NO. 368285-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BRUCE ALAN FISCHER,

Appellant,

v.

KAREN LYNN FISCHER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR THURSTON COUNTY
THE HONORABLE PAULA J. CASEY

REPLY BRIEF OF APPELLANT BRUCE A. FISCHER

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 3

A. Appealable Orders 5

1. The orders renewing and modifying the domestic violence Order for Protection are properly before the Court for review. 5

2. The remaining final orders of the trial court are properly before this court for review. 6

B. All Final Decisions From Trial And The Post-Trial Motion Are On Review Of The Appellate Court 9

C. Post Trial Decisions By The Trial Court 11

1. The trial court refused to make a proper final disposition of home. 11

2. The attorney lien on the real property was improper. 15

3. The Court should make a determination as to the propriety of the additional post-trial orders entered by the trial court pending appellate review. 17

D. Substantial Evidence Does Not Support A Finding Of A History Of Acts Of Domestic Violence 18

1. Karen's testimony was determined to be credible 18

2. Karen's testimony was NOT consistent with other witnesses 18

a. The testimony by Peg Cain is inadmissible and should not have been ordered 19

b. Testimony of MaryAnne Trause, Ph.D. 23

c. Testimony of Bridgette Arnett 25

3. The trial court erred in finding Karen did not commit acts of domestic violence 30

E. Statutory Definitions Of Domestic Violence 33

F. Renewal Of Order Of Protection 35

G. The Trial Court Entered A Restrictive Parenting Plan 40

1. Limitations were imposed in the final parenting plan under RCW 26.09.191. 43

2. Limitations imposed should be reasonably calculated to protect the children. 44

3. Domestic violence treatment does require admission of guilt and "Perpetrator" labeling. 50

H. Attorney Fees/Intransigence 51

III. CONCLUSION 52

INDEX TO APPENDICES

Appendix A Excerpts from the Deposition of Nancy Hanrahan, Guardian ad Litem.

Appendix B Appellant's Response to Court's Motion for Consolidation, filed 11/16/07.

Appendix C Marriage of Trubner-Biria, 72 Wn. App. 858, P.2d 675 (1994).

Appendix D Email to Bridgette Arnett terminating visitation services dated 7/15/07.

Appendix E Selections of WAC 388-60, downloaded from http://apps.leg.wa.gov/WAC/default.aspx?cite=388-60.

TABLE OF AUTHORITIES

Cases

Aquarian Found. v. KTVW, Inc.,
11 Wn. App. 476, 523 P.2d 969 (1974) 10

Foley v. Smith,
14 Wn. App. 285, 539 P.2d 874 (1975) 10

In re Disciplinary Proceeding Against VanDerbeek,
153 Wn.2d 64, 101 P.3d 88 (2004) 16, 17

In re Freeman,
No. 26148-4-III, slip op. at 11 (Wash. Ct. App.
June 12, 2008) 36, 37, 38

In re Interest of Mowery,
141 Wn. App. 263, 169 P.3d 835 (2007) 30

In Re Marriage of Forsyth,
14 Wn. App. 909, 546 P.2d 117 (1976) 10

In re Marriage of Greenlee,
65 Wn. App. 703, 829 P.2d 1120 (1992) 14

In re Marriage of Thompson,
97 Wn. App. 873, 988 P.2d 499 (1999) 18

In re Marriage of Young,
18 Wn. App. 462, 569 P.2d 70 (1977) 51

In re Trustee's Sale of Real Property of Whitmire,
134 Wn. App. 440 (2006) 16

Marriage of Trubner-Biria,
72 Wn. App. 858, P.2d 675 (1994) 13

Martin v. Schoonover,
13 Wn. App. 48, 533 P.2d 438 (1975) 10

Penry,
119 Wn. App. 799, 82 P. 3d 1231 (2004) 51

Ross v. Scannell,
97 Wn.2d 598, 647 P.2d 1004 (1982) 16

State ex rel. Carroll v. Junker,
79 Wash.2d 12, 482 P.2d 775 (1971) 14

Stigall v. Courtesy-Chevrolet Pontiac, Inc.,
15 Wn. App. 739, 551 P.2d 763 (1976) 10

Streater v. White,
26 Wn. App. 430, 613 P.2d 187 (1980) 51

Constitutional Provisions

Const. art. I, § 3 2

Const. art. I, § 5 ..... 2, 9

Statutes

RCW 10.99.010 34

RCW 10.99.020(5) 33, 34

RCW 18.19.180 21

RCW 26.09 40

RCW 26.09.002 41

RCW 26.09.050(1) 11

RCW 26.09.060 (3) 42

RCW 26.09.080 ..... 12, 13

RCW 26.09.187(3)(a) 43

RCW 26.09.191 ..... 43, 44

RCW 26.09.191(2)(m)(i) 45

RCW 26.09.191(2)(m)(iii) 49

RCW 26.09.191(4) 44

RCW 26.09.191(5) 42

RCW 26.09.191(6) 43

RCW 26.09.197 42

RCW 26.09.225 23

RCW 26.50 ..... 35, 36, 42, 43

RCW 26.50.010(1) 33, 34, 36

RCW 26.50.060(2) 35

RCW 26.50.060(3) 35, 36

RCW 60.40.010(5) 17

RCW 61.24 12

RCW 70.02.040 20

Regulations and Rules

CR 60 17

ER 612 ..... 31, 32

ER 701 20

RAP 1.2 (a) 8

RAP 2.2 51

RAP 2.2(a)(1) 7

RAP 2.5 9

RAP 2.5(a)(3) 20

RAP 5.1(c) 9

RAP 5.3(f) 7

RAP 7.2 ..... 5, 18

RAP 7.2(e) 6

RAP 9.10 8

RAP 9.11 9

RAP 9.2(b) 7

RPC 8.4(d) 16

WAC 388-60 50

I. INTRODUCTION

The purpose of this appeal is review of the procedural and legal basis upon which the trial court entered orders pursuant to the dissolution proceeding and associated domestic violence civil action, matters that have been consolidated by the Court for review. Contrary to Karen's claims, the appeal is not predicated on a desire to "win." I don't believe there are winners when a family is dissolved. I want only to move forward with my life, I just want my children to be a part of that. I am asking this court to look beyond the rhetoric and decline the invitation to merely adopt a predetermination that I am a heinous perpetrator of domestic violence simply because the assertion has been repeatedly proffered. I am asking this court to pragmatically examine the empirical evidence in the record without applying this false supposition so that the ends of justice might finally be served and concern for the children's best interest and emotional welfare be given consideration.[1]

Substantial evidence in the file shows a history of a bonded and loving relationship that has suffered violent upheaval to the increasing detriment of the children's emotional well-being. Substantial evidence shows the children have been the victims and have been harmed by this process. Their best interest has not been considered but disposed under

[1] For the sake of the minor children's privacy, I refer to my daughter and son by their first initials only, C and R respectively.

the guise of restricting our relationship for the sake of protection. This is a faulty basis that should not be sustained. The facts do not bear truth to these findings and therefore this Court should reject the thinly veiled coercive and punitive tactics employed as the premise for the dissolution court's determination of my parental relationship and property disposition. I am asking this Court to review the rulings for propriety in light of legal authority and my rights under the Washington State Constitution, including those articulated in Article I, Section 3, which guarantees, "No person shall be deprived of life, liberty, or property, without due process of law, and Section 5, which protects my Freedom of Speech, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." The trial court's rulings effectively violated my rights to property and current and future contact with my children.

The record will reflect that I have acted lawfully but assertively in seeking to receive justice rather than the punitive consequences appropriate for a violent criminal. Of what use are rights if we cannot stand for their application in the absence of a legal basis to dispose of them? What more relevant and valued rights are conveyed to lawful citizens than the right to a relationship with our children and the protection of one's property?

II. ARGUMENT

As a preliminary discussion I would like to address some inaccuracies in the Summary of the Argument presented in respondent's brief. There are blatant untruths and misstatements used to set the tone of her argument. Without addressing every detail in a tit-for-tat response, there are some essential claims that warrant rebuttal. First, my acts to seek a legal remedy to unjust and untenable orders of the trial court are construed as a "full blown campaign against the courts," Resp. Br. at 1, and the use of the word "rage" is peppered throughout the brief. Most offensive are the repeated assertions that I "went after the girl," referring to my relationship with my daughter. These allegations are not substantiated, but put forth merely as incendiary statements to elicit the Court's bias. This has been a well-used and effective tactic but should be rejected to enable an objective review of the record as a whole, and should be admonished as a shameful tactic that has harmed an innocent child.

I do not diminish the plight of victims of violent crimes and the dedication and passion of those serving as their advocates. However, those circumstances do not apply to this case, other than that I received the hostility and contempt appropriate for such criminals throughout this process by the court and other providers. Those who did not endorse this stratagem were decisively admonished and rejected. It was essential that I

received the treatment of a criminal and that concept be portrayed to the children, even in the face of my repeated pleas to ease the emotional distress inflicted on the kids – this is the clear cause of psychological damage and anxiety now apparent in the them that was not present in the beginning. Hanrahan Dep. at 18.[2] I remained unchanged; their emotional well-being has suffered; they have suffered.

My refusal to adorn the label of perpetrator is cast as "rage," whereas *outrage* is the more appropriate term. To have not been guilty of, charged with, or convicted of any crime and having to accept the destruction of my relationship with my children held hostage as coercive tools, and all of my assets and financial standing systematically destroyed, I sought all available avenues for a legal remedy – to no avail. I believed it was the appropriate course to pursue justice in this manner. To date, this "campaign" (to be a dad and save my home) has been definitively answered that justice and the benefit of the law are privileges subject to biased application and the court's discretionary determination of the parties' worthiness of rights, property, relationships, and condoning of *responsive* or punitive acts.

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[2] Excerpts from the Deposition of Nancy Hanrahan, Guardian ad Litem, (hereinafter Hanrahan Dep.), CP 752-869, are attached as Appendix A for the Court's convenience.

A. Appealable Orders

1. The orders renewing and modifying the domestic violence Order for Protection are properly before the Court for review.

The domestic violence Order for Protection was extended during August 2007 pending trial and then renewed on 09/05/07, granting the order for an additional year. The renewal order was amended later that day to include the provisions included in the previous order permitting, "Respondent shall have contact with the children as authorized in Cause NO. 06-3-845-7."[3] I timely appealed the order on 10/03/07. At Karen's request, the order was modified in 12/20/07, adding the further restrictive language, "Additionally Respondent shall be allowed to attend school programs and extracurricular events but shall have no contact with Petitioner or the children." (Emphasis added). There was no identified or perceived threat of harm by me to warrant the increased restriction. I objected and assert the invalidity to the trial court's authority to modify this order that was indisputably under the authority of the appellate court and was not brought pursuant to any motion authorized by civil rule, and was therefore not in compliance with the requirements of RAP 7.2.

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[3] The Temporary Order entered in Cause No. 06-3-00845-7 on 09/21/06, ordered, "Mr. Fischer's attendance at or participation in the children's school and extracurricular activities shall not constitute a violation of the Protection Order under Thurston County Cause # 06-2-30505-9 provided that Mr. Fischer makes no direct contact with Ms. Fischer." CP 258-262.

Permission of the appellate court was not sought prior to the entry of the modifying order. RAP 7.2(e).

