

FILED
Oct 03, 2016
Court of Appeals
Division I
State of Washington

NO. 75146-8-I

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

Jose Maldonado,

Petitioner/Appellant,

v.

Noemi Lucero Maldonado,

Respondent.

**REPLY BRIEF OF APPELLANT AND ANSWER TO MOTION TO
DISMISS (PURSUANT TO RAP 17.4(d))**

NORTHWEST JUSTICE PROJECT

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I. ARGUMENT

A. The evidence is undisputed that all three children were harmed by domestic violence.

Mr. Maldonado presented evidence to warrant inclusion of all three children in the DVPO issued by the superior court.¹ Ms. Maldonado argues otherwise. Br. Respondent, at 13-15. Respondent agrees that *In re Marriage of Stewart*, 133 Wn. App. 545, 547, 137 P.3d 25 (2006), rev. denied 160 Wn.2d 1011 (2007) is controlling as to this case. Br. Respondent, at 11.

The Response Brief erroneously argues that this Court in *Stewart* “recognized that...*extensive exposure to severe domestic violence support a parent’s restrictions on visitation.*” Br. Respondent, at 11-12 (emphasis added). This was not a ruling in *Stewart*. With respect to this issue, this Court in *Stewart* simply held that psychological harm meets the definition of domestic violence in RCW 26.50.010(a). *Stewart*, 133 Wn. App. at 551-552.

Neither the DVPA’s text nor the Legislature, in its numerous pronouncements indicates that “severe” domestic violence needs to occur in order for children to receive protection available in a DVPO. *See*

¹ The petition for a DVPO functions as a declaration to sustain the entry of a DVPO. *See Juarez v. Juarez*, No. 33668–9–III, 2016 West 4706535, at *2 (Wn. Ct. App. Sept. 8, 2016).

Scheib v. Crosby, 160 Wn. App. 345, 249 P.3d 184 (2011). In fact, the DVPA has been broadly interpreted to provide protection even years after domestic violence has occurred. See *Spence v. Kaminski*, 103 Wn. App. 325, 12 P.3d 1030 (2000). Additionally, “[a]s the title of the Act indicates – Domestic Violence Prevention, the Legislature has made it clear that the intent of chapter 26.50 RCW is to *prevent domestic violence*.” *Muma v. Muma*, 115 Wn. App. 1, 7, 60 P.3d 592 (2002) (emphasis added).

As discussed in Mr. Maldonado’s Opening Brief, social science and scientific research informs us that children are especially susceptible to harm when exposed to domestic violence. Br. Appellant, at 19-22. The Legislature also understood this and specifically found:

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.

Laws of 1992, ch. 111, § 2 (emphasis added) (Legislative finding).

The holdings in *Stewart* support Mr. Maldonado’s position that all three children should have been included in the DVPO and that the superior court committed an error of law when it failed to do so.

Ms. Maldonado attempts to distinguish *Stewart* on a factual basis by arguing that the violence in *Stewart* was “severe.” Br. Respondent, at 11-12. However, as explained above, the DVPA does not require a finding of “severe” domestic violence, only that domestic violence occurred. With respect to the particular facts in this case, Ms. Maldonado had supervised visitation for an extended period of time because her ex-boyfriend sexually assaulted two of the minor children. CP 5-8; RP 14:11-12, 25:4-5. It was during only her third weekend of non-supervised visitation that Ms. Maldonado assaulted the children. *Id.* Ms. Maldonado’s assault on 9-year-old N.L.M. caused *multiple bruises*. CP 5-10; RP 14:11-15:2, 25:4-5. The other two children witnessed the assault. CP 8. Ms. Maldonado’s “severe” argument is a red herring.

Mr. Maldonado asserts that there was proof of imminent fear of harm to all three children. The DVPA specifically allows a petition for a DVPO to be filed by a parent on behalf of a child under the age of sixteen (*See* RCW 26.50.020(2)(b)). As the parent filing the DVPO, Mr. Maldonado signed the Petition and affirmed that the facts were true and accurate, including the statement that all three children were in fear of Ms.

