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No. 66551-1-I

King County Superior Ct. No. 09-3-08031-7

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

Marr Paul Madden
Appellant,
v.

Karen Lynn Madden,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mariane C. Spearman

APPELLANT'S OPENING BRIEF

Marr Madden, Pro Se

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A.
INTRODUCTION

This is a dissolution that resulted in a six day trial. There is undisputed evidence that Karen Madden has a history of domestic violence against me, our three boys and our property, which must trigger automatic residential and decision-making restrictions under Washington state law. There are also legal questions regarding discovery which severely impacted my case.

B.
ASSIGNMENTS OF ERROR AND ISSUES

1. The court erred in not applying residential restrictions upon Karen as required by RCW 26.09.191(2)(a)(iii).

ISSUES

There is undisputed testimony detailing Karen's history of assaults, threats and acts of violence against me, our children, and our property. Did the court err in not placing restrictions on her as required by RCW 26.09.191(2)(a)(iii)?

If residential restrictions are mandated under RCW 26.09.191(2)(a)(iii), are they the controlling factor when determining the residential schedule?

2. **The court erred in not applying decision-making restrictions upon Karen as required by RCW 26.09.191(1)(c).**

ISSUES

Again, there is undisputed testimony detailing Karen's history of assaults, threats and acts of violence against me, our children, and our property.

If decision-making restrictions are mandated under RCW 26.09.191(1)(c), are they the controlling factor when determining decision-making responsibilities?

3. **The court erred in denying Marr's pre-trial discovery request for equal access to family and personal financial, insurance, medical and other records located in the family home.**

ISSUES

These records were not obtainable by any other means and were used by Karen for trial.

Was this an abuse of discretion that denied Marr the opportunity to present evidence in his defense?

4. **The court erred by excluding family calendars as evidence at trial that would have shown critical dates and events vital to Marr's position that he was the primary parent.**

ISSUES

The trial court excluded family calendars which had details of events for the past three years.

Did the court deny me the right to effectively present my case in denying the calendars because the court stated she didn't understand them and stating they weren't going to 'sway' her one way or the other?

Was this an abuse of discretion?

5. **The court erred by denying my motion for discovery of joint counseling records.**

ISSUES

Karen admitted we started joint counselor together.

Did the court err by denying my access to these records?

6. **The court erred in Finding of Fact 2.13, Continuing Restraining Order, by continuing a restraining order and finding Karen "...has a reasonable fear of harm from Marr and that he has a history of controlling behavior, an abusive use of conflict, and an inability to control his anger."**

ISSUES

Are these findings supported by substantial evidence?

7. **The judge erred by awarding attorney fees to Karen for Marr's supposed intransigence.**

ISSUES

To the extent the court was to rely on my conduct after the settlement agreement, was there substantial finding that I was intransigent in that regard?

8. **The court erred in Finding of Fact 2.19, Parenting Plan, by finding Marr was emotionally abusive and financially controlling.**

ISSUES

Was there substantial evidence that Marr was emotionally abusive?

Was there undisputed evidence that Karen bought whatever she wanted, I paid for it and she had separate financial accounts where she deposited her earnings and had substantial balances in those accounts?

Was this finding an abuse of discretion by the court?

Would Marr's discovery request for financial records from the family home have further supported his defense that he was not financially controlling?

9. **The court erred in Finding of Fact 2.19, Parenting Plan, by finding Marr was verbally abusive.**

ISSUES

Was there substantial evidence to find that Marr was verbally abusive?

Did the court consider Karen's admitted acts of verbal and physical abuse towards me and the children?

Was this finding an abuse of discretion?

10. **The court erred in Finding of Fact 2.19, Parenting Plan, by finding Marr sent abusive emails to Karen.**

ISSUES

Karen presented only two emails from many years of communications. All of our emails were civil and without profanity from either party.

Are two emails enough evidence and did the court consider the full email chain to determine context before making this finding?

Was there an abuse of discretion?

11. **The court erred in Finding of Fact 2.19, Parenting Plan, by finding Marr used conflict as a weapon to the detriment of the children.**

ISSUES

Was there substantial evidence to support the finding I used conflict as a weapon?

12. **The court erred in Finding of Fact 2.19, Parenting Plan, by making the finding, "Mr. Madden claims ... her refusal to have sex with him or engage in sexual activity with him at his preferred frequency will impact their sons' sexual development."**

ISSUES

Is there evidence that I ever said this? This finding is unsupported by the evidence.

13. **The court erred in Finding of Fact 2.19, Parenting Plan, by finding "The court finds that Mr. Madden's abusive use of conflict has negatively impacted the boys and creates a serious risk of ongoing psychological harm."**

ISSUES

There is no substantial evidence that there was an abuse of conflict in the courts and certainly there was never any evidence presented that it "negatively impacted their children".

Was this finding an abuse of discretion?

14. **The court erred in finding abusive of conflict by Marr warranted 26.09.191 restrictions.**

ISSUES

Was there sufficient evidence to warrant this finding?

Was this an abuse of discretion?

15. The court erred in finding abusive of conflict by Marr which warranted 26.09.87(2)(b)(i) restrictions.

ISSUES

Was there substantial evidence to warrant this finding?

Was this an abuse of discretion?

16. **The court erred in applying RCW 26.09.004(3) to define the primary parent.**

ISSUES

Did the court err in applying the wrong standard to define the primary parent?

C.
STATEMENT OF THE CASE

This is a case where the father is the primary parent to three young sons, works from home and is the victim of domestic violence perpetrated by his (ex)wife.

