

COURT OF APPEALS  
DIVISION II

CO FEB 24 PM 12:14

STATE OF WASHINGTON  
BY \_\_\_\_\_

DEPUTY

No. 368285-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

In re the Marriage of:

KAREN LYNN FISCHER,

Respondent,

and

BRUCE ALLAN FISCHER,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
THE HONORABLE PAULA J. CASEY

---

RESPONSIVE BRIEF OF RESPONDENT

---

By: J. Anne Redford-Hall  
The Redford Law Firm  
2633A Parkmont Lane SW, Ste. A  
Olympia, WA 98502  
360-570-0907

Attorneys for Respondent

## Table of Contents

I.	Summary of Argument.....	1
II.	Issues in Response to Appellant's Brief.....	2
III.	Restatement of the Case .....	3
IV.	Argument.....	17
A.	Introduction .....	17
B.	The claimed errors and issues that are unsupported by argument should not be considered on appeal.....	18
C.	Review is limited to the renewal of order for protection and the parenting plan, both entered following the dissolution trial 2007 .....	18
	1. The order for protection and the orders denying reconsideration and revision of it are not reviewable.....	19
	2. Finding of fact and conclusions of law, decree of dissolution, and order of child support are not reviewable.....	20
	3. The post-trial order of March 18, 2008, is not an appealable final .....	20
	4. The additional post-trial orders are not reviewable.....	21
D.	Substantial evidence supports the finding that Bruce had a history of acts of domestic violence ...	21
	1. Karen's testimony was credible and Bruce's was not.....	22
	2. Karen's testimony was consistent with other witnesses'.....	23
	3. The trial court did not find that Karen committed domestic violence .....	25

E.	The trial court properly made the restrictive parenting plan .....	27
	1. A restrictive parenting plan is required under RCW 26.09.191(1) and (2).....	27
	2. The limitations imposed where reasonably calculated to protect the children .....	29
	3. Bruce was not forced to admit guilt to wrongful act .....	30
F.	The trial court properly issued a renewed order of protection .....	31
G.	The trial court properly made post-decree decisions .....	33
H.	Bruce should not be awarded attorney fees on appeal .....	33
V.	Motion for Attorney Fees .....	34
VI.	Conclusion .....	35

## Table of Authorities

### Cases

<u>Barber v. Barber</u> , 136 Wn. App. 512, 150 P.3d 124 (2007).....	31, 32
<u>Burrill v. Burrill</u> , 113 Wn. App. 863, 56 P.3d 993 (2002).....	22
<u>Kelly v. Schorzman</u> , 3 Wn. App. 908, 478 P.2d 769 (1970) .....	19
<u>In Re Marriage of Mattson</u> , 95 Wn. App. 592, 976 P.2d 157 (1999) (citations omitted).....	35
<u>In re Marriage of Wagner</u> , 111 Wn. App. 9, 44 P.3d 860 (2002) .....	34
<u>In re Marriage of Wallace</u> , 111 Wn. App. 697, 45 P.3d 1131 (2002).....	18
<u>Spence v. Kaminski</u> , 103 Wn. App. 325, 12 P.3d 1030 (2000).....	31
<u>Standing Rock Homeowners' Assoc. v. Misich</u> , 106 Wn.App. 231, 23 P.3d 520 (2001) .....	25
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994) .....	18, 32

### Statutes

RCW 26.09.140 .....	35
RCW 26.09.187(3)(a) .....	27, 28
RCW 26.09.191 .....	28

RCW 26.09.191(1).....	28
RCW 26.09.191(2)(a) .....	28
RCW 26.09.191(2)(m)(i) .....	29
RCW 26.50.030(1).....	31
RCW 26.50.060(3).....	31

### **Rules**

RAP 2.2(a).....	20
RAP 2.4 (b).....	20, 21
RAP 5.2(a).....	19
RAP 7.2(e).....	21
RAP 10.3(a)(5) .....	18
RAP 18.9(a).....	34

## **I. Summary of Argument**

Over two and a half years ago, in August 2006, the court ruled that Bruce Fischer committed domestic violence against his wife, Karen, and entered an order for protection of her and their two children. He was ordered to participate in a domestic violence assessment and treatment program. His visits with the children were to be in professionally supervised, pending review of the assessment results.