2. The remaining final orders of the trial court are properly before this court for review.

The trial court entered the final parenting plan on 10/04/07. That order was timely appealed on 10/17/07. Due to Judge Casey's leave from the bench, the entry of the remaining final dissolution orders was delayed until 10/30/07. The appellate court moved to consolidate the two matters on appeal on 11/01/07. Along with Appellant's Response to this Court's Motion for Consolidation on 11/16/07, my then-counsel, Ms. Amamilo, added by reference in the response and attached under separate cover, the remaining final orders from trial; (1) Findings of Fact and Conclusions of law dated, (2) Decree of Dissolution, and (3) Order of Child Support, all dated October 30, 2007.[4] It was clearly my intent and understanding that all final orders from trial were under this Court's review. In fact, Karen's trial attorney, Mr. Lucenko, in his responsive memorandum to my post-trial motion regarding the disposition of the home stated, "The matter is currently before the Court of Appeals Division 2." CP 1083. His

[4] Attached hereto as Appendix B are true and correct copies of the pleadings herein referenced. The attached final orders, located at CP 1028 – 1059, as stated below, are not included as part of the exhibit. Included are the Certificate of Service and Facsimile transmission verification report. The orders can be located as follows: Decree of Dissolution, CP 1028-1035, Findings of Fact and Conclusions of Law, CP 1036-1041, Order of Child Support Final, CP 1042-1059, all filed October 30, 2007.

memorandum to that motion sets out as Issue #1, "Is respondent required to seek and obtain permission of the Appellate Court prior to pursuing this motion in Superior Court?" CP 1083-1084. The issue was further discussed at the December 19, 2007, hearing in which the trial judge discusses whether she may entertain the motion regarding the home. The judge inquired about the property division being on appeal. Mr. Lucenko responded, "I think everything is, Your Honor." The Court replied, "Everything is on appeal." RP 12/19/07 at 4-5.

Respondent's brief argued extensively that the remaining final orders are not properly under this Court's review. I respectfully disagree. Appellant's 11/16/07, response to the Court's motion to consolidate specifically addressed issues in the additional final orders to which errors are assigned and included in the appeal. If Ms. Fischer is asserting error in the notice, the appellate court will disregard defects in the form of a notice of appeal if the notice clearly reflects an intent by a party to seek review. RAP 5.3(f). There is no debate on my intent to seek review and my reliance on my counsel's having assigned those orders for appellate review. Clearly the orders fall within the provisions of RAP 2.2(a)(1), Final Judgment.

If the Court finds a party has made a good faith effort to provide those portions of the record required by rule 9.2(b), the appellate court will

not ordinarily dismiss a review proceeding or affirm, reverse, or modify a trial court decision or administrative adjudicative order certified for direct review by the superior court because of the failure of the party to provide the appellate court with a complete record of the proceedings below. If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may direct the transmittal of additional clerk's papers and exhibits. RAP 9.10. The Rules of Appellate Procedure will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b). RAP 1.2(a).

I would argue that justice can only be served by reviewing the issues presented in those orders Karen now asserts are not before this Court and should not be reviewed. However, the rules clearly provide for the Court's determination of the scope of its review.

> The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily

> expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11.

A notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review. RAP 5.1(c). Even if the appellate court were to decline to review the remaining final orders from trial due to deficiency in designating those orders for appeal, the scope of the court's review may extend to those errors of the trial court that have or are affecting a constitutional right. RAP 2.5. Most notable are those rulings which deny my freedom of speech and have acted to deny my most basic rights of a relationship with my children and my property rights. I have not been afforded due process, have not been charged, adjudicated, or convicted of any crime for which these rights have been and continue to be denied. The post-trial modification of the protection order prohibiting me from exchanging a greeting is a violation of free speech under Const. art. I, § 5.

B. All Final Decisions From Trial And The Post-Trial Motion Are On Review Of The Appellate Court

The final orders from trial and the post-trial orders are before this court for review, including the Order on Renewal of Order for Protection; the dissolution final orders, and the post-trial order denying my CR 60 motion.

Issues that the respondent failed to address containing a prima facie showing of reversible error should be determined pursuant to the standard applied in cases in which the respondent fails to file a brief. Because Karen elected not to address those issues in her responsive brief, the Court should determine there exists sufficient assignments of error to establish the fact asserted. "If the respondent files no brief, the cause will be deemed submitted upon its merits as to him." In Aquarian Found. v. KTVW, Inc., 11 Wn. App. 476, 523 P.2d 969 (1974), Division One interpreted the rule to mean that, absent a respondent's brief, appellate review was limited to examining the appellant's brief to determine if its assignments of error present a prima facie showing of error. Later cases firmly established and elaborated upon this holding. See Stigall v. Courtesy-Chevrolet Pontiac, Inc., 15 Wn. App. 739, 551 P.2d 763 (1976); In Re Marriage of Forsyth, 14 Wn. App. 909, 546 P.2d 117 (1976); Foley v. Smith, 14 Wn. App. 285, 539 P.2d 874 (1975); Martin v. Schoonover, 13 Wn. App. 48, 51, 533 P.2d 438 (1975) (a respondent choosing not to file a brief does so at his peril).

C. Post Trial Decisions By The Trial Court

1. The trial court refused to make a proper final disposition of home.

Because the trial court had failed to make a final disposition of the real property, I brought a motion on 12/11/07, seeking to resolve the matter of the home. Karen had been allowed to remain in the home after trial although she testified that she was unable to afford the associated debt. The court found she no longer qualified for maintenance but ordered that I continue to make half of the debt payments for the house. RP 9/5/07 at 4 (Oral Decision), CP 1038. After November Karen discontinued paying her half of the payment as ordered. The house was listed for sale but was unable to sell without a deficiency, due largely to the attorney lien in favor of Mr. Lucenko attached to the home. Mr. Lucenko's attorney fees were to come from the net proceeds of the home, if any. CP 1034, 1041. An independent evaluation of the home was not relied on to determine the true market value of the home at trial. A trial judge has a statutory duty to make a final disposition of the property to prevent the need for future litigation on the issue by the parties. RCW 26.09.050(1). The decree did not do so, but left us as tenants in common granting exclusive use and control of the home to Karen.

> In a proceeding for dissolution of the marriage . . . the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties . . ."

RCW 26.09.080

The judge was unwilling to award the home to me and ultimately denied my post-trial motion for relief by order dated 03/18/07. The result is that the home went through foreclosure proceedings and the title was ultimately transferred in a manner not consistent with non-judicial foreclosure statute, the notices of trustee sale mailed to me, or the published notices of trustee sale pursuant to RCW 61.24. The property has been transferred and sold despite the existence of a Lis Pendens. This matter, including the execution of documents by Karen Fischer and other acts by her with the assistance of her attorney Mr. Lucenko, as demonstrated by his billing statements filed at trial, shortly after having me removed from the house, are subject to investigation by state and federal agencies.

The issues I am asking this court to review are the trial court's awarding the property to both parties as tenants in common, subsequent refusal to transfer the property to me absent refinancing given repeated findings of no equity in the home, the effect of Mr. Lucenko's lien preventing my ability to finalize a refinance, and barring my access to the

property after Karen relocated, including prohibiting me from taking possession of personal property I was awarded in the dissolution.

The trial court flatly refused to permit my assumption of the home despite my ability to meet this financial obligation and there being no equity to award to Karen. My attorney filed a Memorandum of Authorities 01/25/08 offering Marriage of Trubner-Biria, 72 Wn. App. 858, P.2d 675 (1994)[5] as authority for the court to award the home to me absent any equity to divide. The court responded, "I'm not sure if I've stated this on the record, but it has been my concern that Mr. Fischer may, in fact, not choose to keep the mortgage timely paid, because of the strained relationship between Ms. Fischer and Mr. Fischer." RP 01/25/08 at 7. All evidence submitted to the court was that Karen had not maintained timely payments of the auto or home and had ceased paying her share of the mortgage after November. This argument is contained in RP 01/25/08 8-10 regarding transfer of home, governing authority, no contrary authority presented, and no ruling by the court on the CR 60 motion.

Contrary to RCW 26.09.080, the court was clearly applying bias based on perceived behaviors. "So if Mr. Fischer chooses not to pay the mortgage to create problems for Ms. Fischer, which seems somewhat

[5] Attached as Appendix C for the Court's convenience.

likely based upon his behavior in these proceedings, then she does have problems." RP 01/25/08 at 15. I made extensive payments timely throughout proceedings, had repeatedly raised concerns about Karen's acts resulting in negative credit reporting for me during the dissolution and a pattern from before separation. Trial. Ex. 191. The court never expressed concerns for her behavior. Additionally, the decree contains a hold harmless provision that was an available remedy if this were to ever become an issue. In re Marriage of Greenlee, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992) (under hold harmless clause of dissolution agreement, respondent had clear legal right, which was enforceable in court, to be held harmless with respect to claim against former husband).

The judge applied an unfounded and untenable basis for determining the property disposition. Abuse of discretion occurs where the trial court's action is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). I had repeatedly brought concerns for the derogatory effect Karen's acts were having on my credit. Karen had ceased making her portion of the mortgage payment three months prior to moving out of the home and then had relocated. The court repeatedly found no equity existed in the home. I sought injunctive relief to allow me to exercise possession and control over the home that would

have prevented foreclosure and the resultant damage to both parties' credit because I could have afforded the home if I was not forced to maintain a secondary residence. All attempts have been flatly denied at all levels.

2. The attorney lien on the real property was improper.

Karen's dissolution attorney attached a lien to the home for the attorney fees she was awarded at trial from the proceeds of the home, if any. The lien acted as a cloud on title that eventually frustrated my attempts to refinance the home. Karen's attorney argued, "Your Honor, as the court knows, the attorney fees attaches to any real property. We didn't do anything to detain anything, Your Honor." 01/25/08 at 21. I had repeatedly brought to the court a statement from the lender requiring no other liens against the home as a requirement for the loan. CP 1430-1431, 1442-1444. Mr. Lucenko was acting to obstruct the refinancing to force the sale in order to force me to satisfy his attorney fee judgment lien on the property. I had no means of doing so and the court refused to contend with that inevitability in its ruling regarding the sale and refinance options.

Mr. Lucenko's contention was faulty. "The entry of a judgment in favor of an attorney in the enforcement of an attorney's lien against a former client's cash judgment awarded in a marriage dissolution proceeding does not create a "valid interest, lien, or lien claim" against the former client's former home that the dissolution court awarded to the other

spouse and ordered to be refinanced to satisfy the cash judgment." In re Trustee's Sale of Real Property of Whitmire, 134 Wn. App. 440 (2006). In this instance, the trial court continued to uphold the lien on the property preventing refinance or a clear sale of the property, eventually culminating in the foreclosure of the property. A lawyer may not file an attorney's lien on the proceeds of a real property sale by a client to secure a bill for fees owed by the client. The filing of such a lien contravenes the Supreme Court's holding in Ross v. Scannell, 97 Wn.2d 598, 647 P.2d 1004 (1982), that an attorney may not file a lien on a client's real property to secure a debt owed by the client and constitutes a violation of practice norms prejudicial to the administration of justice contrary to RPC 8.4(d). In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 101 P.3d 88 (2004). The Washington Supreme Court has held that, for policy reasons, an attorney may not obtain an attorney lien on real property. Ross v. Scannell, 97 Wn.2d 598, 606-07. As in Ross, Mr. Lucenko filed the lien with the admitted purpose of clouding title to the property. RP 12/28/07 at 5. Also, as in Ross, the trial court approved the attorney lien on real property but the Washington Supreme Court disagreed. Ross, 97 Wn.2d at 603, 605. The court was concerned that an attorney lien clouded the title to real property. Ross, 97 Wn.2d at 606. The holding of Ross also prevents attorney lien on the proceeds of real property sales, since

both filings appear as lien on a title report and cloud the title.

