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No. 76954-I
(consolidated with Nos. 77155-8-I and 77494-8-I)

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

Jessica Bodge, LLP,

Appellant,

v.

Brian Bodge,

Respondent

ON APPEAL FROM
SNOHOMISH COUNTY SUPERIOR COURT
(The Honorable Eric Z. Lucas)

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington

Other Cases

Statutes

Rules of Appellate Procedure

I. INTRODUCTION

"Washington State has a clear public policy of protecting domestic violence survivors and their children and holding domestic violence perpetrators accountable."[1] In a relocation trial, the trial court failed to impose RCW 26.09.191(1) or (2)'s mandatory limitations, switched the children's primary residential parent from the survivor to the perpetrator, authorized joint decision making, and required alternative dispute resolution prior to court action. Despite this, the Court of Appeals affirmed believing Father had completed domestic violence treatment. After being apprised Father had never completed domestic violence treatment, but instead started treatment twice and was involuntarily discharged or quit each time he started, the Court of Appeals amended its Opinion, but still affirmed the trial court's decision. Under these circumstances, should this Court accept review, once again articulate our State's public policy surrounding abusive parents and their children and clear up once and for all how courts are to apply the mandatory restrictions in RCW 26.09.191(1) and (2).

[1] *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 221, 193 P.3d 128, 138 (2008)

II. PETITIONER'S IDENTITY

Petitioner JESSICA BODGE ("Mother") is the Appellant at the Court of Appeals and the Petirioner at the trial.

III. CITATION TO APPELLATE DECISION TO BE REVIEWED

Mother requests the Washington Supreme Court review the Washington State Court of Appeals Unpublished Opinion in *Matter of Marriage of Bodge*, 76954-5-I, 2018 WL 4215618, at *10. f.n. 24 (Wash. Ct. App. Sept. 4, 2018), opinion withdrawn and superseded on reh'g in part sub nom. *Bodge & Bodge*, 76954-5-I, 2018 WL 6181740 (Wash. Ct. App. Nov. 26, 2018) (the "Opinion," **copy attached hereto**).

IV. ISSUES PRESENTED FOR REVIEW

A. Whether the Opinion violated Washington's public policy by failing to impose mandatory limitations on decision making, dispute resolution and the perpetrator's residential time with the minor children.

B. Whether the Opinion is contrary to RCW 26.09.191(1) and (2) by failing to impose mandatory limitations on decision making, dispute resolution and the perpetrator's residential time with the minor children.

C. Whether the Opinion is contrary to RCW 26.09.191(2) by allowing the trial court to lift otherwise mandatory domestic violence restrictions when the perpetrator has not completed domestic violence

treatment and both experts testified that his current conduct of minimizing and justifying his behavior and blaming the victim are cause for concern that any domestic violence treatment that he received was ineffective.[2]

C. Whether the Opinion violated public policy when allowing the trial court to lift a domestic violence finding or restriction toward the perpetrator's victim.

D. Whether the Opinion is contrary to RAP 7.2(a), (c) and (e) when it allowed the trial court to modify its May 2017 final decisions that were being reviewed by the Court of Appeals.

E. Whether the Court of Appeals abused its discretion in denying Mother's request for attorney fees when Father did not contest an award of appellate attorney fees and where the survivor Mother makes $2,304 net per month and the Father makes $34,907.39 per month in net income.

[2] "Domestic violence experts for both Brian and Jessica testified that a perpetrator blaming the victim, claiming self-defense, or changing the narrative about the incident would be concerning or indicate that domestic violence treatment was ineffective." *Bodge & Bodge,* 76954-5-I, 2018 WL 6181740, at *2 (Wash. Ct. App. Nov. 26, 2018)

V. CASE STATEMENT

For continuity, the relevant facts are included with the arguments.

VI. ARGUMENT

A. Conflicts with Decisions of this Court.

1. When a parent has engaged in a history of acts of domestic violence, trial courts are prohibited by Statute and public policy from allowing joint decision making and alternative dispute resolution.