Karen and I were married in October 1997. We have three sons; twins, age 10, and another, age 6. Karen is 43, I am 51 and we are both in good health. I am employed by Boeing as a Security Policy Writer, work from home, and have extremely flexible hours. RP II 376@14. I typically start work at 6:00 am before the kids get up and then help them get ready for school. I then work until 3:00 pm when they need picking up from

school. I sometimes work while they are home in the afternoon or later at night after they go to sleep. About once per week, I attend a brief meeting at a Renton office.

Karen has a BS degree in Biology and worked as a research technician at a local biotech firm earning $55,000 per year in 2000, before the birth of the twins that year. She stayed home with the children and she currently babysits in the family home and states she can earn $1,500 per week. RP II 373@2. She is currently taking night classes to be a pre-school teacher.

Shortly after our marriage Karen was diagnosed with depression and anxiety. RP I 113@2, RP II 384@21, She took prescription medication and saw a counselor, unbeknownst to me. CP 945@11. Shortly afterwards, we purchased a house and had twin boys in 2000. Our relationship grew contentious over the years and about 8 years ago, when the boys were 18 months old, she approached me one evening and said she was leaving me and taking the boys and moving to California. RP III 579@3-11, RP I 119@7-19, CP 1429@2nd paragraph. I suggested we see a marriage counselor again, RP III 579@6, and we began seeing Rhonda Griffin. RP III 580@8, CP 874. The next day I also took her name off of our joint savings account in an effort to protect family assets in case she left and I had to pay the mortgage and household expenses. She did not move and continued to use the account, RP III 579@8, RP III 411@18 - RP III 412@1, without restrictions, in fact, she was never aware that her

name wasn't on the account. We also had numerous other joint financial accounts and she had full access to them, as well as her own. RP III 580@24 - RP III 582@18. Even though she did not move, she continued to threaten divorce and moving to California. She also became increasingly physical in our arguments, threatening me with physical violence and assaulting me.

We began seeing the joint counselor to address our marriage issues, Karen's anger and control issues, and Karen's unhappiness. We also addressed Karen's lack of sexuality RP IV 647@12, for which she was later diagnosed with a physical gynecological condition, RP II 329@3. We continued for many months until the counselor recommended that Karen take drugs for her anxiety and depression, RP I 114@24. Karen refused and we quit seeing her.

KAREN'S HISTORY OF DOMESTIC VIOLENCE

Karen has a history of emotionally and physically abusive behavior against me, my property and our children.

1. She admits to threatening to cut off my genitals during an argument. RP III 405@5.
2. She admits to splitting two doors in the house out of anger, RP III 407@3-10, RP III 507@3-12, although she originally denied these acts, CP 261@16.

3. She admits to damaging my work laptop, RP III 508@3-16.
4. She admits to threatening to smash my laptop on the sidewalk laptop, RP III 507@ 24 – RP III 508@2.
5. She has assaulted me several times, RP III 413@14 - RP III 414@18, RP III 584@5-19, RP III 405@14-18.
6. She was assaulting me and I called 911 during one of her attacks. She kicked me in an effort to trip me as I was going to meet the police, CP 600, RP III 406@6-20.

KAREN'S EMOTIONAL ABUSE OF THE CHILDREN.

In addition to the emotionally and physically abusive behavior above, Karen is also emotionally abusive towards the children.

1. In September 2010, Karen left our children unattended in a Safeway parking lot while she went shopping. RP II 359@4-9. They were terrified and unbuckled their seatbelts and hid behind their seats. The children were again left unattended in a dark parking lot at a later time, and for a longer period. RP III 521@2-14. The parenting evaluation was already completed when these events took place and the evaluator at trial was very adamant about never leaving young children unattended in cars. RP III 424@8, RP III 475@8. Yet, Karen was defensive and rationalized her poor judgment, saying that it just took two minutes. RP III 547@12-23.

2. She started a public argument at our local swimming pool, CP 585, RP III 598@5 – RP III 599@4, and the boys were visibly upset by her crying and yelling at me.
3. She started an argument on their birthday, RP III 599@5 – RP III 600@7, and the boys were scared by her anger.
4. In one of the two incidents where she attacked and split doors in the house, the children were on the other side brushing their teeth in the shower, RP III 440@16 - RP III 441@2, RP III 507@3. They were terrified by her anger and physical attack.
5. I was watching TV one evening and she entered the room and demanded the TV remote. She started yelling in a louder and louder voice, 'Marr, give me the remote. Marr, give me the remote." Her screaming awoke the children, RP III 506@10-12. I left the TV area and locked myself in my bedroom. She began pounding on the door and yelling even louder. One of our sons was crying and pleading from his bedroom for her to stop, RP II 592@6-9. My response was to open the door and comfort the children, RP III 592@14-19. Karen's response was to get back at me by faking a call to 911, RP III 592@18 -21, RP III 407@11-18.
6. I have never used foul language within earshot of the boys, whereas Karen observed no such boundaries in her tirades, RP III 583@13-23.

I WAS THE PRIMARY PARENT PRIOR TO SEPARATION.

I provided primary parenting services to the boys in a wide variety roles, including meal preparation, house cleaning, clothing and food shopping and transporting them. We both took them to doctor and dentist appointments, either together or separately. We both investigated schools for our children and observed in classrooms. I enjoy teaching our sons, going to local parks and camping, taking them swimming, coaching their Little League team, building "forts" out of furniture cushions and blankets and making Halloween costumes with them and for them. I also disciplined them, bathed them nightly, played with them after school or got their homework started and read them good night stories. I watched them when they we sick and Karen had to work as a teacher's aide or babysitting at our church. I also watched other people's kids while she had appointments, as was documented on the family calendars.