At the same time, the court denied his competing petition for a protection order against Karen. This perceived defeat turned his rage towards his wife into a full blown campaign against the courts, accusing the legal system of punishing him, motivated by a bias against men, while minimizing his wife's behavior, and ultimately causing psychological damage to his children.

To this day, Bruce refuses to do the domestic violence treatment program. His goal is to persuade the appellate court to find that it is his wife, not him, who is the perpetrator of domestic violence, thereby relieving him from doing the required treatment.

This is a doomed effort. Substantial, credible evidence at trial showed that Karen lived in fear of Bruce's rages and violence.

It also showed that, while the case was pending, Bruce tried to intimidate those people who he believed opposed him—including the visit supervisors, a therapist, and the court.

In his need to win, however, the losers have been those who love him the most—his children. Bruce chose to stop seeing them in supervised visits from December 2006 to March 2007 and again since July 2007. He has not visited them to this day, as he says in his opening brief.

This Court should end Bruce's efforts to blame his wife and the legal system and affirm the only two trial court decisions properly on review: the initial order on renewal of the order for protection, and the final parenting plan, entered on October 3, 2007. It also should award Karen attorney fees and costs, incurred in defending against this appeal.

## **II. Issues in Response to Appellant's Brief**

1. Should the claimed errors and issues that are not supported by argument in the appellant's brief be considered on appeal?

2. Should review be limited to the order on renewal of order for protection, entered September 5, 2007, and the final parenting plan, entered on October 3, 2007?

3. Does substantial evidence support the finding that the father has a history of acts of domestic violence?

4. Did the trial court properly exercise its discretion in establishing a parenting plan with restrictions on the father's residential time and decision making rights?

5. Did the trial court properly exercise its discretion in renewing the order for protection on September 5, 2007?

6. Did the trial court properly enter an order on March 18, 2008, without obtaining permission from the appellate court to do so?

7. Should the appellant's request for attorney fees on appeal be denied?

### **III. Restatement of the Case**

In the years following her marriage to Bruce Fischer in 1992, Karen came to know another side to her husband, one he kept mainly at home. RP II 392; RP III 457, 459. He called her cruel names, pushed her, and isolated her from family and friends. RP III 457-459, 464, 466-473, 488-489, 575-576. Around the end of 2005, he became increasingly threatening and physically violent towards her, causing her to fear him. RP III 477-478. Eventually, she recognized that he was affecting their children. RP III 488,

494. 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, with their eight year old son, barricading the door with a chair. RP III 487-494. The last thing he said to her was, "I'll make your life a living hell." RP III 486, 494.

The next day, Karen obtained a temporary order for protection for herself and the children. CP 5-11; RP 494. She said, in her petition, how she was afraid for their safety, based on what Bruce did the day before and over the prior months. CP 5-11. Realizing that the marriage was over, a few days later, she also filed a petition for dissolution. CP 11-16

Meanwhile, on August 3, 2006, Bruce, seeking to depict Karen as the perpetrator, obtained a temporary order of protection order against her. He alleged that, over the last 15 years, Karen went into rages, hitting, spitting, kicking, pushing, and blocking him from leaving rooms, so he now was afraid that she or a male friend could cause him harm or death.

A two day hearing on the competing petitions took place before a court commissioner on August 11 and 18, 2006. RP 08-18-06 & 08-11-06. The court heard testimony by Karen and her

brother Ronnie, as well as by Bruce and his parents. It also considered numerous declarations in support of each of them.

The court, finding Karen's testimony credible, entered a one year order for protection. RP 190-200, CP 62-65. Bruce was to submit to a domestic violence assessment, with input from Karen, and follow all recommended treatment. CP 62-65. He was allowed to see the children four hours a week, in professionally supervised visits, at Family Visitations, LLC, pending a review of the assessment. CP 64.

