COURT OF APPEALS NO. 44484-4-II

CLARK COUNTY SUPERIOR COURT NO. 11-3-00581-7

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

BECKY DEVELLE,

Appellant,

v.

MARC DEVELLE,

Respondent.

OPENING BRIEF OF APPELLANT

Becky Develle
9314 NE Alpine
Vancouver WA 98664

Marc Develle
3412 SE 165 Ave
Vancouver WA 98683

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Statutes

I. INTRODUCTION

This appeal arises after the dissolution of a 26-year marriage with children during which time abuse by and addictions of Marc were well documented. The trial court's coercion of the settlement on August 21, 2012, caused numerous errors relating to maintenance, parenting, and later, contempt issues.

Marc and Becky Develle were married in 1986 and had eight healthy children together. Becky quit college to become a housewife and stay-at-home mom. Becky also homeschooled all of the children. She was a dedicated mother who chose to spend her time raising her own children all day.

Marc is a journeyman printer and has been at the same employment for over thirty years. While he always contributed to the family financially he did not participate in the children's lives very much.

Sadly the parties divorced and the ensuing court process became a tangled, complicated mess, through a series of confusing and illegal court hearings. A short chronology follows.

On August 21, 2012, the dissolution trial ended with a coerced settlement, (known as "the settlement" in this case).

On September 7, 2012, orders presented for entry were denied.

On September 12, 2012 contested orders of settlement were entered.

On October 5, a hearing to show cause was rescheduled for 10/12/12.

On October 12, a hearing to show cause and review held in which custody changed from Becky primary to Marc primary parent.

On December 13, 2012, an evidentiary hearing for show cause was held for Becky but evidence was denied to be presented. Becky's visitation with the children was restricted.

On January 4, 2013, contested orders were entered for an amended final parenting plan.

On January 25, 2013, a reconsideration motion on maintenance and custody were denied; sanctions against Becky for contempt. Becky filed an appeal on these.

On February 8, 2013, child support order entered. Becky appealed that order.

Becky is nurturing and dedicated mother who lost custody of her children completely because of the abuse of discretion by the trial court. She was left destitute after the divorce and penalized illegally contempt. Becky now appeals to this Court for justice, equity, and to reverse the errors of the trial court.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Becky's motions to establish family support on September 12, 2012 , January 25, 2013, and February 8, and entering orders which restate a false stipulation to no maintenance, then reserving on the matter of maintenance.

2. The trial court erred on January 25, 2012, in denying Becky's motion to reconsider custody and ordering terms for future ability to request increased visitation which are void for unconstitutional vagueness

3. The trial court erred in denying Becky's motion to reconsider contempt charges on January 25, 2012.

4. The trial court erred by coercing a settlement and keeping proceedings off of the record, thus establishing an invalid contract.

5. The trial court acted in a manner that would cause a reasonable person to suspect bias and impropriety, and reflected reflect poorly upon the judiciary?

Did the court abuse its discretion by ordering retroactive child support?

6. The trial court erred by ordering the parties' children into public school without due process or jurisdiction.

Issues Pertaining to Assignments of Error

1. Did the trial court err in denying family support when the transcript of August 21, 2012 shows an agreement for support and an order of support was given for the month of October, 2012? Is it lawful to deny a party maintenance after a twenty six year marriage when it leaves a great disparity in incomes and standard of living?

2. Did the trial court err on January 25, 2012 by denying Becky's motion to reconsider custody, by ordering terms for future ability to request increased visitation which are void for unconstitutional vagueness, and by removing custody from Becky when no allegations of child maltreatment were even presented? Was due process ignored? Is it an abuse of discretion for a court to make baseless custody changes rather than upon evidence of an actual threat - not just an alleged one?

3. Did the trial court err by finding Becky in contempt without due process of law? Was the contempt punitive and therefore a criminal issue? Did the court ignore evidence to disprove Marc's allegations? If the allegations were fact would the law support contempt for loss of custody? Were Becky's rights from the 5th, 6th and 14th amendments of the US Constitution upheld in this process or did it in fact amount to the deprivation of property (her children) without due process of law? If the allegations were fact would it violate Becky's 8th amendment rights?

4. Did the trial court err by coercing a settlement and keeping proceedings off the record, thus establishing an invalid contract?

5. Did the trial court act in a manner that would cause a reasonable person to suspect bias and impropriety? Does the court's refusal to hear on an issue prior to trial demonstrate prejudice when it rules for one party without a fair hearing? When the trial court signed-orders on a settlement which a party contests the validity of, did that constitute bias or impropriety? Was it proper for a court to conceal rulings in chambers, then on the record state that the parties had settled? Did the trial court show bias by removing custody from Becky based solely upon allegations from the other party? Did the trial court demonstrate bias by refusing Becky due process of law on contempt charges?

Did the trial court appear biased by various comments made about the parties? Did the court abuse its discretion by ordering retroactive child support and allowing Marc to have a preferential position in the parenting plan?

6. Does the trial court have jurisdiction to force children under compulsory educational age to attend school? And does a trial court have the authority to order children into public school without due process and presentation of evidence and arguments to determine whether the parents have complied with the educational laws of the state?

III. STATEMENT OF THE CASE

1. In Becky's pretrial memoranda, she requested $2,000 per month for an additional seven years for maintenance. CP 133. But the settlement was coerced (see error #4) by the court, which only ordered $1,000. RP 45, line 20; 46 line 15-16; 57, lines 4-6; 59 lines 14-17; 119 lines 24-25.

In pretrial memoranda, case law was cited for Becky's right to an equal standard of living post-decree and to maintenance. CP 133. This case law was ignored and maintenance was removed upon the entry of orders on September 12, 2012 which state that parties agreed to no maintenance. CP 140

The court ruled, on August 21, 2012, for support without committing it to either maintenance or child support, thus implying that Becky would continue to receive "family support" as she had under temporary orders.

In January, 2013, Becky again asked the court to order regular support, whether it was called maintenance or other. The court reserved on the issue of maintenance. RP 352; 379, lines 6-11; 379; 383.

Thus the court did establish jurisdiction over the maintenance or family support issue. On October 12, 2012, when one month of support was ordered for November, 2012, that was further establishment that the court has jurisdiction. CP 151

2. When Becky and Marc separated on April 1, 2011, Becky had

custody of the four minor children. Becky had always been a stay-at-home mom and had homeschooled all of the children. Her life revolved around caring for the children full time. In no court proceedings was it found that Becky had not provided for the care and growth of her minor children.

Becky was actively raising the children with minimal involvement by Marc. RP 6. CP 178. Becky has been the primary parent. She was home for the children the majority of the time. CP 178. In light of this fact, she should be given the first opportunity to do so. Becky desires and is able, to raise the children herself.

Marc worked all week and did not have much interaction with the children but some times on weekends. Evidence submitted to the court shows that Marc is not now parenting the minor children, that other family members do so. Evidence also shows that Marc has a long history of drug use and domestic violence. RP 239. The psychologist's report discussed openly the abuse of the father on the children and that he had not been involved in the children's lives. CP 178. "Marc attended a men's program for domestic violence. Becky sought counseling for PTSD and abuse recovery." CP 178. Yet the trial court deemed him "more stable" when the preponderance of evidence shows that the father is in fact the unstable parent. CP 178.

> "I'm concerned about the mother's ability to help, develop and maintain appropriate interpersonal relationships." RP 303

Again, no evidence was brought in support of this The children have been able to develop and maintain close loving relationships with their family members and others,-and have been reported to be doing well in public school, res ipsa loquitur. RP 223 The fact that Becky had been the primary parent for these children should be a prima facie case that her parenting did meet these standards.

3. Becky was found in contempt of court on January 25, 2013 for

damaging the family home prior to vacating and for unlawfully taking items from the home. The ruling was for a show cause motion originally brought in October of 2012.

The ruling was made based solely upon allegations by Marc and the evidence he presented: some photos of the family home from after he moved in. The court should have taken judicial notice that during the trial the parties stipulated to the deferred maintenance of the home.

Becky had needed some household items such as kitchen and bedding items immediately in order to set up a new home for her and the children. The court dictated the goals for where the children live, "My goal is to get safe and suitable household; safe, secure, suitable housing; food and shelter for these kids." RP 74. CP 140. If Becky had taken no items as per the written orders then she would have been in violation of providing a warm and suitable home. Because she took needed household items for the children and the new domicile as per the oral instructions of the court then she was found in contempt. These vague orders placed Becky in a legal paradox. Becky did the best she could by dividing up the household into two sets so that the children would have the essentials at both parents' homes.

Becky attempted several times to present a defense but the court would not hear it. Finally she held up her documentation to the court who looked away, saying, "There's no evidence." RP 360 lines 24-25, 361-363.