VanDerbeek, 153 Wn.2d 64, 88. VanDerbeek explicitly prevents attorney liens from attaching to the proceeds from the sale of real property.

VanDerbeek, 153 Wn.2d at 88.

> For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with RCW 62A.9A-315(b)(2). The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under RCW 62A.9A-327 or a transferee under RCW 62A.9A-332.

RCW 60.40.010(5).

This shows that the legislature only intended the lien to attach to cash proceeds from the action and not to the proceeds from the sale of property. Mr. Lucenko's lien should not have attached to the home to act to obstruct to my ability to refinance and possess the home.

3. The Court should make a determination as to the propriety of the additional post-trial orders entered by the trial court pending appellate review.

Except for the March 18, 2008, Order Denying my motion for relief pursuant to CR 60, there were no other post-judgment motions properly brought from which to enter such orders or authority offered for denying possession of my property. A decree is modified when rights given to one party are extended or reduced beyond the scope originally

intended. In re Marriage of Thompson, 97 Wn. App. 873, 878, 988 P.2d 499 (1999). The remaining post-trial orders should be deemed improper and unauthorized pursuant to RAP 7.2, and should be reversed. RP 4/29/08 at 4-8.

D. Substantial Evidence Does Not Support A Finding Of A History Of Acts Of Domestic Violence

1. Karen's testimony was determined to be credible.

Karen was presented with a statement in her own handwriting, admitted as Exhibit 2 at the 8/11/06 hearing and admitted at trial as Trial Ex. #145, that directly contradicted her immediately preceding testimony. She then acknowledged the denied behavior by writing on the reverse of the exhibit the admission of having done so "only once," thereby further confirming her perjurious testimony. Upon questioning her credibility, based upon the confession inconsistent with her testimony, the commissioner applied attorney client privilege and determined, contrary to statements and evidence witnessed, that Karen was the credible party. This determination is upheld throughout the proceedings and reaffirmed at trial contrary to corroborated facts and testimony of witnesses to her acts of violence and physical harm.

2. Karen's testimony was NOT consistent with other witnesses.

The testimony of the other witnesses for which this statement relies were based primarily upon those witnesses who relied upon the information provided directly to them by Karen. There is no evidence of abuse independent of that which was derived from Karen. Peg Cain acknowledges that she relied on information provided to a staff member during a telephonic interview with Karen. There was no criminal history or physical evidence upon which she relied. Dr. Trause never observed my interaction with my daughter from which to base her conclusion of our relationship or to substantiate the basis for her diagnosis of C's anxiety. The uncorroborated testimony amounts to little more than hearsay.

a. The testimony by Peg Cain is inadmissible and should not have been ordered.

Upon coming to some concerning realizations about Ms. Cain and finding that a business relationship existed between her and the Court and the Commissioner who ordered the second assessment, I notified my attorney's office who immediately faxed notice revoking my privacy release to her office. Although the revocation was received by Ms. Cain on 11/14/06, she faxed a report to the court days later on 11/17/06. RP I 13-16. At trial the question of the propriety of her providing testimony about the evaluation conducted at her office without a release arose. After filing an objection to her testimony, CP 700-703, the trial judge ordered

that she testify and also stated that she does not qualify experts as witnesses. RP I 45 ln. 4. Therefore, the testimony of Peg Cain would not be in her professional capacity offering expert opinion, but as a fact witness subject to hearsay limitations and pursuant to ER 701.[6] More importantly, Judge Casey overruled my objection to her testimony without a signed release and further relied upon her report provided to the court without a valid release. Judge Casey indicated she would reduce to writing her decision that Ms. Cain testify at trial. There is no evidence in the record that such an order was ever entered.

> A patient may revoke in writing a disclosure authorization to a health care provider at any time unless disclosure is required to effectuate payments for health care that has been provided or other substantial action has been taken in reliance on the authorization. A patient may not maintain an action against the health care provider for disclosures made in good-faith reliance on an authorization if the health care provider had no actual notice of the revocation of the authorization.

RCW 70.02.040.

Ms. Cain had knowledge of the revocation but chose to ignore it and filed her report after receiving my revocation. No reliance upon her report had yet existed and never should have been considered by the court. This is

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[6] OPINION TESTIMONY BY LAY WITNESSES. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702. ER 701.

clearly an example of a manifest error affecting my constitutional right to privacy. RAP 2.5(a)(3).

Ms. Cain had no direct knowledge of the facts of the case. She did not personally conduct the interview with Karen, RP I 96, 124, and the tests I took were administered by an uncertified office staff person both times. My conversation with that person revealed that she was Ms. Cain's daughter. The report filed with the court by Peg Cain was in conflict with the requirements of RCW 18.19.180.[7] In answer to my counsel's inquiry whether she could recall any specific instances of power and control that Ms. Cain identified, she responded, "I didn't think there were." RP 1 145. Even if she concluded I have issues with power and control, these are not terms within the statutory definition and do not equate to violence. Not liking my demeanor does not make me violent.

Ms. Cain relied heavily on the conclusion that I was being untruthful because I denied applicability of a majority of questions on the test. Most were not relevant because they pertained to individuals with a criminal history or problems with alcohol or substance abuse; I truthfully

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[7] Confidential communications. An individual registered under this chapter shall not disclose . . . any information acquired from persons consulting the individual in a professional capacity . . . except:

(1) With the written consent of that person . . . .

RCW 18.19.180 (Emphasis added).

answered they do not apply. I took the test twice with identical results. The test was therefore deemed invalid and she concluded I was being untruthful. When questioned at trial, Ms. Cain replied "I don't know how the whole test works." RP I at 105.

The first domestic violence assessment I took included several tests plus a psychological evaluation by Mr. Notarfrancisco that concluded, "Based on my findings, the need for a One year DV group program is **not** indicated at this time." CP 232-235, Trial Ex. 154. Mr. Notarfrancisco is a licensed counselor and has the same or greater credentials as Ms. Cain. He is listed on the same list of state certified perpetrator treatment providers through DSHS.[8] He made attempts to contact Karen but she was unwilling to call him back. Due to a clerical error, he noted he had made contact. This issue was clarified in his letter to the court. CP 249-252, Trial Ex. 155. Mr. Notarfrancisco was provided all pleadings filed in support of the petition for the domestic violence protection order, to include all documents that Karen filed. RP V at 846. He administered a psychological evaluation and questionnaire specifically screening for domestic violence and also conducted an in-person interview. According to Ms. Cain, it is not statutorily required to have the victim's input for an assessment to be valid and in compliance with the

[8] http://www1.dshs.wa.gov/pdf/ca/perplist1.pdf

governing authority. RP I 164 - 165. Karen's refusal to speak with Mr. Notarfrancisco is similar to her pattern throughout the case. RP V at 987.

Karen's unwillingness to cooperate with anyone except those specifically referred by her attorney or who endorsed her representation of the matter. The Guardian ad Litem related her astute observations from her interactions with Karen in her deposition. Hanrahan Dep. at 8, 23-24, 33. When the desired response was not elicited from the Guardian ad Litem, she was consequently admonished by the court to the point she was left shaken and her recommendations and findings flatly rejected. She disclosed intimidation by Karen's counsel, including at her deposition. As she suffered serious health concerns, she did not remain actively involved in the case.

b. Testimony of MaryAnne Trause, Ph.D.

Dr. Trause testified to factors regarding my relationship with my daughter yet was never willing to personally witness our interaction. She wrote in a letter dated 01/12/07, that the relationship should quickly resume normalized visitation. Trial Ex. 150. Dr. Trause failed to respond to numerous attempts to communicate regarding joint therapy sessions and concerns I attempted to convey regarding C exhibiting increasing emotional distress. RP 5 at 835-844. Dr. Trause refused to share any information beyond the dates of their session with me. I believe denying

me access to all information about C's therapy session was a violation of RCW 26.09.225.

Dr. Trause's testimony was ripe with contradictions and appeared strained orchestrated to conform to the predetermined conclusion. Dr. Trause refused to facilitate joint therapy with me and C or to ever personally observe interaction between my daughter and me. She had extensive conversations with Karen throughout the therapy sessions but was not willing to afford me the same courtesy. As therapy progressed, it was clear that rather than working through any emotional distress the divorce was having on her, there was increasing anxiety and distancing apparent in C's relationship with me. RP II 377-378. The only way to save C from subjection to this *Rovang*-style of therapy was to stop enforcing visitation. When I don't see her, she doesn't go to weekly therapy and have the anxieties reinforced in this manner. She is rarely at other events and if she is, she is moved to the opposite side of her mom and kept out of view. Once walking down the wide gymnasium corridor while attending R's basketball game, I was going to the restroom during half-time and passed C and Karen. Upon seeing Karen she swiftly shoved C toward the wall and blocked her with her body as we passed. This sudden exaggerated movement shocked my girlfriend and me. She reacted as if she was protecting C to prevent me from abducting her.

Karen's testimony and their behavior now reveal this is the fear that is being instilled in the kids. Surely this hysterical behavior is frightening and harmful for them. Why it is being enabled is baffling to me.

Karen was very hostile in accosted my parents following their attendance at one of my son's games. They were left shaken and in tears after being confronted by her and receiving a stern admonishment against attending games and assuring their grandson that he is loved and missed. He and my father shared a very tight bond as was demonstrated by his inquiries in visitation notes expressing concern as my father was very frail during an intense and life-threatening battle with cancer. It was during a rare opportunity to be exposed to public environments that they wanted to attend a game and drove nearly two hours in hopes of seeing the kids. They left that day very distraught and in tears. They too have no opportunity to visit or speak with the children and the kids have said their cards and letters were not received. Attending games when my dad's health permits is the only chance to see the kids. Karen's aggressive behavior reveals her motivation in alienating the children from me and my family is clearly not motivated by fear or their best interest.

c. Testimony of Bridgette Arnett

Karen's brief asserts the visitations were detrimental and were canceled by the supervisor. This is another blatantly false statement. I

spoke with Ms. Arnett and wrote a letter addressing my concerns and reasons for terminating the visitations. The truth is that it was getting unbearable for the children for me to exercise my visitation rights and I couldn't continue watching them endure the emotional cost. There is no *Solomon's Wisdom* applied today.

Karen makes the offensive allegations that I continuously "went after" my daughter. Those are insulting lies purposed for the Court's bias and are not supported by any evidence. As with other allegations, assertion does not make fact. The testimony of Ms. Arnett and the reports from the visitations reflect an entirely opposite picture. Ms. Arnett testified that the visitations were overall successful although she noted the increasing distress exhibited by the children, particularly notable in C.[9] RP II at 360. C was exhibiting obvious conflict and distress because she just wanted to be able to be confident in her daddy's love and affection and move on with "just being a normal kid." RP III at 593

The decision to discontinue the visitations the second time (with Ms. Arnett) was also a decision arrived at after much deliberation. I terminated the visitations, not Ms. Arnett as depicted by Karen's brief. RP II 356, see also email dated 7/15/07.[10] Contrary to Karen's assertion, Ms.