Karen spent significant amounts of time out of the home with her personal activities, volunteer work, shopping, etc. We kept family calendars and she had day planners to keep track of family events. Events, primarily in Karen's own handwriting, RP II 378@9-16, showed that she routinely spent very substantial periods away from the home doing a variety of activities. I requested the court admit these calendars and a summary of events but was denied because the court said she couldn't

understand them and that they are not going to 'sway' her one way or the other. RP II 378@23 - RP II 379@22.

PROCEDURAL HISTORY

Karen filed for divorce on December 7, 2009, CP 1, and obtained an ex parte financial restraining order on that date, CP 22. Karen made no allegations about domestic violence nor did she seek physical restraints. We continued to live together in the family residence in Bellevue until December 28th 2009, when I called the police, RP III 586@1-15, to report the latest in a series of Karen's physical attacks upon me. I was arrested for DV4 because Karen claimed I grabbed her, and, after spending a night in jail, the judge released me on personal recognizance and removed the no contact order. I returned home until Karen's attorney threatened a restraining order. The DV case was later dismissed with prejudice several months later by the prosecutor, CP 598, after I submitted evidence of Karen's behavior; albeit less evidence than for our family law case due to Karen's increasing number of incidents of conflict after the parenting evaluation was completed, which recommended a 50/50 residential schedule.

Karen filed a motion for Temporary Orders, CP 32. Temporary Orders were entered by Commissioner Sassaman on January 28th, 2010,

CP 285, which provided for Karen to assume a primary parenting role, as well as temporary spousal maintenance for her.

I filed a motion for Revision, CP 321, and was successful in getting the court to revise the Commissioner's ruling on March 4, 2010, CP 368. Spousal maintenance was eliminated, CP 369, income was imputed to Karen, CP 369, and my child support payments were reduced, CP 369.

I served discovery requests, CP 424, on July 15th, 2010, and Karen filed a motion for a Protective Order on August 23rd, 2010, CP 379. Her order was granted, CP 763. On October 14th, 2010, I filed a motion of appeal to the Court of Appeals, CP 862. Karen responded but I never replied and dropped my appeal during the trial.

I filed a motion on September 20th, 2010, to request that the court allow the parenting evaluator to update her recommendations and, in the alternative, to request a continuance to allow her time to do so, CP 926. My motion was denied by the Commissioner, CP 866, and I filed a motion for Revision and Continuance, CP 926. My motion was denied, CP 950.

I filed a motion on September 20th, 2010, for the release of joint counseling records, CP 782. The motion was denied, CP 877, and on October 6th, 2010 I filed a motion for reconsideration, CP 873, and was denied, CP 934. I filed a notice of appeal to the Court of Appeals on Oct 27, 2010, CP 957, but never filed a motion.

In early November, I retained services of Barry Rose and on November 9, we attended a settlement conference conducted by Mr. Howard Bartlett. Karen and I successfully reached agreement on all financial matters, including child support worksheets and a CR2A agreement was signed. However, the financial issues of limited attorney fees, starting with fees generated in preparation for the settlement conference and trial, as well as the issue of a child support deviation based on the parenting plan, were reserved for trial.

D.
ARGUMENTS

Karen as primary aggressor.

All families disagree and have conflicts but these issues should never result in physical violence or threats of violence. On many occasions Karen escalated our discussions to become physically aggressive and the primary aggressor. My response was to get away from her or defend myself against her assaults, and, finally, calling the police during one of her attacks. The parenting evaluator testified that Karen's argument style is to pursue after I go away, RP III 486@5. Her attacks were also in front of our children and in public.

Karen's history of domestic violence.

Karen has a history of domestic violence against me, our children, and property:

1. There is undisputed testimony that she threatened to cut off my genitals during an argument. RP III 405@5.
2. There is undisputed testimony that Karen started an argument with me at our local swimming pool in front of our children and other families. RP III 598@5 – RP III 599@4. She had been attempting to take my weekend and we had discussed the issue many times by phone and in many email. CP 585. While at the pool, she physically kept me seated while she berated, yelled and cried at me. RP III 510@17 - RP III 511@3. This was upsetting for our children and other guests. My response was to get away from her and get into the water and comfort our children. She saw my actions to console our children as inflammatory. RP III 511@1-3. My attorney asked her:

   > Q. And wasn't Marr's reaction at your behavior to walk away and, and get into the swimming pool at that point?
   > A. It was to avoid it and inflame it, yes.

3. There is undisputed testimony that during arguments she admitted to (1) damaging my computer, RP III 508@3-16, after initially not recalling the incident, (2) threatened to damage my computers and cause me to lose work data, RP III 508@14 and (3) grabbing at me

and my property, over my objections, RP III 584@15-19, RP III 592@24 – RP III 593@16, RP III 413@1 - RP III 414@19.

One incident was over a letter I had received from the Bellevue District Court and she wanted to know its contents. I said 'no' and she threatened to unplug my computer. I continued to deny her requests and then she escalated to physical violence by grabbing for the letter and hitting me. RP III 507@12-23, RP III 592@24 - RP III 593@12. My response was to protect the letter in a purely defensive manner by covering it up and taking her blows.

