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.

REPLY BRIEF OF APPELLANT

Becky Develle
9314 NE Alpine
Vancouver WA 98664

Marc Develle
3412 SE 165 Ave
Vancouver WA 98683

pm 11/3/14

TABLE OF CONTENTS

TABLE OF AUTHORITIES (ALPHABETICALLY ARRANGED) ii

A. INTRODUCTION 1

B. ARGUMENTS ON ERRORS

No. 1: Maintenance 3

No. 2: Custody 8

No. 3: Contempt 14

No. 4: Settlement 15

No. 5: Bias 19

No. 6: Educational 22

C. CONCLUSION 22

APPENDIX

TIMELINE a

TABLE OF AUTHORITIES

Washington State Cases	Page #
Burrill v. Burrill, 113 Wn. App. 751 (Div. 1 2002)	2
DeRuwe v. DeRuwe, 72 Wn. 2d 404 (1967)	7, 25
In re Marriage of Ferree, 71 Wn. App. 35, 856 P. 2d 706 (Div. 2 1993)	4, 15, 17
In re Marriage of Horner, No. 27343-8-II, __ Wn. App __ (Div. 2 2002)	10
In re Marriage of Katare, 175 Wn. 2d 23, 283 P.3d 546 (2011)	10
In re Marriage of McDole, 67 Wn. App 884 (Div. 3 1992)	10
In re Marriage of Pape, 139 Wn. 2d 694, 989 P.2d 1120 (1999)	10
In re Marriage of Potts, 40 Wn. App 582 (Div. 1 1985)	10
In re Marriage of Rockwell, 157 Wn. App. 449 (Div. 1 2010)	8, 23
In re Marriage of Urbana, 147 Wn. App. 1 (Div. 2 2008)	8
In re Marriage of Washburn, 101 Wn. 2d 168 (1984)	8
In Re Parentage of Schroeder, 106 Wn. App. 343, 22 P.3d 1280 (Div. 2 2001)	10
Lavigne v. Green, 106 Wn. App. 12, 23 P. 3d 515 (2001)	18
State v. Browet, 103 Wn. 2d 215, 691 P. 2d 571 (1984)	17
Sullivan v. Sullivan, 52 Wn. 160, (1909)	7
Thompson v. Thompson, 56 Wn. 2d 244, 352 P. 2d 179 (1960)	15

Washington State Statutes	
RCW 7.21.010(1)	16, 17

RCW 26.09.090 6, 25
RCW 26.09.187 14, 15
RCW 26.09.191 13
RCW 26.09.260 12
RCW 28A.225.010 22

Washington State Court Rules
Wash. Super. Ct. Civ. R. 2A 4, 18

Federal Cases
Troxel v. Granville, 350 U.S. 57, 120 S. Ct. 2054 (2000) 12, 17
Washington v. Glucksberg, 521 U.S. 702 (1996) 12
Meyer v. Nebraska, 262 U.S. 390 (1923) 12

United States Constitution
U.S. Const. amend. I, (d), (e) 22
U.S. Const. amend. V, (d), (e) 23
U.S. Const. amend. VI, (a), (b), (d), (f) 23
U.S. Const. amend. VII, (a), (b) 23
U.S. Const. amend. VIII, (a), (b) 23
U.S. Const. amend. XIV, § 1. (c), (d) 22, 23

Treatises
Kenneth W. Weber, *Washington Practice, Family and Community Property Law*, 20 §34.6 (1997) 24
Winsor, *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, 14 Wash. St. B. News, 16 (Jan. 1982) 24

A. INTRODUCTION

Appellant, Becky Develle ("Becky"), respectfully replies to BOR (BOR), Marc Develle ("Marc").

Marc's BOR is in significant part an ad hominem attack on Becky rather than a legitimate legal argument. In it he makes sweeping condemnations of Becky. His comments, e.g., "she blew it," fail to show what it is that Becky purportedly blew and do not show from the record specifically what it is that Becky did contrary to law. His arguments are not all logical and they do not properly apply the law of Washington and the U.S. Constitution. His brief brings in a lot of irrelevant material to further complicate this appeal.

His complaint that this appeal is frivolous, BOR 21, distracts from the true legal debate: the lower court erred on many issues and Becky clearly spells that out in her opening brief.

Marc has made numerous false claims in his brief only some of which merit a response as the rest are outside the scope of this appeal. Reports to the court, by one adverse party against the other, do not equal proof. Yet that very presumption of truth on the part of Marc is at the heart of this complicated legal case. It is the essence of abuse of discretion, and it is the cause of the denial of Due Process rights for Becky.