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[9] Copies of the visitation reports are found at Trial Exhibits 100 - 115.

[10] Email to Bridgette Arnett terminating visitation services dated 7/15/07, attached hereto as Appendix D.

Arnett characterized the visitations as successful. When testifying, Ms. Arnett stated "I'd say, overall, the visits went great." RP II 359 ln 14. Ms Arnett also testified I did not discuss the ongoing litigation as Karen asserts. RP II 321 ln 11-12. Ms. Arnett noticed that the kids were getting more and more stressed at visitations while I remained the same. RP II 377-378. Ms. Arnett testified, "I started noticing a pattern with her at the beginning of the visits being difficult and then she'd warm up and things would be great," (referring to my daughter). RP II 360. Despite that pattern Ms. Arnett noted that C wanted to be with her dad and be near him, not draw away from him. RP II 360. In the 5/20/07 visit, C stated that she would like to be at Dad's house and that she was not afraid of him. RP II 313.

Throughout the first year of visits with both the visitation house and Ms. Arnett, C was noted as jumping on my back, holding my hand, saying "I love you," etc. The charge repeated throughout Karen's brief that I went after C personally is absurd and is also intended to elicit bias from the Court. Resp. Brief at 10. This assertion is not supported by Ms. Arnett's report or testimony. In fact, her report from 7/15/07 shows we ended the visit with a hug and "I love you." C also said, "we miss you."

I couldn't bear to watch the impact it had on them and my pleas for intervention not only fell on deaf ears, but were interpreted as acts of

hostility toward Karen. I felt Ms. Arnett understood how hard it was on the kids, especially doing transient visitation, but was also powerless except to facilitate the visits as positively as possible. After much heartfelt deliberation and consideration of my children's emotional welfare, it was my decision for the second time to stop the supervised visitations.[11]

Karen's trial attorney tried repeatedly to paint the picture proffered in her responsive brief. Ms. Arnett repeatedly rejected his characterization in testimony. RP II 293-390. Mr. Lucenko persisted in portraying a scenario that simply did not exist. Ms. Arnett's responses contradicted him with statements such as, "I don't know that I would say that," RP II 309, 314, 315, 326, 357, "I don't know if I'd put it in those words," RP II at 314. Prior to trial, Mr. Lucenko attempt to coerce his desired version of testimony from Ms. Arnett by insinuating threats to her ability for future professional employment in Thurston County. After trial, my trial and initial appellate counsel received a similar manner of attempted intimidation and career threats from Mr. Lucenko's firm's former partner, the current County Prosecutor. Throughout this case, dissent was decisively contended with, whether with me directly or anyone not

[11] Appendix D.

advocating their position. Even so, reality simply does not conform to the portrait that has been presented and adopted by the trial court.

Similar circumstances existed during the initial visitations. I discussed my concerns with the Guardian ad Litem before determining to cancel visits at that time. The supervisor that conducted the majority of the visits was mysteriously unavailable during trial. However, her notes reflect positive interaction between me and the kids and with her. The other circumstances made this arrangement strained and it was wearing on the kids. I discussed thoroughly my decision to discontinue visitations with the Guardian ad Litem, as she recalled in her deposition:

> He had told me that he was going to discontinue visitation house, visitation. I didn't say yea or nay. It was -- I was receiving the information as information. Um, I had thought that the environment was very difficult, but I wasn't recommending anything one way or another.

Hanrahan Dep at 36.

Regardless of civil disagreement that might have transpired, the reports themselves demonstrate a loving relationship and successful visits with an absence of any notation of difficulties (at the time) with me. Witnesses Robin Jones and April Godsey from the visitation house were clearly displeased by my challenging their double standards and discontinuing use of their service. When cross examined about their claims both Ms. Jones and Ms. Godsey could not point to any specific instances or visits where

any threatening or abusive behavior actually occurred or were documented. RP II 290

3. The trial court erred in finding Karen did not commit acts of domestic violence.

The trial court adopted the findings of the Commissioner from the domestic violence petition hearings from August 2006. Upon motion for revision, the revising judge did not address any of the issues relevant to the finding of domestic violence, but merely stated that she would uphold the commissioner's ruling to reject the initial positive domestic violence evaluation and require me to obtain a new one. Because the superior court did not revise the commissioner's decision, the commissioner's decision stands as the decision of the superior court that is before this Court for review. In re Interest of Mowery, 141 Wn. App. 263, 274-75, 169 P.3d 835 (2007).

The Commissioner's oral ruling on the domestic violence issue stated that finding domestic violence as to Karen was the Court's discretion, and "although she may have physically *acted out* in some manner" she had discretion not to find Karen committed acts of domestic violence. RP 08/18/06 at 198. Judge Casey later affirmed the position that any acts of assault perpetrated by Karen were simply "responsive" acts. RP 9/5/07 (Oral Ruling) at 14-15. This justification would never be

afforded to a man. Judge Casey did not offer explanation of how acts in which Karen admitted to pursuing me from room to room as I left and initiating conflict by often waking me from a sound sleep would constitute "responsive" acts. Karen's note in her own handwriting said, "I think he likes me out of control." Perhaps her "he made me do it" excuse was the Court's conclusion as well. Her note in its entirety was given no credibility because Karen, whose testimony was deemed credible, testified she had no personal recollection of committing the acts of which she wrote. She admits to it being her handwriting and remembers the feelings, but not "throwing water on Bruce's body and hitting him." Those acts, without the Court's discretion to determine otherwise, are within the statutory definition of Domestic Violence. Ms. Cain testified that even if fear was not present it would still be considered an act of domestic violence.

Karen had just testified that she had not ever struck me or otherwise acted in the violent manner noted, such as throwing things, yelling, or destroying things. ER 612 would appear to permit exactly that type of evidence to refresh Karen's memory of the event and the note was in fact entered into evidence. In the course of presenting it, she wrote a note to her attorney confessing she had done so "only once." The commissioner determined the admission should be destroyed and was

inadmissible as privileged communication. My counsel noted an objection. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires. ER 612.

In addition to assault, throwing things at me, pursuing me from room to room, interrupting my sleep, destroying my business equipment and documents, all acts that were admitted by Karen, testimony was given that she scratched my arms until they bled. This was corroborated at trial by Mr. Ricci who personally witnessed the injuries and was also previously testified to by other witnesses at the initial domestic violence petition hearing in 2006. There was also testimony of other aggressive acts, such as driving erratically and throwing keys out the car window. RP V at 830, CP 241.

The trial court's ruling on domestic violence was based primarily upon two factors, (1) due to my "sheer size,"[12] I am clearly a perpetrator, RP 09/05/07 at 11 (Oral Decision), and (2) I testified that I am not afraid that Karen can physically harm me. I have been punched by her, among other acts testified to, and although I suffered momentary pain, I do not believe by the sole use of her physical force she can cause me serious

[12] I am 6' tall.

injury. That is not the statutory requirement for an act to qualify as domestic violence. Ms. Cain, a certified domestic violence perpetrator treatment provider testified that fear does not have to be present. RP I at 142-144. The court, having predetermined that I was the "perpetrator" and she the "victim" excused her acts of violence, hostility, and aggression as "responsive" and excused any culpability for such behaviors; in essence, condoning them. I submit that the same standard would not have been afforded a man.

Ms. Cain also testified that the policy in domestic violence perpetrator treatment is that one party is deemed the perpetrator and the other the victim.[13] The standard and policies applied exclude the possibility that a dynamic relationship exists in which either party may act during the course of the relationship in a matter that is unkind or even harmful to the other party. In other words, by this standard, as the physically larger party, I am guilty by default and her acts would always therefore be deemed justifiable.

E. Statutory Definitions Of Domestic Violence

The statutory definitions of domestic violence are provided in RCW 10.99.020(5) and RCW 26.50.010(1).

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[13] Attached as Appendix E are the relevant selections of Chapter 388-60 of the Washington Administrative Code (WAC), as noted, downloaded from http://apps.leg.wa.gov/WAC/default.aspx?cite=388-60.

> (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.

RCW 26.50.010(1).

Although not an exclusive list, RCW 10.99.020(5) lists numerous acts which fall within the statutory definition of domestic violence. In each instance the **act** is both a crime and an affirmative, intentional behavior. I have not committed, been charged with, or convicted of any of those acts. The history of domestic violence upon which the trial court relied was Karen's testimony about her treatment within the marriage. Oral Decision 12/05/07 at 10. No evidence exists that I inflicted physical harm upon Karen or the children. Irrefutable evidence was presented however, that Karen had committed acts which fit the statutory definition under RCW 10.99.010, specifically assault. RCW 10.99.010 contains a very definitive Legislative Intent statement of that chapter's purpose, "The purpose of this chapter is to recognize the importance of domestic violence as a **serious crime** . . . and shall communicate the attitude that violent behavior is not excused or tolerated." (Emphasis added). The trial court erred in its interpretation of the domestic violence prevention statutes. It determined that her declaration of "fear" constituted a violent

act on my part and thereby imposed criminal punishment through civil litigation, and excused Karen's acts of violence.

F. Renewal Of Order Of Protection

Karen sought a protection order under RCW 26.50. The protection order has been in effect since 07/26/06 and applies to the minor children. She petitioned for renewal in 2007 and again in 2008 and the court has extended the order for one-year durations. "If a protection order restrains the respondent from contacting the respondent's minor children the restraint shall be for a fixed period not to exceed one year." RCW 26.50.060(2). "[I]f the petitioner has petitioned for relief on his or her own behalf or on behalf of the petitioner's family or household members or minor children, and the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection." RCW 26.50.060(2)(Emphasis added). The court did not expressly find that I am likely to resume acts of domestic violence.

> (3) If the court grants an order for a fixed time period, the petitioner may apply for renewal of the order by filing a petition for renewal at any time . . . . The petition for renewal shall state the reasons why the petitioner seeks to renew the protection order. . . . The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children . . . .

RCW 26.50.060(3)

Thus, at a minimum, the respondent must show that he will more likely than not refrain from resuming acts of domestic violence, i.e., acts of actual physical harm, injury or assault or acts to inflict fear of imminent harm, injury or assault. In re Freeman, No. 26148-4-III, slip op. at 11 (Wash. Ct. App. June 12, 2008). (Emphasis added).

The trial court's application of RCW 26.50 to continue each year to arbitrarily renew the order should not be upheld. The petition for renewal shall state the reasons why the petitioner seeks to renew the protection order. RCW 26.50.060(3). Karen's petition states she has a present fear because I have not completed domestic violence perpetrator treatment. She does not cite any basis or act constituting the "*infliction* of fear of imminent physical harm, bodily injury or assault." RCW 26.50.010(1) (Emphasis added). There has been no contact, nothing by which to substantiate the *infliction of fear* of *imminent* physical harm, there is no *act* by me inflicting her alleged fear, rather she cites an omission as inducing fear.

