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NO. 72932-2-I

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

JARED BRYAN KILLEY,

Appellant,

v.

ELIZABETH KILLEY NKA ELIZABETH RODRIGUEZ,

Respondent.

BRIEF OF RESPONDENT

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A. INTRODUCTION

This case is an appeal from a final Parenting Plan for A.S.K., the four-year-old son of Respondent Elizabeth Rodriguez[1] and Appellant Jared Killey. Dissolution trial took place over three days in November 2014. The court entered final orders, including the Parenting Plan, on December 4, 2014. CP 373-383, 384-395, 396-410, 411-417. Mr. Killey timely appealed the Parenting Plan. Ms. Rodriguez argues his appeal is without merit and respectfully asks that it be denied.

Mr. Killey also appears to be appealing a Temporary Order for Protection dated February 13, 2014, and a subsequent Temporary Order for Protection dated February 25, 2014. These temporary orders have expired. His appeal of the temporary orders is not timely and is without merit. Ms. Rodriguez requests his appeal of these orders be denied.

An Order for Protection was entered by the Court on May 15, 2014. CP 69-75. Mr. Killey did not appeal this Order for Protection.

B. COUNTER STATEMENT OF CASE

The parties met in early 2002 and were married on September 15, 2003. CP 433. They have one child: A.S.K., age four. The parties separated for a few months in 2010 but reconciled shortly before the child was born. Their final separation occurred on June 15, 2013. CP 433-434.

[1] The Decree of Dissolution—which is not on appeal—authorized Respondent's change in last name from Killey to Rodriguez.

On December 4, 2013, the Kirkland Police Department arrested Mr. Killey on Assault in the Fourth Degree DV from an incident in which Mr. Killey grabbed Ms. Rodriguez under her arms and jerked her to her feet, pushed her toward the bedroom door, slammed the door on her, and kicked her in the stomach. CP 284-291.

On December 6, 2013, Mr. Killey filed the underlying dissolution and custody action. CP 423.

On January 16, 2014, Ms. Rodriguez filed a Petition for an Order for Protection. CP 223-231. She was granted a Temporary Order for Protection that day. CP 232-234. At the return hearing on February 13, 2014, the court ordered a Domestic Violence Assessment by Family Court Services (FCS) and reissued the Temporary Order for Protection permitting only limited, professionally supervised visitation between Mr. Killey and the child. CP 337; CP 424. That same day, Mr. Killey filed a motion for reconsideration alleging that Ms. Rodriguez lied to the court. The court scheduled a hearing on reconsideration for February 25, 2014, on the sole issue of whether the father should have unsupervised visitation. CP 349; CP 434. On February 25, 2014, after a contested hearing, the court entered an Order which found "the mother did not mislead the court" and authorized unsupervised visitation every other weekend pending the

return hearing.[2]

On May 15, 2014, FCS released the Domestic Violence Assessment and recommended an Order for Protection be entered against Mr. Killey, he be required to enroll in a domestic violence perpetrator treatment program, and his residential time with the child be limited and professionally supervised pending treatment compliance. CP 446. After a contested hearing, the court entered a full one-year Order for Protection against Mr. Killey which required him to enroll in treatment and which limited his residential time with the child to every other Saturday from 10:00 a.m. to 4:00 p.m. CP 69-75. Further, the Court ordered Mr. Killey to provide proof of enrollment in a domestic violence perpetrator treatment program, or his "unsupervised visits shall terminate." CP 72.

At trial, both parties were *pro se* and both testified. Ms. Rodriguez told the trial court Mr. Killey became violent toward her two years into their marriage. RP 22:7-11. Ms. Rodriguez stated Mr. Killey beat her several times, including in front of her son; he humiliated her "in every form and fashion"; he forced her to have sexual relations with another person; he beat her when she was four months pregnant; and she told Mr. Killey's mother that he was violent towards her. RP 100-103.

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[2] *See* February 25, 2014 Report of Proceedings 17, 20-21. *See also* CP 355; CP 353-354.

Ms. Rodriguez also stated she did not feel safe around Mr. Killey—or his mother—and she feared for her life. RP 153-154. Mr. Killey denied all of Ms. Rodriguez' allegations of domestic violence. RP 100-103; 153-154

Deborah Hunter, social worker with King County Superior Court Family Court Services (FCS), testified regarding the Domestic Violence Assessment. RP 113-141. Ms. Hunter specifically addressed the court's inquiry: Was there any history of domestic violence by Mr. Killey toward Ms. Rodriguez? RP 115:14-20. The court also wanted to know whether there were any "mental health issues for the father [Mr. Killey]." RP 115:20.

Ms. Hunter interviewed the parties and reviewed the legal file, which included 2010 and 2013 police incident reports. She also reviewed all of the written materials and documents provided by both parties, the parties' legal history, and the child's medical records. RP 115-116; CP 441-442. Although Ms. Rodriguez reported to the police during the 2010 incident that Mr. Killey "punched her with a closed fist very hard in the face/mouth," and the police report indicated that the "mother's lip was swollen and bloody," Mr. Killey's explanation to Ms. Hunter was that his cell phone had flown out of his hand "and hit her [Ms. Rodriguez] in the mouth or lip area." CP 443; RP 118:1-4.