The court directed Becky on August 21, 2012 to list the boat on Craigslist and sell it. She did so on September 22, 2012 and submitted the bill of sale to the court via her attorney. The taking of this boat was an item in the contempt charge of January 2013. Later Becky filed a small claims suit against Marc for failing to provide the title to the buyer of the boat. The court did not consider this evidence provided to the court when finding contempt, and erred in finding contempt for an issue which had already been discussed and proven false. CP 115

4. In the middle of the trial on August 21, 2012, the court recessed suddenly. As the transcript shows, the court called the attorneys back to chambers. RP 35 The court instructed attorneys off-the-record in chambers to make the parties settle. The court, on the record, mentions this meeting in chambers: RP 139, 147. The message conveyed to Becky was to comply or risk losing everything. Becky then agreed under duress to keep her children part-time, for fear that failure to comply would result in her losing all access to them.

When the trial resumed two hours later, the court began, "The status of the case at this point in time?" RP 35. This is an indication that the court had insight into a settlement. And the court responded, "Excellent. It's much better when the parties work out an agreement as opposed to involving the Court. You may consult still if you'd like." This is false. The parties did not work out an agreement. Becky was directed by the court via her attorney how to "settle." Next, Marc's attorney, Mr. Boyd, asked the court for clarification how it wanted the terms set up and the court responded with those terms. This makes a prima facie case that the court designed the settlement and not the parties. Mr. Boyd stated, "Your Honor, I'm sorry, but I'm trying to read my notes. Were we doing the child Luke as the Wednesday overnight? Was that the non-alternating weekend?" RP 35

The court directed that some terms be kept off the record: RP 39, lines 7-8. Numerous other times the court dictated terms: RP 39, 15-16; RP 43, lines 9-19; RP 5; RP 54, lines 9-10.

The court asked Becky, "Do you agree with the educational decision-making that I've awarded?" RP 61. Nowhere is this "award" on the record previously so it had to have been done in chambers during the two hour break. And if it is an award, that means that the court decided that issue.

The court added its own criteria to the parenting plan: no corporal

punishment and adults banned from consuming alcohol. Neither party had requested either of these points prior to trial. It was the court who ordered those items in the parenting plan. There was no testimony about DJ during trial. Yet up until trial the children were allowed unsupervised visitation with him. This restriction had not been brought up previously nor during the trial. CP 141

At the end of the trial, the court asked the parties if they agreed. Becky shook her head, no, initially, and said inaudibly, "no." To which the court then said, "I know you don't agree . . . . " Under duress, Becky then answered "Yes." This is the first evidence that the settlement was coerced and that Becky was not in actual agreement. RP 61

The next incidence to show coercion was on September 7, 2012. Counsel for Becky, Hoke, presented orders for entry according to Hoke's understanding of the court's directions on settlement (parenting plan, divorce decree, findings of fact/conclusions of law, child support order). It was rejected. The parties had to return the following week for entry of different orders, written by opposing counsel. Those orders were signed on September 12, 2012 over objections from Becky and her counsel that these orders did not correctly reflect the terms of settlement discussed on August 21, 2012, during the trial. Further proof that Becky was coerced was her statement on the record that she felt that her arms had been twisted. RP 145, lines 10-18.

Ms. Hoke, counsel for Becky, stated on the record, that Becky does not agree with the settlement. RP 151. Becky refused to sign the orders with which she disagreed. CP 139 - 141

That is why the court had to ask for agreement a second time. RP 61. At each succeeding hearing, Becky continued to protest the terms. RP 145. Becky did not give real consent to the terms of settlement. A coerced settlement is de facto a ruling not a contract.

5. There are so many errors in this case: Constitutional errors, justice and fairness errors. It is not just one misstep which causes Becky to cry bias. It is the whole protracted case riddled with illegal decisions against her that makes this case a clear one in regards to bias and partiality. On any one of the six points an average person would suspect bias or partiality of the court. But in view of so many mistakes by the court, bias is res ipsa loquitur. The appearance of partiality is so strong that the judge should be removed from the case.

The parenting plan restricts Becky's children from contact with DJ. It states that Becky may have more visitation in the future ". . . if she can provide safe, secure housing and shelter, and this other kid's not around the child." In order for Becky to have visitation she must not be in her home where DJ resides. This again puts Becky in a position where it is impossible to follow the court orders. Either she has a home for her children or she is out of the home for the children to be kept away from DJ.

Becky testified that because there had been no harm, and based upon the behavior she sees, she does not believe that DJ is a threat. RP 187. Based on Becky's experience in this court she believes that if she had stated that she believes DJ to be a threat to her children then the court would have used that as a reason to take away custody.

A reasonable person would wonder why the court would not question the motives of the father in making such allegations against the mother, when it places her in a no win situation. There is no evidence at all that DJ has harmed anyone. Yet the court has ordered Becky to treat DJ as a threat in matters of her children. This is the definition of prejudice. Why does the court not ask for proof of harm? Without harm there is no case.

Becky's attorney, Ms. Hoke, stated, "I can make an offer of proof that she's met with the counselor, she's met with the principal. I think you can -- from the report you can see that there was no indication that she wasn't taking

the kids to school. They're getting to school on time. She's helping them with their homework at night. She stayed somewhat clear of the school in some ways because you were very, very clear that she was not to go in the classroom," RP 166-167. To that, the court replied, "How she's not cooperating with their education is beyond me. That she's now home schooling this D.J. is beyond me. That she's allowing DJ to be around the children when I've told her not to is beyond me." RP 168 The court had not listed what constituted "not cooperating with their education." The statement that the court does not like Becky homeschooling, DJ, a third party, is not the jurisdiction of the court therefore the court should not have an opinion on that. The parenting plan specifically says that the children are to be supervised around DJ, not that there is to be no contact. CP 141. Here the court has changed its position to one in which Becky should not have allowed any contact between DJ and her children. That is not in the orders. It is bias and retroactive ruling.

The fact that Marc inhabited the house immediately after Becky moved out is proof that either the house was in habitable condition or that he was living in an uninhabitable home to have part time custody of the children. The court did not consider either scenario nor allow Becky to present a defense. The court presumed allegations by Marc were fact. If allegations of the conditions of the family home were fact then that would make the community home uninhabitable and the court should not have sent these children to live there? The court had no reason to believe that Becky provided an unfit home for the children.

The court stated on the record that homeschooling made Becky an unfit mother. "The facts have shown that the mother is not concerned about their education. She kept home schooling on the table for very long period of time, contrary to everyone's objection, including this Court's." RP 304-30. This is a prejudicial-statement. The court did not investigate the mother's

concerns, and the mother is under no compulsion to follow "everyone's" opinion.

The trial court's bias against homeschooling has been present from the beginning. Becky's attorney relayed to her that the court had threatened in chambers to report the families that Becky is teaching, to CPS.

This claim denies 14th amendment rights. To not be allowed to take my children to a homeschool church, to gather in a homeschool meeting, etc. restricts freedom of religion, freedom of assembly, and freedom of speech. RP 142-143.

In June, 2012, the court declared that it would not hear any arguments on homeschooling during the upcoming August trial. The court already had decided upon that issue. There was no substance at that time upon which to make a decision. The court refused to hear anything related to homeschooling and has banned the children from any association with it. Becky runs a small homeschooling business which the children have helped to run and the court has forbidden that. CP 165. RP 142-143. The court several times stated or hinted on the record that he already had his mind made up about future decisions. RP 159.

Restricting Becky's activities and ability to volunteer and spend her time in her children's school is likewise unconstitutional. The court ordered that Becky not volunteer at the children's school nor join the PTA. This is unnecessary intrusion.

6. The Develle family had always homeschooled their children. It was a joint decision of both parties and both parties were members of a homeschooling church. Then in the beginning of divorce proceedings Marc decided that he wanted to change all of that and made allegations against Becky for educational neglect without any legally viable demonstration of neglect. To protect against those allegations, the court ordered the children

into public school, beginning in September, 2011. Becky followed those orders, enrolling the children full-time in the Evergreen School District.

At the time Ben Develle was aged 6. He was not of compulsory attendance age. The court denied Ben this civil right by ordering him into public school.

In June, 2012 Becky petitioned the court for permission to move the children to another school district which had funding for students with certain learning disorders not available in the local Evergreen School District. The court denied this and instead ordered the children to attend their local neighborhood public school which does not have the specific services that Luke Develle needed.

Also at that time the court ordered that Becky do no homeschooling at all, and announced that there would be no discussion of homeschooling at the upcoming trial. There was no substance at that time upon which to make a decision, but no arguments were allowed on the issue. The court appeared to have judged the issue ahead of time, which is the definition of prejudice.

The court further appeared to express bias in statements against Becky in regards to homeschooling. Homeschooling was used to make a determination against Becky having custody. RP 348. And, when the court found out that Becky was continuing to help other families homeschool, the court expressed anger, "That she is continuing to homeschool is beyond me." RP 168

Becky's attorney relayed to her that the court had threatened in chambers to report the families that Becky is teaching to CPS. For the trial court to express an opinion about Becky homeschooling a third party is not proper subject matter jurisdiction. It demonstrates a personal bias or hostility against the topic of homeschooling.