"[U]nless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence." RCW 26.50.060(3). The trial court's position is that upon declaration of

the petitioner of having present fear, by default I am deemed guilty. There is no evidence effective in refuting that presumption. Rather, contrary to criminal proceedings, I am not afforded the presumption of innocence. In order to defeat a renewal of the protection order, I bear the onerous burden of proving by a preponderance of the evidence that I will not resume acts that I deny having committed, thereby I cannot overcome the burden of disproving her declared fear. The court in Freeman applied a more appropriate reading of the law to include the discussion of the necessity of declarant's fear having a reasonable basis. The trial court in this instance eliminates a respondent the option of presumed innocence and disallows any evidence substantiating unlikelihood of any future acts of violence occurring, but relies solely on "present fear" as the basis for renewal.

Maintaining this action under civil proceedings is dispositive of the protections afforded under criminal proceedings and the benefit of presumed innocence. The punitive measures imposed however are left unfettered and without limitation, and without any equitable ability surmount the presumption of future guilt. The court limited its interpretation of the statute to Karen's declaration of fear, but stopped short of reading the remainder - (a) Physical harm, bodily injury, assault, or the *infliction* of fear of imminent physical harm, bodily injury or assault. A protection order acts to prevent the harmful act of another, not

as validation of the existence of fear or anxiety. The declared fear is unreasonable based upon the facts. It is reasonable that a past act could inflict current fear, but that fear must still relate to a threat of *imminent* harm, injury, or assault. In re Freeman, No. 26148-4-III, slip op. at 17 (Wash. Ct. App. June 12, 2008). Here, there is no history of battery and due to the passage of time and absence of contact, there is no evidence to support a current fear that physically harmful acts or threats of imminent harm would occur upon lifting the order. As stated at trial, I have moved on with my life and harbor no ill will toward Karen. I have remained in a positive long-term relationship for 2½ years. Karen has observed this fact because we have attended numerous events and activities together through the past couple of years. I make it a habit to always be accompanied by at least one witness at any of the children's activities in hopes of minimizing opportunities to be falsely accused of protection order violations. I have made no contact with Karen since separation nearly three years ago. I am now even prohibited from contact with my kids, specifically including casual greetings or hugs since the December 2007 modification of the protection order.

The December 2005 incident was cited as the "primary impetus" for seeking a protection order on July 25, 2006. RP V at 923. A gap of seven months does not meet the definition of imminent. The children

were left alone in my care at least 3-4 times in the interim months as Karen went to Arizona to visit her parents and also on weekend getaways to the beach with friends. She tries to create the existence of imminent danger in her brief that is simply not supported. The facts of the July evening before filing the petition were misstated. In her brief she stated, "On July 24, 2006, he started yelling at their 10 year old daughter, who fled to her closet, and, close to midnight, he locked himself in the master bedroom." Resp. Brief at 4. Karen's own testimony is that C was not even home that evening. RP III at 489- 490. She contradicts her own testimony about R and I coming home at 11:30. RP III at 490. Her prior testimony was that she came home to find R and I in the master bedroom with the portable air conditioner on a hot night wherein she stated, "When I came home that evening it was 11:30 at night." RP 8-11-06 at 17-18. Karen stated in her brief that she obtained the protection order based on what Bruce did the day before and over the prior months. Resp. Brief at 4. Yet, there is nothing in the record to support any events in the prior months since her December stories and we know that the day before she filed for the protection order was a work day in which I was at work so we were apart all day and then attended C's soccer game after work. We were apart for the entire evening as R and I went to batting cages and she and C were over at their friend's. We slept in the same house but

separately that evening. C was sleeping over at the friend's and R and I were tired and trying to get to sleep. Karen persisted in pursuing conflict so I locked R and I in the room to avoid further conflict and get some sleep. Anytime I refused to engage in conflict or respond emotionally she became enraged.

Further inaccuracies in the responsive brief misconstrue the December 26 Christmas card scenario with her brother. Her brief states they were in the kitchen talking as per her testimony. RP III at 475. However, Karen's brother testified that she was on the couch during the encounter. RP 8-18-06 at 162. Additionally, her brother testified that Karen did not exhibit any fear prior to that time in the evening of December 26th. RP 8-18-06 at 172 ln 10-13. The December 2005 incident that was the "primary impetus" happened days or weeks before the December 26th Christmas card incident.

G. The Trial Court Entered A Restrictive Parenting Plan

Chapter 26.09 RCW begins with a policy statement that includes:

> [ ] In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, ... Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best

> interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

RCW 26.09.002.

This policy was categorically dismissed in this case. The best interest of the children was not given any weight and our interaction and relationship suffered drastic and unnecessary alteration from the onset and got worse through the process. There were never any parental deficiencies identified. After many months of supervised visitation, I was found to be an informed, involved, loving parent with exceptional parenting skills and a bonded relationship with my children. There was never a finding that I presented a threat of harm or any history of harm to the children. The Guardian ad Litem investigation revealed that the children had not witnessed domestic violence in the home. The children repeatedly expressed a desire to come to my home. The court refused to consider any provisions that would permit a normalized relationship. This was distressing to the kids. We were required to spend our four-hour visits in transit even though the Guardian ad Litem noted my home is more than adequate for the children to visit and their expressed desire to come to my home. CP 1173-1178. There is no other conclusion to be drawn except that this provision was to ensure we could not enjoy being together in a

normal environment, but to instill in the children anxiety about being in my home and with me as was done throughout this process.

RCW 26.09.197 provides for the issuance of a temporary parenting plan. "[] the court shall make a temporary parenting plan that is in the best interest of the child. In making this determination, the court shall give particular consideration to:

. . .

> (2) Which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending.
>
> The court shall also consider the factors used to determine residential provisions in the permanent parenting plan.

My requests for a temporary parenting plan were denied during the pendency of the case. I was only permitted contact with the children under a temporary order. "Either party may request a domestic violence protection order under chapter 26.50 RCW or an anti-harassment protection order under chapter 10.14 RCW on a temporary basis. The court may grant any of the relief provided in RCW 26.50.060 **except relief pertaining to residential provisions for the children which provisions shall be provided for under this chapter**, . . ." RCW 26.09.060 (3). (Emphasis added). Clearly RCW 26.09.191(5) assumes the requirement of a temporary parenting plan, "In entering a permanent parenting plan,

the court shall not draw any presumptions from the provisions of the temporary parenting plan." I was denied a temporary parenting plan for over a year.

The considerations for determining residential provisions for the children are set forth in RCW 26.09.187(3)(a), which states, "The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, ..." (Emphasis added). This statutory criterion was never considered by the court except to act to deny this result.

1. Limitations were imposed in the final parenting plan under RCW 26.09.191.

The trial court imposed restrictions in the final parenting plan pursuant to its finding a history of acts of domestic violence. RCW 26.09.191. I am denied normal residential time with the children without compliance with the domestic violence treatment requirement. The court repeatedly stated that the rules of evidence did not apply in determining its finding of domestic violence under RCW 26.50. However, "In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure. RCW 26.09.191(6). (Emphasis added).

Permanent sole decision making was ordered to the mother because the judge could not conceive cooperation in this area would ever exist. RP 10/02/07 at 20. I was punished for attempting to maintain my relationship with my kids. This ruling rewards contentious behavior rather than encouraging adults to cooperate and act in a manner that is the least disruptive and in the best interest of children.

Although the court used RCW 26.09.191 to impose limitations on residential time between the children and me, it failed to comply with the provisions of RCW 26.09.191(4) of this section in doing so, which states, "In cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties."

2. Limitations imposed should be reasonably calculated to protect the children.

The court has the discretion to fashion any variety of appropriate remedies available to provide for the security of the other parent and the children. The court knows I pose no threat to Karen or the children, the limitations are premised on my refusal to provide a coerced false confession and patronize the perpetrator program. The limitations were never for the purpose of protection.

> "The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional abuse or harm that could result if the parent has contact with the parent requesting residential time."

RCW 26.09.191(m)(i). (Emphasis added).

> (n) If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection. The weight given to the existence of a protection order issued under chapter 26.50 RCW as to domestic violence is within the discretion of the court. . . . .

The existence of the domestic violence protection order was erroneously used as a dispositive tool to impede any opportunity for a normalized relationship between the kids and me going forward. It was a stopping point. Clearly, the children's best interest did not receive consideration. To attempt to inject their physical safety as a concern at this point and suggest I would harm my daughter is a tawdry tactic that should be rejected. There is no evidence cited to support these assertions. I do believe however, that fear and anxiety have been instilled in my daughter

to use her for this purpose as reflected in the visitation reports. She is a sensitive girl that has suffered the abuse of being convinced that she should be fearful and anxious of me and doubt my love for her. This is shameful! She has cried out, "My daddy does love me, I know he does." That her emotional well-being would be used for this purpose is criminal. She begs to just be able to be a normal kid. She doesn't want to be forced to this psychological torture; the cost to her of spending time with her dad. When asked if she was afraid of her dad C said "No." RP II at 313. Said she would like to have a visit at her dad's house. There was no identified harm to prohibit visitations at dad's home, yet the children were subjected to transient visitation. C felt she could "just relax" if they were permitted normal visitation at my home.

At the onset of this case, Karen commented, "I recognize it's important for him to see my kids at some level." RP 08/11/06 at 22. The increasing restrictions and limitations on my contact with the children were to alleviate Karen's discomfort with my continued relationship with the kids, not for anyone's protection. She testified that R playing baseball was uncomfortable because she "believed that it was very controlled by Bruce." RP IV 609. She successfully sought an order prohibiting my ability to continue coaching my son. My walking around in the normal course of helping with the fields and teams, emptying trash, and taking

care of equipment as I had always done caused her fear. Karen kept C nestled under her arm as she has done at any events C is present. RP IV at 607. I have watched C react with increasing anxiety toward me when in her mother's presence. During visitations C was often physically close, held my hand, sat on my lap, and often wanted piggy-back rides. I tried to express my concern for how this behavior was impacting C to her therapist but I not only received no response, I felt it was interpreted not with a concern for C but that I was being abusively critical of the mother.

In sharing concerns with R's therapist, Dr. Luecke, as part of the initial intake, his notes reflect Karen stating, "[Bruce] seems to be lurking around," regarding my attendance at the children's events from the beginning. Karen shared concern she and her dad had after watching the movie, "Mickey," about a dad running away with his son who played baseball. The whole family had watched the movie together at the beach the weekend preceding the Tuesday she obtained the protection order. This was a movie R and Karen's father selected because it was based on little league baseball. The notes reflect her expressions of concerns for R being ADHD, having OCD, "another huge piece for R[]." She clearly views anxiety by the children as support for her position. It is unnecessary and harmful to them.

The children are well-trained not to even make eye contact with me now. I cannot conceive of anyone rationalizing this to be in their best interest. This is clearly the manifestation of their mother's unbridled anxiety projected onto them causing emotional distress. It gets increasingly severe with time despite my remaining at a great distance and making no contact whatsoever. A clear review of the record will show that Karen's "fear" and anxiety has exponentially increased during this process. It is unreasonable and cannot be justified as responsive to any act by me. The children's behavior and anxiety has escalated relative to their mother's and while in her exclusive care. There is no basis for them to suffer this level of emotional distress. This is not being addressed and my concerns are met with repugnant responses that I would voice criticism of their mom. It is not criticism of Karen, but concern for the children. No one in this process is permitted to objectively apply a best interest of the children standard because it clearly conflicts with Karen's intent. This is harmful to the children.