As for the 2013 incident, when Mr. Killey was arrested for

assaulting Ms. Rodriguez, he reported that she "entered his apartment and assaulted him, kidnapped his son and charged him (falsely) with domestic violence." CP 444. He also denied that Ms. Rodriguez took the child to the doctor right after the assault despite the police report which noted that the officer followed Ms. Rodriguez to the hospital where she sought medical care for the child. CP 444. Further, Ms. Hunter noted that "as the litigation has escalated" so did the allegations of child abuse and neglect against Ms. Rodriguez. Ms. Hunter found no evidence of abuse and neglect by Ms. Rodriguez from her review of the child's medical records. CP 444.

Ms. Hunter concluded there was a history of domestic violence by Mr. Killey toward Ms. Rodriguez and she recommended an Order for Protection be entered to protect Ms. Rodriguez. RP 116:17-19. She also recommended Mr. Killey enroll in domestic violence perpetrator treatment. RP 120:10-12. Ms. Hunter's recommendations were based not only on the physical violence by Mr. Killey toward Ms. Rodriguez but on "behaviors that constitute a pattern of control, attempts to have power and control over the other party." RP 120:12-16.

Examples of Mr. Killey's abusive behavior cited by Ms. Hunter included "attempting to get the mother fired from her job which would cause her to lose her home" and "attempting to make it appear in the court

record that the mother had been charged with felonies." RP 120:17-23. Ms. Hunter found no evidence that Ms. Rodriguez had engaged in custodial interference or kidnapping, as Mr. Killey alleged in his pleadings. RP 121:6-9; CP 444. Ms. Hunter also found the paternal grandmother—Mr. Killey's mother, Terry Bradley—made similar allegations against Ms. Rodriguez. Ms. Hunter considered these allegations "particularly egregious ... and constituted considerable abusive use of conflict" by Mr. Killey. RP 121:6-13. Ms. Hunter testified that domestic violence "does not include only allegations of physical violence but emotional abuse, mental abuse, verbal abuse, attempts to control the other party" and cited Mr. Killey's desire to have Ms. Rodriguez deported as another example of his power and control over Ms. Rodriguez. RP 130-131. The court admitted the Domestic Violence Assessment into evidence at trial. RP 122:3-6.

In regard to the court's inquiry about the father's mental health, Ms. Hunter testified that Mr. Killey refused to sign a release of information and did not provide records to FCS, as he said he would. Therefore, Ms. Hunter could not review his medical or counseling records. RP 126:15-20; CP 446. In her Domestic Violence Assessment, Ms. Hunter states that based on her interview with Mr. Killey, "he had delayed responses to questions, changed his answers several times and has an

'odd' affect." CP 445. Ms. Hunter recommended the parenting plan evaluation include an investigation of Mr. Killey's mental health. CP 446. At trial, Mr. Killey had his mother, Terry Bradley—who is not a doctor—testify about his mental health. RP 31-33 . Mr. Killey's personal medical records were not admitted by the trial judge. CP 368-372.

Emily Brewer, social worker with FCS, testified at trial regarding a Parenting Plan Evaluation she conducted. RP 142-150. She testified Mr. Killey did not participate in the evaluation despite several opportunities to do so. RP 143-144. While the father's lack of participation limited Ms. Brewer's ability to make formal recommendations, she finalized a report to provide the court information to consider regarding the final Parenting Plan. RP 144:6-9. Ms. Brewer testified she interviewed Ms. Rodriguez, made a home visit and met with the child and Ms. Rodriguez' adult son, reviewed the Domestic Violence Assessment, reviewed some court documents involving charges against the father, spoke with Ms. Rodriguez' current partner, and spoke with the director of the child care center. RP 145-146.

Ms. Brewer recommended Ms. Rodriguez have primary custody of the child and that a 26.09.191 restriction be entered against Mr. Killey. She concluded Ms. Rodriguez was the child's primary care provider; the child is clearly bonded to her and to his older brother; and it would be

detrimental to reduce his residential time with his mother. RP 147:3-11. She also concluded Ms. Rodriguez did not pose any threat to the child and she did not find any evidence that Ms. Rodriguez neglected the child. RP 146:1-5. Ms. Brewer reported that during the home visit, both of Ms. Rodriguez' children—including a son from an earlier relationship—"appeared clean, healthy, and appropriately dressed." CP 427-428. During her testimony, Ms. Brewer stated "the home visit was probably the most telling part of the evaluation as far as it was extremely positive." RP 146:6-10. Further, she reported she spoke with the director at the child's day care who reported "no noted concerns about the care of the child." CP 428. She recommended the father continue to have residential time with the child but that any increase occur only if Mr. Killey provided proof of compliance with the domestic violence treatment required under the Order for Protection. RP 147:16-21; CP 430.