The Opinion conflicts with a decision of this Court. In *Caven v. Caven*, 136 Wn.2d 800, 808, 966 P.2d 1247, 1250–5 (1998), this Court affirmed the Court of Appeals, which held, "Because the statute requires sole decision-making upon a finding of a history of domestic violence, the trial court abused its discretion in awarding mutual decision-making." *In re Marriage of C.M.C.*, 87 Wn. App. 84, 89, 940 P.2d 669, 671 (1997), aff'd sub nom. *Caven v. Caven*, 136 Wn.2d 800, 808, 966 P.2d 1247 (1998). *See*, *also*, RCW 26.09.191(1).[3] *There is no exception to this statutory requirement*. Despite this, the Opinion conflicts with the rule announced in *Caven*.

[3] The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct…or (c) a history of acts of domestic violence as defined in RCW 26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy.

B. Conflicts with Decisions of the Court of Appeals.

1. When a parent has engaged in a history of acts of domestic violence, the restrictions prohibiting joint decision making and alternative dispute resolution are absolute and the restrictions on residential time can only be waived upon express findings not made in this case.

There is conflict between the Opinion and the Court of Appeals decision in *Mansour v. Mansour*, 126 Wn. App. 1,106 P.3d 768, 773 (2004), publication ordered (Feb. 10, 2005). There, the Court of Appeals held that "Once the court finds that a parent engaged in physical abuse, it must not require mutual decision-making." *Mansour* 126 Wn. App. at 10. *Mansour*, reading RCW 26.09.191(1) in conjunction with RCW 26.09.187(2)(b)(i) also states that trial courts must award sole decision maker to the parent who has no RCW 26.09.191 limitations against them. *Id*.[4] Here, the trial court refused to remove RCW 26.09.191 history of engaging in acts of domestic violence restrictions against the perpetrator, at least as to the survivor. Pursuant to RCW 26.09.191(1), 26.09.187(2)(b)(i), and *Mansour*, the trial court was, therefore, obligated to award sole decision making to Mother. The Opinion conflicts with *Mansour*.

[4] RCW 26.09.187(2)(b)(i) provides "The court shall order sole decision-making to one parent when it finds that: (i) A limitation ***on the other parent's*** decision making authority mandated by RCW 26.09.191.

The Opinion also conflicts with the Court of Appeals decision in *Kinnan v. Jordan*, 131 Wn. App. 738, 129 P.3d 807 (2006). In *Kinnan*, the Court of Appeals held the trial court erred in not following the mandates in RCW 26.09.191(1) and (2). *Kinnan*, 131 Wn. App. at 752-53. There, the key flaw was the trial court made no finding that the purported modification was in the child's best interests. The same flaw exists in the parenting plan under review in this case.

The Opinion also conflicts with *In re Marriage of Stewart*, 133 Wn. App. 545, 137 P.3d 25 (2006). It holds, "RCW 26.09.191(2)(a) provides that in parenting plans, residential time with a child must be restricted where there is a pattern of emotional abuse of the child or a history of acts of domestic violence." *Stewart*, 133 Wn. App. at 553.

The Opinion conflicts with *Matter of L.H.*, 198 Wn. App. 190, 194, 391 P.3d 490, 492 (2016). It holds, "Restrictions on a parent's decision-making and residential time are mandatory if the trial court finds that the parent has '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.'" Because

the restrictions are mandatory, they cannot simply be ignored or swept under the rug by the lower courts.

The trial court also provided that the domestic violence restrictions against the Father toward the Mother would be lifted if Father successfully completed domestic violence treatment. There is no provision that allows courts to remove domestic violence restrictions in their entirety. In fact, that proposal conflicts with *LH* that requires a written finding where there has been a "***history of domestic violence***." *LH*, 198 Wash. App. at 194.