The kids deserve and have the right to enjoy a relationship with both parents and there are remedies the court can fashion to accomplish this. There have been many cases in which the parents assign an agent to act for them to exchange the children and information or have email only contact. This provides a method for indirect contact and an irrefutable

record of any correspondence. I am not even permitted this sterilized method of contact with the kids. I receive no schedules of their activities and have no provision for being informed if they were ever seriously ill or injured.

The court was careful not to permit any normalized contact between the children and me. I was immediately reduced from a parent to a scary "visitor" with safeguards appropriate for a criminal. Admittedly I was not happy about our relationship being altered in this manner or being treated by the providers as an abuser, but more importantly, I was bothered by the negative toll this took on the kids, their perception of me, and our overall relationship. I am not the one inflicting fear in them, but it surely has intentionally and irreparably been done. I understand the statute and their training requires the supervisors to adopt this perception of me.

> (iii) If the court limits residential time under (a) or (b) of this subsection to require supervised contact between the child and the parent, the court shall not approve of a supervisor . . . unless the court finds based upon the evidence that the supervisor accepts that the harmful conduct occurred and is willing to and capable of protecting the child from harm.

RCW 26.09.191(m)(iii).

The only avenue remaining to exercise concern for the children is to conference with their teachers to get updates on their academic progress. I do this whenever the teachers are willing to schedule a time to

speak with me. I notify them that it should occur when there is no likelihood that the children are present. I have no other means of keeping apprised of their welfare.

3. Domestic violence treatment does require admission of guilt and "Perpetrator" labeling.

I have researched extensively the domestic violence perpetrator treatment program per WAC 388-60.[14] There is no way to comply with the requirements of this program without relinquishing several rights and committing more than a year of time and thousands of dollars patronizing a program that demands admission to false allegations of abusing my family. My position is the basis for the court predicating all limitations on my residential time with my children and continuing to reissue the restraining order. I cannot subject myself to a program on a faulty basis that would only act as an unlimited tool for inflicting further limitations on my liberty. As it stands, the existence of the protection order prevents my ability to volunteer in children's activities. I was denied the right to purchase a small target rifle with a friend because of the order. Relinquishing this and other rights are required in these programs. I cannot ethically lay aside the truth and invite further unjust criminal penalties and limitations upon my life and liberty.

---

[14] See Appendix E.

H. Attorney Fees/Intransigence

The burden of proving need rests on the spouse asserting the request (see In re Marriage of Young, 18 Wn. App. 462, 466, 569 P.2d 70 (1977)). Karen has not met this burden. Rather she asserts I should pay her attorney fees because I have a greater income than Karen and the appeal was frivolous. This request should be denied.

The determination by the Court whether an appeal is frivolous, is by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. Penry, 119 Wn. App. 799, 804 n.2, 82 P. 3d 1231 (2004) (quoting Streater v. White, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980)).

The trial court specifically did not find intransigence as to me as Karen continues to claim as a fact of this matter. Pursuing alternate legal remedies is within my rights and was the only course of action remaining in this situation in which I know and believe the findings to be wrong. RP 5 at 872-874. Rather, it is Karen who has acted intransigent with

obstructionist tactics which forced me to return to court to obtain relief as to the property disposition. Her continued intransigence forced foreclosure of the home. Karen also acted intransigent throughout the proceedings by neglecting to timely make auto payments. CP 1300. Her attorney also refused for several months to enter the order revising maintenance so that the DSHS records could be corrected which resulted in derogatory credit reporting. I brought all of these acts and their negative effects on my credit to the court's awareness many times. RP 10/30/07 at 4, CP 1433-1464, CP 1289-1315, RP 4/29/08 at16.

III. CONCLUSION

This travesty of justice needs to be corrected. This Court should balance the whole of the evidence in this matter with the application and intent of the plain language of the applicable statutes and reverse the trial court's finding that I am a perpetrator that has a history of acts of domestic violence against Karen or my children. A parenting plan should be entered that protects the best interest of the children, their emotional and psychological health, and their right to a positive and continuing relationship with both parents. The protection orders based upon erroneous findings should be reversed, as well as the subsequent inappropriate orders entered. The Court should further reverse the trial

court's orders regarding the property disposition and deny all attorneys fee awards to the respondent.

RESPECTFULLY SUBMITTED this 23rd day of March, 2009.

BRUCE ALAN FISCHER, *Pro Se*
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(360) 584-0204

Appendix A

Hanrahan, Nancy

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KAREN FISCHER, Petitioner, v. BRUCE FISCHER, Respondent.	NO. 06-3-00845-7

DEPOSITION UPON ORAL EXAMINATION OF: NANCY HANRAHAN

August 9, 2007

10:00 a.m.

4535 Lacey Blvd SE

Lacey, Washington 98503

A. Yes, both parties did but in a different way.

Q. Okay. Can you describe Mrs. Fischer's follow up on your offer to provide assistance in any way that they needed.

A. The way that I would describe Mrs. Fischer's follow up is that Mrs. Fischer -- it seemed to me that Mrs. Fischer would come up a theory regarding she and the children, or she and parenting, or her children and -- as abused or neglected children, and she would call me on the telephone to discuss this theory, or this awareness on her part, and I would feel overwhelmed by the continuation of her call.

It was, like, I felt coerced, and I -- and I wanted to leave the telephone call like, okay. We can agree to maybe disagree, or we -- could just let me go. I've got to go now. Um, but it -- it -- I felt com -- compelling to agree and to buy on to the -- to the idea that Mrs. Fischer had -- a new idea that Mrs. Fischer had regarding whatever was going on between she and the children and Mr. Fischer at that -- at that time. And I -- I got it -- it became very, very stressful for me, because I'm not very good with salesmen, and it felt like proselytizing or salesmanship to me, and it -- it was easier for me to begin to avoid those calls rather than try to get them ended.

Q. Okay. Did you ever have an opportunity because of these types of calls to check in with the children to see what was going on with them from an individual perspective?

A. I don't know, because I have a way of asking for information that elicits those kinds of responses, so I don't know if I could pat myself on the back and say, oh, yes, I did that, but I don't know. I think it was just the way that it flowed and it was like, I need more. What else have you got to talk about? Tell me.

Q. So do you feel that Mrs. Fischer withheld anything from you in that regard?

A. I don't think so. I didn't think so. I don't think so.

Q. Did you -- in your observation of the children with their father, did they seem kind of arms length with him or any kind of --

A. Not at all. Not at all. Not at all.

Q. Can you describe their relationship.

A. They -- they were like cub bears. They were all over him. They were hand holding, hugging, sitting on his lap, getting on his back and sharing food, joking about that shot that -- that croquet shot that somebody took or didn't take. No, and it was -- it was warm and it was natural and it was -- it couldn't be scripted. It just -- it just was there and it was actually pretty heartwarming for me to see.

Q. Was there more than one opportunity that you had to observe a -- a visit with Mr. Fischer and the children?

A. I could have. I didn't. I didn't ask for more. I

A. I guess it was open to my interpretation. I mean, she kind of gave the facts and it was up to me to make the interpretation, and I don't -- I just --

Q. Was this before she started calling you with these theories?

A. Yeah, right.

Q. Okay. All right. At -- at the time she started calling you with these theories, was -- did you get the feeling that she had started talking to counselors or anything like that?

A. Well, all I know is that she -- that Peg Cain's office opened up their, um, duh, duh, duh, duh, duh, treatment to her, which they do. They open that to the -- to the domestic -- what we -- perpetrator -- victim. They have quite a -- a -- a large victims group. Um, but you know, I think something else maybe went on here too. Peg Cain Roberts -- Peg Cain is a very intelligent woman, and -- and I don't like to be catty, but in Olympia it's hard to find an intelligent woman to talk to, and when Karen came in, I'm sure that Peg thought, wow, another intelligent woman, because getting together with Karen Fischer is a real trip. She is so intelligent. She is so, um, con -- conversive. Um, she just brings you in to where she is. She's just -- I was just so taken with her on my first two visits until the telephone calls got closer, and then I kind of got like, oh, dear. I'm

kind of feeling scared here. Um, but I -- you know, I even thought -- I even said to her, gee, I have some people I'd like to introduce you to. You know, I think you are so intelligent and so keen that I can see you with so and so and so and so and I was just taken. And -- and my guess is that Peg Cain would have been just really taken with Karen too, and maybe not -- I think it's just really nice to have somebody to really talk to.

Q. Um, in regards to how you managed to kind of see the kids together with Mr. -- with Mr. Fischer, and how you -- you said you had two visits, the first visit I didn't see Ms. Fischer with -- interact with the children. On the second visit did she interact with the children?

A. What did you just say?

Q. On the first visit --

A. With who?

Q. With Mrs. Fischer, you said she didn't really interact with you and the children or around you with the children, the children sat --

A. It was -- it was one visit.

Q. Only one home visit?

A. Yes.

Q. Well, I'm reading your report and maybe you would like to look at that to refresh your memory if you don't have --

Q. And, so, um, would you have an opinion as to the reasonableness of Mrs. Fischer's fear of Mr. Fischer?

A. Reasonableness in what way?

Q. To take -- does she have a reasonable fear based on historical interactions or -- or manifestations that you were able to observe in things she described?

A. In her relationship with Mr. Fischer?

Q. Mm-huh.

A. Would I -- would I look at that and see that she had a reasonable to keep Christina away from her father?

Q. Well, that's a separate question. The first one: Does she have a reasonable fear for her own safety from Mr. Fischer?

A. For her own safety? All of her bodily reactions showed that, that she was afraid. I had a hard time relating she being that afraid and -- and -- and the -- with the fact that she's a powerful woman inside. Um, she kind of goes around with a hangdog expression and looks a little pathetic, but, boy, I've seen that power in her and that woman could be running the country.

Q. Now as -- as regards to Christina, what do you -- you have an opinion about the reasonableness of her fear of having Mr. Fischer have unsupervised access to Christina?

A. Yes, I -- my sense is that Karen is way, way -- two ways, two way ways overprotective of Christina, that -- that

A. I did not.

Q. Okay. Did you talk to Mr. Fischer at all regarding, um, whether or not he should continue or discontinue visitations --

A. No.

Q. -- at any point in time?

A. Yes.

Q. Okay?

A. Yes. He -- that was one of our telephone calls. He had told me that he was going to discontinue visitation house, visitation. I didn't say yea or nay. It was -- I was receiving the information as information. Um, I had thought that the environment was very difficult, but I wasn't recommending anything one way or another. If I thought that if he could continue doing it, it would be good for the kids, you know, so I didn't have any recommendations. But once he said that's what he was going to do, I could understand that.

Q. So was this a, kind of like an open-ended discussion between you and he?

A. No.

Q. Or were you just listening?

A. I was just listening to that part.

Q. Okay. And did he, um -- so did you have an opportunity to talk to Robin then?

A. I did talk to Robin.

C E R T I F I C A T E

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

I, Donna Hunter, Certified Court Reporter and Notary Public duly and qualified in and for the State of Washington do hereby certify there came before me the deponent herein, namely NANCY HANRHAN who was by me duly sworn to testify to the truth concerning the matters in this cause.

I further certify that the foregoing transcript is a true and correct transcript of my original stenographic notes.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal this _____ day of _____, _____.