Maldonado.² CP 4, 7. Additionally, the child who was assaulted also stated that harm occurred to the other two children as well. CP 8; RP 15:8-9. While the children in *Stewart* attempted to contact law enforcement one time, it was the mother in *Stewart* who informed the superior court of those particular facts. *Stewart*, 133 Wn. App. 551. The only evidence of the attempted call to law enforcement was the mother's own declaration to the superior court. *Id.*

Ms. Maldonado argues that there must be specific proof that the children were in fear of harm, beyond the sworn statement of their father, in order for children to be included in a DVPO. This argument is dangerous given the abilities and comprehension of children. Children may not be aware of or comprehend danger. They may be reluctant, or afraid, to speak out against a parent. Even if they could provide evidence of their fear of harm, should they?

The Legislature and courts in Washington have a strong public policy against having children acting as witnesses in family and criminal law cases.³ Mr. Maldonado, pro se Spanish-speaker, filed for the DVPO

² The Washington Supreme Court in *Gourley v. Gourley*, 158 Wn.2d. 460, 466-7, 145 P.3d 1185 (2006) explicitly held that hearsay is allowed in a DVPO proceeding pursuant to ER 1101.

³ The Legislature strongly disfavors involving children in legal proceedings as witnesses. As a result the Legislature has enacted various protections in family law cases and criminal law cases. These include the following; RCW 26.09.201 which allows for in

and pled the fear he knew his children felt. He was the person best suited to understand and speak to the children immediately after the abuse. In addition to the information provided by Mr. Maldonado there was also a statement from the child, N.L.M., who was assaulted in this case by Ms. Maldonado about what she experienced and what she saw. She confirmed the presence of her siblings. CP 8.

The argument made by Ms. Maldonado means that a child must call 911 in order to establish fear of imminent harm sufficient to support the entry of a DVPO. However, a threshold this high would be too high for most children exposed to domestic violence and contrary to the intent of the DVPA. A non-verbal child, who, due to age or disability, is unable to otherwise communicate fear, would not be entitled to protection, even if their sibling were assaulted in their presence. A child may also be torn and not disclose fear of harm, out of affection and their relationship with the respondent. If this standard is what the courts wish to require of children, then many children, who should be protected, will continue to be denied DVPOs.

camera interviews of children in Parenting Act proceedings and RCW 26.12.175 which allows for the appointment of a GAL. In criminal cases, the Legislature enacted the child hearsay exception pursuant to RCW 9A.44.120 as well as RCW 9A.44.150 which allows for testimony when absolutely necessary by way of a closed-circuit television. Despite a criminal defendant's right to confrontation, both of these statutes have been deemed constitutional. See *State v. Shafer*, 156 Wn.2d 381, 392, 128 P.3d 87 (2006) and *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998). King County also adopted King County Local Family Law Rule (LFLR) 6(e)(2) also states that "[d]eclarations by minors is disfavored."

The protections requested by Mr. Maldonado were not extreme. Mr. Maldonado requested that Ms. Maldonado be restrained from causing *further harm* to all the children, that she be restrained from *harassing or stalking* the children, and prevented her from going to *their home or school*.⁴ CP 2-3. Under the circumstances, these requested reliefs were reasonable to keep the children safe.

Finally, Ms. Maldonado argues that Mr. Maldonado was *not denied relief* when two of the children were excluded from the DVPO entered. Br. Respondent, at 15-16. Ms. Maldonado argues that the superior court's decision not to include all three children was not a denial because a DVPO was still entered as to one child. *Id.* at 16. This concept was recently rejected in *Juarez v. Juarez*, No. 33668-9-III, 2016 West 4706535, at *4 (Wn. Ct. App. Sept. 8, 2016).

In *Juarez* the Court of Appeals determined that the superior court erred in entering a sixty-five day DVPO, as opposed to a one-year DVPO as requested by the petitioner. *Id.* at 4-6. In finding error, the Court indicated that the petitioner "*was denied the relief she sought* and to which the statute declares she may be entitled. By not allowing the full one-year

⁴ In *Gourley*, the Washington Supreme Court rejected the Appellant's argument that a one-year DVPO affected his "fundamental right to make decisions concerning the care, custody, and control of his children." 158 Wn.2d. at 468. In so doing the Court indicated that a one-year DVPO was only a temporary restraint. *Id.*

protection order, the trial court in essence denied partial relief. The trial court delayed the full relief requested by” the petitioner. *Id.* at 4.