IV. ARGUMENT

1. The amount and duration of maintenance (or family support) that Becky requested is in keeping with the legal standards after a lengthy marriage such as this one. The amount ordered is less than equitable. Becky is entitled to maintenance by law. She requested it and is due a higher amount.

Marc's income is very high for this community and will continue at an extremely high rate, pursuant to the conservative income projections set forth in the WHALEN PROJECTED GROSS INCOME FIGURES chart, a copy of which was supplied in trial memoranda. To this point Becky has only been able to find odd jobs for below minimum wage. Marc has stated that his income is $6177.21 per month. CP 174. Consequently, the court must look to future earnings of the wife and the husband to effectuate an ongoing lifestyle for the wife.

The economic status and need of each of the parties and the children is addressed by Washington courts:

> In Sullivan, 52 Wn. 160, 164 (1909): " . . . the ultimate duty of the court is to make a fair and equitable division under all of the circumstances."
>
> In making its determination, the court should give consideration to the necessities of the wife and the financial abilities of the husband; the age, health, education, and employment history of the parties and their children, as well as the future earning prospects of all of them; and the sources and dates of acquisition of properties accumulated by the parties along w/ the amounts and kinds of property left to be divided at divorce. DeRuwe v. DeRuwe, 72 Wn 2d 404 (1967)

Given the length of the marriage, parties' disparate incomes and Becky's need, spousal maintenance or family support will be necessary.

The duration of spousal maintenance is addressed in Washington case law, at In Re Marriage of Rockwell, 157 Wn. App. 449 (2010), looking at a marriage the length of this marriage:

In a long-term marriage of 25 years or more, the Trial Court's objective is to place the parties in roughly equal positions for the rest of their lives. By law, Becky is entitled to half of Marc's income. She is requesting less than one third, only $2,000 per month.

Marc was awarded the family home, which is large enough to support renters for extra income, which Marc is now receiving. By refusing to award the needed family support, the lower court has left Becky destitute, while Marc has been able to increase his income. CP 178.

The situation in this case is similar to that in another Washington case, In Re Marriage of Sheffer, 60 Wash. App 51, 57 (1990):

> The economic reality is that the community has substantially benefited from the Alfred's [husband's] career which in turn was facilitated by Beverly's [wife's] caring for the home and family while forfeiting her own economic opportunities. Beverly [wife] provided the services needed to function as a family . . . That trade-off, clearly agreed to by Alfred [husband] now leaves Beverly [wife] economically disadvantaged as compared to Alfred.
>
> Maintenance should be used in this case as a flexible tool to more nearly equalize the post-dissolution standard of living of the parties where the marriage is long-term and the superior earning capacity of one spouse is one of the few assets of the community. (Emphasis added.) [Where's the emphasis?]
>
> In any event, an award of maintenance must be based upon presently identifiable needs, . . . This rule has been applied to prohibit the court from awarding nominal maintenance (such as $1.00 per month)"

Washington law states: §34.6, " . . . the court is mandated to consider the standard of living established during the marriage (§34.3)"

> The standard of living which the spouses maintained during the marriage is an important factor in reaching the ultimate decision of the court in entering its decree, which is the economic condition in which the parties are left by the final decree. In Re Marriage of Mathews, 70 Wn App. 116, 121, 853 P.2d 462, 466 (1993), rev. den., 122 Wn. 2d 1021, 863 P.2d 1353

> Consideration of the standard of living maintained during the marriage is particularly important as a matter of fundamental fairness.
>
> The longer the marriage, the more homemaker's full responsibility for the home decreased the homemaker's earning capacity and simultaneously benefitted the other spouse by allowing him to have a family and yet devote all productive hours to increasing his earning capacity.
>
> Indeed, it has been held that when a marriage has been of many years duration, with one spouse having sacrificed employment to raise the children and to make a home, a **maintenance award of short duration is an abuse of discretion**. *(Emphasis added)*
>
> In (§34.34.7 abuse of discretion. "A three year maintenance award was held to be in error in a case involving a 30 year marriage with the recipient spouse having sacrificed employment to raise the family In Re Marriage of Sheffer, 60, Wn App 51, 802 P.2d 817 (1990)

The length of the marriage, parties' disparate incomes, and Becky's need all argue for spousal maintenance or family support for Becky. After a 26-year marriage it is an abuse of discretion for the court not to grant an equalizing amount of support. Guidelines regarding property distribution are set forth in the Washington Family Law Desk Book Second Edition (2000) at Chapter 32.2 STATUTORY FACTORS.

> In a long marriage, Judge Winsor suggested that both spouses be placed in roughly equal financial positions for the rest of their lives. This approach was used by the court in Sullivan v. Sullivan, 52 Wn. 160, 164 (1909):
>
> After a husband and wife have toiled on for upwards of a quarter of a century in accumulating property, what they may have had to start with is a matter of little concern. The origins of the property is only a circumstance in the case and the ultimate duty of the court is to make a fair and equitable division under all of the circumstances.

A fair and equitable division of property would not leave Becky without maintenance. As noted through out the trial, Becky had been a stay

at home mom for over twenty five years. She has no work history and no credentials to obtain a decent paying job. Without maintenance Becky is living below the poverty level while Marc lives in an upper middle class home. Becky submitted sealed source financial documents to the court pre trial, and exchanged her current financial information in the court on February 8, 2013. Clearly this is an abuse of discretion.

It has long been the policy in this State, legislatively and judicially, that if one spouse is without funds and the other spouse has the ability to pay, denial of fees is an abuse of discretion. Valley v. Selfridge, 30 Wn.App. 908, 918, 639 P. 2d 225 (1982); Krieger v. Krieger, 133 Wash. 183, 185, 233 P. 306 (1925).

The court erred in not granting Becky maintenance or "family support" which clearly should be reversed.

2. In cases such as this the court should have a presumption that the residential arrangement remain. RCW 26.09 speaks to permanent parenting plans and is also fortified by the "presumption for custodial continuity" in Washington. The presumption for custodial continuity is based on society's understanding that arbitrarily altering custodial continuity in the absence of any documented neglect or mistreatment by the custodial parent can be extremely harmful to the child.

The trial court reversed the custody arrangement and restricted Becky's visitation in violation of the law.

We find the state policy in RCW 26.09.002:

> Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children.
> In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities.

The statute goes on to discuss factors determining the best interests of

the child:

> Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, **the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.** [Emphasis added] RCW 26.09.002:

Thus, to maintain as much as possible "the existing pattern of interaction" between parent and child, Becky should have retained custody.

In order to radically alter the existing pattern of interaction between parent and child, that pattern must be shown to threaten physical, mental or emotional harm to the child. There has been no harm to the children that Becky has caused nor allowed.

RCW 26.09.002: "The child's best interests are best served by a full and regular pattern of contact with both parents."

Becky and her children have been denied a full and regular pattern of contact. Becky's visitation is limited which is not in the best interests of the children, according to the statute. Becky's parental rights have not been upheld. This is addressed in CP 178:

> Children's identities are preserved when they continue to feel they belong to both families. They need to remain in a safe, consistent, supportive and familiar environment.
>
> This is not possible when the children do not get an opportunity to reside with the mother.
>
> To feel security they need supervision, access to both parents, and to establish religious and school routines. They will typically thrive if both parents are able to participate in the day-to-day as much as time and structure will allow.
>
> When asked to reconsider custody, the trial court responded, "Based upon past experience, based upon testimony, this Court found that your future performance was going to lack in

the parenting function." The trial court did not state anything Becky had done to make her unfit.

The trial court stated concerns about parenting functions, RP 304-305:

> what troubles me most is the past . . . performance of parenting functions. . . . I'm concerned with the mother's ability to provide a loving, stable, consistent relationship with each of the children. I'm concerned about her ability to provide to the daily needs of the children . . .

Yet nowhere in this case has any evidence been presented that Becky failed to do this, while evidence was presented that Marc had not seen to any of it. CP 178.

> I was very concerned about the mother's ability to provide adequate education. She kept home schooling on the table for very long period of time, contrary to everyone's objection, including this Court's.
>
> As we indicated previously, there were some concerns about your home schooling. You failed to provide adequate education to those children to the level that they would enter the public school in an average or above standard. RP 346

Homeschooling happened several years prior to the trial and was no longer a consideration. It is not appropriate for the court to use as a determination later for custody. Nowhere in Washington law is the child's academic standing an element of consideration in determining custody.

Becky's past homeschooling was used as a reason to take custody from her. There is no evidence that Becky was in any way not in full accordance with the homeschool law. It is unlawful to remove custody for compliance with a law.