4. In another of her assaults upon me, there is undisputed testimony that I was seated at my desk and paying family bills with my checkbook. She wanted to pay a bill and I refused. She began threatening to damage my computers and then escalated to physical violence by grabbing and hitting me while attempting to grab the checkbook. RP III 413@14 - RP III 414@4, RP III 584@5-19. I was defending myself by flinging her arms away. I called the police and while waiting for them to arrive, she kicked me in the shins. The police report states, CP 600,

> "Karen stated that while she was standing in the kitchen Marr took the bill out of her hands and out of 'instinct' she stuck her leg out to trip him to slow him down."

I find it disturbing that her 'instinct' is to use physical violence and at trial Karen denied trying to trip me, then rationalized her behavior so that if I fell on my face it was somehow my fault, RP III 406@6-13. My attorney asked Karen:

> Q. Have you ever tried to trip him?
> A. No.
> Q. Isn't sticking your leg out when someone is passing by tripping them?
> A. If he trips over, it was not my, it was my intention to, if we're referring to the 28th, December 28th, I was intending to slow him down. It was not my intention to trip him. I did not expect him to fall flat on his face.

5. There is undisputed testimony that she hit two interior doors with enough force to crack them while she was trying to get at me and the children. RP III 407@3-10, RP III 507@3-12.

   a. One event was when the children were brushing their teeth in the shower, which she despises. I had locked the bathroom door in an attempt to get away from her and she hit it with such force that it cracked. RP III 507@3-11. She rationalizes her aggressive behavior to the parenting evaluator, CP 596, by saying,

      > "So I did hit the door. It's not broken. House is 50 years old. He wrote me dad."

      I find this philosophy similar to saying 'I stabbed him, but it only went in three inches.' The intent is what is

disturbing, and even more so because the children were behind the door and witnessing their mother's violence.

b. The other door was split because I was watching TV in the living room one evening while the children were sleeping. Karen entered the room and demanded the remote. In ever increasing volume she began yelling, "Marr, give me the remote. Marr, give me the remote." I left the room, taking the remote, and locked myself in a bedroom. She began pounding on the door and hitting it with her body. RP III 505@19-25 – RP III 506@1-9. One of our children was crying and yelling for her to stop. RP II 592@6-9. My response was to open the door and comfort the children, RP III 592@14-19. Karen's response was to get back at me by faking a call to 911, RP III 407@9-25, RP III 592@18-21.

I find it revealing that in one of her declarations she says, CP 261@16:

> "I also strongly deny that I am some madwoman that breaks down doors to get to Marr."

6. There is undisputed testimony that Karen threatened to damage my property numerous times and has done so on several occasions. She has damaged my work laptop and monitor and threatened to

smash it to bits while holding it over her head on our front porch. RP III 507@25 – RP III 508@16.

This substantial evidence seems to contradict the courts' oral ruling, RP IV 743@21-25, when my attorney asked the court:

> ATTORNEY ROSE: --from our side. Number one, does the Court make any findings with regard to the mother's, uh, commission, or not, of acts of domestic violence and emotional abuse?
>
> THE COURT: I'm not finding the mother has committed domestic violence or emotional abuse upon the father.

1. The court erred in not applying residential restrictions upon Karen as required by RCW 26.09.191(2)(a)(iii).

Karen has a history of domestic violence and assault as defined by RCW 26.09.191(2)(a)(iii) which automatically triggers residential restrictions against her.

RCW 26.09.191 - Restrictions in temporary or permanent parenting plans, and states (bolding mine):

> "(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting

> functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; **(iii) 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; or... "

Referenced in the above statute, RCW 26.50.010 – Definitions, states:

> As used in this chapter, the following terms shall have the meanings given them:
>
> (1) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

There is no legal definition of assault so common law definitions are used. The Washington State Supreme Court relied on the Cooley definition in Howell v. Winters, 58 Wash. at 438; bolding is mine:

> An assault is an attempt, with unlawful force, to inflict bodily injuries upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. **Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect**; the pointing of a loaded pistol at one who is in its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. **Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his**

> **person;** 'A right to live in society without being put in fear of personal harm.'

Karen has admitted to several assaults against me, as documented above. She has also admitted to threatening bodily injury, damaging my property and grabbing at my personal property, for which I have a right to defend. The Washington State Supreme Court ruled in PEASLEY v. PUGET SOUND TUG & BARGE CO., 13 Wn.2nd 485 at 506:

> One of the defenses to a charge of assault is that the act was committed in the defense of property of the actor, or of one whom he is under a legal duty to protect. It is the generally accepted rule that a person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances in order to protect that property, and for the exertion of such force he is not liable either criminally or civilly. 4 Am. Jur. 159, 164, Assault and Battery, §§ 61, 68; 6 C. J. S. 816, 821, 951, Assault and Battery, §§ 20, 94.

2. The court erred in not applying decision-making restrictions upon Karen as required by RCW 26.09.191(1)(c).

The same evidence presented above also requires the court to impose decision-making restrictions under RCW 26.09.191(1)(c), which states:

> (1) 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: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or **(c) 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.

Both of these 26.09.191 statues override any others when considering residential time and decision making rulings. Further, RCW 26.09.187 (2) – Criteria for establishing permanent parenting plan states:

> (b) SOLE DECISION-MAKING AUTHORITY. 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 is mandated by RCW 26.09.191;

3. The court erred in denying Marr's pre-trial discovery request for equal access to family and personal financial, insurance, medical and other records located in the family home.

I was denied equal access to family and personal financial, insurance, medical and other records located in the family home. The court ruled further that I could only request records for time frames stipulated by my ex-wife in her discovery requests and that I must use pattern forms, which are not required, CP 763-765. This ruling show

bias and provided an unfair advantage to Karen in trial preparation. One of the tenets of discovery is that both parties enter into proceedings with the best available information. The records I requested were not obtainable by any other means.