The court admitted the Parenting Plan Evaluation into evidence at trial. RP 145:3-5. In it, Ms. Brewer discussed the mother's disclosures that Mr. Killey "slapped her, pushed her, thrown things at her, and punched her in the face resulting in an injury." CP 429. The mother also disclosed the father was "controlling in regards to finances and resources" and he had "disconnected services when he moved out of the family home and intentionally made it difficult for the mother to support herself and the

two children." CP 429. Ms. Brewer found Ms. Rodriguez was credible and consistent in her allegations. CP 429. She noted documentary evidence of a visible injury on Ms. Rodriguez from a 2010 assault. CP 429. In reviewing Mr. Killey's declarations, she noted his denial of abuse and control but also that he reported Ms. Rodriguez "assaulted him, kidnapped the child, and made a false report of domestic violence." CP 429-430. Ms. Brewer found no evidence supporting Mr. Killey's allegations. She concluded "the father engaged in a pattern of behavior that is congruent with the definition of domestic violence." CP 430. She found "sufficient evidence to conclude that the father engaged in assaultive behavior on more than one occasion and he has used finances in an attempt to control the mother." CP 430. Therefore, she recommended RCW 26.09.191 restrictions. CP 430; RP 146-147. Consistent with her testimony at trial, Ms. Brewer's report recommended Mr. Killey's residential time with the child be increased upon his compliance with treatment previously ordered by the court. Further, the Parenting Plan Evaluation recommended the father be required to "supply the court with information regarding his current living situation in order for a sustainable parenting plan to be developed." CP 430.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT IMPOSED RCW 26.09.191 RESTRICTIONS IN THE PARENTING PLAN.

a. The Trial Court Made a Clear Finding of Domestic Violence to Support RCW 26.09.191 Restrictions

A trial court's rulings on the provisions of a parenting plan are reviewed for abuse of discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). A trial court only abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or untenable reasons. Id. at 46-47, 940 P.2d at 1366. A court's decision is unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if an incorrect standard is applied or if the facts do not fall within the correct standard. Id. at 47, 940 P.2d at 1366. In this case, the trial court did not abuse its discretion because it applied the appropriate legal standard and its findings are thoroughly supported by the record.

RCW 26.09.191(2)(a) requires limitations in the parenting plan if the court finds that a parent has engaged in "a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm." RCW 26.50.010(1) defines domestic violence as (1) "[p]hysical harm, bodily

injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members."

The Parenting Plan entered by the court clearly sets forth findings of a history of domestic violence as defined under RCW 26.50. CP 385; CP 384-395. The court's findings are supported by substantial evidence in the record and are consistent with the standards laid out by the Washington Supreme Court in LaBelle which required that findings of fact be sufficient to indicate the factual basis for the court's ultimate conclusions. In re LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138, 152 (1986). LaBelle concerned involuntary commitment where the written findings consisted of a preprinted standardized form that recited the statutory grounds and requisite findings for involuntary commitment. Id., 728 P.2d at 151. In this case, the trial court laid out a sufficient factual basis for imposing RCW 26.09.191 restrictions on Mr. Killey where it found a "history of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or fear of such harm." CP 385.

Relying on Katare, Mr. Killey argues that the court "may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191." *See* Katare v. Katare, 125 Wn. App. 813, 826, 105 P.3d 44, 50 (2004), aff'd in part, rev'd in part, 175

Wn.2d 23, 283 P.3d 456 (2012). Further, he argues that "since no harm was identified or even alleged, the restrictions on Jared's residential time are not authorized by Statute." Mr. Killey's argument has no basis: in this case, the history of domestic violence was identified, alleged, documented, and discussed at trial by the parties and two FCS social workers. CP 128-160, 223-234, 422-447; RP 22-23, 100-103, 115-141. 142-150. The trial court *expressly* made a finding of a history of acts of domestic violence on the part of Mr. Killey, as defined by RCW 26.50.010, in Section 2.1 of the final Parenting Plan. CP 385.

Mr. Killey acknowledges that the trial court specifically marked the 26.09.191(2) restriction, indicating "a history of acts of domestic violence as defined in RCW 26.50.010" but questions the basis of the restriction. But the trial court is not required under LaBelle or Katare to exhaustively catalogue each and every instance of domestic violence that forms the basis for an RCW 26.09.191 finding. The trial court must only make specific findings that "establish the existence or nonexistence of determinative factual matters." LaBelle 107 Wn.2d at 219, 728 P.2d at 152. The trial court clearly did that in this case.

b. The Trial Court's Restriction under RCW 26.09.191(2) is Amply Supported by the Record

The trial court's finding of a history of domestic violence is

supported by substantial evidence. This finding is consistent with Ms. Hunter's testimony. The Domestic Violence Assessment pointed to "a history of domestic violence by the father that included physical and emotional abuse and controlling behaviors." CP 434-437. Ms. Hunter concluded that "it is more likely than not that he [Mr. Killey] engaged in at least two instances of physical violence." CP 443. Referencing the 2010 incident, Ms. Hunter noted Ms. Rodriguez reported being unable to assist in Mr. Killey's prosecution because she was hospitalized for gestational diabetes. CP 443. Ms. Hunter found this report to be credible based on the "note in the docket on the criminal case" and the fact that the mother was pregnant at the time of the assault. CP 443. As for Mr. Killey's explanation for the incident, she stated "[it] does not seem plausible in that the cell phone 'flew out of his hand' and hit her lip." CP 443.