Similarly in this case, Mr. Maldonado requested that all three children be protected in the DVPO for one-year. CP 2-5. Only one child was protected in the DVPO issued by the Court for four-months. CP 43-45. Pursuant to the reasoning in *Juarez*, Mr. Maldonado was also *denied* relief by the superior court.

B. The superior court erred in finding that inclusion of all three children in the domestic violence order for protection constituted an improper modification of the parenting plan.

A domestic violence order for protection addresses issues of immediate safety. RCW 26.50.060. A parenting plan addresses future contact between parents and their children. RCW 26.09.002. The two parts of RCW Title 26 work together to ensure the safety of children and their parents. A party may petition for a DVPO regardless of any other pending actions between the parties. RCW 26.50.030(2). Once petitioned, entry of a full DVPO cannot be delayed or denied because relief may be available in another legal proceeding. RCW 26.50.025(2).

Ms. Maldonado argues that including all three minor children improperly modifies the parenting plan because two of the children should never have received protection in the DVPO. Br. Respondent, at 16. She

does not argue that including the one child was an improper modification, although that is what the court, in error, held.

Judge Garrat found that including a child as a protected party on a DVPO, whether one child or three children, is an improper modification of the parenting plan.⁵ The entire relevant parts of the record follow.

So the father believes that the DVPO *should have listed all three children and should have been for a full year's duration*, but the problem with this calculation is that that's a *back door modification* of a parenting plan and *is contrary to the statute*. Modification of a parenting plan requires specific statutory steps including a hearing to establish adequate cause.

It is completely proper under the circumstances, when there is a parenting plan in place – regarding the children and all parties are affected by the decision that the commissioner makes – not to extend it to a point that would, by its language contained in the order, impact the dynamics of the parenting plan.

Here the commissioner did set some safeguards for the short-term – four months is plenty of time for someone to get something going *if they want to modify the parenting plan*; and also directed, *if you wanted additional restrictions, you know, that was his avenue which was appropriate*.

RP 26:17-25; 27:1-10 (emphasis added). Judge Garrat declined to enter a DVPO protecting all three children for a period of one-year because she

⁵ Whether a DVPO includes one child or three, it is not an impermissible modification of a parenting plan. *See Stewart*, 133 Wn. App. at 554.

held the law required Mr. Maldonado to file a modification of the parenting plan for *all three* children, *not* just the two children N.A.M. and J.M.M. Judge Garrat's words are unambiguous on this point: providing children who are victims of domestic violence the statutory protections available in a DVPO is "contrary to statute". RP 26:17-23.

However, had Judge Garrat merely denied protection to two of the children, without making a corresponding finding that the petition for a DVPO was an improper, backdoor, modification of the parenting plan, the superior court still erred: all three children were victims of domestic violence and should have been protected in a one-year order. Mr. Maldonado addressed the error as to the exclusion of the two children in great length in the Opening Brief and will not do so here. Br. Appellant, at 19-22.

The superior court erred by its failure to include all three children in the DVPO.

C. RCW 26.50.060(1)(d) requires that the superior court enter protective residential provisions for all children of the parties.

Ms. Maldonado argues that while protective residential provisions were entered as to N.L.M. that they need not have been entered as to the other children and that the superior court did not err as a result. Br.

Respondent, at 18-19. However, RCW 26.50.060(1)(d) specifically requires otherwise.

Relief available in a DVPO is listed in RCW 26.50.060. While all are discretionary by the use of the word “may,” what distinguishes RCW 26.50.060(1)(d) from all other reliefs is that it is the *only* relief listed which states that it “shall” be ordered in a DVPO.