When considering residential placement, the trial court posited that the benefit of the minor children living with their father and adult siblings was equal to or greater than the benefit of a residential relationship with the mother. In considering a residential relationship with adults siblings to be of equal or greater value to a residential relationship with the mother , the court erred in evaluating standards of the law set forth in RCW 26.09.187:

(3)(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 . . .

(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

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

The goals of (3)(a) can not be accomplished when one parent has restricted contact. The relationship of the child cannot be nurtured by a parent who must remain at a distance. The trial court had the duty to consider custody arrangements which foster the parent-child relationships.

For (i) the trial court did not make a custody ruling in accord with the evidence of Marc's past and the type of relationship that the parents have with the children was not directly investigated. In RCW it states, "Factor (i) shall be given the greatest weight." In the absence of direct investigation, the presumption for custodial continuity should have applied. The court should have looked at all testimony and documents and the whole of the history of the family.

(iii) The past shows that Becky performed the majority of the parenting. RP 6. The past performance of Marc was minimal, RP 6, and the future performance of Marc shows that he has others take responsibility for the children RP 238. Becky met the definitions in this section. Marc did not.

In looking at past parenting performance, the trial court compared Becky, a stay-at-home mother who met the needs of the children, to Marc. Judicial notice is that Marc works nights and sleeps days. The psychologist found it "inappropriate" to have the children without his presence at night CP 178. The record showed that Marc has a long history of non-involvement in the children's lives CP 178, and that he admitted to abusing the children CP

178. And the court declared Marc a more stable parent. Judicial notice should be taken that an addict's life is inherently unstable.

> "The nature of his relationship was not centered around home schooling, as yours was, as the evidence showed." RP 348.

Ergo the trial court has imputed homeschooling to be worse for children than being raised by an abusive drug addict. This does not meet the intent of the legislature who has clearly established homeschooling as legal, valid, and a suitable option.

The natural place for the children is with Becky since she is home for them. The parenting plan signed by the court is contrary to the law (vii).

The court stated, "There was information that your daughter had been confronted for sex." RP 346. Here the court exaggerated an allegation that DJ was a threat to the children, and propositioned the daughter. There is no proof.

Allegations do not equal facts. The trial court is prejudiced to decide based upon hearsay or suppositions. If the allegation, that the child uttered words of a sexual discussion is true, talk does not equal harm. If the court implies that any discussion of any sexual content or innuendo should be barred from the children's presence, then they should not be allowed access to the American culture or media, and especially not with their father who has been in treatment for sexual addiction. CP 133. The trial court has a duty to determine facts. Finding, as the trial court did, that allegations of a child uttering innuendo is more harmful than a parent who has admitted to child abuse and drugs is an abuse of discretion.

When Becky testified on October 12, 2012, about the children's association with DJ she explained that there is no evidence that DJ is a threat to her children. The court stated in response that, "because you believe that DJ is not a threat you cannot parent these children." In addition, on December 13, 2012, the court stated, "It is irresponsible to require proof."

Orders signed on October 12, 2012 state that custody would change because of her belief. The parenting plan signed on December 13, 2012 restricted Becky's custody because of allegations of innuendo.

It is a serious error of the court to punish a person for their personal beliefs. Personal beliefs have never been an element in any state or U.S. statutes. This infringes upon the freedom of religion, freedom of speech, and freedom of association rights guaranteed in the First Amendment.

The court has a duty to rule based upon evidence after both parties have presented arguments. The court is a trier of facts, not beliefs.

If Becky had testified that she believed DJ to be a threat to her children that would make her appear negligent in her parenting. Thus the court placed Becky in an unfair and impossible position: to deem Becky irresponsible for demanding proof that DJ is a threat

Complaints of parental alienation by the father were not taken into consideration when applying RCW 26.09.002. CP 178. The trial court told Marc, "The issue of parent or parental alienation came into play a couple of times. Work on it." RP 65

There is an extensive section in the trial memoranda regarding this issue which was not allowed to come out during trial. Witness testimony affirmed this. RP 7. CP 178. The parent who is guilty of parental alienation and is given full custody has a great potential to turn the children against the other parent, which is another form of child abuse. CP 133, 200-201, 204A. RP 6-7.

The psychologist's report to the court stated, "Marc tried to help with the children's school work and he couldn't do it (with Hanna). He reported he didn't graduate from high school because 'I wasn't much into education.' He . . . said 'I wouldn't know, I cut school a lot when I was young." And, "Becky is intelligent and she can provide supervision." The court abused its discretion and showed bias, to find that Becky was not supporting the

children's education in the absence of any factual support. CP 178.

The trial court erred by entering a parenting plan which gave preferential status to Marc. Becky was allowed no input and no consideration for any details. Ms. Roberge, counsel for Becky, "Again, it was not discussed in trial and my client is just saying she didn't have a way to comment on it, and if he gets some vacation, she wants vacation also." RP 219.

> A court abuses its discretion by exercising that discretion on untenable grounds or for untenable reasons. Hough v. Stockbridge, 152 Wash. App. 328, 337, 216 P. 3d 1077 (2009). Substantial evidence must support the lower court's findings of fact. In Re Marriage of Schumacher, 100 Wn.App. 208, 211, 997 P. 2d 399 (2000), review denied, 129 Wash.2d 1014(1996).

The Parenting Plan filed, CP 165, states the conditions under which Becky may request increased visitation:

> 1. provide proof of a safe and secure home;
> 2. Develop and show proof of ability to have appropriate parenting skills;
> 3. Develop a responsible attitude towards her children; and,

The court did not prove that Becky had violated any of the above. The trial court has prejudicially applied this against Becky but not Marc. The ruling was applied retroactively and the future enforcement is invalid due to vagueness (discussed in point 5).

There are serious abuses of the trial court's discretion. The law has not been applied carefully, accurately, and fairly. Terms for Becky to regain custody are too vague to avoid a court's arbitrary enforcement. Becky did not demonstrate any negligence that would make for grounds for losing custody.

Custody should be returned to Becky. The best interests of the children demand that the court uphold the rights of the children and the mother to be together. This abuse of discretion must be reversed.

3. On October 12, 2012, during a show cause hearing, custody of Becky's children was removed. There was no petition for modification of parenting plan submitted. This is a procedural error. No contempt was found. No order of contempt was filed. No conditions to purge contempt were offered. Due process was ignored. The court ruled that custody would change because of allegations by Marc that Becky left moldy food in the fridge where Marc lives. RP 159. The court did not wait until all evidence had been presented before that ruling. The court erred by offering no conditions by which to regain custody of her children. The court did not have procedural jurisdiction to change custody. It is an abuse of discretion to remove custody without findings of fact that the children were harmed. These are serious errors of the court. CP 151. RP 168.

During the October 2012 hearing, a trial was scheduled for December 13, 2012, to hear this matter of contempt. Becky brought an expert witness to court, Mary Duncan, from Elle Construction, and filed declarations from several people to present her defense in December 2012. The expert witness was not allowed to testify. The court did not hear any issues on the topic of contempt instead encouraged the parties to settle the matter out of court. RP 318. CP 149-149B, 177-179.

On January 25, 2013, the court ruled that Becky was in contempt and awarded sanctions; still with no opportunity given to Becky to present a defense and no opportunity to settle the issue as the court directed on December 13, 2012. RP 318. And at this hearing in January, she did not have the opportunity to have the assistance of effective counsel for lack of funds. The court erred by ruling for contempt when it previously directed parties to work it out. This is abuse of discretion for not following ipse dixit.

Becky was prevented from speaking to the court on January 25, 2013, to present her affirmative defense of specific admissions. RP 356-357, 361-362. That defense is that the court stated on the record, directly to Becky, on

September 12, 2012, "The house will not be empty of furnishings when he moves in. Becky replied, "Yes, sir." RP 121

Becky was told not to leave the house empty. Any reasonable person would construe that as permission to take some items from the family home. It was agreed on the record that Becky could take half of the furnishings from the home. Becky's attorney asked, "So she's been packing and assuming she would be able to take about half of the furnishings; is that correct?" The decree filed states, "Wife will provide a personal property list of items she would like to remove from the community home. The court retains jurisdiction to address any disputes as to this issue. The personal property in the home shall remain intact for transfer of possession to Husband."

Becky followed the oral court instructions precisely by leaving more than half of the community property, filing with the court a detailed list of items taken and left behind. The elements of knowingly and willfully cannot be applied to Becky following those oral instructions. If there is a conflict between written and oral orders, that is not grounds for contempt.

Several compelling arguments demand reversal of this decision. The first is a lack of due process. Becky was denied the right to present a defense, to confront her accuser and to have witnesses testify on her behalf. In addition, the lower court refused to look at the evidence she filed, stating, "There is no evidence." RP 361-362

At trial, parties agreed that the home was in need of repairs and an expert witness testified to that as well. A contempt finding is inconsistent with these earlier court findings. With judicial notice of the deferred maintenance in the family home there is no element of damage. Contempt for damage to the house is a court error.

