental responsibilities. Id and CP 380; CP 399. The parenting evaluator noted:

> *The collateral data supported that Mr. Bubernak was very active and very hands on with Sean when he was not traveling and it appeared that he could create a responsibility for Sean's care during those times. The data also supported that when Mr. Bubernak was travelling, Ms. Bubernak's mother stayed with her and assisted her in Sean's care, so she was providing the majority of care but she continued to have some assistance during those times.* RP, August 11, 2010 p. 638

Irene claims that Tom left lists as a form of control when he travelled. The evidence suggested that Irene solicited the lists as she did not know how to take care of Sean on her own. RP August 11, 2010, p.

710. The Court, after listening to all of the testimony and reviewing the evidence stated the following about the lists:

> The lists corroborate and in some cases demonstrate certain contentions by Tom. First, as at least one of the notes indicates, Irene requested that he leave lists to help her in parenting Sean. Second, Irene at times was overwhelmed by her parenting duties as noted by a number of witnesses. Third, Tom has a capacity for handling details and planning. Fourth, Tom was the parent who, when both were present, performed the bulk of the hands-on parenting after Sean was about one year old, and when he left he felt it appropriate to leave lists for her. Fifth, the notes are designed to be helpful to Irene and not hostile. One of them, for example, encourages her to, quote, have fun at the park, close quote, which is hardly a domineering or controlling message. RP August 12, 2010, pp. 787-788.

Irene's claims for domestic violence were never substantiated and ultimately found to be not credible by the trial Court. Id. at 782. Oddly, despite the false allegations made by Irene about DV and false allegations regarding Tom's parenting deficiencies, Irene is the only parent about whom there was testimony with regard to hitting Sean. CP 215. Irene's disregard for Sean's best interest is clearly evident beginning with the manner in which she left the family home, removing Sean from his home without any notice to Tom and after leaving a voice message that they would be home in a few hours only to never return. RP August 9, 2010, pp. 302-305. Tom called hospitals and filed a missing persons report. Id. at 305. She took nothing from the home for Sean, no toys and no clothing.

Id at 306. This was inexplicable given that she picked a day Tom was out of town and she had ample time to at least get some comfort items for the child. She used false allegations of domestic violence throughout the litigation in an attempt to limit Tom's time with Sean although the undisputed testimony was that prior to the dissolution he performed the bulk of parenting functions. In the end, the witnesses and evidence clearly supported the fact that Tom was the more able and capable parent and the parent with whom Sean was most closely bonded.

C. THE RESPONDENT IS ENTITLED TO ATTORNEY'S FEES ON APPEAL

Tom is entitled to attorney's fees on appeal under RAP 18.1. Instead of focusing her time, money, and efforts on addressing her son's needs and best interests, Irene has pursued this appeal and tried to circumvent the lower court, forcing Tom to pay his attorney to defend in both the Superior Court and the Appellate Court, despite a very thorough and unbiased Parenting Evaluation.

Tom requests fees pursuant to RCW 26.09.140, which provides that "the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." Thus, as a result of defending this appeal, Tom is the party entitled to attorney's fees. Moreover, given that Irene is

a full time professional employee at The Boeing Company and in consideration of the $223,137 financial settlement awarded to her, the Wife certainly has the ability to pay. CP 768.

IV. ARGUMENT

A. STANDARD OF REVIEW

The appellate court reviews errors of law to determine the correct legal standard de novo. ***In re Marriage of Kinnan***, 131 Wn. App. 738, 751, 129 P.3d 807 (2006). The Court reviews challenges to a trial court's factual findings for substantial evidence. ***In re Marriage of McDole***, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). Trial court findings that are supported by substantial evidence should be upheld. ***McDole,*** 122 Wn.2d at 610. Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. ***In re Marriage of Griswold***, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002), review denied, 148 Wn.2d 1023 (2003). Conclusions of law are reviewed to determine whether factual findings that are supported by substantial evidence in turn support the conclusions reached by the Court. ***In re Marriage of Myers***, 123 Wn. App. 889, 893, 99 P.3d 398 (2004). A trial court has wide discretion in determining the best interest of the child in the context of the statutory criteria set forth in

RCW 26.09184 and 187. ***In re Marriage of Kovacs,*** 121 Wn. 2d. 795, 854 P.2d 629 (1993).

Here, Irene asserts that the parenting plan entered was not based on substantial evidence but that is not supported by the trial record or the evidence presented. The court specifically considered the statutory factors. RP August 12, 2010 pp.788-789. The most important evidence was the parenting evaluation and the testimony of the parenting evaluator who had unique access to both of the parties, their son, Sean, and 10 collateral contacts. In addition, the trial court was able to gauge the credibility of all witnesses, including the parties, the evaluator, the parties' joint therapist, two teachers and a mutual friend and neighbor of six years since the birth of the child. As set forth herein, the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person that Tom is the best person to have primary residential care of Sean during the school year and that both parents can care for Sean during the summer when the need for routine is somewhat relaxed.

B. THE TRIAL COURT PROPERLY APPLIED RCW 26.09.184 AND RCW 26.09.187 WHEN IT DETERMINED THAT THE FATHER/RESPONDENT SHOULD BE THE PRIMARY RESIDENTIAL PARENT AND THAT HE SHOULD HAVE SOLE DECISION MAKING

1. THE TRIAL COURT ORDERED PARENTING PLAN PROPERLY CONSIDERED AND APPLIED THE

STATUTORILY REQUIRED FACTORS.