To comprehend why protective residential provisions are required when a DVPO is entered, a review of RCW 26.50.060(1)(d)’s history is important. RCW 26.50.060(1)(d) has only been modified once. The precursor section to RCW 26.50.060(1)(d) was enacted in 1984 and stated as follows:

On the same basis as is provided in chapter 26.09 RCW, award temporary custody and establish temporary visitation with regard to minor children of the parties, and restrain any party from interfering with the custody of the minor children.

Laws of 1984, ch. 263, § 7. (emphasis added).

This language remained in place until 1987. In 1987 the Legislature enacted the Parenting Act (RCW 26.09, et seq.) and adopted the language currently in RCW 26.50.060(1)(d) in the same legislation.

RCW 26.50.060(1)(d) states as follows:

On the same basis as is provided in chapter 26.09 RCW, the court *shall make* residential provision with regard to minor children of the parties. However, parenting plans as

specified in chapter 26.09 RCW shall not be required under this chapter.

Laws of 1987, ch. 460, § 55 (emphasis added).

The Legislature intended to distinguish protective residential provisions from other reliefs available in RCW 26.50.060 by its selection of the word “shall.” “Where a provision contains both the words ‘shall’ and ‘may,’ it is presumed that the lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory and ‘may’ as permissive.” *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982). The use of the word “shall” in RCW 26.50.060(1)(d) makes residential provisions required in each and every DVPO. While not every remedy is required in a DVPO pursuant to RCW 26.50.060, residential provisions are.

In the legislation enacting the Parenting Act the Legislature also adopted RCW 26.09.191 which mandates restrictions in parenting plans when domestic violence occurs. Laws of 1987, ch. 460, § 10. The Legislature sought to protect children from domestic violence by enacting both RCW 26.09.191 and RCW 26.50.060(1)(d). The Legislature intended to require residential protective provisions for the parties’ minor children in each and every DVPO by the use of the word “shall.” The Legislature’s priority then as now, is to protect children from domestic

violence. It makes no sense for a court to find that domestic violence has occurred and yet take no steps to address protective residential provisions for the parties' children.⁶

Additionally, RCW 26.50.060(1)(d) references the “*minor children of the parties*” *not* just children included in the DVPO as protected parties. (emphasis added). RCW 26.50.060(1)(d) makes no distinction between children who were directly abused or exposed to abuse. This is consistent with the Legislature’s findings related to domestic violence: that children should be protected when domestic violence has been committed because it harmful.

Ms. Maldonado suggests that Mr. Maldonado was requesting RCW 26.09.191 restrictions in the DVPO. Br. Respondent, at 18-19. He was not. RCW 26.09.191 restrictions are only *expressly* available in a parenting plan. The point made by Mr. Maldonado in his Opening Brief was that the residential provisions in a DVPO must be consistent with RCW 26.09. Br. Appellant, at 29-31. Domestic violence *must* be

⁶ Entering protective residential provisions is not only important to protect children, but also to ensure the safety of adult victims of domestic violence who share children with their abusers. An abuser’s use of children against a victim is common. When finally separated, “the perpetrator’s main vehicle for continued contact and control of the adult victim is through the children.” State Gender and Justice Commission, *Domestic Violence Manual for Judges*, at 2–52 (2015 rev.). Abusers commonly use children to control victims by “[i]nterrogating the children about the [victims’] activities” or by “[h]olding children hostage or abducting the children in an effort to punish the abused party or to gain the abused party’s compliance.” *Id.* at 2-51, 2-52.

considered in any type of custody order. RCW 26.09.191 addresses mandatory restrictions in a parenting plan when domestic violence has occurred. RCW 26.09.191 principles of safe visitation for minor children when domestic violence has occurred was adopted by RCW 26.50.060(1)(d) and must be considered in entering *protective* residential provisions in a DVPO.

The superior court here determined that domestic violence occurred pursuant to the definition of DVPA and entered a DVPO. Residential provisions that were *protective* should have been entered for all three children consistent with the intent of the Parenting Act and RCW 26.09.191. The superior court was required to enter protective residential provisions for all three children, not just N.L.M.

D. The Court of Appeals recently ruled in *Juarez*, that the Domestic Violence Prevention Act presumes a one-year domestic violence order for protection. The superior court erred by entering only a four-month domestic violence order for protection.