In addition, Becky was not allowed to present a defense on the issue of removing property out of the family home. In declarations submitted to the court, Becky attempted to present her qualified general denial of the

allegations. She was denied the right to speak to the veracity of the photos. Thus the ruling did not come after a fair and impartial review of the arguments from both parties. That is a denial of due process and the 7th Amendment. RP 360 lines 24-25, 361-362.

The decree filed states that Becky is not to remove anything but her own personal belongings, and, "The children's personal property will remain in the community home unless otherwise specifically ordered or agreed." That is too vague as to be lawful. In a marriage of more than twenty-six years there will be discrepancies as to what is personal and separate property. Determination of personal items for the children is likewise unlawfully vague especially in light of the children needing personal items at their new home with their mother. An order that is too vague is invalid as it prevents justice, which this scenario demonstrates. CP 140. Becky was not allowed an opportunity to present her affirmative defense to taking separate property which Marc alleges as community property.

To Becky's qualified general denial that she did not do what was alleged, the court erred by failing to provide due process of law. To the specific admission of removing some household items, the court left Becky with an impossibility to follow the court's orders fully. By following the oral instructions of the court there are no elements of knowingly and willfully failing to follow an order. The court has erred on all points of finding of contempt on Becky.

Furthermore, if the allegations that Becky damaged the community home were fact, the law would not support that as basis for loss of custody. Child custody is not subject matter jurisdiction in property settlement. The court erred and abused its discretion.

Becky's parenting was put on trial on December 13, 2013 during a trial set for show cause. The issues of contempt were not heard as the court ended the trial without hearing on contempt and encouraged the parties to work it

out. That denied to Becky due process.

Opposing counsel argued on January 25, 2013, that Becky had refused to negotiate on the settling of the miscellaneous community property. Previous counsel for Becky, Millie Roberge, and opposing counsel, Chris Boyd, stipulated that Boyd had not sent Becky any counter offers of settlement. The court noted that the parties had not attempted contact to settle. RP 333-334, However Becky did take the initial step of settlement by submitting a list to Marc. Marc did not reply. The court should have referred the issue back to the parties to attempt to settle as per the decree which states specifically, "Wife will provide a personal property list of items that she would like to remove from the community home. The Court retains jurisdiction to address any disputes as to this issue." CP 140. There is no language which makes this issue one of contempt. If negotiation had been attempted unsuccessfully then the court should have been asked to decide the dispute. The court erred by proceeding in contempt orders instead of ordering both parties to follow the instructions ipse dixit to negotiate. Since there was no counter offer from Marc then there is no element of contempt for Becky refusing to cooperate in negotiation with Marc.

The 8th Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Even if Becky were guilty of damaging the family home, leaving moldy food in the refrigerator or leaving the house in disarray, removing her children is not a just punishment. This is an abuse of the discretion of the court. Denying a mother the basic rights of raising her children-- in the absence of any abuse-- constitutes cruel and unusual punishment.

The 5th Amendment states, "No person shall be . . . deprived of life, liberty, or property, without due process of law." Becky was not allowed to present a defense yet she was deprived of her children based upon allegations from Marc. This is a clear violation of Constitutional rights.

The 6th Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." On October 12, 2012, the court removed custody from Becky but the nature and cause of the accusation was not clear. Did that happen because of contempt charges or because grounds for a petition for modification of parenting was found? The court stated, "She is not taking the orders of this Court seriously. And it's gonna stop as of today." RP 169 The court does not state which orders of the court were not followed. The court stated that because Becky had left the house damaged and moldy food in the refrigerator that custody would be changed, then that it is because she is not supporting their education. RP 168.

> RCW 7.21.010(1)
> (1) "Contempt of court" means intentional:
> (b) Disobedience of any lawful judgment, decree, order, or process of the court;
> (2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.
> (3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

Intentions were not proven (point 1). Becky was not in disobedience of the oral ruling of the court by taking items from the home (point 1b) The sanctions were imposed for an alleged misconduct in the past which constitutes a punitive sanction (point 2). There is no future performance with which to compel Becky not to damage the home of Marc; therefore, this is not a remedial sanction (point 3).

RCW 7.21.030
(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:
(c) An order designed to ensure compliance with a prior order of the court.

There is no future performance with which to ensure compliance.

A contempt proceeding which is punitive and which results in a determinate sentence and affords the contemnor no opportunity to purge the contempt, will be considered a criminal contempt which requires that the contemnor be given a right to a jury by a trial. *State v. Browet, Inc.*, 103 Wn.2d 215, 691 P.2d 571 (1984).

Becky was not provided the above opportunities.

RCW 7.21.040
[2] "A punitive contempt order is a criminal proceeding. As such, due process protections are required." *State v. Boatman*, 104 Wn.2d 44, 48, 700 P.2d 1152 (1985). In *Boatman*, the Supreme Court held that under RCW 7.20 the courts have no authority to impose a punitive sanction, but may only use coercive power. Due process also prohibits the trial court's use of punitive sanctions under its inherent power, if the statutory powers are adequate to cover the situation involved. *Boatman*, at 48. In a punitive sanctions contempt proceeding under RCW 7.21.040: a criminal contempt proceeding is initiated by the filing of a criminal information and/or complaint.

Due Process: the alleged contemnor is entitled to . . . reasonable time to prepare a defense, and to have a meaningful opportunity to meet the charges at the hearing. *In re Marriage of Nielsen*, 38 Wn. App. 586, 687 P.2d 877 (1984). §67.5(3)(b)(i). In re James, 79 Wn. App. 436, 442, 903 P.2d 470 (1995) At the time of the contempt hearing, the alleged contemnor must be given a reasonable opportunity to defend against the contempt charges. *Wulfsberg v. MacDonald*,42 Wn.App. 627, 632, 713 P.2d 132 (1986). *In re Marriage of Nielsen*, 38 Wn. App. 586, 687 P.2d 877 (1984).

> The trial court exceeded its authority by removing custody from petitioner as a punitive sanction. The trial judge also erred in failing to provide petitioner with the opportunity to purge herself of contempt prior to sanctions. *See Boatman.* Under RCW 7.20, a trial court may impose a sentence: . . . if it also allows a defendant to purge the contempt (at an earlier date). *Keller v. Keller,* 52 Wn.2d 84, 90-91, 323 P.2d 231 (1958). A penalty under RCW 7.20, without giving the defendant an ability to purge the contempt finding, is impermissible. *See Boatman.* [42 Wn. App. 631]
>
> Courts have emphasized that if the sanction is wholly punitive the appellate courts will view the matter as akin to a criminal contempt proceeding even though the proceeding is initiated under the general contempt statute, Chapter 7.20 RCW. *State v. Boatman*, 104 Wn.2d 44, 700 P.2d 1152 (1985); *In re Marriage of King*, 44 Wn. App. 189, 721 P.2d 557 (1986); *see also Sate ex rel. Herron v. Browet, Inc.*, 103 Wn..2d 215, 691 P.2d 571 (1984) (defendant entitled to a jury trial when charged with contempt for violation of a moral nuisance law because of punitive nature of the sanctions imposed).

On October 12, 2012, the lower court removed custody from petitioner due to allegations of contempt. The basis for the contempt finding was not set forth until January 25, 2014, when the contempt order was filed. This procedure did not comply with the order. This trial court's order on October 12, 2012 constituted an impermissible parenting plan modification. That amounts to a punitive sanction and is not authorized by the Marriage Dissolution Act. The scope of the court's contempt power under the Marriage Dissolution Act allows contempt proceedings solely for the purpose of coercing compliance with a parenting plan: RCW 26.09.160. Whether or not allegations were true, once the wife moved out of the community home there was no continuing order with which to comply. Because the lower court's punitive sanctions allowed no method for Becky to purge the contempt, the trial court acted beyond its authority. The order can only be characterized as punishment for an alleged refusal to comply with the dissolution decree.

In Re Marriage of Farr, 940 P.2d 679 (1997), 87 Wash.App. 177, the lower court abused its discretion by suspending appellant's visitation rights. Postponing a parent's visitation rights indefinitely amounts to an abuse of discretion. *See Wulfsberg v. MacDonald*,42 Wn.App. 627, 632, 713 P.2d 132 (1986).

Conduct of wife suing for divorce in refusing to surrender custody of child pursuant to court order and in secreting herself and child was clearly contemptuous but did not warrant adjudication for contempt against wife without hearing as prescribed by statute nor punishment for contempt except after hearing. Lind v Lind, 63 Wn. 2d 482, 387 P.2d 752 (1963)

Elements
Before a finding of contempt is appropriate, the following must be established:
(a) The existence of a valid court order requiring or prohibiting the conduct for which contempt is sought;
(b) knowledge by the alleged contemnor of the existence and contents of the order;
(c) failure to comply with the order by the alleged contemnor, without good excuse;
(d) notice of the contempt proceeding and an opportunity to be heard afforded to the alleged contemnor; and
(e) that the complained of conduct is that for which a finding of contempt is appropriate.
The courts have found that contempt is an extraordinary remedy. Not every violation of a court order or decree constitutes contempt and not every order and may be enforced using the court's contempt powers.