Ms. Hunter did not find Mr. Killey's explanation for the December 2013 incident to be credible or consistent with the police report. He alleged Ms. Rodriguez stopped by his apartment, attacked him, and—with the assistance of her new partner—abducted the child under false premises that the child was sick. CP 443-444. Ms. Hunter expressed concern that Mr. Killey and his family were focused on "demonizing the mother" and making "alarming allegations" that Ms. Rodriguez had kidnapped the

child, engaged in custodial interference, neglected and abused the child, and that she was illegally in this country—all intended to make it easier for Mr. Killey to get custody of the child. CP 444. She noted that this "across the board escalation of polarized allegations" was "suggestive of a violation of the court orders via third party contact" and represented "a troubling example of abusive use of conflict that is directly harming the child emotionally and psychologically." CP 445.

Mr. Killey objects to Ms. Hunter's testimony and to the Domestic Violence Assessment. He states that her opinion of a history of domestic violence is "irrelevant and not admissible" because she has no documented proof of assault and he was not convicted of an assault. However, the burden of proof for a finding of assault is different in criminal cases than in civil cases. In civil domestic violence cases, the preponderance of the evidence standard is applied, whereas in criminal trials the defendant's guilt must be proven beyond a reasonable doubt. Freeman v. Freeman, 169 Wn.2d 664, 673, 239 P.3d 557, 561 (2010); State v. Walker, 182 Wn.2d 463, 480, 341 P.3d 976, 986 (2015). As Ms. Hunter explained, her role was to look at all the records and information provided and determine consistencies and inconsistencies. RP 123:2-14. Referencing the 2010 incident, Ms. Hunter found, as Ms. Rodriguez stated, she was hospitalized for gestational diabetes and could not assist in Mr. Killey's prosecution at

the time. CP 443. Mr. Killey's acquittal in the criminal trial for the December 2013 incident is not proof he did not commit acts of domestic violence against Ms. Rodriguez for purposes of a 26.09.191 finding. In this case, the preponderance of the evidence supports a finding of domestic violence.

Ms. Hunter was qualified as an expert witness at trial and is employed by FCS at King County Superior Court to conduct domestic violence assessments, mediation, and parenting plan evaluations. She has worked in the legal system for 26 years and at FCS for 13 years where she had completed 238 domestic violence assessments and 351 parenting plan evaluations, and she has testified in 75 trials. RP 113-114. She noted the information she reviewed in this case, in addition to interviews with both parties and with collaterals, which included documents provided by the parties. RP 115-116; CP 441-443.

Mr. Killey asserts that Ms. Hunter is not a lawyer and "misapplies the law when she labels Jared's behavior [as] 'domestic violence.'" He argues that "'physical force' is not synonymous with 'assault' or 'battery' and does not indicate that domestic violence occurred." However, physical harm is included in the definition of domestic violence, as is the infliction of fear of physical harm. RCW 26.50.010(1). Mr. Killey alleges that the 2010 incident that led to a bruise on Ms. Rodriguez' lip was the

result of a fight over control of a cell phone and that her injury was accidental. Ms. Rodriguez disagrees that punching her on the mouth was accidental. CP 132-133, 135-136, CP 426. The incident meets the definition of physical harm, bodily injury or assault under RCW 26.50.010(1).

Mr. Killey states that the term "'history of acts of domestic violence' was intended to exclude isolated, de minimis incidents which could technically be defined as domestic violence." However, the language Mr. Killey cites refers to the 1987 Parenting Act, when the statute originally required "either (1) a single act of domestic violence that rose to the level of a felony or (2) a history, or pattern, of domestic violence that did not necessarily rise to the level of a felony" in order to prohibit mutual decision making. In re Marriage of C.M.C., 87 Wn. App. 84, 88, 940 P.2d 669, 671 (1997). Under this outdated definition, however, a series of domestic violence incidents are sufficient to trigger 26.09.191 restrictions. Furthermore, in 1989, the Washington legislature amended the statute, "replacing the phrase 'or an act of domestic violence which rises to the level of a felony' with the current phrase 'or an assault or sexual assault which causes grievous bodily harm or the fear of such harm,'" indicating domestic violence could be found with a history of domestic violence or one serious incident, and lowering the threshold to

one serious incident. Id., 940 P.2d at 671.