More troubling is the fact Karen admitted at trial to violating court orders prohibiting the selling of community property, RP III 517 @1-3, RP III 517 @16-17, hiding assets, and using community funds to pay attorney fees. Given this behavior, my request for past records seems reasonable. Access to credit card statements, checking account balances, cancelled checks and payment histories would further show that Karen spent freely and I paid her bills. This information was needed to further repudiate the court's finding that I had a history of financially controlling behavior, RP IV 726@17, CP 1119@14.

4. **The court erred by excluding family calendars as evidence at trial that would have shown critical dates and events vital to Marr's position that he was the primary parent.**

The major premise of my case was that I was the primary parent and tended to the children more than Karen. I was a stay at home dad who also worked from home and had very flexible hours. Our family calendars, and her daytimers, to be used as corroborating evidence,

were used by both parents to list events and plan schedules. They show, beyond a doubt, that I watched our children more than Karen, and by a significant margin. At trial, the judge denied my exhibit of copies of our family calendars, RP II 378@8, because she didn't understand them. In discussing the calendars the judge admits,

> "And how does one gleam that from looking at these calendars? I, I, I can't make heads or tails out of them." *Id.*

And, despite not understanding them, she later states,

> "This is not gonna be the factor that sways me one way or another." *Id.*

Denying me the opportunity to present evidence and explain the events from these family calendars shows an abuse of discretion and denied me the opportunity to effectively present my case. While the court is not expected to, for example, comprehend detailed financial transactions or highly technical presentations, it should not summarily dismiss them due the inability to understand them. When the court further states, "This is not gonna be the factor that sways me one way or another." it shows addition bias and refusal to hear evidence that would affect the trial outcome.

From my attorney, to Karen, RP II 378@8, bolding is mine:

> Q. Your attorney asked you to review calendars that I'm proposing to, uh, submit into evidence. Have you had a chance to

review these calendar, ma'am?
A. Yes.
Q. Do you recognize them as the family calendars that were in your home?
A. Yes.
Q. And do you recognize your handwriting on those dates?
A. Yes.
Q. Uh, your Honor, I have, uh, marked those as Exhibit 136 and would like to offer them into evidence at this time.
ATTORNEY SEDELL: We object as to, uh, first of all the authenticity of them. Ms. Madden testified that, uh, they also contain other writing on them that isn't hers and that she had, as she testified, concerns about the authenticity of them.
THE COURT: What's the purpose of offering these calendars?
ATTORNEY ROSE: **The purpose of offering the calendars, your Honor, is, uh, two fold. One, to show that these were family calendars that both parties, uh, understandably would make notations on them. Uh, that, that this was generally family oriented, uh, information. And secondly, the purpose of offering these calendars is to offer proof of the amount of time that Ms. Madden spent outside of the home. She claims to have been a stay at home mom, to be in the, uh, home virtually on a 24/7 basis and in fact her own hand writing as stated on these calendars, and as later summarized by my client, uh, show that she spent significant amounts of time, uh, doing other activities aside from being a stay at home mom.**
THE COURT: And how does one gleam that from looking at these calendars? I, I, I can't make heads or tails out of them.
ATTORNEY ROSE: Well that's why I'd like to offer them into evidence and have Ms. Madden comment on them, and I would also like my client to comment on them. Uh, I would also, uh, uh, ask the Court --
THE COURT: You know, Counsel, I really don't want to dwell on, this is not a helpful area to dwell on. Um, you know we're looking at, I think by all accounts, everyone is asking for substantial amount of time for both parents. This is not gonna be the factor that sways me one way or another. Uh, just is, is giving you some direction.
ATTORNEY ROSE: Um, I will take the hint, your Honor. Let's move on.

5. **The court erred by denying a motion for discovery of joint counseling records.**

Karen admitted we started joint counseling together, CP 880@7, and I submitted a motion for reconsideration with newly discovered details, CP 873. During joint counseling we discussed our relationship, her depression, her controlling behavior, her sexual dysfunction, which I did not bring up at trial, and her verbal and emotional abuse of me and the children.

There is legal precedent in Washington for my request of joint counseling records. My motion stated:

> The Washington State Court of Appeals has ruled that joint counseling statements are not privileged communications, see Redding v. Virginia Mason Medical Center, 75 Wash. App. 424. They ruled, "In litigation between patients who had received joint counseling from a therapist, the psychologist-client privilege (RCW 18.83.110) does not protect statements made by one of the patients to the therapist." The court further states, "[5] Statements made to an attorney (and by analogy to a psychologist) in the presence of a third person waive the privilege normally attached to them.". They also reference Cummings v. Sherman, 132 P.2d 998 (Wash. 1943) which states, "[I]f two or more persons consult an attorney at law for their mutual benefit, and make statements in his presence, he may disclose those statements in any controversy between them."