_____

NOTARY IN AND FOR THE STATE OF WASHINGTON, RESIDING IN SEATTLE

Appendix B

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STATE OF WASHINGTON

WASHINGTON STATE COURT OF APPEALS
DIVISION II

KAREN L. FISCHER, Appellee, vs. BRUCE A. FISCHER, Appellant.	Case Nos.: 36828-5-II and 36875-7-II APPELLANT'S RESPONSE TO COURT'S MOTION FOR CONSOLIDATION

IDENTITY OF RESPONDING PARTY:

Bruce A. Fischer, Appellant asks for the relief designated in Part 2.

STATEMENT OF RELIEF SOUGHT:

The Appellant respectfully requests denial of the Clerk's Motion to Consolidate the above captioned cases for the reasons articulated below.

FACTS RELEVANT TO RESPONSE:

The Honorable Paula Casey signed and filed a renewed protection order and parenting plan on September 5, 2007. The remaining documents pertaining to the dissolution of the marriage of Bruce A. Fischer, Appellant and Karen L. Fischer, Appellee were signed and filed on October 30, 2007. The Appellant filed a timely Notice of Appeal of the Protection Order and the Parenting Plan. The Appellant adds the specific portions of the October 30, 2007 orders and

findings to his appeal of the Parenting Plan under separate cover with this response. True copies of all relevant orders are attached to this response.

GROUNDS FOR RELIEF AND ARGUMENT:

In, *Ortega v. Employment Sec. Dep't*, 90 Wn.App.617; 953 P.2d 827 (1998) the court held that the Employment Security Department's motion to consolidate two cases should be granted because *"they are factually similar and require us to answer the same legal question."* The Fischer cases should not be consolidated because the issues are not factually similar and the court is asked to answer different legal questions. In the first case filed under cause no. 36828-5-II the trial court made its ruling after finding that *"the respondent committed domestic violence as defined in RCW 26.50.010"* CP 77 – 78.

RCW 26.50.010 provides the following definition:

> *(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.*

Article 1 Section 3 of the Washington State Constitution provides for the protection of personal freedoms; specifically, *"No person shall be deprived of life, liberty, or property, without due process of law."* In addition, the Fourteenth Amendment provides, in relevant part, that *"nor shall any state deprive any* person of life, liberty, or property, without due process of law.

Whether or not a trial court finds that a person's behavior falls into the category of domestic violence is a very specific and factual determination which requires the interpretation of very specific legal questions. The trial court's rulings are reviewed for an abuse of discretion based on the record below. In this case the appellants threshold argument is that abuse of the

trial court's discretion resulted in due process violations and unreasonable restraints on his constitutional freedoms. The court should make a separate inquiry into the questions presented upon appeal challenging the findings of the court below.

In the second case filed under cause no. 368757-7-II the Appellant challenges the parenting plan (CP at 291) entered below on September 5, 2007; specific portions of the decree of dissolution (CP at 301); specific portions of the Findings of Fact and Conclusions of Law (CP at 302) and the final child support order (CP at 303) entered below on October 30, 2007. The Appellant acknowledges that the parenting plan has restrictions imposed because the court below found that domestic violence occurred; however, the Appellant believes that was in error and should be addressed separately. The Appellant further believes that the court erred in its orders regarding the wife's use of the family home; erred in the requirement that the husband make one-half the mortgage payments; erred in the distribution of property and liabilities; erred in awarding attorney's fees to the wife and erred in not adopting the Appellant's worksheets in determining child support.

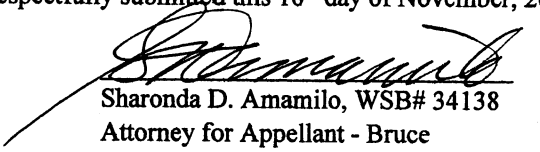
In determining an equitable distribution of property, a trial court has a mandatory duty to determine the value of such property. *In re Marriage of Martin*, 22 Wn. App. 295, 296-97, 588 P.2d 1235 (1979). Valuation of property is a question of fact. *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984). The Appellant points out that the Findings of Fact in this case do not provide a record of property valuation in this case; including real property. CP at 302. The purpose of spousal maintenance is to support a spouse until he or she is able to earn a living or otherwise become self-supporting. *In re Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797 (1992). The trial court specifically found that spousal maintenance was no longer necessary yet made rulings contrary to that finding. Additionally, the court failed to acknowledge the wife's direct actions that forced court hearings for disposition of the family home that should have been

handled without litigation. Finally, the Appellant challenges the child support calculations of the Appellee which were adopted by the trial court.

While, the Appellant acknowledges that some cases are appropriate for consolidation it would appear that the RAP provides for a two prong test. RAP 3.3 (b) provides in relevant part: A party should move to consolidate two or more cases if consolidation would save time and expense and provide for a fair review of the cases. Mr. Fischer agrees that consolidation would (1) save time and expense but he does not agree that consolidation would (2) provide for a fair review in light of the foregoing discussion.

Clearly these two cases are factually different and will require the appellate court to answer very different legal questions and thus should not be consolidated.

Respectfully submitted this 16th day of November, 2007



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WASHINGTON STATE COURT OF APPEALS
DIVISION II

KAREN L. FISCHER, Appellee, vs. BRUCE A. FISCHER, Appellant.	Case Nos.: 36875-7-II COVER SHEET FOR ADDITIONAL DOCUMENTS ENTERED BELOW

The Appellant, Bruce A. Fischer, by and through his attorney of record, respectfully requests that the court add the following documents to the appellate record commenced on October 17, 2007 with the filing of the Parenting Plan entered in Thurston County Superior Court Cause No. 06-3-00845-7:

1. Findings of Fact and Conclusions of Law dated October 30, 2007.
2. Decree of Dissolution dated October 30, 2007.
3. Order of Child Support dated October 30, 2007.

Respectfully submitted this 16th day of November, 2007

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WASHINGTON STATE COURT OF APPEALS
DIVISION II

KAREN L. FISCHER,
Appellee,
vs.
BRUCE A. FISCHER,
Appellant.

Case Nos.: 36875-7-II

CERTIFICATE OF SERVICE

I, Sharonda D. Amamilo, certify under the penalty of perjury under the laws of the State of Washington that I am over the age of 18 years and as the Attorney of Record for the Appellant that I caused a copy of the Response to Clerks Motion for Consolidation and a copy of the Findings of Fact and Conclusions of Law, Decree of Dissolution, and Order of Child Support to be delivered to the Appellee's Counsel as indicated below:

Via fax to (206) 464-4202 to Edward Hirsch WSB# 35807 and hardcopy to Law Offices of Janice M. Sutter, 80 S. Jackson Street, #301, Seattle, WA 98104.

Respectfully submitted this 16th day of November, 2007

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TRANSMISSION VERIFICATION REPORT

TIME : 11/16/2007 20:21

DATE,TIME	11/16 20:18
FAX NO./NAME	~~12065442~~02 EDWARD HIRSCH ATTORNEY FOR KAREN ESCHEN
DURATION	~~00:02:57~~
PAGE(S)	07
RESULT	OK
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Appendix C

issue is the finding that "Demarest could feel a slippery material in the pocket." There is no finding that Demarest knew by training or experience that a slippery material was likely to be cocaine. The absence of such a finding is fatal.

During oral argument, the State contended Demarest inadvertently pulled the baggie out of the defendant's pocket. The findings do not support this contention nor does the written conclusion that "Officer Demarest was not required to ignore his experience when he felt the slippery material in the pocket."

We reverse.

ALEXANDER and MORGAN, JJ., concur.

[No. 30653-7-I. Division One. February 7, 1994.]

In the Matter of the Marriage of KAREN TRUBNER-BIRIA, *Respondent, and* ALI BIRIA, *Appellant.*

[1] **Divorce — Decree — Enforcement — Property Division — Separate Property — Restricted Use — Date of Sale.** When a property settlement agreement incorporated into a dissolution decree requires a divorced person, upon being paid in full for an interest in real property, to quitclaim the person's entire interest in the property to the person's former spouse who then is to own the property as separate property, once the agreement is satisfied the divorced person has no interest in the property that is subject to protection through the judicial process. Specifically, a court does not have authority (1) to enforce a provision of the property settlement agreement restricting the use to which the former spouse can make of the real property or (2) to set a date by which the property must be sold.

Nature of Action: A divorced person sought to have her former spouse held in contempt for occupying the family home pending its sale in violation of a provision of a property settlement agreement incorporated into the dissolution decree.

Pursuant to the agreement, the plaintiff, upon receipt of a sum of money, had quitclaimed her interest in the house to her former spouse.

Superior Court: The Superior Court for King County, No. 90-3-05531-4, Carol A. Schapira, J., entered an order of contempt on April 16, 1992.

Court of Appeals: Holding that the plaintiff had no interest in the property subject to protection through the judicial process, the court *reverses* the contempt order.

Michael Green and *Davis Wright Tremaine,* for appellant.

Jill A. Salmi, for respondent.

GROSSE, J. — Ali Biria (Ali) appeals a contempt order for his alleged noncompliance with a provision in a decree of dissolution. Specifically, the trial court ordered that Ali not occupy the former family home pending its sale under a property settlement agreement despite the fact that his former wife, Karen Trubner-Biria (Karen), has been paid in full for her interest and has quitclaimed that interest to him. In addition, the trial court set a date by which the house must be sold, and awarded attorney fees to Karen. We reverse, holding that Karen no longer has any interest in the property subject to protection through the judicial process.

The marriage between Karen and Ali was dissolved in 1991. The dissolution decree incorporated a property settlement agreement, signed in December of 1990, dividing the property of the parties. With recognition of the fact that Karen and Ali owed approximately $100,000 to Ali's father, Abdul Biria, the agreement sought to "irreparably divide certain community property and satisfy certain claims" prior to execution of a separation agreement or entry of a decree of dissolution. The agreement was signed by Karen, Ali, Abdul Biria, and respective counsel. The agreement set forth the parties' intent to sell the house as soon as possible, subject to approval of Abdul Biria. After satisfying obligations to Karen in the amount of $25,000, the balance of any sales price was

to be paid to Abdul Biria in satisfaction of his $100,000 claim against the community. The parties were not to live in the house pending sale. The house was to be listed and an aggressive effort made to sell it as soon as possible. However, even if the house did not sell right away, payment of the $25,000 was to be made to Karen in two installments on dates certain. Once Karen had been paid, she was to quitclaim her interest to Ali. The agreement specifically set out that the sales price and the terms of any sale were "subject solely to the direction of Abdul Biria".

The house did not sell but Karen was timely paid her $25,000 interest in the house. Ali did not live in the house for 10 months. However, after Karen was paid in full, the house was reconveyed to him giving him clear title. Ali moved back into the home to avoid paying both the mortgage and rental on an apartment. Karen did not approve and brought an action for contempt based on an alleged breach of the agreement.

In the affidavit accompanying her motion, Karen indicated she was initially given temporary possession of the house. However, Ali indicated he could not pay the mortgage, child support, and rent on an apartment, and sought to force a sale. Karen fully acknowledged that Ali's father, Abdul Biria, was in a position to sue to get his money from the house. Because of the interests involved, the parents of the couple negotiated a settlement "pursuant to which [Karen] would leave the house and would be paid $25,000, and Ali and his father would release [Karen] from liability and sell the house."