Substantial evidence on the record shows that domestic violence occurred not only on the 2010 and 2013 incidents—when Mr. Killey was arrested—but that Ms. Rodriguez reported Mr. Killey had beaten her several times, including in front of her son; that the first incident of abuse occurred two years into relationship when Mr. Killey was angry with her and thrown a cup of hot coffee on her; that he pushed her; that he was physically violent with her prior to the child's birth; that Mr. Killey slapped her "with an open hand." CP 425-426. Ms. Hunter also found evidence that Mr. Killey attempted to get Ms. Rodriguez fired from her job, which would affect her housing and her finances; that he was "attempting to make it appear in the court record that the mother had been charged with felonies" by allegedly kidnapping the child and engaging in custodial interference; and that he and his mother had repeatedly raised the issue of Ms. Rodriguez' immigration status. RP 120-121; CP 444. As Ms. Hunter explained at trial, domestic violence is not limited to incidents of physical abuse but also includes "emotional abuse, mental abuse, verbal abuse, and attempts to control the other party." RP 130:15-25.

The trial court's finding of domestic violence is also consistent with the testimony by Ms. Brewer. She found Ms. Rodriguez' allegations that Mr. Killey was controlling and "had slapped her, pushed her, thrown

things at her, and punched in the face" credible and consistent. CP 429. Ms. Brewer reviewed Mr. Killey's declarations denying the allegations. CP 429-430. She did not find his allegations to be credible and instead found "sufficient evidence to conclude that the father engaged in assaultive behavior on more than one occasion and he has used finances in an attempt to control that mother, and as such, a restriction should likely be included in the final parenting plan." CP 430. The trial court properly exercised its discretion in entering a 26.09.191 finding against Mr. Killey based on a history of domestic violence.

c. The Residential Schedule Entered by the Trial Court is Consistent with RCW 26.09.191

RCW 26.09.191(2)(a) requires residential restrictions when the court makes a finding of domestic violence against one parent. Specifically, "the parent's residential time with the child shall be limited" if such a finding is made by the court. RCW 26.09.191(2)(a). While RCW 26.09.002 establishes it is the state's intent to foster the parent-child relationship under the best interest of the child standard, the residential restrictions under RCW 26.09.191 trump the best interests of the child standard. RCW 26.09.187, which sets the criteria for establishing a parenting plan, states that "the child's residential schedule shall be consistent with RCW 26.09.191." RCW 26.09.187(3)(a). While the same

statute lists the factors the court is required to consider when determining the residential schedule, it specifically excludes consideration of these factors in cases involving RCW 26.09.191 findings ("Where the limitations of RCW 26.09.191 are not dispositive... the court shall consider the following factors"). RCW 26.09.187(3)(b).

Having entered an RCW 26.09.191(2) finding against Mr. Killey based on a history of domestic violence, the trial court correctly gave Ms. Rodriguez primary custody of A.S.K. and limited Mr. Killey's residential time with the child. CP 384-395. Mr. Killey argues that the Parenting Plan is manifestly unreasonable because it "effectively ends [his] role as a parent and places him in the role of occasional visitor." The trial court limited Mr. Killey's residential time to Saturday from 9:00 a.m. to 7:00 p.m. on the first and third weekend of the month and required him to comply with the domestic violence treatment program at Wellspring Family Services and with the parenting class DV DADS. CP 386, 389-390. The Parenting Plan provisions are consistent with the legislative intent and with the RCW 26.09.191(2) finding.

d. Mr. Killey's Parental Rights were not Terminated and he was Afforded Appropriate Due Process when the Court made RCW 26.09.191(2) Restrictions in the Parenting Plan

Mr. Killey argues that the trial was unconstitutional and he cites Santosky to argue that a parent has a fundamental, protected liberty in

raising his child. Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed.2d 599 (1982). His reliance on Santosky is misplaced. In Santosky, the Supreme Court held that before a state can terminate the rights of parents regarding their biological children, due process requires the implementation of a "clear and convincing evidence" standard, rather than the "preponderance of the evidence" standard. But this case does not involve the termination of parental rights. Under the Parenting Plan, Mr. Killey is able to see the child on the first and third Saturday of every month for several hours without any restrictions or supervision. CP 384-395. His parental rights were not terminated. Mr. Killey makes no argument why RCW 26.09.191 and other statutes regarding parenting plans should be determined unconstitutional. An assignment of error that is not supported by citations to authority will ordinarily not be considered on appeal unless it is meritorious on its face. State v. Young, 89 Wn. 2d 613, 574 P.2d 1171 (1978); State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977) (disapproved of on other grounds by, State v. Lyons, 174 Wn.2d 354, 275 P.3d 314 (2012).)

Mr. Killey also argues that the Parenting Plan is void because it was entered without due process. The Supreme Court of Washington has held that due process requires that parents have notice, an opportunity to be heard, and the right to be represented by counsel. In re Key, 119 Wn.2d

600, 611, 836 P.2d 200, 206 (1992); In re Welfare of Myricks, 85 Wn.2d 252, 254, 33 P.2d 841, 842 (1975); In re Messmer, 52 Wn.2d 510, 514, 326 P.2d 1004, 1006 (1958). In this case, Mr. Killey is the petitioner; he participated at trial and testified; he presented evidence; he called his own witnesses; and he questioned Ms. Rodriguez' witnesses. While he represented himself—as did Ms. Rodriguez—his right to secure an attorney at trial was not taken from him by the trial court. The fundamental right of access to the courts guaranteed by the State Constitution does not include the right to publicly funded counsel in a dissolution action. King v. King, 162 Wn.2d 378, 391, 17 P.3d 659, 666 (2007).