Further, the Alaska Supreme Court has ruled on this exact same topic in A. Carstens v. R. Carstens (2/11/94), 867 P 2d 805, bolding is mine:

> Ann sought discovery under Alaska Rule of Civil Procedure 26(b)5 of all the mental health records of Kodiak Island Mental Health Center that pertained to Richard. Two files were at issue: a file prepared by Paul Ruff, Richard's counselor after the parties' separation, and another therapist's file from 1984 pertaining to joint counseling sought by Ann and Richard. The trial court permitted discovery of the recent records, but not the records from 1984. The court did not deny access to these records on the basis that they were privileged, but because it determined them to be irrelevant.
>
> In our view this determination amounted to an abuse of discretion. **The mental health records presumably contained information concerning the parties' conduct toward each other and thus were relevant in the broad sense of relevance for discovery purposes:** "Alaska Civil Rule 26(b)(1) permits a party to discover all evidence, not privileged, that would be relevant at trial or that 'appears reasonably calculated to lead to the discovery of admissible evidence.'" Doe v. Alaska Superior Court, 721 P.2d 617, 620 (Alaska 1986). Mental health and joint counseling records of divorcing parties have commonly been held to be discoverable. See, e.g., Bishop v. Goins, 586 N.E.2d 905, 907 (Ind. Ct. App. 1992); In Re Marriage of Kiister, 777 P.2d 272, 275-76 (Kan. 1989); Perry v. Fiumano, 403 N.Y.S.2d 382, 385-
> 86 (N.Y. App. Div. 1978).

Washington state's own CR 26(b)(1) is almost identical to Alaska.

> RULE CR 26
> GENERAL PROVISIONS GOVERNING DISCOVERY
>
> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

6. **The court erred in Finding of Fact 2.13, Continuing Restraining Order, by continuing a restraining order and finding Karen "...has a reasonable fear of harm from Marr and that he has a history of controlling behavior, an abusive use of conflict, and an inability to control his anger."** CP 1114@7.

   a) **Karen has no reasonable fear of harm from me**. Karen's actions and testimony do not support this finding. She has been the primary aggressor in all arguments and she is only one inch shorter than me and 20 lbs lighter. The evidence shows that she had no fear and no hesitation in escalating the argument or assaulting me. She knows that I won't retaliate and my response is to walk away.

      She testified that she has never called the police, RP III 407@ 11, or ever reported any alleged physical injury

allegedly perpetrated by me to her physician, RP III 408@1. Our transfers of children go well and I am frequently at the family home helping her with projects. In short, there is no substantial evidence that she has a fear of harm from me.

b) **I do not have a history of controlling behavior.** My response to her threats of divorce or taking our children and moving to California show great restraint and a desire to resolve our issues. Eight years ago Karen told me that she was taking the kids and moving to California. I recommended that we see a marriage counselor, which we did, and the next day I took her off of our joint credit union account in hopes of protecting our assets and paying the household bills and mortgage. She had no idea I did this and she continued to write checks and I continued to pay the bills. I didn't bring up this issue with our credit union and returned her name voluntarily several months later.

In the winter of 2009 I took her name off of our joint account when she was threatening divorce and began funneling her income into a new account and not helping with the family's monthly bills.

These two actions were in direct response to her threats and

there were no other financial actions undertaken by me. There is undisputed testimony that she bought whatever she wanted, I paid the bills and she had multiple financial accounts with substantial balances. She actually controlled more family financial accounts than I did as well as our children's college funds.

c) **There was no abusive use of conflict**. As in any dissolution, legal actions are undertaken. I did not use the courts as a weapon and, in fact, I could have filed two contempt of court motions for the instances where she sold community property, hid assets, and used community funds to pay her attorney. I could have also called Child Protective Services twice when the children were left unattended in parking lots. At trial, I offered, and the court accepted, a stipulation to speed up the trial and reduce costs, CP 1036, RP III 495@15. In short, there is no substantial evidence that actions taken by either side were out of the ordinary. My restraint in filing contempt motions, calling CPS and my actions at trial prove there was no abusive of conflict in the courts.

If the court were to define the phrase 'abuse use of conflict' to mean conflict in our inter-personal relations, I think the

evidence speaks for itself. Karen escalates to physical contact and I try to avoid her. The parenting evaluator said, CP 1442@'Restrictions':

> "I do not think that either parent's anger rises to the level that there should be restrictions in the parenting plan for "abusive use of conflict."

d) **There was no evidence that I could not control my anger**. I have never struck Karen or threatened her body or property in any way, RP III 571@15 - RP III 572@24. There is no evidence or testimony that I could not control my anger or that I ever threatened her.

7. **The judge erred by awarding attorney fees to Karen for Marr's supposed intransigence**.

The issue of intransigence and attorney fees for the time period up to the CR2A was resolved in our CR2A agreement. Karen's father, a wealthy physician from California, paid all her fees and was 'happy' to do so. He stated that the cost didn't make any difference to him. Her attorney asked him, RP I 146@2-10:

> Q. You've assisted Ms. Madden with her attorney's fees during this case, is that right?
> A. That's correct.
> Q. And has that been financially difficult for your family?

> A. Uh, I, I think that, uh, our investment is, uh, absolutely critical to our lives. We, it, it, the fact is it doesn't make any difference. We are happy to support our daughter to free her and to make this part of her life work out well. So, I mean, if it is, um, it's alright. I have no complaints.

The court also found that Karen had no financial need for an award of fees when it said, RP IV 740@22-25:

> So one could argue that if Mrs. Madden's parents are willing and able to pay her attorney's fees, uh, and don't expect to be reimbursed that perhaps she has no need. So I'm not going to order attorney's fees on a need ability to pay basis.

The court goes on to describe my supposed intransigent behavior, all of which were resolved in the settlement conference. The court even mentions that I filed a state bar complaint, implying that I don't have the right to seek review of misconduct by Karen's attorney. My filing of a bar complaint should have no relevance in the trial court or as an example of my supposed intransigence.

It is relevant that we agreed in the CR2A that the only fees to be taken into account were for intransigence for the time frame after the CR2A agreement was signed. At trial, Karen's attorney even asked for clarification. The court replied, RP IV 743@4, bolding is mine :

ATTORNEY SEDELL: So just so that we're clear, uh, the award of fees is per the CR 2A Agreement it's from the period that as it says in the CR 2A Agreement through preparation for trial, the appeals, and the trial itself.