Marc would like for this Court to believe that there was sexual abuse of Becky's daughter in the past or concurrent with the lower court's proceedings. However, there is no record of any such harm occurring in any record. The only thing on the record is Marc's repeated allegations.

Marc would like this Court to believe that Becky had failed to provide for her children in the area of nutrition, education, and safety and is therefore an unfit parent. As recapped, below, nowhere on the record was Becky found not to have provided food, shelter, supervision, or to get them to school on time. BOR 10 Marc provides no evidence.

In his brief Marc lists numerous case citations all but one of which are appellate cases outside of Division 2 and thus not binding on this case and does not support his case with applicable legal authority.

The case of *Burrill*, which Marc also cites, suggests that parties not be allowed to make false allegations and get away with it. This too is part of Becky's argument, that Marc's false allegations not be enabled by this Court.

Marc proposes Becky's opening brief did not conform to RAP 9.2 (b) on content, that Becky failed to provide an adequate record for review, that it is deficient in evidence that the lower court heard. BOR 22

Becky agrees that all of the record was not provided. This case is long and protracted and to avoid any compounding to that effect, Becky provided only those parts of the record necessary for this Court to evaluate the lower court's errors. For example, in one instance the lower court stated that Becky would lose custody for asking if her child had had a bad day at school. RP 167-169 It does not matter the source of the information; this Court has the task of deciding if it is abuse of discretion to remove custody from a mother for such words. Reports and records outside the scope of this appeal, prior to the lower court's errors, and all parts not pertaining to, were

specifically excluded. Becky was allowed by this Court to submit a partial report of proceedings

Marc has offered his own interpretation of the chronology of the court's proceedings and orders in this case which is not correct. Therefore this brief intends to make clear the issues, set the record straight, and ignore the irrelevant portions cited by Marc. To make these issues clearer, the following timeline is presented for review, in the appendix.

In summary, what is on review is whether the court erred in coercing a "settlement" upon Becky which makes for an illegal contract and is illusory. It is contrary to the law of the state of Washington to deny a party maintenance after 26 years of marriage. It is an abuse of discretion for the court to remove custody of Becky's children due to mere allegations of asking them if they had had a bad day at school, leaving them home alone on one occasion for 15 minutes RP 174, and for a single allegation of not complying with a past order of the court. It is a denial of Due Process not to allow experts to testify on her behalf. RP 318 It is contrary to the law of Washington to force a child under compulsory age to attend school. CP 141 This Court is asked to use the reasonable person standard to determine if an average person would suspect bias on the part of the court.

1. MAINTENANCE REVIEWED FOR MANIFEST ABUSE OF DISCRETION

Marc states,

> "There is no award of maintenance because the mother did not request one and the parties' agreement did not include an award of maintenance. BOR 2. ". . . she did not even plead for maintenance. .

. Moreover, Becky agreed to forego maintenance 'with the thought that she was getting the $1,000 in child support...'", "Becky expressly agreed when the court further advised that the $1,000 'will not be fixed.'" BOR 23-24

". . . [T]he father does not have the means to support his ex-wife." "Further, Becky fails to prove her need for maintenance. There is no record that she cannot support herself, apart from her self-serving and unsubstantiated declaration." BOR 24

"The court resolved property issues with specific orders to the mother and set over family support issues." BOR 11 (Emphasis added).

"Becky fails in any way to dispute the agreement's existence and its material terms. *In re Marriage of Ferree* . . ." BOR 16

Yet *Ferree* fits Becky's case, in actuality in which the husband brought a second set of final orders which he proposed reflected the original settlement but the court did not find substantiated. In this brief Becky shows that Marc brought a second set of final orders which did not reflect the original settlement yet the court signed them despite Becky's disagreement to it.

Wash. Super. Ct. Civ. R. 2A provides that,

" . . . no disputed agreement will be regarded by the court unless it was assented to in open court on the record, or unless the evidence is in writing and subscribed by the attorneys denying the same.

In *Ferree* counsel on both sides supplied evidence to the agreement of the settlement. In this case and unlike *Ferree*, Becky's attorney dissented from the subsequent, changed orders. RP 144 lines 24-25 The record shows that on September 12, 2012 when that record was supposed to be entered as final orders, additional negotiation between the parties occurred. There was no agreement between the parties on the record and Becky

refused to sign the documents. RP 145 The court stated that it was the order of the court and orders were signed. RP 145 lines 21-24

This issue necessitates a careful reading of the transcript, as well as notice that there was a two and one half hours off the record proceeding prior to the court's oral record of the "settlement" and that the on-record portion continues that discussion. This resulted in the terms of settlement becoming misconstrued. Appellant requests this Court take that into consideration.