Mr. Killey alleges that his due process rights were violated because the trial court relied on Ms. Hunter's testimony and a report based on an interview with him "in the absence of witnesses and of a court reporter." He argues this action was in violation of RCW 26.09.191(6) requiring that the court "apply the civil rules of evidence, proof, and procedure." In a related argument, he states that both Ms. Hunter and Ms. Brewer made recommendations not authorized by statute. FCS investigations and reports are specifically authorized by King County Local Family Law Rule 13(b)(2) and by RCW 26.12.190(2) which permit the use of family court services for investigations, evaluations, and "any other services

[that] may be used to assist the court." GR 22(e) permits the filing of reports in family law cases—including Parenting Plan Evaluations and Domestic Violence Assessment Reports. RCW 26.09.220 allows the court to order an investigation and report regarding the parenting arrangements for children, and to admit the report into evidence at trial.

Mr. Killey similarly argues that the trial court erroneously ordered him to comply with domestic violence perpetrator treatment relying "on the opinion of a social worker." The treatment requirement was imposed on Mr. Killey by the May 15, 2014, Order for Protection. Mr. Killey never appealed that order. The treatment requirement was imposed by the court, not by FCS. CP 69-75, CP 385, CP 430. RCW 26.50.060(e) specifically authorizes the court to order perpetrator treatment with the goal of ending the violence and holding the abuser accountable. *See also* RCW 26.50.150. The trial court admitted the Domestic Violence Assessment and the Parenting Plan Evaluation and has discretion to adopt the recommendations by FCS regarding treatment.

Mr. Killey also objects to the trial court's Parenting Plan on evidentiary grounds. First, he argues the trial court testified about a video introduced by Mr. Killey instead of allowing him to testify about the content of the video. The record is clear that Mr. Killey showed a video from 9:06 a.m. to 9:08 a.m. without any audio, that the court told him to

show the video and not make any arguments about it, and that the court noted for the record that the video showed a couple of transfers involving the child. RP 46-50. The trial court did not provide any analysis or make any legal arguments involving the video.

Mr. Killey claims the court abused its discretion when it refused to qualify his mother, Terry Bradley, as an expert witness on the child's medical records. Mr. Killey's mother testified that she is a grandmother so she has "seen a lot of childhood illnesses," that she has an associate degree in medical assisting, that she has worked in OB/GYN, and that she worked as a lab technician in a family practice. RP 26:14-20. His mother is not a doctor, is not the child's medical care provider in any capacity, was not involved in preparing the child's medical records, and is not the custodian of the child's medical records. Referring to the child's medical condition, the trial court appropriately limited the paternal grandmother's testimony to what she had observed and prohibited testimony regarding the child's medical needs or diagnosis. RP 34-35, 42-43. In permitting expert witnesses, the "qualifications of expert witnesses are to be determined by the trial court within its sound discretion, and ruling on such matters will not be disturbed unless there is a manifest abuse of discretion." In re Detention of A.S., 138 Wn.2d 898, 917, 982 P.2d 1156, 1166 (1999). Despite this limitation, the court allowed Mr. Killey's

mother to testify about some content of the child's medical records but stopped the testimony when Mr. Killey asked his mother to offer an opinion on the child's medical condition and whether the child received proper treatment. RP 35-41.

Mr. Killey's mother is not competent to testify as an expert witness on the child's medical condition or diagnosis and she is anything but a neutral witness. Her "expert testimony" included an allegation that Ms. Rodriguez had taken the child to the doctor with her current partner and "posed" as his mother. RP 27, 31. Ms. Hunter noted her review of an e-mail from Mr. Killey's mother to Ms. Rodriguez' employer stating that Ms. Rodriguez was "a criminal who kidnapped her grandson, that she was being charged with crimes and was not able to legally work in the United States and should be fired." CP 441. Ms. Hunter also noted that Ms. Rodriguez' current partner, Kurt Krinke, reported losing his job as a result of the actions by the paternal grandmother. CP 444. Ms. Hunter concluded that the paternal grandmother's behavior was "a troubling example of abusive use of conflict that is directly harming the child emotionally and psychologically." CP 445, RP 121:6-16.

e. The Trial Court Properly Entered a Parenting Plan without any RCW 26.09.191 Restrictions against Ms. Rodriguez

There is no evidence that Ms. Rodriguez abused Mr. Killey, as he

alleges. He alleges that on December 4, 2013, Ms. Rodriguez showed up to his apartment, verbally abused him when she learned he had not taken the child to the emergency room, and abducted the child by force. However, at trial Mr. Killey indicated that he knew Ms. Rodriguez was stopping by that day to take the child to the hospital. RP 18:2-19. He admitted to FCS that he asked Ms. Rodriguez for visitation with the child while she was in his apartment; that she said no because of the medical appointment; and that Ms. Rodriguez regularly allowed him visitation with the child prior to this incident. CP 439-440, CP 444. He admitted to the police that he pushed Ms. Rodriguez from his bedroom on the day of the incident. CP 132. To FCS, he admitted pushing the child behind him purportedly to fend off her attack. CP 440.