Trial court findings that are supported by substantial evidence will be upheld. ***In re Marriage of Thomas***, 63 Wn. App.658, 660, 821 P.2d 1227 (1991). Evidence is substantial if it persuades a fair-minded, rational person of the truth of the finding. ***In re Marriage of Spreen***, 107 Wn App. 341, 346, 28 P.3d 769 (2001). Trial court parenting plans that do not constitute an abuse of discretion will be upheld. ***In re Marriage of Littlefield***, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

Here, there was no abuse of discretion as the trial court carefully considered the testimony and evidence provided at trial in consideration of the requisite statutory factors. The trial court stated that it would find the parenting evaluator "probably [to] be the most important witness in this case." RP August 10, 2010, p. 374. Indeed, as the evaluator was an agreed upon and court appointed evaluator who spent over a year interviewing the parties and collaterals and observing the parents with the child, her testimony was the most reliable and credible evidence and the best evidence for a trial court to consider when making a parenting determination. The ambiguous or uncertain portions of the parenting evaluation or various concerns raised therein were further explored through testimony of both the parties, two teachers, a mutual friend and neighbor and the parties' joint therapist. Substantial evidence supported

the residential determination of the trial court and the ruling should not be disturbed.

Irene cites to inappropriate behaviors by Ms. Dyer during the course of the dissolution trial, but fails to relate that behavior to the ultimate ruling on Parenting. There is no causal link between the alleged bad behavior and the resulting Parenting Plan--the Court relied NOT on Jan Dyer's lack of professionalism during the trial in making a determination for parenting, but rather the statutory factors set forth in RCW 26.09.187. In applying the statutory factors to this case, the Court considered the Parenting Evaluation completed by Jennifer Keilin, the testimony of Sean's teachers, and the testimony of the parties themselves. The Court also listened to testimony from Irene's "DV expert", a neighbor and mutual friend, a joint counselor, Irene's counselor, and most importantly, the testimony of a qualified parenting evaluator, over a period of 6 (plus) days. The trial Court indicates its consideration of the statutory factors very clearly in its ruling. RP August 12, 2010 pp. 788-789. He noted that the parenting evaluator:

> *...made a careful evidence based analysis of these factors. There is no indication of bias or unsound analysis in her report or assessment. In going through the report and after listening to the evidence in this case, I find myself in basic agreement with her assessment of the statutory factors and agree that the ones she has indicated are not of any*

> *significant importance are not important.*[2] *And I also agree with her conclusion that based on these factors that Tom should be the primary residential parent.* Id at 789.

Clearly, the trial court gave careful consideration to all of the statutory factors including careful consideration of the most objective evidence, that of the parenting evaluator and that of Sean's teachers. There was never any assertion by either party that Ms. Keilin's report was flawed or that there was any indication of bias.

The Court, presumably based on testimony from the teachers that Sean was not timely to school when with Irene and that it had a substantial negative impact on him when he was late, reduced the time recommended by the Parenting Evaluator by about 12 hours such that the return of the child would be to the father on Sundays rather than to school on Monday mornings. The testimony of the teachers was also set forth in Appendix A of the Parenting Evaluation considered by the Court. CP 725-726 and 731.

Jennifer Keilin, a highly respected expert, was Court appointed as a Parenting Evaluator on this case in February of 2009. As part of the evaluation, the parenting evaluator met with both parents individually and with the parties' son, Sean, as well as conducted additional interviews via

[2] The parenting evaluator noted that RCW 26.09.187(3)(a)(ii) did not apply as there were no agreements between the parties; he also felt that the fifth and six factors were not really very pertinent.

telephone with each party, reviewed responses to a substantive written questionnaire and exchanged numerous e-mails with the parties. The evaluator also read all of the Court pleadings and contacted all of the child's schools and other collateral contacts provided by each parent. RP, August 10, 2010, p. 403. The fact that the father provided the majority of the care for the child is based not on his own testimony, but rather was substantiated by collateral witnesses, school teachers and Jennifer Keilin. Ms. Keilin stated she recommended the father be the primary parent because:

> *It was my opinion based on the data that Mr. Bubernak had the stronger parenting skills. He had the better relationship with Sean, the greater availability of time, the better ability to support Sean in meeting his needs and that his overall mental health and day-to-day functioning were greater such that would sustain Sean.* RP, August 10, 2010, p. 408. (emphasis added)

There is no question that both parents love Sean very much. The question for the Court was not who loved Sean the most, but rather which parent was best equipped to meet Sean's day to day needs and emotional and physical health. The answer to that question was very clear from the data to be Tom.

Irene has blamed the outcome of the parenting evaluation on outside stressors that occurred during the evaluation process but the parenting evaluator stated that there were patterns of behaviors

that preexisted Irene's alleged stressors. RP August 10, 2010 p. 436. The evaluator further stated that while those things may have been a factor, "...overall Sean needs to get his needs met regardless of background context of that parent's experience, so. And I did not feel that those were able to be met as well in Ms. Bubernak's care." Id. Moreover, after talking to the child's last teacher, Ms. Burza, the parenting evaluator noted that "the data was consistent that there were continuing tardy behavior even outside of Mrs. Zebroski's passing and they didn't seem to be isolated." RP, August 10, 2010, p.529.

Irene alleged during trial that Ms. Burza was prejudiced toward one parent over another due to Mr. Bubernak volunteering in the classroom. RP August 10,2010 p. 529. Nancy Burza testified that she did not have a personal connection with either parent. RP August 10, 2010, p.532. Nancy Burza observed that:

> *Sean seemed to be a little bit more stressed on the days that mom brought him to school. It took him a little bit longer to get into the routine of the day and to kind of get acclimated for what was happening at school.* RP, August 10, 2010, p. 534.