As previously noted, the Court of Appeals very recently determined that in construing RCW 26.50.025(2) the “[t]he policy behind the Domestic Violence Prevention Act bolsters a conclusion that limiting the duration of the protection order in deference to a separate marital dissolution proceeding contradicts RCW 26.50.025(2)” *Juarez*, 2016 West 4706535, at *4. The *Juarez* Court concluded:

[The] trial court denied Anna Juarez’s request for a one-year domestic violence protection order in order to maintain the status quo until the parties could conduct a hearing in the marital proceeding. This decision *contradicted* the language of RCW 26.50.025(2).

Id. at 5 (emphasis added). In so construing RCW 26.50.025(2), the *Juarez* Court concluded that the superior court erred in granting a short-term DVPO, in lieu of a longer term, one-year DVPO, and remanded the matter to the superior court as a result. *Id.* at 6.

In this case, the superior court erred by improperly deferring relief in the DVPO proceeding for relief to be ordered in a future parenting plan modification action. On the motion for reconsideration the superior court here specifically noted the following; “some safeguards for the short-term – four months is plenty of time for someone to get something going if they wanted to *modify the parenting plan.*” RP 27:5-8 (emphasis added). This was inappropriate and in violation the DVPA.

The superior court erred as a matter of law when it granted a four-month DVPO instead of a one-year DVPO.

II. ANSWER TO MOTION TO DISMISS (PURSUANT TO RAP 17.4(d))

This Court should not dismiss this appeal for several reasons: this case is not moot and this case contains issues of public importance.

First, Ms. Maldonado improperly based her motion to dismiss in part upon alleged facts not in the record. She never sought—nor was she otherwise granted—leave of court to supplement the record. This Court should deny her motion to dismiss for her violation of RAP 10.7 and RAP 10.3(b). The issue of improperly citing to facts outside the record without requesting and receiving leave of Court to supplement the record is fully addressed in an affirmative motion filed contemporaneously, but separately, from this brief by Mr. Maldonado. (For purposes of ease, a *copy* of this motion is attached to this brief as Appendix A).

Second, even if the issue of DVPO renewal was properly before this Court, it is not directly related to the issues on appeal here. As explained in the Opening Brief, one of several errors attributed to the superior court was its failure to enter a one-year DVPO. Br. Appellant, at 36-41. A four-month DVPO was entered on March 4, 2016. CP 43. Had the DVPO been entered for a period of one-year, as requested, it would have expired on March 4, 2017. Should this Court agree with Mr. Maldonado's argument on appeal, it could still remand this matter with instructions to enter a DVPO through March 4, 2017.

Third, an argument *could* be made that this appeal is moot after the March 4, 2017 date, as that would be the one-year expiration date had the DVPO been granted for one-year. However, even if this Court decides

this case after March 4, 2017, this Court should not dismiss this appeal. The DVPA does not require a recent act of domestic violence for a DVPO to be entered. *See Spence*, 103 Wn. App. at 330-4. Nor does the DVPA expressly prohibit the entry of a *new* DVPO based upon prior acts of domestic violence adjudicated in a *prior* DVPO. *See Muma*, 115 Wn. App. at 6-7. Finally, an attempt was made to have this appeal heard as soon as possible. A motion to expedite the appeal and to schedule oral argument for the first week in November 2016 was filed on August 4, 2016 by Mr. Maldonado through counsel. However, Commissioner Kanazawa of this Court denied the request on August 9, 2016. Additionally, if this Court accepts that this case is moot, then appeals of DVPOs, especially those of short-term duration entered in violation of the DVPA, will always escape review and will be unreviewable.

Fourth, Ms. Maldonado argues that this should be dismissed because there are no issues of importance that are likely to arise again pursuant to the factors as set forth in *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004). The *Horner* factors include “(1) whether the issue is of a public or private nature, (2) whether an authoritative determination is desirable to provide future guidance of public officers, and (3) whether the issue is likely to recur.” *Blackmon v. Blackmon*, 155 Wn. App. 715, 720, 230 P.3d 233 (2010) *citing Horner*, 151 Wn.2d at

891-2. While there are three factors, the analysis does not need to involve all three factors. *See Blackmon* 155 Wn. App. at 720.