When discussing fee arrangement, counsel for Becky said,

> "Excuse me, we've hit a snag here because Dad's got the lion's share of the income. . . . She's got $1,000." RP 41

Here Ms. Hoke is relying on the idea that Becky will have $1,000 maintenance to cover her expenses. Not child support.

In *Ferree*, the court stated,

> " . . . the party moving to have the agreement enforced must prove there is no genuine dispute over either the existence of the agreement or a material term thereof, unless relieved of that burden by discussion that occurred in open court."

Marc did not prove that there was no genuine dispute over the settlement yet he gives no argument to the many points on the record in which Becky objected. The Verbatim Report of Proceedings clearly shows the court said there would be some maintenance for Becky. RP 59 line 15 The subsequent negotiations in September prove that there was no agreement to the settlement begun in August. RP 86-145

Becky did not need to request maintenance when the court had stated

that there would be such. RP 59 Marc cannot both state that she did not request maintenance and that she agreed to forego maintenance without pointing to where that happened in the record. The record stated that she would get it so Marc cannot now state that it was never agreed to. RP 57 line 5, 59 line 15

The record does show that Marc will be paying financial support to Becky. RP 59 But nowhere on the record does it show that Marc objected to maintenance based upon his inability. He even paid one month of support to Becky in November of 2012. He cannot now bring that up on appeal. The truth of his financial status is that it improved by divorcing Becky. Marc's argument that he cannot afford to pay support to Becky is without merit and most importantly is irrelevant to this review.

Finally Marc claims that there is no record of Becky's financial need but later refers to her record of financial declaration as "self serving," and "unsubstantiated." CP 184 Becky does have a need for maintenance as she has been impoverished by the removal of maintenance. There was ample information provided in the pre-trial notebook to Becky's need and it was clearly noted that the parties had agreed that Becky would always be a stay-at-home wife and mother. The judicial notice of Becky's lack of employment history is sufficient to establish her need for maintenance.

RCW 26.09.090 ; Maintenance orders for either spouse — Factors.
(1) The maintenance order shall be in such amounts and for such periods of time as the court deems just . . .
(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently. . .

(c) The standard of living established during the marriage;
(d) The duration of the marriage;
(e) The age, physical and emotional condition . . . of the spouse seeking maintenance; and
(f) The ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse seeking maintenance.

In regard to factor 1(a) above, Becky does not have the ability to meet her own financial needs as was explained in pretrial memoranda and was the basis for the court ordering support. RP 59 In regard to factor 1(c), Becky's standard of living has dropped significantly while Marc's has risen. In regard to factor 1(d), this marriage lasted for 26 years and 3 months. In regard to factor 1(e), Becky is nearing 50 years of age with no work experience and no employment history. Her age makes it difficult to start a career. Becky's health history submitted prior to trial plus the record of Marc's abuse towards her have left Becky at a severe financial disadvantage.

In regard to factor 1(f) above, Marc is now in the family home and reporting an income of over $6,000 per month which is double what Becky received in family support. This excludes his rental income and income of other adults in the home, which he is not reporting.

> In *Sullivan*, " . . . 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; *DeRuwe*

The Supreme Court has stated,

> "The paramount concern in determining the size of a maintenance award is the post dissolution economic positions of each of the parties. Maintenance is a flexible tool by which the parties' standards of living can be equalized . . .", *In re Marriage of Washburn.*

Other appellate courts have followed this doctrine. *In re Marriage of Rockwell*, (Div. 1 2010), which has been upheld in all three appellate divisions, in looking at the length of marriage, states, "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."

> This Court has expressly upheld *Rockwell* in *In re Marriage of Urbana*, ". . . if its dissolution "decree results in a patent disparity in the parties' economic circumstances," we will reverse its decision because the trial court will have committed a manifest abuse of discretion." I*n re Marriage of Rockwell.* (emphasis added).

Marc has only offered appellate rulings outside Division 2 to support his argument. Becky brings in two controlling standards: Washington State statute and Supreme Court rulings. Both give financial support to Becky. The law is clear that Becky is entitled to maintenance after a lengthy marriage and Marc has the financial resources to provide maintenance. By law, Becky is entitled to half of Marc's income. She is requesting less than one third: $2,000 per month. Stripping Becky of maintenance violates both Washington state statute and case law."

2. REVIEW OF ABUSE OF DISCRETION IN DENYING CUSTODY

Marc did not address the unconstitutional vagueness of the terms for future ability to request increased visitation. CP 165 It can be presumed then that they are unconstitutionally vague and he tacitly agrees.

He writes in a tone presumptive of Becky as an unfit parent and of DJ as a threat to her children and a sexual predator. BOR 20 But all reports of sexual abuse come from unfounded allegations by Marc. Daughter Hanna has not ever reported being touched or harmed by anyone, and there is no evidence that any harm occurred.