The Opinion conflicts with the Court of Appeals unpublished decision in *In re Marriage of Moody*, 143 Wn. App. 1025 (2008) (UNPUBLISHED). There, "the trial court not only failed to restrict Moody's residential time with the children as required under subsection (2), but made [the perpetrator] the primary custodial parent after imposing discretionary limitations on [the survivor's] visitation and parental rights based on RCW 26.09.191(3) factors." *Id*. Despite the issues being identical, the *Moody* court reached the opposite conclusion and reversed the trial court because it did not make the required findings to remove the residential time

restrictions[5] and because it could not remove the absolute prohibition on joint decision-making and alternative dispute resolution. *Id*.

The Opinion also conflicts with the recent decision in *Burke v. Burke*, 50141-4-II, 2018 WL 4600925, (Wash. Ct. App. Sept. 25, 2018). There, the trial court made a finding that a parent had engaged in acts of domestic violence for the purposes of RCW 26.09.191, but ordered joint decision making. *Burke*, 2018 WL 4600925 at *2. The Court of Appeals reversed stating, "the trial court could not order joint decision-making under RCW 26.09.191. Therefore, the trial court abused its discretion in ordering joint decision-making." *Burke* at *3.

C. Substantial Public Interest.

This Court's latest pronouncement on domestic violence, *Rodriguez v. Zavala*, 188 Wn.2d 586, 398 P.3d 1071, 1077 (2017), and the public policy previously articulated in *Danny v. Laidlaw Transit Servs., Inc.,* 165 Wn.2d 200, 193 P.3d 128, 133 (2008), are

[5] In *Moody*, the trial court found "The trial courts finding that "Mr. Moody has taken steps to address his addiction and his use of violence" does not satisfy the statute's specific requirements. The trial courts finding that "Mr. Moody has taken steps to address his addiction and his use of violence" does not satisfy the statute's specific requirements." *Id.* This was held to be insufficient. *Id*.

not well-served by the Opinion. In *Rodgriguez*, this Court properly determined that,

> Scholarly research supports the conclusion that exposure to domestic violence is a simpler, more insidious method of inflicting harm. While exposure to abuse may not leave visible scars, the secondary physical and psychological effects of exposure are well documented. (Citations omitted).
>
> In addition to witnessing violence, hearing and seeing its effects on loved ones may harm a child's brain development and lead to learning disabilities, put children under emotional stress, and contribute to an increase in anxiety, sleep disorders, and posttraumatic stress disorder. (Citations omitted).
>
> More importantly, our legislature has recognized that domestic violence is "at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse."(Citation omitted).
>
> Ample evidence supports the view that direct and indirect exposure to domestic violence is harmful.

Rodriguez, 188 Wn.2d at 597–98.

The *Rodriguez* pronouncement flows directly from this Court's decision in *Danny* where it declared:

> The legislature has repeatedly and unequivocally declared that domestic violence is an immense problem that impacts entire communities. *E.g.,* Laws of 1992, ch. 111, § 1 (declaring that "[d]omestic violence is a problem of immense proportions affecting individuals as well as communities"); Laws of 2004, ch. 17, § 1(1) ("Domestic violence, sexual assault, and stalking are widespread societal problems that have devastating effects for individual

> victims, their children, and their communities."); RCW 10.99.010 (noting the "serious consequences of domestic violence to society and to the victims"); Laws of 1991, ch. 301, § 1 ("[T]he community has a vested interest in the methods used to stop and prevent future violence."); *see also* Washington State Task Force on Gender and Justice in the Courts, Final Report 18 (1989) (noting the idea that domestic violence is a " 'family matter' " is a gender biased belief).