The teacher further stated that the problem with Sean and mom was consistent throughout the year. Id; CP 731.

Irene alleged that the parenting evaluator failed to acknowledge that she had been in counseling to work on her issues and was allegedly improving despite going through difficult times. The parenting evaluator noted that she did consider the very difficult circumstances in which Irene found herself but that ultimately the concerns were that Irene could not meet the child's needs. RP, August 10, 2010 p. 617.

The parenting evaluator went on to state:

> *The data supported that there was a history of a difficult relationship between Ms. Bubernak and Sean that began around the time that he was born when it appeared that she had significant difficulties with depression. There was substantial data that supported she struggled to care for him for an extended period of time. There was the data that continued to support that her relationship with Sean is somewhat more challenged, that the ease of the relationship is not consistently there. That once Sean reached school age and he started attending the preschool program that more information was made available about the difficulties she had in getting him to school on time which made an impact for him. And the school talked to her about that there continued to be problems.*
>
> *Then his current teacher for the past year noted that not only was there continuing attendance problems but that Sean appeared to have more difficulty either to be more down in not as good of a place emotionally on a number of occasions when he came to school brought by Ms. Bubernak. So those are concerns that I highlighted that I think illustrate the ongoing of the history, the history of problems in their relationship and the ongoing difficulties between Sean and Irene at times and her struggles with*

providing him the care that he needs. RP August 10, 2010 pp 617-618.

Jennifer Keilin also later reported that the collateral data supported that Tom was the primary caregiver when he was not travelling and that when he was travelling, Irene's mother stayed with Irene to provide assistance with parenting. RP August 10, 2010, p. 638. Irene's inability to deal with parenting extended even into her inability to answer a parenting questionnaire for the parenting evaluator without the assistance of counsel. RP August 10, 2010, p. 642.

Testimony and data revealed that Petitioner had a difficult time managing details that were important to the child's structure and routine, such as ensuring that homework was done and returned to school, that the child was timely to school, and managing a calendar for school breaks. RP August 10, 2010, p. 512; CP 703-738.

The discussion of the specific statutory factors considered by the Court and by the parenting evaluator begin on page 12 of the Parenting Evaluation. CP 715-724.

Under RCW 26.09.187(3)(a)(i), "The relative strength, nature, and stability of the child's relationship with each parent",

the parenting evaluator noted that Irene had deficits under this factor, including:

> *poor communication, acting out by Sean, and Irene's difficulty effectively managing Sean and day-to-day demands at times...there is also current collateral data to support the presence of some problematic behavior patterns and interactions that negatively impact Sean and cause him distress at times.*

In stark contrast, the parenting evaluator noted under this factor the following:

> *Sean's relationship with Tom had good strengths including love, mutual caring and warmth, affection, responsiveness and shared activities. No significant deficits were noted. Collateral data supported that Tom and Sean are strongly bonded, have a close and loving relationship, and outside of Irene's reports, no concerning interactions were reported. Tom has a flexible schedule and is highly available to Sean, including volunteering regularly at the school and attending field trips. Of the two parents, Sean appears to have a somewhat stronger, more positive, and more stable relationship with Tom than he does Irene.*

Under RCW 26.09.187(3)(a)(iii), regarding past and potential future performance of parenting functions, the evaluator noted that the marriage therapist of two and a half years reported that Tom "was not abusive to Irene and felt Irene demonstrated the greater degree of psychological problems, based on her observations in sessions." CP 716. The overall data supported that Irene struggles with significant symptoms of depression that negatively impacted her ability to parent Sean from

early on in Sean's life and continued to negatively impact her. CP 718. In contrast, the collateral contacts consistently reported that Tom was actively involved with Sean from birth to current and some collaterals observed that Sean fulfilled more of the primary care giving responsibilities and appeared to have a stronger, more nurturing relationship with Sean and Irene. Id. This factor weighed heavily in favor of Tom as primary parent.

Under RCW 26.09.187(3)(a)(iv), the emotional needs and developmental level of the child, the evaluator determined that Sean needs consistency stability and routine and that Sean benefitted from more time with Tom who has a greater availability and provides more consistency and structure than Irene. CP 721.

RCW 26.09.187(3)(a)(v) and (vi) were fairly neutral in terms of the evaluator determinations. CP 721-722. RCW 26.09.187(3)(vii), each parent's employment schedule weighed in favor of Tom since he did not need to use before or after school care for Sean, whereas Irene regularly utilized after-school care. CP 722.

Overall, all of the statutory factors weighed heavily in favor of Tom as the primary parent. The testimony and evidence confirmed the same for the trial Court.

The wife spends a great deal of her brief addressing the false domestic violence accusations. The testimony confirmed, however, that the main reason the evaluator gave any credence to the accusation was due to a misunderstanding when she spoke to the parties' joint counselor. The joint counselor, Joan Oncken, saw the parties for two and a half years. RP June 16, 2010 pp 196-197. Ms. Oncken testified that she told Ms. Keilin that she had "heard there had been some shoving" but at trial confirmed that she did not mean to infer she had heard it from the parties during the course of their counseling, rather that there was a subsequent accusation during the dissolution. RP June 16, 2010 pp 208-209. She further testified she never saw bruises on Irene's arm despite Irene's claims to the contrary. RP June 16, 2010 p. 197. Ms. Oncken testified she had not consulted her notes when she initially spoke to Jennifer Keilin. Id. When Dr. Roland Maiuro became involved she checked her notes and advised him that she did not find any discussion or allegations of domestic violence in her notes. RP June 16, 2010 pp. 197-199; TE 223. Ms. Oncken also testified that she would have put any discussion of domestic violence into her notes had the issue been raised. Id. at 199. Ms. Keilin testified that Dr. Maiuro advised her that Ms. Oncken reported a memory of an alleged incident but could not find it in her notes. RP August 10, 2010, p. 420. Both the testimony and trial exhibit 223 confirmed that was