Ms. Rodriguez reported that on December 4, 2013, she was invited by Mr. Killey to walk into his bedroom to get the child while her partner waited outside the apartment; she described how as she was helping the child with his shoes, Mr. Killey inquired whether the child would be staying with him the following day. CP 132, CP 427. She said no because she was taking the child to the doctor. Mr. Killey became very upset and accused her of trying to take his son. He picked her up and jerked her by the arms and he tried to shove her out of the bedroom. During this incident the child was crying. Mr. Killey pushed the child behind him and

continued to shove her out the door. She tried to push the door back so that she could get the child. Mr. Killey then kicked her in the stomach causing her pain and knocking her away from the door at which point she called Mr. Krinke for help. CP 132, CP 427. Mr. Krinke stated he waited outside the apartment until he heard Ms. Rodriguez call for help; Ms. Rodriguez was crying outside the bedroom door; he knocked on the bedroom door and Mr. Killey opened it and pushed the child out the door, yelled profanities at them; and, as Mr. Killey continued to yell and threaten Ms. Rodriguez and Mr. Krinke, they carefully backed out of the apartment with the child and called the police. CP 132. The police determined Mr. Killey was the aggressor. CP 130, 133.

Mr. Killey's allegations of child abuse and neglect are not supported by the record. The only medical records that were admitted by the court were the child's December 7, 2013, medical records.[3] No other medical records were admitted and no one testified or provided evidence to support any of the allegations Mr. Killey now makes about abuse and neglect of the child. CP 368-372. As FCS noted, the child's medical records do not support this allegations. CP 444. The records show that Ms. Rodriguez has taken the child for regular medical treatment and exams—where providers are mandated to report any evidence of abuse.

[3] *See* December 7, 2013, medical records—CP 182-183.

CP 444. The FCS investigations revealed no concerns about Ms. Rodriguez' home environment. CP 430; RP 145-146.

f. Mr. Killey Relies on Facts And Exhibits Not Admitted In The Record

Under RAP 9.1(a), a court of appeals is generally limited to the materials that were before the trial court. *See* Dioxin/Organochlorine Ctr. v. Dep't of Ecology, 119 Wn.2d 761, 771, 837 P.2d 1007, 1013 (1992) citing Casco Co. v. Public Utility Dist. No. 1 of Thurston County, 37 Wn.2d 777, 784785, 226 P.2d 235, 239 (1951) ("This court is a reviewing court, and, on appeal, considers only such evidence as was admitted in the trial court"). In this case, the trial court only admitted seven exhibits.[4] Mr. Killey has also referenced clerk's papers that were not in evidence and not relied on by the trial court.[5] The only other exhibits at issue on appeal are those involving the Temporary Orders for Protection that Mr. Killey appears to be appealing.[6] The court should not consider any arguments based on exhibits not admitted at trial.

2. APPEAL OF THE TEMPORARY ORDER FOR PROTECTION IS NOT TIMELY OR MERITORIOUS

Under RAP 5.2(a), a notice of appeal must be filed within 30 days after entry of a decision by the trial court. Mr. Killey argues that the

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[4] App. 1
[5] App. 2
[6] App. 3

Temporary Order for Protection entered on February 13, 2014, and a subsequent Temporary Order entered on February 25, 2014, should be vacated. Neither appeal is timely. Mr. Killey filed notice of the underlying appeal on December 30, 2014, ten months after both temporary orders were entered. Neither order was in effect at the time of the appeal. A full Order for Protection was entered by the court on May 15, 2014, which is not subject to this appeal. The trial court incorporated the May 15, 2014, Order for Protection into the Decree of Dissolution. CP 416, 411-417. That act alone does not make it appealable. Even if Mr. Killey's arguments could be construed as appealing the May 15, 2014, Order for Protection, the appeal is neither timely nor meritorious.

Mr. Killey's arguments have no merit. He argues the trial court relied on false testimony when it entered those temporary orders. He also argues the court itself testified and gave false testimony on Ms. Rodriguez' behalf. There is no evidence that the court did anything other than to explain to Mr. Killey that Ms. Rodriguez' arguments were corroborated by the child's medical records.[7] RCW 26.50 authorizes the issuance of an order for protection if the party requesting it alleges "the existence of domestic violence...and [declares] the specific facts and circumstances from which relief is sought." RCW 26.50.030(1); A

[7] *See* February 25, 2014, Report of Proceedings 17

protection order must be supported by a preponderance of the evidence. This standard requires the court to find that it was more likely than not that domestic violence occurred. Freeman, 169 Wn.2d at 673, 239 P.3d at 561. Here, the court heard from both parties, considered the arguments and evidence, and properly exercised its discretion when it entered the orders.