According to Ali, he could not afford to pay the mortgage on the house, rent on an apartment, and child support. The housing market was depressed and his father did not want the house to sell until he could recoup his investment. The property is subject to a $93,000 mortgage, and the asking price is $229,000, a sum Karen believes to be $20,000 to $30,000 too high. Karen argues the delay is a ruse to allow Ali to stay in the home. She does not want her former husband to take their child to the former "family home".

[1] The trial court erred in ordering Ali to vacate a home which is now, by operation of law, his separate property. Under the settlement agreement, which was incorporated into the decree, the home became Ali's separate property upon Karen's execution and delivery of a quitclaim deed. Once the agreement was satisfied, Karen had no further interest in the home. *See* RCW 26.16.050.

A trial court does not have unfettered discretion to compel the sale of property in a dissolution of marriage. *See High v. High*, 41 Wn.2d 811, 252 P.2d 272 (1953); *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951). *Cf. In re Marriage of Sedlock*, 69 Wn. App. 484, 849 P.2d 1243 (a fact-specific case in which this court distinguished *High* and *Arneson* but did not overrule them), *review denied*, 122 Wn.2d 1014 (1993).

While deference is usually given to the terms agreed to in a property settlement agreement, there are limits upon the effect that will be given a property settlement agreement by a court. *See Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987). Here, as in *Byrne*, there was nothing in the agreement stating the sale of the home had to be immediate. In fact, though the parties may have anticipated a quick sale, they left the final say to their biggest creditor and third party to the agreement, Abdul Biria.

The principal issue in *Byrne* was to what extent trial court discretion in the distribution of marital property was restricted by the requirement that a trial court make a definite and final distribution so as to avoid the prospect of future litigation. While the *Byrne* court held the award of title subject to a lien with no set date for sale to not violate the statutory and judicial mandate of finality, it did not retreat from the rule. To permit enforcement of a provision of a decree with respect to property in which one party no longer has any interest due to compliance with other provisions of the decree, *i.e.*, payment in full, certainly burkes the requirement of a full and final distribution and the reasons for that rule.

In this case all financial obligations of the husband to the wife have been paid in full. The wife no longer has any finan-

cial or legal interest in the house. Karen's affidavit below, and the brief before this court, indicate her objection to Ali remaining in the house is based on allegations that there would be psychological injury to her son if Ali is allowed to keep the "family home" and take their son to it for visitation. This issue is better addressed, if at all, under the dispute resolution provisions of the decree of dissolution and in terms of visitation. The issue of what is in the best interests of the child of the parties is not a property settlement dispute and should not be made to be so.

The decision of the trial court is reversed.

WEBSTER, C.J., and SCHOLFIELD, J., concur.

[No. 31121-2-I. Division One. February 7, 1994.]

DIANE L. EVANS, *Respondent,* v. THE EMPLOYMENT SECURITY DEPARTMENT, *Appellant.*

[1] **Administrative Law — Judicial Review — Appellate Review — Record — Agency Record.** An appellate court reviewing an administrative action applies the standards of RCW 34.05 directly to the record before the agency.

[2] **Administrative Law — Judicial Review — Findings of Fact — Standard of Review.** An administrative agency's findings of fact are reviewed under the substantial evidence standard.

[3] **Administrative Law — Judicial Review — Question of Law — De Novo Review — In General.** While a reviewing court will accord substantial weight to an administrative agency's view of the law which is within the agency's special field, questions of law are reviewed de novo.

[4] **Administrative Law — Judicial Review — Mixed Question of Law and Fact — Standard of Review.** When mixed questions of law and fact before an administrative agency are subjected to judicial review, the factual portions must meet the substantial evidence test while the legal portions are reviewed de novo.

[5] **Colleges and Universities — Unemployment Compensation — College Employees — Community College Teachers — Academic Term — What Constitutes — Summer Term.** For purposes of determining the eligibility of a community college teacher to receive unemployment benefits under RCW 50.44.050(1), which forbids payment of benefits to such teachers for a period between academic terms if the teacher taught in the first term and has a reasonable assurance of teaching in the next term, a summer term is an academic term.

[6] **Unemployment Compensation — Eligibility — Federal Standards — Applicability.** United States Department of Labor standards are used in determining eligibility for unemployment benefits under RCW 50.44.050.

[7] **Colleges and Universities — Unemployment Compensation — College Employees — Community College Teachers — Academic Term — Vacation Period.** For purposes of determining the eligibility of a community college teacher to receive unemployment benefits under RCW 50.44.050, an established and customary vacation period or holiday recess under RCW 50.44.050(3) refers to such periods occurring *within* an academic term.

Nature of Action: Action seeking judicial review of an administrative decision denying unemployment benefits to a part-time community college teacher who was not hired to teach a summer term.

Superior Court: The Superior Court for King County, No. 91-2-21066-7, Carol A. Schapira, J., on June 26, 1992, entered a judgment reversing the denial.

Court of Appeals: Holding that the community college's summer term was an academic term, the court *affirms* the judgment.

Christine O. Gregoire, Attorney General, and *Andrew A. Fitz, Assistant,* for appellant.

Martha B. Lindley, for respondent.

SCHOLFIELD, J. — The State of Washington appeals an award to Diane Evans of unemployment benefits, arguing that as an unemployed teacher during the summer at Green River Community College, Evans was not entitled to bene-

Appendix D

Bruce Fischer

From: <brucefischermail@comcast.net>
To: "Brigitte Arnett" <brigittearnett@yahoo.com>
Cc: <samamilo@amamilolaw.com>; <Hanra67@aol.com>; "Cassandra Miklavcic" <cassandra@amamilolaw.com>
Sent: Sunday, July 15, 2007 6:07 PM
Subject: Visitation Cancellation

Ms. Arnette - Effective immediately, I am cancelling the remainder of supervised visits we had scheduled until trial. I can no longer put my kids through the emotional abuse that is obviously being inflicted on them at home. As we discussed today, no professional, including Dr. Trause and Dr. Luecke have addressed divorce with the kids. Nobody has helped them understand the divorce or help them transition instead are only adding to their hurt and confusion. The kids are very confused and heart broken. It is a heart wrenching situation that continues to get worse and not only left unchecked but enabled while I can only sit back and watch my children harmed. As you know, Karen continues to complain, make false insinuations and make something out of nothing. The "suspicious" before and after celebrity article from the paper (from my mom) is a perfect example of Karen's continuing pattern of interference and hysterical anxiety level. It has become a situation where we can't even enjoy what little time we have together because of her obsessive interference and power and control issues. It is evident by the children's behavior that Karen's emotional manipulation is escalating. I don't want the visits to just be further detriment at the children's expense. It is so sad to say what they are being put through to spend only 4 mere hours a week with their father that they love. The price to them is just too high and I can no longer bear to watch it. I know it has gotten increasingly demanding and uncomfortable for you to be in this situation as well. You have conducted yourself with commendable professionalism and neutrality.

After a year of reducing my relationship and parental role to a minimal four hour a week visitor, I don't believe anything would be deemed sufficient to reinstate my parental role and rights in their lives.

I therefore have come to the difficult decision that I can no longer participate in the infliction of additional emotional distress upon innocent children by continued supervised visits.

At this point, I can only hope and pray, that by some miracle, trial will bring some justice for these children.

Sincerely,

Bruce A. Fischer

Sent via BlackBerry from T-Mobile

Appendix E

DOMESTIC VIOLENCE TREATMENT WAC 388-60[1]

388-60-0045 What must be the focus of a domestic violence perpetrator treatment program?

(1) A domestic violence perpetrator treatment program must focus treatment primarily on ending the participant's physical, sexual, and psychological abuse.

(2) The program must hold the participant accountable for:
(a) The abuse that occurred; and
(b) Changing the participant's violent and abusive behaviors.

(3) The program must base all treatment on strategies and philosophies that do not blame the victim or imply that the victim shares any responsibility for the abuse which occurred.

388-60-0055 What must be a treatment program's primary goal?

The primary goal of a domestic violence perpetrator treatment program must be to increase the victim's safety by:

(1) Facilitating change in the participant's abusive behavior; and

(2) Holding the participant accountable for changing the participant's patterns of behaviors, thinking, and beliefs.

388-60-0225 What must the treatment program include in the contract for each participant's treatment?

The contract between each participant and the treatment program must include the following elements:

(1) A statement regarding the treatment program's philosophy that:
(a) The victim may not be blamed for the participant's abuse;

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[1] Selected sections, as noted, of Chapter 388-60 of the Washington Administrative Code (WAC), downloaded from http://apps.leg.wa.gov/WAC/default.aspx?cite=388-60 (Emphasis added)

(b) The perpetrator must stop all forms of abuse;
(c) An abuser is to be held accountable for the abusers actions; and
(d) The program's primary concern is for the safety of victims.

(2) A statement requiring the participant to:
(a) Cooperate with all program rules;
(b) Stop violent and threatening behaviors;
(c) Be nonabusive and noncontrolling in relationships;
(d) Develop and adhere to a responsibility plan;
(e) Comply with all court orders;
(f) Cooperate with the rules for group participation; and
(g) Sign all required releases of information.

(3) A policy on attendance and consequences for inadequate attendance;

(4) A requirement that the perpetrator must actively participate in treatment, including sharing personal experiences, values, and attitudes, as well as completing all group activities and assignments;

(5) A policy regarding other program expectations, such as completion of written exams, concurrent treatment requirements, and possession of weapons as described under chapters 388-861 and 388-875 WAC;

(6) Written criteria for completion of treatment;

(7) A statement that group members must honor the confidentiality of all participants;

(8) A statement that the treatment program has the duty to warn and protect victims, law enforcement, and third parties of any risk of serious harm the program determines the participant poses to them;

(9) Requirements that the participant must either:

(a) Provide the program with the participant's arrest records, criminal history, and any information regarding treatment services previously received; or

(b) Identify the existence of and location of all service records, and authorize release of all such records to the domestic violence treatment program.

(10) The program's policy regarding the use of drugs and alcohol, including a provision that the participant must attend treatment sessions free of drugs and alcohol; and

(11) Fees and methods of payment for treatment.

388-60-0255 What is the minimum treatment period for program participants?

(1) The minimum treatment period is the time required for the participant to fulfill all conditions of treatment set by the treatment program. Satisfactory completion of treatment is not based solely on a perpetrator participating in the treatment program for a certain period of time or attending a certain number of sessions.

(2) The program must require participants to attend treatment and satisfy all treatment program requirements for at least twelve consecutive months.

(3) The program must require the participant to attend:

(a) A minimum of twenty-six consecutive weekly same gender group sessions, followed by:

(b) Monthly sessions with the treatment provider until the twelve-month period is complete. These sessions must be conducted face-to-face with the participant by program staff who meet the minimum qualifications set forth in this chapter.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KAREN LYNN FISCHER,

Respondent,

v.

BRUCE ALAN FISCHER,

Appellant.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the Appellant's Reply Brief and Motion for Overlength Brief to be served via US Mail, postage paid, on the following:

Judith Anne Redford-Hall
Redford Law Firm
2633A Parkmont Ln SW Ste A
Olympia, WA 98502-5751

Leonard Konstantyn Lucenko, Jr.
Connolly Tacon & Meserve
201 – 5th Avenue SW, Ste 301
Olympia, WA 98501-1060

DATED this 23rd day of March, 2009.

BRUCE A. FISCHER
4425 ROXANNA LP SE
LACEY, WA 98503
(360) 584-0204

COPY

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