not the case and Ms. Keilin testified that the weight of Dr. Maiuro's opinion would weaken significantly if she had known that Ms. Oncken stated she had heard of the allegations during the dissolution rather than during the marriage. Id at 421. The Court listened to all testimony—that of the parties, of Doug Bartholomew, of Jennifer Keilin and determined that there had been no domestic violence committed by Tom during the marriage. No weight should be given to the mother's allegations whatsoever as the trial court is in the best position to gauge credibility of the witnesses. The Court did not punish Irene for making false allegations, rather it relied on the statutory guidelines and the evidence presented to determine that the father was the best person to be the primary residential parent during the school year when a consistent routine is particularly important and for 50/50 schedule during the summer when there is no academic impact if routine is lacking.

2. THE TRIAL COURT PROPERLY DECLINED TO PROVIDE JOINT DECISION MAKING GIVEN THAT THE MOTHER HAD DEMONSTRATED AN OPPOSITION TO COOPERATION IN DECISION MAKING PER RCW 26.09.187(2)(c).

RCW 26.09.187(2)(b) mandates sole decision making to one parent when the court finds that one or both parents are opposed to joint decision making. RCW 26.09.187(2)(c) mandates, in relevant part, that

the Court consider (ii) the history of participation of each parent in decision making and (iii) whether the parents have a demonstrated ability and desire to cooperate with one another in decision making.

Here, the Court properly considered the parents inability to effectively communicate when it awarded sole decision making to Tom with some input from Irene. It is odd that Irene questions the trial court's decision making allocation when she herself testified that she did not feel she could have joint decision making with Tom. RP June 15, 2010 p. 128. Irene refused throughout the litigation of the case to have e-mail communication limited to specific issues about Sean even though the written communication would have addressed the needs of the child. RP August 9, 2010 p. 272. The parenting evaluator testified that she opined if sole decision making was to be granted then it should be granted to Tom because it was consistent with her opinion that Tom have primary residential care of Sean. RP August 10, 2010, p. 412. The Court confirmed that he also granted it to Tom as the primary residential parent. RP August 12, 2010 p. 794.

Irene asserts that it was an error to fail to provide a mechanism for changing the parenting plan in the future. As set forth above, the Court listened to testimony that the father was the best primary parent and no facts alleged gave rise to a presumption that would change. This was not

an error. The statute specifically allows Irene to change the plan if there is a significant change of circumstances if such a change arises.

Irene asserts that the Court's parenting plan did not give the parents the right to make decisions about the day to day care of the child or the right to make emergency decisions about the child when the child is in either party's care. This is completely false. Section 4.1 of the Parenting Plan specifically addresses both points. CP 88. There were no ambiguities.

3. THE TRIAL COURT DID NOT ERR BY VIRTUE OF EXPRESSING A HOPE THAT OVER TIME THE MOTHER WOULD IMPROVE HER PARENTING SKILLS AND PROVIDE A BASIS FOR THE FATHER TO BE MORE FLEXIBLE IN TERMS OF EXERCISING THE PARENTING PLAN.

There is no authority cited whatsoever by Irene to support this request. Our legislators are aware that parenting plans are entered at various stages of a child's life but there is no mandate that the Court build in provisions for each stage of a child's life. This request is not appropriate and not based in any legal argument and Irene does not cite to any legal basis to support this claim. The testimony was clear that Tom was the better primary parent and there is no reason to believe this will change.

C. THE COURT DID MAINTAIN A FAIR TRIAL DESPITE THE UNPROFESSIONAL BEHAVIOR BY COUNSEL THAT APPELLANT/WIFE HAD RATIFIED FROM THE OUTSET OF LITIGATION AND BASED ITS RULING NOT ON THE BEHAVIOR OF COUNSEL BUT ON SUBSTANTIAL EVIDENCE AND TESTIMONY.

Irene claims that her attorney was completely unprepared, however a careful review of the trial transcript shows that Irene's counsel spent a great deal of time, not only reading the Parenting evaluation, but also reviewing in depth the entire file of the Parenting Evaluator. Ms. Dyer had to create a sub-exhibit and numbered the pages 1-193 so that she could refer to it with the Parenting Evaluator. RP August 10, 2010, p 445-446. This exhibit became Exhibit 26 in Petitioner's Exhibit Notebook. In fact, Irene's attorney spent a great deal more time on her cross-examination and re-cross of Ms. Keilin than Tom's attorney spent on direct examination and redirect, despite the fact that the Parenting evaluator was called by Tom. The trial transcript indicates that Irene's attorney's cross examination and re-cross span from page 442 through page 529 (RP August 10, 2010 pp. 442-529) and then pp. 615-626 and pp. 642-667(RP August 11, 2010 pp.615-626 and pp. 642-667)—a total of 123 pages of examination. Toward the end of re-cross examination of Ms.

Keilin, when the Court called a break, Irene's attorney reserved the right to ask additional questions. It appears from the record that though Ms. Dyer did reserve the right to ask further questions, her client did not have any additional questions she wanted to ask. When trial resumed, Ms. Dyer stated that she did not have any further questions. RP, August 10, 2010, pp 666-667.