This case has multiple issues of importance that are likely to arise again. In addition to addressing the issue of protecting minor children exposed to domestic violence in a DVPO, this case also presents a novel issue not previously addressed by any published decisions: the requirement of the superior court to enter protective residential provisions in a DVPO pursuant to RCW 26.50.060(1)(d).

The Court of Appeals also applied the *Horner* factors in *Blackmon* and determined that the question on appeal (pertaining to a right to jury trial in a DVPO proceeding) “[was] unquestionably an issue of broad public import that is likely to recur and on which an authoritative determination is desirable to provide guidance to public officers.” *Blackmon* 155 Wn. App. at 720. There are thousands of DVPO proceedings held in Washington every year, many involving families with children. The issues on which Mr. Maldonado requests guidance are sure to repeat as they have since the *Stewart* decision.

III. CONCLUSION

Appellant, Jose Maldonado, respectfully requests that the Court remand this case to the superior court to enter a domestic violence order for protection protecting all three children for a period of one-year.

Appellant respectfully requests that this Court remand to the superior court with instructions directing the superior court to enter protective residential provisions for all three children in the DVPO.

Appellant specifically requests that this Court find that the DVPA requires protective residential provisions consistent with RCW 26.09.191.

Appellant also respectfully requests that this Court deny Respondent, Ms. Maldonado's, motion to dismiss this appeal as moot.

RESPECTFULLY SUBMITTED on this 3rd day of October, 2016.

NORTHWEST JUSTICE PROJECT



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APPENDIX

App. A	APPELLANT'S MOTION PURSUANT TO RAP 10.7 AND RAP 10.3(b) TO STRIKE PORTIONS OF RESPONDENT'S RESPONSE BRIEF
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App. A

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOSE MALDONADO,

Appellant,

v.

NOEMI LUCERO MALDONADO,

Respondent.

NO. 75146-8-I

APPELLANT'S MOTION PURSUANT
TO RAP 10.7 AND RAP 10.3(b) TO
STRIKE PORTIONS OF
RESPONDENT'S RESPONSE BRIEF

1. IDENTITY OF MOVING PARTY

Jose Maldonado, Appellant, seeks the relief designated below.

2. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 10.7 and RAP 10.3(b), Appellant moves the Court for an order to strike the identified portions for the Respondent, Noemi Lucero Maldonado's, response brief.

3. FACTS RELEVANT TO MOTION

On September 2, 2016, Respondent, Ms. Maldonado, filed her response brief pursuant to RAP 10.3(b). As part of her response brief, she also filed a motion to dismiss the appeal pursuant to RAP 18.9(c). However a number of factual assertions not supported by the record in violation of RAP 10.3(b) (through the requirements of RAP 10.3(a)(5)) were also included in her response brief.

The portions of the response brief asserted to be in violation of RAP 10.3(b) are as follows:

Page 8 of Respondent's brief, *beginning* on the *third line* of text with "Ms. Maldonado had the children for the weekend with her boyfriend." The violation continues and *concludes* on the *fourteenth line of text* with the words "cease her fit." None of the information provided in

1 this entire section of Ms. Maldonado's brief was before the superior court which is why the
2 record was not cited to.

3 *Page 21* of Respondent's brief, *beginning* on the *eleventh line* of text of Section V, with
4 "Here, as the DVPO [domestic violence order for protection] has expired, the renewal was
5 denied and the modification of the parenting plan is currently pending." This information is not
6 properly before this Court and was not in the record before the superior court which is why the
7 record was not cited to.

8 *Page 22* of Respondent's brief, *beginning* on the *fourteenth line* of text continuing
9 through the *sixteenth line*, with the following text: "after which, he filed a motion to modify the
10 parenting plan. The DVPO has also expired in this case, as the renewal was not granted." This
11 information is not properly before this Court and was not in the record before the superior court
12 which is why the record was not cited to.