Marc writes that the GAL stated the children had fears that the mother would hit them for talking with the GAL, therefore the GAL recommended no overnights with the mother. BOR 9 That is illogical reasoning and proactive justice. If Becky were prone to hitting the children as described then daytime visits would not prevent that. And it is mere hearsay and speculation without findings.

The GAL's report contained statements of what the children claimed they had heard in other conversations. This is hearsay. The child repeated hearsay and the GAL reported that hearsay. BOR 8-10 It is unreasonable for the trial court to find that Becky had not protected her daughter based on such reports. Credible eyewitness testimony should have been given greater weight than reports of unreliable hearsay. RP 249-259, 304-306

To support change in custody the court stated that Becky had been allowing Hanna to have contact with DJ. RP 168 lines 17-18. But the settlement allowed for these people to share a household. That contradiction of the court's ruling also goes to illusory promise. Becky was left in an impossible situation to win: how could they share a home and not have contact.

The final parenting plan, filed in September 2012, Marc is now calling

The final parenting plan, filed in September 2012, Marc is now calling an interim parenting plan. BOR 20 The truth is that a final parenting plan was filed. CP 141

Marc makes a claim that Washington does not have a presumption for the continuity of custodial parent. BOR 21 Yet three appellate divisions and the Supreme Court of Washington all have decided cases with that very holding: *In re Marriage of Potts*, (Div. 1), *In re Marriage of Horner*, (Div. 2), *In re Marriage of McDole*, (Div. 3).

> "Washington's legislative and judicial policies have long recognized the importance of 'custodial' continuity to a child who does not live with both parents." quoted from In re Marriage of Pape, (Wn. 1999).

Marc quotes *In re Marriage of Katare* to show that a court wields broad discretion in fashioning a permanent parenting plan. BOR 22 But *Katare*, discusses a court-ordered parenting plan, which contradicts Marc's main contention that the parties in this review settled by mutual agreement rather than by court order.

Marc quotes *In Re Parentage of Schroeder*, (Div. 2 2001). But This Court's holding actually supports Becky's argument:

> 1) A trial court does not abuse its discretion unless its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. 2) A decision or ruling is made for untenable reasons if it is based on an incorrect legal standard or the facts do not satisfy the requirements of the standard.

To remove custody because a mother asked if her children had had a bad day, or because she left them home alone, sleeping, on one occasion for 15 minutes, or because she has an incorrect belief, is manifestly unreasonable. To remove custody because of leaving the house in a bad

discretion.

Furthermore, the court barred Becky from having any involvement whatsoever in her children's school, including entering the building. Then the court accepted the GAL report which claimed that Becky was not supporting the children's education because she didn't visit the school. BOR 9-10 Becky was placed in an impossible situation. If she had gone to her children's school she would have been found in contempt yet followiung the orders she was found to be unsupportive of the children's education and thus unfit to have custody. CP 157 When Becky requested the court to reconsider the custody placement the court stated,

> "If I recall specifically leading up to trial, you were provided some certain things to have complied with, and it seemed like you didn't wish to comply with the court's orders. Based upon past experience . . . this court found your future performance was going to be lacking in the parenting function." RP 347 lines 5-10.

Supposed, yet not stated, actions of Becky from prior to trial were held against her during the reconsideration hearing for custody four months post trial.

But the court actually ruled that based upon, "Hanna being left alone with DJ and mother's testimony that mother does not consider DJ a threat.", that custody would change. CP 150

Marc made a false allegation to the GAL that Becky had entered the school against the court order, RP 71 and that was found not true. Marc failed to point to specific evidence in the record to prove his allegations.

The court stated on the record that because Becky allegedly asked her children if they had had a bad day at school, because she left the house in a

bad state, because she was homeschooling another child, and because her children had contact with DJ, and because of her testimony that she didn't consider DJ a threat, that the court would deny her custody. RP 167-169 That is an abuse of discretion. And it demonstrates bias of the court to accept allegations unilaterally only.

This type of control via review by the lower court which offers such sweeping power was ruled against in *Troxel.*[1] Additionally, RCW 26.09.260 provides that:

> (1) The court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that substantial change has occurred in the circumstances of the child or the nonmoving party. . . . (emphasis added)
>
> (2) in applying these standards the court shall retain the residential schedule established by the decree unless: . . . (c) The child's present environment is detrimental to the child's physical, mental,

---

[1] "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision."

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without Due Process of Law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." Washington v. Glucksberg. The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." Glucksberg at 720;

The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interest recognized by this court. More than 75 years ago, in Meyer v. Nebraska, . . . we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and to "to control the education of their own."