The court order requiring Becky to not take any furnishings is in contradiction to the oral ruling of the court which invalidates the decree (point a). Becky had knowledge of the oral ruling of the court allowing her to take half of the furnishings (point b). The furnishings were necessary to establish a home for Becky and the children in accordance with the court (point c). Becky was not afforded an opportunity to be heard (point d). The finding of contempt is inappropriate (point e).

Elements require an act, not a belief. It would have been unlawful for

the court to order petitioner to hold to a certain belief. So even if she had been guilty of violating an order regarding a belief, it would not be enforceable. Acts, not beliefs, are the only substantive jurisdiction a court has. Mens rea without concurring actus reas has never been lawfully ruled against.

> If the court's finding of contempt hinges on credibility issues, it is preferable for the trial court to hear live testimony of the parties or other witnesses. This is especially true if live testimony is requested. *Rideout*, 150 Wn. 2d. 37.
>
> The purpose of contempt is coercive in nature: to coerce future behavior that complies with a court order. RCW 7.21.030(3) Remedial sanctions are "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3). The sanctions sought or imposed in a general contempt proceeding should be related to the contemptuous conduct, should adhere to the statutory provisions and, above all, should be coercive in nature.
>
> Generally, if the issue is merely one of enforcing property settlements or property divisions, contempt is unavailable. In re Marriage of Young, 26 Wn. App. 843, 615 P.2d 508 (1980).

The 14th Amendment states, ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The court has erred to not consider Becky's need for effective counsel in a criminal contempt. Becky has been unable to obtain the assistance of effective counsel. She seeks assistance from this Court for adequate counsel.

The court erred in substance and in procedure in removing custody of Becky's children, and justice was denied because Becky did not get to present a defense against contempt. Contempt charges are wholly inappropriate and are an abuse of discretion which must be reversed.

4. The settlement which provided the basis for the court's continuing review and unconditional authority over the parties is invalid due to duress, illegality and shocking unfairness. It is an abuse of discretion for a trial to hold so much power of direction over a family. The settlement should be set aside.

A contract can be set aside if it has been entered into under duress. Coercing a settlement is illegitimate pressure on the part of the court. And it constituted a significant cause of inducing Becky to enter the settlement or contract. Both elements of duress are met. The court has the power to take away Becky's children and property. Becky had a reasonable and legitimate fear of losing everything if she did not participate in the settlement. Becky did not have a realistic alternative to the coercement at the time. She was informed that she would lose her children for about a year, until the trial resumed. The court had already decided how to rule in this case and Becky would not get a different outcome after the trial concluded.

> According to the Cannon of Judicial Conduct:
> Canon 3(7)(D) Disqualification. (1) judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party;
>
> Rule 1.2 Promoting Confidence in the Judiciary.
> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety
> (5) Actual improprieties include violations of law, court rules, or provisions of this Code. **The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.** (Emphasis added.)
>
> Rule 2.6 Ensuring the Right to Be Heard
> (B) Consistent with controlling court rules, a judge may

> encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces any party into settlement.

Coercion of a settlement is clear evidence of abuse of discretion and is not consistent with the Code. Becky was told by her counsel, off the record, that the court was angry that Becky was continuing to teach and support other homeschool families. The court threatened to turn those families in to CPS. While this is off the record and cannot be proven, when Becky provided employment records to the court and opposing counsel on January 4, 2013, the families' names were redacted. Becky cited her reason for the redaction on the record, and immediately notified those families of the court's threat. CP 176, 184. RP

Alternatively, if the settlement had been freely entered into it would nevertheless be invalid for illusory promises. The settlement defined a review period for the court to intervene and determine later changes.. It is invalid because its performance is discretionary on the part of the court, rendering it illusory, and inadequate consideration to support the agreement. There is no mention in the decrees what would cause the court to change the terms. Courts "will not give effect to interpretations that would render contract obligations illusory." Shigaki, 84 Wn. App. at 730. This definition clearly contemplates contracts, and by extension, settlement agreements. Becky could not knowingly enter into a contract when the future terms of the settlement were to be determined by the court later.

Where performance under a contract is conditioned on another party's subjective evaluation of the consideration offered, that amounts to an illusory promise. In the settlement in this case the court erred in not making a definite commitment to the terms for review. If the court had wanted a specific attitude to be displayed by a parent, then the orders should have stated that along with a clear description of what constitutes attitude. To add that as a condition later, does not allow parties sufficient consideration.

> An illusory promise is one that is so indefinite that it cannot be enforced, or by its terms makes performance optional or entirely discretionary on the part of the promisor. King County v. Taxpayers of King County, 133 Wn.2d 584, 600, 949 P.2d 1260 (1997). Generally an agreement that reserves the right for one party to cancel at his or her pleasure will not be recognized as a contract. Mithen v. Board of Trustees of Central Wash. State College, 23 Wn. App. 925, 932, 599 P.2d 8 (1979).

And, alternatively, if Becky had agreed to the original terms of the settlement, promissory estoppel would have prevented future modifications on the court's initiative.

So whether the settlement is invalid because of coercion, illusory promises or promissory estoppel the settlement is illegal and must be overturned.

But if this settlement is not overturned then the terms of the settlement on August 21, 2012 still cannot be ermine what conduct is prohibited, or what punishment may be imposed from this settlement. It does not state explicitly and definitely what conduct is punishable or would result in Becky losing custody. It is so vague and broad that it did allow arbitrary decisions of the court. For example, Becky followed the orders regarding the children's schooling. Then the court said, "How she's not cooperating with their education is beyond me." RP 142-143, 168 There is no statement given of what constitutes cooperation.

> The void for vagueness doctrine serves two purposes. First: All persons receive a fair notice of what is punishable and what is not. Second: The vagueness doctrine helps prevent arbitrary enforcement of the laws and arbitrary prosecutions.[1] There is however no limit to the conduct that can be criminalized, when the legislature does not set minimum guidelines to govern law enforcement. (See p. 13 of[2]).

In this case, Becky, an ordinary citizen, did not know what the law required.

Scienter and objective criteria that specify the harm to be protected against are necessary to limit vagueness in criminal statutes. To satisfy the Due Process Clause of the Fifth Amendment, individuals are entitled to understand the scope and nature of statutes which might subject them to criminal penalties or in this case, loss of custody. "[a] penal statute must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement."[4] In this case the court found that Becky had not followed its orders without specific elements being identified in said orders.

Justice Sutherland said that an individual should not face punishment for violating the law, unless the nature of the prohibited conduct can be understood by a reasonable person. The void for vagueness doctrine is seen as protecting an individual's right to due process, and then to live free from fear or the chilling effect of unpredictable prosecution.

If penal statutes are overly vague, it is argued that the state's discretion to prosecute becomes too broad, and potentially subject to abuse through selective enforcement. This is precisely the situation that Becky faced when she was informed by the court that she would lose custody for not supporting the children's education. RP 167

The theory behind the vagueness doctrine is that it allows the state's discretion to prosecute to become too broad, and potentially subject to abuse through selective enforcement. And by extension, the same principle applies to orders and rulings from the court. Orders that are too vague cannot be enforced because of the potential for selective enforcement. And that is what had happened in this case. The court applied selective standards not specifically enumerated in the orders. "Develop a responsible attitude towards her children." CP 165, page 5. This is not an instruction to Becky on how to

demonstrate that she has met terms for custody. It is too vague and an abuse of discretion.

The Order on Review cites Becky's belief that DJ was not a threat to her daughter as a reason for removing custody. CP 151. Her belief was not a change but had been consistent from the time that she had custody. It is an abuse of discretion for the court to rule this way when belief was not listed a term for custody changes. This is arbitrary discretion of the court which is too vague to be lawful. "As we indicated previously, there were some concerns about your home schooling. You failed to provide adequate education to those children to the level that they would enter the public school in an average or above standard." RP 346 Becky had not been homeschooling for well over two years prior to the settlement. That issue then cannot be used against her when she was given custody of the children in the settlement; it is an abuse of discretion for the court to retroactively use that as a reason for removing custody.

Becky entered the settlement under duress. Any court that coerces a settlement upon a party weakens the confidence in the judiciary. This settlement as a contract is not enforceable and cannot hold up to legal scrutiny. It is invalid for illusory promises, for promissory estoppel and for vagueness. The settlement is abuse of discretion and must be overturned.