Danny v. Laidlaw Transit Servs., Inc., 165 Wn.2d 200, 214–15, 193 P.3d 128, 135. It further declared:

> The legislature's consistent pronouncements over the last 30 years evince ***a clear public policy to prevent domestic violence***—a policy the legislature has sought to further by taking clear, concrete actions to ***encourage domestic violence victims to end abuse, leave their abusers, protect their children, and cooperate with law enforcement and prosecution efforts to hold the abuser accountable***. The legislature has created means for domestic violence victims to obtain civil and criminal protection from abuse, established shelters and funded social and legal services aimed at helping victims leave their abusers, established treatment programs for batterers, created an address confidentiality system to ensure the safety of victims, and guaranteed protection to victims exercising their duty to cooperate with law enforcement. The legislature's creation of means to prevent, escape, and end abuse is indicative of its overall policy of preventing domestic violence. ***This public policy is even more pronounced when a parent seeks, with the aid of law enforcement and child protective services, to protect his or her children from abuse***.

Danny, 165 Wn.2d at 212–13.

This Court based its public policy pronouncement on the changes to domestic violence legislation over the past 40 years. "As early as 1979, the legislature recognized that domestic violence is a community problem that accounts for a 'significant percentage' of violent crimes in the nation and is disruptive to "personal and community life.'" *Danny*, 165 Wn.2d at 208–09 (*citing* RCW 70.123.010). "At that time, the legislature declared 'that there is a present and growing need to develop innovative strategies and services which will ameliorate and reduce the trauma of domestic violence.'" *Id*. In the same year our Legislature enacted RCW ch. 10.99 and stressed "the importance of domestic violence as a serious crime against society and [sought] to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide." *Id*. citing RCW 10.99.010.

Five years later, in 1987, our Legislature enacted the mandatory restrictions on residential time for a domestic violence perpetrator "unless the court expressly finds that the probability that the conduct will recur is so remote that it would not be in the child's best interests to apply the limitation or unless it is shown not to have had an impact on the child." Laws of 1987 ch. 460 §10(2).

In 1992 the Legislature found that "Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more." *State v. Dejarlais*, 136 Wn.2d 939, 944, 969 P.2d 90, 92 (1998) citing, Laws of 1992, ch. 111, sec. 1; and *Danny* at 208-09, citing Laws of 1992 ch. 111, §1.

In 2005, the Legislature found domestic violence victims "have the highest need in terms of legal services," but "do not have access to legal services and do not know their rights under the law." *Danny,* 165 Wn.2d at 211–12, citing, H.B. Rep. on H.B. 1314, at 3, 59th Leg., Reg. Sess. (Wash.2005).

Finally, this Court has recognized that, "Even after separation, batterers use the children as pawns to control the abused party." *State v. Veliz*, 176 Wn.2d 849, 869, 298 P.3d 75, 85 (2013) (in dissent) citing, Wash. State Gender and Justice Comm'n, Domestic Violence Manual for Judges 2-36 (rev. ed. 2006).

Here, the trial court switched three minor children's primary parent from the survivor, Mother, where the trial court described them as flourishing to the Mother's abuser without making the findings required by RCW 26.09.191(2)(n) and also ordered joint decision making and alternative dispute resolution prior to court action. All three actions contravene the public policy pronouncements in *Rodriguez*, *Danny* and *Dejarlais*.

. D. Attorney Fees

Mother has a right to attorney fees and the Court of Appeals abused its discretion in not awarding fees. The purpose is to allow a financially disadvantaged parent to present his or her case without financial hardship. *Frazier v. Frazier*, 174 Wash. App. 1003, 972 P.2d 466 (2013). Here, the trial court abused its discretion in not awarding Mother her attorney fees.

RAP 18.1 allows attorney fees on appeal on the same basis as at trial. RCW 26.09.140 allows attorney fees on appeal based on need and ability to pay. Here, Father has an ability to pay (#35,000 per month in net income) and Mother does not (less than $3,000 per month in net income and owes her attorney over $50,000 in appellate fees).

RESPECTFULLY SUBMITTED December 26, 2018.

WESTERN WASHINGTON LAW GROUP, PLLC

/s/ Robert J. Cadranell
By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Petition for Review to the following:

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Signed this 26th day of December, 2018 Edmonds, Washington.

/s/ Lindsey Matter

Lindsey Matter

WESTERN WASHINGTON LAW GROUP, PLLC

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