"We have recognized on numerous occasions that the relationship between parent and child is Constitutionally protected.

We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.

My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected through the Fourteenth Amendment.

> or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child;

RCW 26.09.191 allows for a parent's residential time to be restricted if certain of enumerated issues of the parent has been found. Becky has never been found to have any of these restrictions. However the record does show that Marc has a history of domestic violence.

> RCW 26.09.187 (3)(a) provides that:
>
> "The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child. . . ."

Becky has not been able to have this type of relationship with her children since custody was unlawfully restricted.

There was no petition for a modification of a parenting plan filed. The children were removed from Becky at a review hearing at which a contempt motion was brought without any basis. The court erred by changing custody in opposition to the statutes of RCW 26.09.191 and 26.09.187.

In June of 2013 the court ordered the parties to work out visitation between themselves in an attempt to lessen court appearances on the issue. As it currently stands Marc has full custody and Becky only gets visits when he allows it. This is less surety of visitation than under any previous parenting plans. Marc is in the position of having received full control of the children and Becky has no say at all. That is far from equitable.

The trial court erred 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 without procedural jurisdiction, from Becky when no allegations of child maltreatment were presented. Due Process was denied to Becky. This is an abuse of discretion for the trial court to make baseless custody changes upon unsupported allegations rather than upon evidence of an actual threat. Justice necessitates that the custody and parenting plan be set aside.

3. REVIEW OF CONTEMPT

Marc claims that several weeks after entry of the final orders, he moved for contempt based on concerns about the 11-year-old daughter, Hanna, being propositioned for sex. RP 214-216; CP 59-61, 429-430.

> "At this point, the father requested the children reside primarily with him." CP 64.

This is a false statement. This is not on the record with the contempt hearing in October 2012.

> "The court reiterated its findings that the mother failed to provide the basic needs of the children, including for education, nutrition and safety. . . . The court found the mother in contempt for violating the order to leave the house in good condition. The court resolved property issues with specific orders to the mother and set over family support issues." RP 352-353." BOR 10

As recapped, below, nowhere on the record was Becky found not to have provided food, shelter, supervision, or to get them to school on time. BOR 10

Marc suggests the lower court was proper in the change of custody for property dispute issues even though that is unlawful, RCW 26.09.190 and

that to impose those sanctions makes the contempt a criminal contempt.

Punishment of the parent for contempt may not be visited upon the child in custody cases. The custody of a child is not to be used as a reward or punishment for the conduct of the parents. "The court shall not consider conduct of a proposed guardian that does not affect the welfare of the child." RCW 26.09.190. *Thompson.*

Marc does not dispute that at the time of a contempt hearing the alleged contemnor must be given a reasonable opportunity to defend against the charges. Marc fails to address that Becky was denied the opportunity to offer expert witness testimony and multiple declarations attesting to the state of the house as a defense during the contempt hearing in December, 2012. RP 318 Marc fails to discuss: the elements of criminal contempt, the legal discussion of court procedures that were absent in the contempt proceeding, the oral ruling of the court permitting Becky to remove items from the home, that contempt and loss of custody are not appropriate for property settlements, and the issue of his failure to follow the orders of the court in cooperating in a property settlement. Marc does not disprove that Becky was denied a trial by jury for criminal contempt. Marc does not disprove that the sanctions against Becky were punitive according to. It is therefore presumed admitted.

This is a violation of the Washington and United States Constitutions. Becky is entitled to a jury trial for criminal contempt. To not be allowed to present a defense to a criminal contempt is a violation of Due Process Laws. Additionally, when Becky was found in contempt, she had no legal

counsel. Contempt charges are wholly inappropriate and are an abuse of discretion which must be reversed.

4. SETTLEMENT REVIEWED FOR COERCION, STRIKING UNFAIRNESS AND ILLUSORY PROMISES.

Marc argues that because the coercion did not happen on the record that it didn't happen. Later he argues that Becky should be afraid to not accept the court's "settlement." Marc stipulates Becky was indeed afraid which gives credence to Becky's argument that she was coerced into vocalizing and agreement. BOR 14

In his BOR, Marc takes the presumption of what a review period entailed but is not what is stated on the record. This supports Becky's argument that the settlement is indeed illusory. BOR 14

Marc states,

> "Indeed, throughout these proceedings, the trial court endeavored to be as specific as possible, a kind of micro-managing necessitated by Becky's conduct." BOR 15

This shows that the "settlement" was indeed not an actual agreement but a court ruling. Marc mentions Becky's conduct but fails to specifically mention which behavior was errant.

Marc asserts that the review period was built in to see if Becky would comply. Again, he would like this Court to believe that there have been issues of neglect or abuse on the part of Becky. But that simply never appeared on the record.