In contrast to the great amount of time Ms. Dyer spent examining the parenting evaluator, Tom's attorney's direct examination of the parenting evaluator begins at the very end of page 390 through page 442 (RP August 10, 2010 pp. 390-442) and redirect begins on page 626 and ends at the top of page 642 (RP August 11, 2010 pp. 626-642)—a total of 72 pages of testimony.

It is simply incredible that despite Irene's counsel utilizing twice the amount of time to question the Parenting Evaluator at length, that Irene now claims her attorney was not prepared and did not ask all of the questions that she wanted her to ask. Frankly, there is no way to confirm that allegation and so the record speaks for itself. A review of the record indicates that overall, Irene's counsel used a great deal more time than Tom's counsel for testimony of virtually all witnesses, not just the parenting evaluator.

Irene claims that her attorney did not call one single rebuttal witness. That is not true. Ms. Dyer specifically identified Ms. Hilfrink, Irene's therapist, as a rebuttal witness to the parenting evaluator. RP August 9, 2010 pp. 251-252. The Court did not assign a great deal, if any, weight to the testimony of Ms. Hilfrink, stating:

> *Another witness whose testimony was rife with bias [sic]Marion Hilfrink who has been Irene's counselor since July of 2007...Now, the court would not expect Hilfrink, of course, to be in any way neutral in her testimony. Her exposure to the issues in this case is solely what she has heard from her client...Tellingly, however, she revealed her bias when she stated, quote: Tom threatened early on in the marriage to spend all of their money to take Sean away from Irene, and I guess that's what we're doing here, close quote...There is no credible evidence of physical violence by Tom against Irene nor is there any credible evidence that Irene was ever in reasonable fear of any physical violence from Tom.* RP August 12, p. 786.

It appears that Ms. Dyer recognized that calling Ms. Bubernak again would not be as helpful as a third party since her own testimony was understandably biased. Regardless, a rebuttal witness was called although her testimony was not helpful to the Court.

Irene states that her attorney was sobbing during part of the trial. While that is true, she still managed to object at times she

thought it was appropriate, often prevailing on her objection. RP August 10, 2010 pp. 401-442.

Irene, through counsel, stated that she 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 109. This is not only NOT a legal basis for reconsideration or a new trial under CR 59 or CR 60 but is also absolutely untrue. Irene is all too well versed in litigation as she has had three separate attorneys to represent her in connection with her probate litigation. CP 646; TE 26, pp. 169-171. Nick Franz was originally on record as her probate attorney and then was replaced by, it is believed, John Martin. She also has Sharon Best as her real estate attorney. The probate case was filed in 2009 so she had the benefit of additional counsel for nearly a year contemporaneously with Jan Dyer. Id.

Not only did Irene have access to attorneys she retained, but she also had the benefit of free advice from her boyfriend, Nick Franz. Id, pg. 7. The Court documents, filed in connection with the probate case, indicate that Petitioner is dating her first probate attorney, Nick Franz, (who also practices Family Law) for at least the time period from the inception of the probate case in 2009,

through the trial in August of 2010, and up until at least October of 2010. Id. Mr. Franz was even in Court for at least one day of the trial, if not more. Id. Any of these attorneys Irene surrounded herself with certainly could counsel her as to the professional or unprofessional behavior of Ms. Dyer and her rights to change attorneys. Indeed, she did so immediately after trial and her new attorney filed the Motion for Reconsideration. CP 100. Her claim that she lacked the judgment to seek a new attorney in the face of the behavior she now alleges against Ms. Dyer is simply not credible.

Irene was present in Court hearings starting in December of 2008 and at all subsequent hearings and depositions when Ms. Dyer demonstrated poor behavior. CP 647. The questionable behavior in court in December of 2008 was BEFORE Ms. Dyer had her accident. Id. Not only did she not raise concerns about Ms. Dyer's over-the-top litigation style, but she clearly embraced it when it yielded results favorable to her earlier in the case. It was only at the very end of the trial when it became clear that the decision was not going to be what she had hoped that she decided to turn against Ms. Dyer in an attempt to shield herself from the outcome. Irene states in her appellate brief that Ms. Dyer failed to

attend to her case from the outset of the case. In addition to the bad behavior she personally witnessed, she, by her own admission, acknowledges that Ms. Dyer's representation was consistent in its methodology and attention from the outset. Irene had every opportunity to seek new counsel if she felt unattended. She did not. In fact, Irene did not on the record below, nor does she in her appeal, provide any evidence that would have lead another trier of fact to reach a different conclusion than that reached by Judge Fox. Regardless of who was representing her, substantial evidence supported that Tom was the better primary parent.

D. APPELLANT/WIFE'S MOTION FOR RECONSIDERATION AND NEW TRIAL WAS PROPERLY DENIED FOR BEING UNTIMELY AND FOR FAILING TO STATE AN ADEQUATE BASIS UPON WHICH TO GRANT THE RELIEF SOUGHT BY WIFE.

1. Appellant's Motion Was Not Timely under CR 59 and not appropriate under CR 59 based on the lack of merits.

New trial is not matter of right. ***Skov v. MacKenzie-Richardson, Inc.,*** 48 Wash.2d 710, 296 P.2d 52 (1956). Even when a final judgment is without prejudice, a court may reopen it only if authorized by statute or court rule. ***Rose ex rel. Estate of Rose v. Fritz***, 104 Wn.App. 116, 15 P.3d 1062 (2001) *(emphasis added)*. CR 59 states in relevant part: "A motion for a new trial or for reconsideration shall be filed not later than 10 days

after the entry of the judgment, order, or other decision. ***CR 59(b)*** *(emphasis added).* A motion for reconsideration of a judgment filed after the period specified by CR 59(b) is untimely and need not be considered. ***Griffin v. Draper,*** 32 Wn.App. 611, 649 P.2d 123 (1982).