13 **4. GROUNDS FOR RELIEF AND ARGUMENT**

14 **The aforementioned identified portions of Respondent Ms. Maldonado's brief, were**
15 **submitted in in violation of RAP 10.3(b) and should be stricken pursuant to RAP**
16 **10.7.**

17 RAP 10.3(b) governs the content of briefs submitted to this Court by respondents. The
18 rule requires conformity with briefs submitted by a petitioner or appellant. Petitioner/appellant
19 briefs are governed by RAP 10.3(a). RAP 10.3(a) and (b) require that "[r]eference to the record
20 *must* be made included for each factual statement." (emphasis added).

21 The portions of Ms. Maldonado's brief identified above violate this requirement and are
22 not supported by the record on appeal, which is why there are no references to the record as
23 required. RAP 10.4(f). These identified portions of Ms. Maldonado's response brief are an
24 attempt to interject new facts into this appeal that were not before the superior court. Some of

1 those facts are those upon which her motion to dismiss is based. (Mr. Maldonado fully addresses
2 Ms. Maldonado's motion to dismiss in his reply brief pursuant to RAP 17.4(d)).

3 RAP 10.7 governs the submission of an improper brief. When an improper brief has
4 been filed, this Court may pursuant to RAP 10.7 "(1) either order the brief returned for correction
5 or replacement within a specified time, (2) order the brief stricken from the files with leave to
6 file a new brief within a specified time, or (3) accept the brief." RAP 10.7 also "grants this court
7 the discretion to order correction of a brief *or accept it without considering the erroneous*
8 *references.*" *In re Adoption of R.L.M.*, 138 Wn. App. 276, 283, 156 P.3d 940 (2007). Appellant
9 Mr. Maldonado suggests that instead of ordering the brief entirely stricken with leave to file a
10 new brief, that the identified portions of Respondent Ms. Maldonado's response brief which are
11 in violation of RAP 10.4(b) not be considered by this Court.

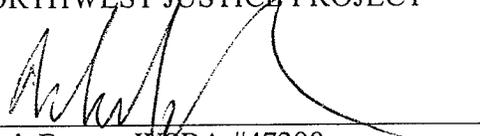
12 Sanctions pursuant to RAP 10.7 are permissive, not mandatory. *See In re M.K.M.R.*,
13 148 Wn. App. 383, 199 P.3d 1038 (2009). Appellant Mr. Maldonado does not seek sanctions
14 from this Court. He only seeks the substantive relief requested in this motion.

15 **5. CONCLUSION**

16 For the reasons stated above Appellant Jose Maldonado, asks this Court to grant his
17 motion pursuant to RAP 10.4(b) and RAP 10.7 and that it not consider *page 8* of Respondent Ms.
18 Maldonado's brief, *beginning* on the *third line* of text *through the fourteenth line* of text nor the
19 assertion on *page 21* of her response brief regarding proceedings occurring post-entry of the
20 DVPO, nor *page 22* of Respondent's brief, *beginning* on the *fourteenth line* of text continuing
21 through the *sixteenth line*.

1 RESPECTFULLY SUBMITTED on this 3rd day of October, 2016.

2 NORTHWEST JUSTICE PROJECT

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4 Mark Ferraz, WSBA #47298
5 Mary Welch, WSBA #29832
6 Attorneys for Jose Maldonado
7 Petitioner/Appellant

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COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

JOSE MALDONADO,

Petitioner/Appellant,

vs.

NOEMI LUCERO MALDONADO,

Respondent.

COA No. 75146-8-I

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the 3rd day of October, 2016, I caused to be delivered via electronic mail in pdf format and via First Class USPS Mail, a true and correct copy of the REPLY BRIEF OF APPELLANT AND ANSWER TO MOTION TO DISMISS (PURSUANT TO RAP 17.4(d)) and APPELLANT'S MOTION PURSUANT TO RAP 10.7 AND RAP 10.3(b) TO STRIKE PORTIONS OF RESPONDENT'S RESPONSE BRIEF addressed to the following:

MIKEL CARLSON
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Dated: October 3, 2016


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