If the settlement is found to be valid then maintenance must be valid since it was included. RP 59 If the settlement is an invalid contract then the

terms should be completely renegotiated. Marc's attorney altered and then rewrote the dissolution final paperwork which was signed by the court. On the record, Becky objected. RP 145 But Marc cannot change the terms, via his attorney, after the fact and considering it a valid contract. The same action was found in fault in *Ferree*.

Nowhere did the settlement state that the court was reserving carte blanche the ability to micromanage this family; it was not stated in the terms. "Review" ended up being an ever-evolving list responding to Marc's unsubstantiated allegations. There was no way for Becky to have known, for example, that she could have her children removed due to her "belief." CP 151 Review with such sweeping powers was ruled against in *Troxel*.

Marc repeatedly stated throughout his BOR that Becky agreed. But Becky raised objections during the time that the settlement was recorded, RP 47, 61, 284, and in every subsequent court procedure.

Marc states that Becky failed to prove what is not on the record. While he is correct that Becky cannot prove what the court conveyed off the record to coerce her to settle, she has demonstrated in her opening brief, that there were off the record proceedings. And from reading what is on the record one can inductively discern the basis of that off the record settlement.

A two and one half hour gap of the record from a recess in the middle of trial during the afternoon of August 21, 2012 occurred without any explanation on the record. RP 35 When the proceedings resumed counsel stated that the parties had reached an agreement. How did two adverse

contested previously? What took nearly two and a half hours of recess time?

This shows that the court had already been consulting when the court said, "You may consult still if you'd like." RP 35 line 20.

Counsel for Becky, Ms. Hoke, said, "I'm sorry, but when we were talking back there the judge said . . . " RP 37 lines 19-21 This shows that the court had been directing the settlement from chambers or "back there". Also at RP 49 lines 12-16

The court stops to review his own notes to the terms demonstrating that he had participated during the off the record settlement. RP 35, 44

A question arose about the children's schedule; the court ruled. RP 35, lines 23-25 Then the court went on to explain the reason for the court's decision. RP 38 lines 17-21 Another explanation of the "decision" was offered. RP 41 lines 12-25 And again. RP 43 lines 9-19 Also RP 85 line 24, " . . .my intent . . ." And RP 88, 139 lines 1-2 And the court made orders in this case: RP 116 lines 18-22, 89 line 19, 95 lines 22-24, 107 lines 4-5

The court revised the ruling, RP 44 line 22, made a ruling on vehicles, RP 47-48, and ruled on a parenting plan. RP 51-52, 53 line 20 The court added additional rules to the settlement. RP lines 21-23 The court acknowledged that Becky did not agree with the settlement. RP 61, 284

Settlement agreements are governed by general principles of contract law, *Lavigne v. Green.* CR 2A, supra, precludes enforcement of this settlement because the dispute is genuine.

In terms of coercion it is clear on the record that Becky did not agree and that it was the court which ordered the settlement. A coerced settlement is invalid under contract law and also is invalid for illusory promises. The terms of "review" are not specified. The record of the settlement included maintenance to Becky but the orders entered stated that parties had agreed to forego that. The court noted that Becky was not in agreement. Res ipsa loquitor this settlement is invalid for three reasons: coercion, illusory promises, and lack of consideration.

5. STANDARD OF REVIEW ON BIAS

Marc does not refute the court's abuse of discretion in ordering retroactive child support payments, nor Becky's contention that the court refused to hear the issue of homeschooling prior to trial, nor Becky's contention that the orders reflecting the "settlement" written by her attorney were rejected while the subsequent orders written by Marc's attorney were accepted over the objection of Becky's counsel. RP 144

In the Opening Brief of Appellant, Becky offers six pages of instances of judicial bias. Marc makes the argument for Becky by stating her objection that the court did not credit her evidence. BOR 17

Becky agrees with Marc's assertion that it is the court's job to resolve conflict in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of witnesses. BOR 17 However, the eyewitness testimony of an honorable US soldier was ignored, while the hearsay testimony by the GAL was accepted as fact. RP 305-306

The lower court would not allow Becky to present a defense to

contempt. RP 318 CP 180. The lower court stated that homeschooling made Becky an unfit parent and the father was a better choice because he had not homeschooled. RP 348

The test in judicial bias is the reasonable mind standard. Would a reasonable person suspect bias on the part of the court?

A reasonable mind would expect a judge to make equitable rulings in a divorce. But in this case Marc received almost the entire marital community: In a marriage of over 25 years, Becky was denied any maintenance at all despite repeated requests and overwhelming need. RP 122 lines 8-10, 123 lines 18-20 Becky was left financially destitute. Marc's financial standing has increased by this divorce.