The use of the word "shall" within CR 59(b) makes the time frame for filing mandatory and not at the discretion of the parties or the Court. As stated by the Court on August 12, 2010, "[This ruling] is effective immediately. In a family law case, just saying it on the record has the effect of an order..." RP August 12, 2010, p. 797. Irene was in the Courtroom when this was stated. Tom anticipates that Irene will allege that her attorney was not competent and therefore Petitioner was unaware of the rule with regard to a new trial. This argument is flawed as Irene had at the time 3 attorneys on retainer and was also dating an attorney who practices Family Law, all of whom are presumably familiar with civil rules. There is no exception carved out for the timing of this rule and no stated basis why the rules should not apply to her. If she were *pro se* case law requires the rules to still apply as though she were represented by counsel and so should they be applied equally even in the face of her attempt to discredit her trial attorney. Established case law confirms strict construction of the rule and that Irene's motion was properly denied.

Even if her motion were timely, she failed to state a legitimate basis on which to grant the relief requested.

2. Even if Appellant's Motion Were Timely When She Filed It, She Fails to Establish Facts To Sufficiently Meet the Standards for Granting a New Trial.

Irene cites to ***Barr v. MacGugan*** in support of her assertion that a new trial was appropriate. That case is distinguishable as it was addressing a default judgment. The law favors resolution of cases on their merits, and generally courts will review the vacation of a default judgment more leniently than vacation of a judgment on the merits. ***Pyabas v.* Paolini**, 73 Wn. App 393, 399, 869 P.2d 427 (1999); ***Stanley v. Cole,*** 239 P. 3d 611 (Division 1, 2010). The Barr case was a default judgment wherein the merits of the case were never adjudicated due to the attorney's *failure to take any action at all* on the plaintiff's behalf. Moreover the Court, in dicta, seemed to put weight on the fact that the Plaintiff, Barr, was unaware of the attorney's depression, stating, "MacGugan contends on appeal that the trial court abused its discretion when it reinstated Barr's lawsuit. We find no abuse of discretion, because her attorney's mental illness, ***of which Barr was unaware***, constituted extraordinary circumstances warranting relief from the judgment. ***Barr v. MacGugan,*** 119 Wn. App 43, 45, 78 P.3d 660 (2003). (Emphasis added.) Here, unlike the Barr case, there was a full trial, which was adjudicated on the

merits and both attorneys had ample time to take testimony of key witnesses and did indeed spend a great deal of time examining and cross examining witnesses at trial. Moreover, Irene was very aware of Ms. Dyer's behavior both before and after the accident as set forth in her own declaration provided in support of a new trial and despite having access to three different attorneys, she failed to address the behavior until after the trial.

The acts of the client's attorney are attributable to the client. ***Lane v. Brown & Haley,*** 81 Wn. App 102, 912 P.2d 1040, *review denied*, 129 Wn. 2d 1028 (1996); ***Hill v. Dept. of Labor & Indus.,*** 90 Wn.2d 276, 580 P.2d 636 (1978); ***Hailler v. Wallis***, 89 Wn. 2d 539, 573 P.2d 1302 (1978). "Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity. The sins of the lawyer are visited upon the client." ***Rivers v. Washington State Conference of Mason Contractors***, 145 Wn. 2d 674, 41 P.3d 1175 (2002). Irene has made no allegation of fraud. Irene witnessed the behavior of her counsel from the outset and adopted it as her own. CP 692. Moreover, she states in her declaration that she had concerns throughout the case from information that her attorney shared with her. CP 125. This confirms Ms. Dyer's actions were known to her from the outset and Irene cannot now claim those same actions that she ratified all along should be a basis

to further harass the Respondent with more litigation. Irene claims she was in the dark about Ms. Dyer's health condition but her declaration in support of a continuance confirms that she was aware of the health issues. CP 57.

Many of the facts asserted, such as the alleged "veiled threat" are not substantiated by anyone but only alleged by Irene. In fact, many of the statements made by Irene were incorrect. Tom's counsel did not file a bar complaint as alleged by Irene. CP 692. Ms. Dyer did not assault Tom's counsel while she was pregnant. Id. Mediation materials were prepared and provided by Ms. Dyer to Tom's counsel. CP 693. Regardless, Judge Michael J. Fox, a respected judge for 22 years, was in the best position to determine if the professional and ethical violations of Ms. Dyer warranted a new trial or vacation of his judgment. It is abundantly clear that in making the primary parent determination, he focused on the statutory factors, the substantial and objective evidence, and not on the behavior of Ms. Dyer.

A new trial should not be granted when it is apparent by proofs that it would avail nothing. ***Tolmie v. Dean***, 1 Wash.Terr. 46 (1858). Given the fact that the outcome of the trial was based on expert opinion of the parenting evaluator, collaterals, and the parties' themselves, a new trial would be financially prejudicial to Tom while failing to yield different

results. Tom would be forced not only to incur additional fees for litigation, but also lose income by having to take time off of work to address a trial all over again. Moreover, putting the parties through litigation all over again would have a collateral effect on the child—a risk not worth taking when a new trial would not likely yield different results. The testimony and trial transcript make it clear that a new trial would yield the same outcome. Irene has not alleged that she would have called additional witnesses. She does not allege she would have done anything differently. She does not assign any error or bias to the expert report on which the trial court relied heavily. There is nothing presented by Irene that if she were granted a new trial, the outcome would be different.