D. CONCLUSION

The court's findings and the record support the entry of a Parenting Plan that contains RCW 26.09.191 restrictions against Mr. Killey. The trial court's decision should be affirmed in its entirety. Appeal of the Order for Protection should be dismissed as untimely and unmeritorious.

RESPECTFULLY SUBMITTED this 15th day of July 2015.

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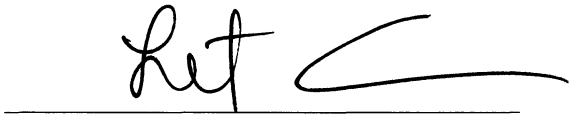


Leticia Camacho, WSBA #31341
Attorney for Respondent, Elizabeth Rodriguez

APPENDIX

App. 1	Killey: Exhibits Admitted (Both Parties)
App. 2	Jared Killey: Documents Not Admitted
App. 3	Order for Protection At Issue

Killey: Exhibits Admitted (Both Parties)

Exhibit No.	Clerk's Papers	Description of Document	Admission Requested By:
6	128-160	**12/4/13 Police Report and Witness Statements** Entire Police Report: 128-160 (33 pages) Officers' Report: 128-133 Statement of Kurt Krinke: 134 Statement of Elizabeth Killey: 135-136 Statement of Keith Roberts (JK's roommate): 137 Statement of Lenoir Tennell (Upstairs Neighbor): 138 Scene Photos and Police Summary Page: 139-160	Petitioner (JK)
11	223-234	**1/16/14 Petition and Temporary Order for Protection**	Petitioner (JK)
18		**Unpaid Mortgage Condo & Vandalism Photos**	Petitioner (JK)
24	182-183	**12/7/13 Medical Records Aaron**	Petitioner (JK)
79	432-447	**DV Assessment**	Respondent (EK)
80		**Case Closure Notice**	Respondent (EK)
81	422-431	**Parenting Plan Evaluation**	Respondent (EK)

Jared Killey: Documents Not Admitted

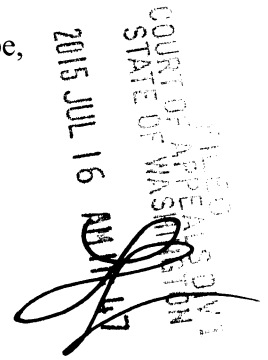
Clerk's Paper (CP)	Description of Document
1-12	Summons and Petition for Dissolution of Marriage
35-42	Response to Petition (Marriage), includes No-Contact Order
43-51	Motion and Declaration for Temporary Order for Guardian ad Litem, Proposed (unsigned) Order Appointing Guardian ad Litem
52-64	Motion for Reconsideration for May 5th Order for Protection
65	Denial of Reconsideration for May 5th Order for Protection
66-68	Order of Transfer to Family Court Department May 15th
76-80	Unsealed FCS DV Assessment
81-87	Motion to Revise Commissioner's Ruling for Order for Protection
88-90	Motion to Revise May 15 Ruling
91	Order Confirming Commissioner's Ruling
92-97	Motion to Terminate Order for Protection
98-100	Response to Motion to Terminate Order for Protection
101-127, 161-169	Police Reports of Incidents (excluding the 12/4/14 report)
170-177	Addendum to Declaration for Motion to Terminate Order for Protection
178-180	Denial Order of Motion to Terminate Order for Protection
235-336	Declarations in Objection to Petition for Order for Protection
337	Reissuance of Temporary Protection Order
338-340	Order of Transfer to Family Court Department 2/13/14
341-346	Declaration of Jared Killey
347-348	Supervised Visitation Order For DV Class
349	Order for New Hearing on Family Law Motion (Re: supervised visitation)
350-352	Declaration of Elizabeth Killey in Response to Motion for Reconsideration
353-354	Order Modifying Protection Order
355	Reconsideration Granted in Part (allowing JK unsupervised visitation)
356-357	Family Law Clerk's Minutes

Killey: Orders for Protection At Issue	
Clerk's Papers	**Description of Document**
337	Reissuance of Temporary Protection Order 2/13/14
353-354	Order Modifying Protection Order 2/25/14
69-75	Order for Protection Issued 5/15/14

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

JARED BRYAN KILLEY,	**No. 72932-2-I**
Appellant,	**CERTIFICATE OF SERVICE**
vs.	
ELIZABETH KILLEY, NKA ELIZABETH RODRIGUEZ,	
Respondent.	

I certify that on the 16th day of July, 2015, I deposited with the United States Postal Service a properly stamped and addressed envelope, to be mailed via Priority Mail Express 1-Day, with next day delivery guaranteed, containing a true and correct copy of the **Brief of Respondent,** addressed to the following:



JARED KILLEY
6817 – 208TH SW #5563
LYNNWOOD, WA 98036

Dated: July 16, 2015

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