A settlement was coerced from Becky by the court. RP 145, 284 lines 19-20

Marc does not discuss the missing parts of the judicial record: what happened during the 2.5 hours during which counsel were called back into chambers. Secreting such important parts of a trial is highly inappropriate. To then declare on the record that the parties had reached an agreement is blatant dishonesty on the part of the court. RP 35 lines 17-19

Deficiencies in Marc's parenting abilities were ignored by the court. Marc's abusive past and addictions were ignored while unfounded allegations against Becky were considered. Indeed, at one point, "The court also warned against the mother further undermining her credibility by raising allegations against the father." BOR 8. When the father made allegations against the mother the lower court accepted it as fact, without

question, and then ruled against the mother. But when the mother suggested the father was not behaving appropriately the court stated that her credibility with the court was diminished by her doing so. RP 161-162 Then the court stated that there are no allegations against the father. RP 305 When the mother denied false allegations the court stated that she is guilty of minimizing everything. RP 161-162. When the father denied allegations brought by the mother, the court accepted his denial at face value. This is the very essence of bias.

One party has received preferential standing from the court. The discussion recorded at RP 71 lines 1-12 and 73 lines 10-18 and 74 lines 18-19 and 77 lines 21-25 and 78 lines 1-12, shows that the court accepted false allegations brought by the father and held against Becky by the court without evidence to back this.

Credible eyewitnesses — a U.S soldier, and an educational expert — testified at trial. RP 3, 248. Yet their testimonies were ignored by the court. Testimony showed that in the past the father was not involved in the children's lives and currently has other people helping him to raise the children. RP 239 The mother had been virtually the sole parent raising the children all of their lives. In response, the court stated that the father had a stronger relationship with the children, questioned the mother's past and future potential to parent, and stated that the fact that the mother had homeschooled prior to any judicial proceedings made her unfit to parent. RP 303-305 Then the court accepted the father's perspective as fact. RP 306

The statement by the court, "That she's now home schooling this D.J. is beyond me.", demonstrates a clear bias by the court against homeschooling. RP 168 (Becky's relationship with any child not a party to this case is outside of the court's jurisdiction.) Refusing to hear an issue prior to trial and ruling on that clearly demonstrates prejudice. RP 61 lines 12-13

This case lists six assignments of error which stem from the trial court's bias. In the context of overwhelming evidence and such a drastic and negative outcome to which Becky has steadfastly objected, any reasonable mind would suspect bias.

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

6. REVIEW OF EDUCATIONAL ISSUES

Marc has not raised any defenses on this issue. He has not addressed that the court erred in applying public school standards to the children contrary to RCW 28A.225.010(4)(c) and RCW § 28A.225.010

Therefore the error raised by Becky should be affirmed by this Court.

C. CONCLUSION

Marc did not refute Becky's assertion that her First Amendment rights to freedom of religion, speech and assembly were violated by the lower court when it prohibited her from discussing homeschooling, taking her kids to homeschool events, teaching them according to her values and

religious views, volunteering at her children's school and participating in the PTA. Marc failed to address Becky's assertion that ordering a child under compulsory attendance age into public school is unconstitutional.

Marc failed to refute Becky's assertion that the contempt charge against her equaled a criminal contempt, that her expert witness and testimony were excluded from her defense, and he failed to refute that she did not have counsel on January 25, 2013, when she was found in contempt. Because of these violations, her rights under the Sixth and Seventh Amendments to the U.S. Constitution were violated.

Marc did not refute Becky's assertion that her Due Process rights under the Fifth Amendment were violated when the court upon hearsay, without allowing a defense, removed custody of her children. Becky has rights under the Eighth Amendment against cruel and unusual punishment. There is nothing more cruel to a mother than to remove her children.

Becky has a right under the Fourteenth Amendment to Equal Protection and Due Process. Marc has not proven that sanctions against Becky were appropriate according to time, procedure, and Due Process.

Marc did not disprove that court proceedings were kept off of the record which is the basis for Becky claiming abuse of discretion, bias, and a coerced settlement. But Marc has demonstrated in his brief that there is a conflict in meaning which proves the error of illusory promise. In light of all of these errors a reasonable person would suspect bias.

Marc did not supply binding legal authority in his brief. He did not prove that the court had valid legal grounds to remove custody from Becky.