Irene's claim that she is entitled to a new trial by virtue of the alleged misconduct of her attorney, Jan Dyer is not appropriate under established case law. Generally when a new trial is due to misconduct of counsel, it is the misconduct of the *adverse and prevailing party*, not the misconduct of one's own attorney.

Right to new trial was waived where party had knowledge of acts constituting misconduct of jury and prevailing party at time they occurred, and failed to call court's attention thereto prior to return of verdict. ***Hopkins v. Copalis Lumber Co.***, 7 Wash. 119, 165 P. 1062 (1917). Party who refuses to move for mistrial because of instances of misconduct of

counsel waives his right to claim occurrences of misconduct up to that time as grounds for new trial. ***Snyder v. Sotta***, 3 Wn.App. 190, 473 P.2d 213 (1970). New trial is properly refused upon mere offer of evidence upon point not raised at trial after full opportunity to do so. ***Collins v. Fidelity Trust Co.,*** 33 Wash. 136, 73 P. 1121 (1903). Irene never raised an objection and should not now be permitted to do so only after she disagrees with the well founded result.

A new trial will not be granted on the grounds of breach of professional conduct unless the breach of the canons of professional conduct is so flagrant that it can be said as matter of law that breach prevented fair trial. ***Ryan v. Ryan***, 48 Wash.2d 593, 295 P.2d 1111 (1956). (emphasis added) As a general rule, the movant seeking a new trial based on the prejudicial misconduct of counsel must establish that the conduct complained of constitutes misconduct, rather than mere aggressive advocacy, and that the misconduct is prejudicial in the context of the entire record. ***Aluminum Co. of America v. Aetna Cas. & Sur. Co.***,140 Wash.2d 517, 998 P.2d 856 (2000). (emphasis added.)

Here, after a careful review of the entire record, it is clear that Ms. Dyer's actions, while questionable, were not the basis for the Court's ruling. While she may have appeared overly aggressive and at times overly emotional, she nonetheless did her job. Anytime it appeared that

her behavior was becoming unprofessional, the Judge promptly reminded her to compose herself. There is nothing in the record to suggest that Ms. Dyer did not adequately represent her client given the facts with which she had to work. She spent a great deal of time questioning the witnesses. She had a prepared list of questions for each witness and always took advantage of the ability to cross examine and re-cross examine. In fact, Ms. Dyer spent more time questioning witnesses than Tom's attorney.

Irene witnessed her own attorney's aggressive style and delay tactics for two years and throughout trial and did not raise an objection at any time despite having access to several attorneys. More importantly, there was no legal tactic or omission that was so flagrant that it, as a matter of law, prevented a fair trial or that was prejudicial in the context of the entire record.

Petitioner has not stated how the bad acts of Ms. Dyer prejudiced the outcome of her trial. While Petitioner spent a great deal of time outlining Ms. Dyer's poor behavior, she did not indicate any substantiated failure in the litigation of her case by her attorney. She has not stated that her attorney's behavior impacted the parenting evaluator's determination that Tom was the better primary parent. Even if she could establish a concrete example of incompetence (as opposed to inappropriate behavior),

her ability to do so would still not warrant a new trial or vacation of the trial court's ruling.

It is well established in Washington that in civil actions, incompetence or neglect of party's own attorney will not generally provide sufficient basis for relief from a judgment. ***Lane v. Brown & Haley***, 81 Wn. App. at 107. (Decision of attorney for plaintiff to rely on erroneous legal theory resulting in summary judgment for defendant did not create circumstance justifying relief from judgment; attorney appeared in fully adversarial setting in which merits of case were fully addressed and, for whatever reason, neglected or refused to investigate possible other sources of evidence.) The fact that a party had inadequate representation in a civil case does not warrant vacation of the judgment. ***In re Marriage of Burkey***, 36 Wn. App 487, 675 P.2d 619 (1984). These principles are key as a matter of public policy. If appellate courts could grant new trials for every attorney's alleged incompetence or negligence, there would be an exorbitant amount of appeals filed each year.

Here, Irene has not set forth any facts that rise to the level of incompetence or negligence, even if that were a valid basis for a new trial. She mentions one instance of some forgotten dates in the trial transcript—this is not unusual given that this case went on for two years. She mentions the use of the narcotics and while Ms. Dyer may have admitted

to being on Percocet on one occasion, that was for the morning session only of the 2nd day of trial—the same day that the trial was continued for a month. Moreover, given that Ms. Dyer had been on pain pills for her injuries since May of 2009, it is questionable what effect, if any, it had on her day to day functioning. Regardless of Ms. Dyer's use of Percocet, the use did not result in any irregularity or negligent act by Ms. Dyer. She spoke coherently, questioned witnesses competently and made appropriate objections throughout trial. The Alaska case cited by Petitioner is not authority in this state and involved an attorney who was impaired due to alcohol use and so not applicable here.

3. Irene's Motion for Relief from Judgment was improper under CR 60 and not supported by Case law and was properly denied

Each relevant section of CR 60 under which Irene could possibly seek relief is addressed below:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order: There was no mistake, surprise or neglect in the manner in which the parenting plan was obtained. As set forth above, there was a full trial and the decision was rendered after consideration of testimony from the parties', the child's teachers, collateral contacts and most

importantly, a mutually agreed upon and court appointed parenting evaluator who worked on the case for 15 months and issued a parenting report. There was no irregularity that affected the trial court's ability to consider the witness testimony or evidence presented.