THE COURT: **Right. Where he was intransigent**.

ATTORNEY SEDELL: Right. Thank you.

There is no evidence that I was intransigent "through preparation for trial, the appeals, and the trial." To the contrary, I dropped my one appeal and never filed the motion for the second notice. I also offered a stipulation at trial, noted previously, and there is no evidence that the trial proceedings were anything but standard, except for the amount of time Karen's attorney spent trying to establish my intransigence.

Since there is no intransigence connected with the settlement conference or trial, the only fees that can be awarded would be regarding their one response to an appeal. The only action Karen's attorney took was to file a nine page response, for which he was requesting $55,613.00, CP 1175@21. The court awarded $17,839, CP 1175@22.

The court ruled there was no financial need on the part of Karen. Any awards wee therefore purely punitive and not based on intransigence after the settlement conference and trial, as stipulated by the court.

8. **The court erred in Finding of Fact 2.19, Parenting Plan, by finding Marr was emotionally abusive and financially controlling.** CP 1119@14.

There was no substantial evidence that I was financial controlling when Karen testified that she could buy anything she wanted, that I paid all the bills, she had individual savings and checking accounts with substantial balances, she had retirement accounts, and she controlled the children's college savings funds.

From Karen's initial declaration, supporting her motion for dissolution, she states, (bolding mine), CP 16 @ 14:

> "The husband has removed the wife's name from **all** accounts containing their community funds. He has **completely blocked** her from accessing their joint checking, savings, and investment accounts."

As an example of my financial control she also claimed, CP 36@12:

> "Money was doled out to me in small sums as he saw fit."

This was proven false during pre-trial declarations, documentation, and again at trial where Karen's admitted that she bought a new dishwasher, refrigerator, stove, washer and dryer, couch, dining room set and buffet table and beds, and more. From RP II 371 @13:

Q. And those were all things that you agreed upon that, and they actually, or that you agreed upon together?
A. No, the couch he told me to go out and buy myself. That he wasn't gonna sit on it. He didn't have an op--, he didn't care. So, I bought the couch with the help of my mom.
Q. Okay.
A. Um, the buffet table and chairs, I, uh, I mean, the, yeah, tab--, the dining room buffet I went and looked at it and I purchased it. Um, the other appliances we were, we went together --
Q. Mm hmm.
A. --to purchase them.
Q. Bottom line you got for your house what you wanted, right?
A. Yes.

She also testified that I never claimed she was spending money frivolously, RP II 257 @19-24, but the most conclusive testimony is when she admits that she has multiple accounts with substantial balances, spends as she wants, and I pay the bills. RP III 408 @8 thru 412 @20.

9. The court erred in Finding of Fact 2.19, Parenting Plan, by finding Marr was verbally abusive. CP 1119@22.

There is no substantial evidence that the conversations and arguments we had had were not out of the ordinary for a couple going through a divorce. Karen's attorney pointedly asked her the question, RP I 126@25- RP I 127@11:

Q. Did Mr. Madden, uh, at any point, um, become verbally abusive toward you?

A. Yes, by putting me down in front of the kids. In front of friends. Um, had the checkbook and was trying to balance it and came up when my brother was staying with us and saying you did this all wrong. Don't you know how to work a checkbook. Um, he I won't get into all of that. He would call me asexual because I didn't re--, um, return his amorous affection. Uh, you know you're not a good housekeeper. You're not good a multi-tasking. That was another thing he loved to say is that he could multi-task. Talk to me, I'm working on the computer but go ahead and talk to me about the issue you need help with. He would not give me his undivided attention.

These statements aren't true, but I understand this court is not at liberty to determine who is telling the truth. We had disagreements like many couple do.

For example, she also claims I called her 'asexual' and told other people so, CP 1119@24. I did, on occasion and during arguments, call her asexual. I did not tell anyone else except our joint marriage counselor in an effort to save our marriage and address her sexual dysfunction, which was later discovered to be a gynecological condition for which she brought up at trial. She claims I emailed her aunt and others about her 'asexuality', RP II 255@14, but I did not. I sent her aunt one email regarding many things, CP 118@bottom, and wrote, "She is controlling, verbally abusive to the children and me,

sexually dysfunctional, and clinically depressed", all of which were true.

Karen further brings up the petty claim that I said, "Uh, you know you're not a good housekeeper. " If the trial court sees this as an example of verbal abuse, then this court has to wonder if Karen can have any conversations without feeling abused. There was substantial evidence, CP 255, RP II 391@21 - RP II 393@6, and she admits during questioning by my attorney that she was not a good housekeeper. RP II 392@17 – RP II 393@6:

> Q. Um, has your sister ever offered to help you clean out closets and generally tidy up the house?
> A. Yes.
> Q. Have you ever kept dirty diapers and other garbage of the front porch of your home?
> A. Yes.
> Q. And did you once tell my, uh, client that you didn't have time to place them in the receptacles?
> A. Yes.
> Q. Do you think this level of clutter sets a good example for children?
> A. No.
> Q. Did you tidy up the house prior to Margo Waldroup's, uh, home visit?
> A. Yes.

I was not the only person to mention it, RP I 116@19:

> I was listening to Marr and other people around me telling me that, well Marr primarily, telling me the house is not clean.

Further, is it verbal abuse when I apparently said, "You're not good at multi-tasking". This is also true and mentioned by the parenting evaluator, RP III 423@8.

The court abused its discretion in reaching this finding and the facts presented at trial do not support the finding.