Marriage of Rockwell sets the standard:

> When the parties have been married over 25 years, the court's job is to put the parties in equal financial positions for the rest of their lives. The income earner is at the peak of their earning ability; . . . It is a sad but hard truth, that people over 50 generally do not start and build successful careers. Long term maintenance, sometimes permanent, is presumably likely to be used unless the properties accumulated are quite substantial, so that a lopsided award of property would permit a balancing of the positions without (much) maintenance." Winsor, Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions.
> One factor in awarding maintenance is the standard of living experienced during the marriage. An acceptable method is equalizing incomes for an appropriate period of time. Weber, Washington Practice, Family and Community Property Law (Emphasis added)

There are two commanding sources of law which apply to this case: statute and Supreme Court decision. For case law, the Washington Supreme Court has ruled that, ". . . the court must consider the necessities of the wife and the financial ability of the husband." Then, it should take into consideration the age, health, education and employment history of the parties and their children, and the future earning prospects of all of them.

> ". . . it is the economic condition in which the decree will leave the parties that engenders the paramount concern in providing for child support and alimony and in making a property division. . . .
> "Abuse of Discretion. Although the Supreme Court will not substitute its judgment for that of the trial court in questions of child support, custody, alimony, and property division except where there has been a manifest abuse of discretion, it will, if shown some abuse of discretion, correct the decree to ameliorate or remove if possible the inequities fostered by it." *Deruwe*, (Emphasis added)

In statute there is RCW 26.09.090 which fully applies regarding the financial resources of the parties, standard of living during the marriage, the

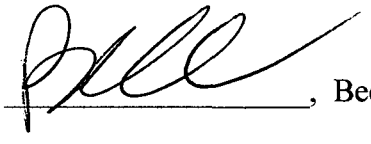
duration of the marriage as well as the age and condition of Becky, Marc's ability to pay; and in Becky's case clearly this should have ended with an order for regular and substantial maintenance.

By all legal standards Becky's rights were violated in the loss of custody of her children.

There are a number of glaring court errors which justice demands be reversed.

Wherefore Becky prays this Court will grant the relief requested and thus serve Justice.

Respectfully submitted this 3rd day of November, 2014.

 , Becky Develle

TIMELINE

August 2012: Dissolution Trial

Settlement was coerced during two hours of off the record court proceedings. RP 35

The court acknowledged that Becky is not in agreement with the settlement. RP 61

"Maintenance" was put into settlement. RP 59

The court stated on the record that Becky should retain custody and that there are not limiting factors, RP 64, lines 5-7, 10-12.

September 7, 2012: Entry of Orders

Becky's attorney submitted final orders which were denied by the court. CP 136

Subsequently a special set hearing was scheduled for September 12, 2012.

September 12, 2012: Entry of Orders

Final orders entered differently from terms stated at trial. CP 139-142

> Marc had a new set of final decrees drawn by his attorney and signed by the court. Ipso facto the terms that Becky and her counsel both understood to be that of the "settlement" were changed by opposing counsel and the lower court allowed.

Additional negotiations to the settlement added to the record. RP 82-148

Becky openly objects to terms on the record, refuses to sign. RP 151

Custody of the children was ordered 60% to mother, 40% to father.

October 12, 2012: Review Hearing

Custody removed from Becky. CP 150

> The court stated that because Becky asked her children if they had had a bad day at school; that she had left the house in a bad state (upon move out); that because she is homeschooling another child (not a party); and that because of her children having contact with DJ, that the court would change custody. RP 167-169
>
> The court order states that custody would change based on, " . . . mother's testimony that mother does not consider DJ a threat." CP 150

November 2012: Support payment to Becky

Becky received maintenance payment.

> One month of "family support" or maintenance was ordered for Becky for November after she no longer had custody. RP 200

December 2012: Trial

Becky's visitation with children restricted.

No evidence was offered that the children's needs of the children were in any way not met.

Court declines to hear contempt issue.

Parties ordered to work it out. RP 317 Expert witness denied from testifying on contempt. RP 318

January 25, 2013: Show Cause hearing

Becky found in contempt.

No argument allowed from Becky. RP 362

Arguments from prior to trial, August 2012, were held against Becky to deny reconsideration of custody. RP 344 lines 11-15, 345 lines 3-8, 346 lines 19-23, 347 lines 1-4

The court does not review expert and supplemental witnesses for Becky who testified at trial, only for Marc. RP 344-347

Becky was denied counsel and trial for contempt.

Maintenance was reserved. RP 352, 379, 383

June 2013: Motion Hearing

Visitation schedule changed.

New visitation schedule to be worked out between the parties. De facto, Becky may have visitation any time that Marc allows. No set times established. No restrictions on Becky. (No record of this latest development provided for this appeal.)

COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

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

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

1. That I am the Appellant in this case.

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

3. That I mailed to the Court of Appeals one paper copy of my appellate reply brief on November 3, 2014.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Vancouver, WA on November 5, 2014

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