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b):

Irene cited to other extrinsic "stressors" and health issues as a basis for her failure to meet Sean's needs in her declaration in support of a request for a new trial. This fact, even if it were true (she did not provide doctor's records with her motion), is not relevant and could have been and should have been discovered prior to trial. Even if the Petitioner's alleged thyroid condition was new evidence, she has provided no evidence that there was a causal connection to her lack of parenting skills from the birth of her son to present with regard to the stated condition.

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party:

There has been no fraud plead and no misconduct of an adverse party alleged.

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending:

There was no unavoidable misfortune in this case. Irene chose her attorney, witnessed her bad acts again and again and used the aggressive approach as a sword against Respondent for two years. In Petitioner's declaration in support of her motion, she acknowledges statements and behaviors of Ms. Dyer that concerned her from the outset of this case, yet she *chose* to remain with her despite having counsel of three other attorneys and the ability to hire a new attorney. Ms. Dyer also spent nearly twice as much time questioning witnesses during trial and spent much more time in presenting both her oral argument and closing argument.

***(11) Any other reason justifying relief from the operation of the judgment*:**

As there has been no assertion of any error of law on the court's part, and the facts of this case do fall within any circumstances enumerated under CR 60 (b) (1)-(10), it appears that Petitioner is claiming that her attorney's behavior is an irregularity that falls within CR 60(b) (11). An irregularity is usually defined as a departure from some procedural rule or regulation, unrelated to the merits of the case. ***Summers v. Department of Revenue***, 104 Wn. App. 87, 14 P.3d 902 (2001). Examples include premature entry of a final judgment (***Muscek***

v. Equitable Savings & Loan Ass'n, 25 Wn. 2d, 546, 171 P.2d 856 (1946)), summons being mailed to the wrong address (***State ex rel. Hennessy . Huston,*** 32 Wash. 154, 72 P. 1015 (1903)), failure to give notice of subsequent proceedings after appearance made ***C.S. Barlow & Sons v. H.&B. Lumber Co.,*** 153 Wash. 565, 280 P. 88 (1929), and a default judgment being entered in excess of prayer (***Stark Bros. v. Royce***, 44 Wash. 287, 87 P. 340 (1906)).

Despite its broad language, the use of rule granting the court discretion to vacate an order for any other reason justifying relief from the operation of the judgment should be reserved for situations involving extraordinary circumstances not covered by other sections of rule; those circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings. ***In re Marriage of Furrow***, 115 Wn.App. 661, 63 P.3d 821 (2003). In the ***Furrow*** case, for example, the Court departed from the statutory mandated procedures for modification that are designed to protect the best interest of the child and therefore it was appropriate to vacate the order terminating a mother's parental rights.

Irene has not articulated any irregularity that warrants relief under CR 60(b)(11). There was nothing extraordinary that actually affected the court's proceedings. Irene's attorney was afforded the same opportunities

to put on her case as Tom's counsel and under the same conditions. Irene's attorney utilized more trial time than Tom's attorney and did in fact put on her case. While Ms. Dyer's sobbing was initially distracting, she continued to interject several objections and managed to cross-examine the witness quite aggressively throughout the day.

Irene cites to ***Hubbard v. Scroggin*** in support of her position that her motion was timely and that CR 59 and CR 60 apply only to formal written orders not to oral rulings. Her reliance is misplaced as the Court in that case specifically stated that CR 59 was not germane to the Court's actions in the case. ***Hubbard v. Scroggin***, 68 Wn. App 883, 888, 846 P. 2d 580 (1993). There is nothing in the Hubbard case to support her position that CR 59 and CR 60 only apply to written orders. Furthermore, the fact that a trial court *may* alter its ruling prior to entry of the final order is not relevant here because the trial court in the instant matter specifically stated on the record that its oral ruling had the effect of a written order. RP August 12, 2010, p. 797. Regardless, as set forth above, even if the motion were timely, it did not assert any facts that if true would support vacation of the orders or a new trial since substantial evidence supported the resulting orders.

V. CONCLUSION

The Trial Court is in the best position to gage the credibility of the parties. There was substantial evidence, including a multi-year parenting evaluation, and the testimony of the parties and collateral witnesses, and the expert testimony of the parenting evaluator, that Tom was the best primary parent and that the resulting parenting plan was in the best interest of the child. It is abundantly clear that the trial court carefully considered all statutory factors, the child's relationship with each parent, and that the needs of the child, not the actions of the Irene's attorney, was the court's focus in determining the best residential placement of Sean. There is no basis to grant the relief requested by Irene. Tom should be awarded attorney's fees for having to defend a frivolous appeal.

Dated this 29th day of September, 2011.

Maya Trujillo Ringe, WSBA #34105
Attorney for Respondent Tom Bubernak

CERTIFICATE OF SERVICE

I certify that on September 29, 2011, I caused a copy of the foregoing document to be mailed via first class U.S. mail, postage prepaid, to the following counsel of record and that a hard copy was also personally delivered via legal messenger on September 29, 2011:

Nancy Hawkins
Attorney at Law
6814 Greenwood Avenue North
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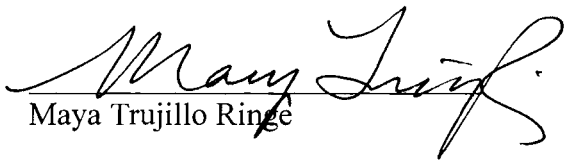

Maya Trujillo Ringe