5. According to the Cannon of Judicial Conduct, Canon 3(7)(D) . (1) judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party;

> 3. Disqualification -- In general
> Due process, the appearance of fairness doctrine, former Canon of the Code of Judicial Conduct, and the Code of Judicial Conduct require that a judge disqualify him or herself

from hearing a case if that judge is biased against a party or if his or her impartiality may be reasonably questioned. West v. Sate, Washington Ass'n of County Officials (2011) 162 Wash. App. 120, 252 P.3d 406. In re Marriage of Meredith (2009) 148 Wash. App. 887, 201 P.3d 1056, review denied 167 Wash.2d 1002, 220 P.3d 207. State v. RA (2008) 144 Wash. App. 688, 175 P.3d, 609, review denied 164 Wash.2d 1016, 195 P3.d 88, on remand 2009 WL 6250870

(3) Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

In Carey v. State, 405 A.2d 293 (Md. Ct. Spec. App. 1979), cert. denied, 445 U.S. 967 (1980). A judge is required to recuse himself only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. United States v. Story, 716 F.2d 1088, 1091 (6th Cir. 1983) (quoting Trotter v. International Longshoremen's & Warehousemen's Union, 704 F.2d 1141, 1144 (9th Cir. 1983)). This standard is objective and is not based "on the subjective view of a party." Browning v. Foltz, 837 F.2d 276, 279 (6th Cir. 1988), cert. denied, 1095 S.Ct. 816 (1989). Prejudice or bias must be personal, or extrajudicial, in order to justify recusal.

The American Bar Association Model Code of Judicial Conduct promulgated in 1972 Section C of canon 3 begins with the broad proposition that judges must disqualify themselves when their "impartiality might reasonably be questioned." Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252, 255. (Utah 1992).

Comment

(1) The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

(2) The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to

further settlement do not undermine any party's right to be heard according to law.
(3) Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality.

This case lists six assignments of error which stem from the trial court's bias. Marc made allegations against Becky without evidence and the court ruled against Becky on that. When Becky brought in substantial evidence against Marc it was ignored, denied, or the argument considered not of substance.

For evaluation and argument sake, these issues are listed side by side:

The court ruled for Marc	The court ruled against Becky
Allegations that Becky damaged the family home	Becky requested opportunities to present a defense, but was denied. Custody was removed and contempt found without establishing elements.
Decree presented for entry stated that parties stipulated to no maintenance.	Becky contested that it was contrary to the court transcript which was not investigated.
Marc works nights and leaves the care of the children to older siblings	Becky is available round the clock to raise the children
Marc requested public school for the children	The right to present the case in a hearing was precluded. Becky is not allowed to discuss homeschooling nor take the children to any homeschool event
Marc requested Becky's address	Becky's right to address confidentiality was dismissed sua sponte.
Marc and his counsel were not interrupted by the court	Becky was regularly interrupted, stopped from pleading and speaking. Court repeatedly rushed to rule without the completion of arguments.
Marc alleged without evidence that DJ is a threat	The court prohibited the Develle children from contact without consideration of argument.
Becky objected to the non-existence of evidence against DJ	That was considered by the court an act of irresponsible parenting.

Marc regularly withholds the children from Becky's scheduled visitation times and the court will not compel him otherwise.	Becky pleaded with the court to protect the children from Marc's addictions and abuse and parental alienation and it was not considered.
After the court determined that allegations from Marc about Becky having no food in the house for the children was untrue, no comment was made	When Becky suggested that Marc had lied, the court refused to consider the allegation.
Marc was awarded a parenting plan of his choice	Becky was not allowed input on any points
Documentation shows that Marc abused the children, slept with his fifteen year old daughter, does not understand that his parenting practices are "inappropriate" according to his attorney.	The court did not consider these points.
Marc requested the same judge continue on the case in perpetuity.	Becky requested local court procedures for a commissioner be followed.

The court has also made commendations towards Marc: on March 28, 2013, about doing a good job of raising the children and getting support from family members after inquiring who was in the court room with Marc. RP 390. The court has no basis to know anything about how Marc is parenting. On March 28, 2013 the court commended Marc for "only being behind on support by a couple thousand dollars," and then encouraged Becky to do likewise. The court has never addressed any deficiencies in Marc's parenting practices, but told Becky, homeschooling made her an inferior parent. RP 348. Both parents are responsible for the children. If there were some sort of negligence in the children's education the father would have as much responsibility legally as the mother. In this case it is only held against the mother.

If the court's standard is that the children must be protected from anyone against whom there is an allegation of sexual misconduct then why did the court apply that standard only against Becky and not against Marc?

Documentation supplied to the court shows the evidence of Marc's counseling and treatment for sexual addictions, as well as his misconduct with his own daughter. CP 178, 133. The court makes judicial notice of this. RP 319. If the allegations against DJ are true then he has uttered a couple of sentences of a sexual nature to Hanna. That is not any form of misconduct. It is not even harassment. It does not meet the element of any statute. Why is the court not protecting the children from Marc when there is credible evidence against him?

The court said, "There have been no issues of abuse or allegations of abuse for a number of years."

Counsel, Ms. Hoke, said, "I think her testimony at trial made more current accusations, Your Honor."

The court said, "Again, as I told her at trial and at the presentation of the order, credibility goes a long way with respect to the placement of these children." RP 162 When counsel attempted to mention that there is substantial evidence against Marc, the court refused to answer the issue. Instead the issue was placed back upon Becky. This seems biased.

The allegation against DJ has seemingly been accepted as judicial notice even when Counsel, Ms. Hoke said, "The allegation is about one line. We have no idea what the actual allegation is. It's very vague, there's no backup facts, no data, no quotes from Hanna, no nothing. RP 155

When Becky alleged that the children need to be protected from Marc the court suggested that Becky was not credible. When Marc alleged that the children need to be protected from DJ, a child, the court chastised Becky.

When counsel informed the court that Becky is a participant in the address confidentiality program, the court responded, "A bit frustrating when your client has not followed the orders of this court or the prior court." RP 160-161. Again the court did not state what it is that Becky has not followed. There is no order prohibiting her from enrolling in the address confidentiality

program. For a mere hint of impropriety against DJ, Becky has lost custody. But when Becky took steps to protect herself, the court stripped that right.

In another place the court ordered for Marc: "No stalking." RP 146. If the court is aware that that has been raised as an issue, then why did the court take away the address confidentiality of Becky? The court said, "Same with you, Dad. There's been allegations of some physical abuse in the past, some sexual innuendoes here and there. Get rid of all that stuff." RP 319 Marc got full custody with that background but Becky lost all custody because a child may have uttered some words to her children.

In settlement Marc received the community home and Becky received the travel trailer. In addition, Marc received about $3,000 more in vehicles than Becky. While Marc and Becky each took possession of one vehicle for a primary means of transportation, Marc was allowed to keep the motorcycle that he used for his own pursuits while Becky was required to sell the boat that she used for recreation with the children. RP123, 125.

Becky petitioned the court to compel Marc to provide the children for her visits. Marc has regularly impeded this. The court would not compel Marc into following the court orders. CP 206, 239 The court stated, "And this is an order that each of the minor children shall have a two-hour dinner visit with Mother." RP 308 This was ordered but when Becky requested that court enforce it, it was denied. CP 239 "We've gone too far into this process without Mother having access to all children, and this Court will order that." RP 311 The court erred to find Becky in contempt, and state that Becky has not followed court orders without explanation. Marc admitted to the lack of visitation and the court did not assist Becky.

This following is a most biased statement of the court, "Although it was explored, it does not appear that the father's employment schedule has posed an impediment to perform a father and mother-like function from his perspective." RP 306. The court took testimony from Marc about how he

parents the children with help from older siblings. Witness testimony showed that he is very passive with the children. RP 6. Becky testified that she has been and is able to continue to be both parents for the children. Marc's testimony that he needs help from others should be a clear indication that he cannot perform the parenting roles.

Local court procedure in Clark County moves parties post dissolution on to a commissioner for future hearings. In this case the trial court judge had himself permanently attached to the parties. In the midst of a case seemingly so biased, that appears to be more bias.

Regarding supervision, the court directed that if Becky needs to hire a babysitter the person must be over 18 years old and the name submitted to counsel to run a JIS. RP 196. However Marc does not have to do this with renters that he has living with the children.

When Becky attempted to provide several pieces of evidence in her defense and to state that the other side was lying, the court cut her off and wouldn't let her speak. The court simply stated, "There is no evidence that the photos were falsified". No opportunity to a defense was given. RP 362. This is a violation of the 14th amendment, due process, and the equal protection clause. Marc has received preferential treatment by the court. Becky lost custody of her children due to bias.

This appeal lists six separate points (assignments of errors) of major mistakes of the lower court which were errors and demonstrate bias. This case is protracted and complicated and confusing. Marc made allegations against Becky without evidence and from that the court ruled against Becky. When Becky brought in substantial evidence against Marc it was ignored, denied, or the argument considered not of substance.