10. The court erred in Finding of Fact 2.19, Parenting Plan, by finding Marr sent abusive emails to Karen. CP 1120@1.

Karen presented only two emails selected from over many years of communications. All of our emails were civil and neither party claimed the other used profanity. However, out of hundreds of emails, there was one email were I called here a "cheap ass".

In the other email I called Karen a 'spiteful bitch', RP III 570@13 - RP III 571@10. Karen was threatening the keep our sons for Halloween and Thanksgiving because I addressed the concern that my dying mother wanted to celebrate one of the boys' birthdays without the conflict of Karen being there. My mother died one month later, during the trial.

Two emails over many years does not constitute sufficient evidence to support this finding. The court has abused its discretion in reaching this decision.

11. The court erred in Finding of Fact 2.19, Parenting Plan, by finding Marr used conflict as a weapon to the detriment of the children. CP 1120@4.

As I have documented above, there was is no substantial evidence that I used conflict as a weapon. Interestingly, in the court's oral ruling, RP IV 728@13, while discussing my behavior and the children, she said,:

> "They don't need to know that he spent the night in jail, and his response was that he was not going to lie to the children."

This is in direct contradiction to what Karen told the parenting evaluator, when she admitted to telling our children that I had spent the night in jail, before I possible could have, CP 1432:

> "Later that evening, when the boys asked Karen where their father was she told them he was spending the night in jail."

12. The court erred in Finding of Fact 2.19, Parenting Plan, by making findings "Mr. Madden claims ... her refusal to have sex with him or engage in sexual activity with him at his preferred frequency will impact their sons' sexual development." CP 1120@14.

There is absolutely no evidence I said this. I did express a fear that she may transfer her own sexual repression onto the boys, but I never said the quoted text in the Finding. Certainly, Karen's and my intimate life was not known to the boys and thusly would not affect their development.

13. **The court erred in Finding of Fact 2.19, Parenting Plan, by finding "The court finds that Mr. Madden's abusive use of conflict has negatively impacted the boys and creates a serious risk of ongoing psychological harm."** CP 1120@19.

This was addressed in 6(c), but there is no substantial evidence that there was an abuse of conflict in the courts, or in interpersonal communications by me. The parenting evaluator also commented in her evaluation, CP 1442@'Restrictions':

> "I do not think that either parent's anger rises to the level that there should be restrictions in the parenting plan for "abusive use of conflict."

Unfortunately, her recommendation was written before trial and one of the reason I filed a motion to reopen the parenting evaluation. Karen's level of anger increased significantly when the DV case against me was dismissed and the parenting evaluation was released 6

months before trial, recommending a 50/50 residential schedule.

Karen has demonstrated verbally abusive, aggressive and physical behavior in front of children which could negatively affect them. The evidence shows that she has started public and private arguments in front of our children and without regard for the audience. She has a history of escalating discussions into arguments, then to physical incidents. I have a history of suggesting counseling, noted above, and mediation, CP 875 @43, and using restraint during her physical and verbal attacks against me, as noted above.

14. The court erred in finding abusive of conflict by Marr warranted 26.09.191 restrictions.

Given all the evidence above, this is an abuse of discretion. This was a contentious relationship primarily due to Karen's anger and depression at not being able to control the world around her. Had the court allowed joint counseling records, I would have shown more evidence of her abusive behavior towards me and our children.

15. The court erred in finding abusive of conflict by Marr which warranted 26.09.187(2)(b)(i) restrictions.

Given all the evidence above, this is an abuse of discretion.

16. The court erred in applying RCW 26.09.004(3) to define the primary parent. CP 1117@12.

The court says that Karen, "...generally took the primary role in all parenting functions defined in RCW 26.09.004(3)..."

The court appears to have applied the wrong code as there are no parenting functions in RCW 26.09.004(3). This is the definition of a parenting plan and does not address any factors regarding the determination of primary parent status, roles or functions.

> RCW 26.09.004
> (3) "Permanent parenting plan" means a plan for parenting the child, including allocation of parenting functions, which plan is incorporated in any final decree or decree of modification in an action for dissolution of marriage or domestic partnership, declaration of invalidity, or legal separation.

E.
REQUEST FOR EXPENSES

Appellant asks this Court to award him expenses based on the relative resources of the parties and the merits of the appeal. *See* RCW 26.09.140; RAP 18.1; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003, 972 P.2d 466 (1999). I have incurred nearly $8,000 in attorney fees and expenses to date.

F.
CONCLUSION

In light of the substantial errors before and during the trial, I ask the Court of Appeals to:

1. Remand with instructions to vacate the parenting plan and issue a new one that places residential restrictions on Karen as required by RCW 26.09.191(2)(a)(iii), due to her history of domestic violence. The parties will adopt Marr Madden's proposed parenting plan on CP 72 – CP 81, and, as per the CR2A agreement, the family home is now be awarded to Marr Madden.
2. Remand with instructions to assign sole decision-making to Marr Madden, as required by RCW 26.09.191(1)(c), due to Karen's history of domestic violence and assault against Marr Madden.
3. Remand for a new trial in King County Superior Court due to serious discovery errors. Mr. Madden will have full access to all documentation in the family home, as well as joint counseling records. The family calendars and their summary material will be admitted.
4. Reverse the attorney fees awarded to Karen Madden for intransigence.
5. Remand for revision of Findings of Fact as addressed in the ARGUMENTS.

CERTIFICATE OF SERVICE

I hereby certify that on August 5th, 2011, I personally delivered one copy of the foregoing brief to the office of:

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