Granting custody to Marc when substantial documentation was presented--including a 20-year history of counseling for abuse and addictions by health care providers, mental health practitioners, and pastors—

demonstrating a significant lack of performance of parenting duties by Marc, gives the appearance of bias on the part of the court. The court has erred in ignoring evidence and ruling upon hearsay. CP 178

The trial court coerced a settlement which included denying to Becky maintenance which she is entitled to by law. This kept the issue of maintenance in Marc's favor. RP 344. This would make any reasonable person suspect bias.

The courts have a duty to apply the law fairly and reasonably, to weigh the rights of both parties and, in dissolution, to consider the best interests of the children as well. Any decision that does not take all of those sides into consideration is by definition unbalanced.

> Canon 2(A) judges should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> Canon 3(5) judges shall perform judicial duties without bias or prejudice.
>
> Canon 3(7)(D) Disqualification. (1) judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:
>
> (a) the judge has a personal bias or prejudice concerning a party,

The canon of judicial conduct is clear. Judges are to promote the public confidence by being impartial and unbiased, and by following the law. Judges are not to coerce settlements but are to give each party the right to be heard on all issues and ensure due process. Becky was denied the right to be heard, a settlement was coerced (discussed in error #11), due process was denied (error #13), and laws violated. The lower court erred by being partial. This has reflected adversely on the court's honesty, impartiality, temperament, or fitness to serve as a judge: ipso facto is the appearance of impropriety.

The court stated, "I was not a part of your settlement," when clearly the transcript shows the court directed it. This is dishonest. RP 388.

According to Congress and U.S. Supreme Court case law, a judge must bow out of hearing any case in which his or her impartiality might reasonably be questioned. "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Partiality denies equal protection of the 14th amendment. The plurality of the judgments against Becky to Marc's benefit in the light of the whole of evidence is concerning. The test is "would any reasonable person would suspect bias" and clearly in this case any reasonable person would. For partiality, this case should be reversed.

6. Constitutionally, a parent should be able to determine which schooling is appropriate for each of their children, provided it meets statutory requirements. When the issue is as deeply entrenched in a family as it was in this case, the court has a duty to hear the issues, to judge impartially, not to prejudge.

However in this case, the court not only mandated that the children be moved to public school, the court also restricted Becky's movements. She was not allowed to be a part of her children's school and activities, volunteer in the classroom, or participate in the PTA. CP 141. She was restricted from taking her children on educational outings, using any homeschool curricula with her children, and taking the children to homeschool activities with other families. Since the Develles had a long involvement in a homeschool church that also precluded her from attending the church of her choice with her children, as well as depriving the children of their existing social network and peer support system.

Under the U.S. Constitution Becky has a right to movement, to assembly, and to raise her children according to her beliefs. Ruling on outings with her children, and on what and how she teaches them outside of school hours is unconstitutional. Restricting this is unconstitutional according to the 14th Amendment which according to the U.S Supreme Court, "embodies the rights of the first amendment."

RCW § 28A.225.010 states that compulsory education laws apply to children "eight years of age and under eighteen years of age." Becky's son, Ben, at age 6 and 7, therefore he was not under the court's jurisdiction to compel him to enter public school.

The right to educate and bring up children is a constitutional right that has long been held. The U.S. Supreme Court has upheld this decision in numerous cases which guarantee that right to all citizens. Washington State law also affords families those same protections. While a trial court may have authority to intervene and make a ruling in a particular family on education, the federal and state provisions for homeschooling should be carefully considered after hearing all of the issues. Prejudging a case and or disallowing an issue to be presented infringes upon due process and makes a court partial.

The issue of parents' rights to homeschool their children has been under scrutiny by both state and federal courts. In 1997, the Ninth Circuit determined an employment case which also dealt homeschooling in which the "School district's adverse employment action based on public school principal's decision to home school his children violated his constitutional rights." Peterson v. Minidoka County School Dist. 118 F.3d 351, 1358 (9th Cir., 1997.

As far back as 1925, the Supreme Court required the State of Oregon to recognize "private instruction" as a valid form of education. In the case of Pierce v. Society of Sisters, 268 U.S. 510 (1925) the court found that public

school attendance was not required, as set forth at Section 5259 of Oregon laws when:

> . . . (d) *Private Instruction*: Any child who is being taught for a like period of time by the parent or a private teacher such subjects as are usually in the first eight years of school . . .

This is a violation of Becky's First Amendment rights to free speech, religion, and assembly, as well as Fourteenth Amendment rights under the Due Process Clause, which includes her right to educate her children according to her beliefs. The U.S. Supreme Court has consistently upheld the liberty of parents to direct the upbringing of their children. This is part of the free exercise of religion. The US Supreme Court has upheld the right to recognize and prepare children for additional obligations. This was upheld in Pierce v. Society of Sisters, 268 U.S. 510 (1925) and again in 1972 in Wisconsin v. Yoder.

A person cannot be found guilty of following a statute. This is a denial of due process. Becky followed the homeschool law carefully. She actively sought out remedies for her son who was not making progress.

There was no inquiry in these proceedings to whether or not Becky was faithfully complying with the law. In particular, in the face of allegations of educational neglect, the court has a duty to investigate compliance with this law; not to ignore it. RCW 28A.200.010 lists the Duties of Parents.

> 28A.225.010(4)(c) The state board of education shall **not require these children to meet the student learning goals**, . . . If, as a result of the annual test or assessment, it is determined that the child is not making reasonable progress consistent with his or her age or stage of development, **the parent shall make a good faith effort to remedy any deficiency**. [Empahsis added.]

Because her top priority is a superior education for her children, Becky has been careful to follow the intent as well as the letter of the full homeschool law. And no evidence was brought before the court to the contrary. The lower court had a duty to carefully and objectively follow the laws of the state

with impartiality and to hear both sides of the issue before making a decision.

The court stated, "As we indicated previously, there were some concerns about your home schooling. You failed to provide adequate education to those children to the level that they would enter the public school in an average or above standard." RP 346 This statement is in clear opposition of Washington's homeschool laws. Washington State laws allow parents the right to a different set of grade level standards than the public schools provide. ". . . shall not require these [homeschooled] children to meet the student learning goals, " and "the parent shall make a good faith effort to remedy any deficiency."

A person cannot be found guilty of following a statute. This is a denial of due process. Becky followed the homeschool law carefully. She actively sought out remedies for her son who was not making progress.

The basic freedoms guaranteed by our Constitution apply to parents who elect to home school their children. The Ninth Amendment states that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." This decision regarding the parent's right to home school their child was not made by a neutral decision-maker and is therefore unconstitutional under the Due Process Clause. In addition, 1st, 9th, and 14th Amendments guarantee a "right" to educate a child at home. Additionally a child has a 14th Amendment right to a hearing before being forced into public education.

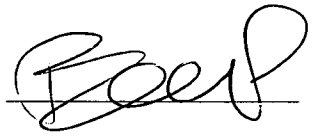
The ruling of the court in this matter is a violation of federal, state, and civil rights and must be reversed.

VI. CONCLUSION

For each of the foregoing reasons, Becky requests that this Court hold that the trial court abused its discretion by denying Becky's motions to establish family support and ordering retroactive child support; that the trial court erred in denying Becky's motion to reconsider custody and ordering

terms for future ability to request increased visitation which are void for unconstitutional vagueness; that the trial court erred in denying Becky's motion to reconsider contempt charges; that the trial court erred by coercing a settlement thus establishing an invalid contract; the trial court acted in a manner that would cause a reasonable person to suspect bias and impropriety, and reflect poorly upon the judiciary; erred by allowing Becky to proceed without adequate representation; and that the trial court erred by ordering the parties' children into public school without due process and without jurisdiction. She respectfully asks this Court to reverse the settlement and strike the original judge from this case permanently, to reverse the contempt charge. Finally, Becky requests that this Court vacate the current parenting plan and child support order from February 2013 forward, and return her children to the pre-trial custody arrangement; and to award $2,000 per month in family support in accordance with state law for the rest of her natural life; Award attorney fees and court costs to Becky; allow Marc's wage garnishment to resume by DCFS.

Respectfully submitted this 18th day of April, 2014.



Becky Develle

COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

Becky Develle,	)	
Appellant,	)	Appeals No. 44484-4-II
	)	Declaration of Appellant
v.	)	
	)	
Marc Develle,	)	
Respondent.	)	

I, Becky Develle, pro se, swear or affirm:

1. That I am the Appellant in this case.

2. That I served upon the Respondent and the transcriptionist, an electronic copy of my appellate brief.

April 18, 2014

Respectfully submitted,
Becky Develle
Becky Develle
9314 NE Alpine
Vancouver WA 98664
360-892-4212
Rubies31@comcast.net