The court, finding Bruce's testimony incredible, denied his petition, noting that he testified that he did not fear Karen. RP 08-18-06 at 190-200.

Bruce unsuccessfully challenged the decisions. His motion for reconsideration was denied on September 21, and, later, his motion for revision was denied, following a hearing by the trial court on October 20, 2006. CP 100, 101, 121; RP 10-20-06.

#### Guardian ad litem

On August 11, 2006, a guardian ad litem, Nancy Hanrahan, was appointed. About four months later, in December, she issued her report, concluding that Bruce was not a perpetrator of domestic

violence and recommending he have unsupervised visits with the children.

#### Domestic violence assessments

Bruce was assessed by Bill Notarfrancisco, MA, who reported that he did not fit the profile of a batterer. CP 1063. However, it turned out that Mr. Notarfrancisco did not get Karen's input, as required by the court. CP 1063.

The court rejected the report as invalid, requiring Bruce to do a second assessment. The next evaluator, Peg Cain, MA, conducted a complete assessment and concluded that Bruce "has issues around power and control." RP I 69

#### Supervised visits

In August 2006, Bruce began seeing the children in supervised visits at Family Visitations, LLC. CP 27-33. This arrangement ended in about four months later, in December 2006, when the supervisors no longer wanted to work with him due to his accusations against them and refusal to follow policies. RP II 263.

Bruce did not visit the children again until March 2007, when he arranged to use a new visit supervisor, Brigitte Arnett. The visits were ultimately not successful, in Ms. Arnett's view. RP II 356-358. Bruce questioned the children about the litigation, blaming their

mother, and making them feel uncomfortable, especially the daughter. RP II 307-357.

After a particularly tense visit, on July 18, 2007, Bruce stopped the visits, without telling the children. RP II 338-357. His behavior at the visit was so upsetting to the daughter that she required an emergency session on a Sunday with her counselor, Mary Anne Trause, Ph.D. RP I 189-191. Bruce has not visited the children ever since. App. br. at 13-14.

#### The trial

A five-day trial took place from August 27 – 31, 2007. RP I - VI. The main issues involved whether Bruce had a history of domestic violence, for the purpose of establishing a parenting plan, and the renewal of the order for protection. RP 09-05-08 at 8.

Karen testified that Bruce had been physically violent and threatening during the marriage. She described how, early one morning in December 2005, he went totally out of control, shoving her against the wall and sweeping everything off her desk. RP III 444-451. He also grabbed her by the neck, saying something like, "I'm going to kill you." RP III 450-451. Before leaving for work, he knocked holes in two doors, and threatened to destroy the house.

RP III 452-453. Later that day, her son asked, "Mommy, what if daddy really does destroy our house?" RP III 453.

She told of other instances of Bruce's explosive anger and threats. For example, one evening around Christmas in 2005, while she and her brother, Ronnie, were talking in the kitchen, Bruce stormed in, threw two holiday cards on the table, shouted profanities at her and demanded to know why she didn't mail them. RP III 475. She was horrified and humiliated. RP III 476.

She described how, in the months leading up to the protection order, Bruce's behavior escalated, even outside of the home. RP III 477-485. She became so scared of him that she felt sick when she touched him. RP III 485. He repeatedly threatened her that "You want to divorce me, then I will make your life a living hell." RP III 480. He also threatened to get at her through the children, saying: "I'm not like you. And I'm not all about those kids. That's your sickness. If we get divorced they're screwed." RP III 486.

She testified that she was still afraid of Bruce, based on his actions did over the last year, including refusing to do treatment; intimidating people, including judges; sending her the message, in songs that he put on a CD that he gave the children, that he

intended to win; and using the children to hurt her, like when he threatened to make a report to Child Protective Services if she did not take their son to the doctor when his bottom hurt for a short period of time. RP III 498-508, 544-547.

Finally, Karen explained a journal entry, where it was written that she slapped Bruce and threw water on him. RP 522. She acknowledged that it was her writing, but said that she did not remember doing those things. RP III 524, 552. She said that she never started anything physically with Bruce; that he was big and intimidating. RP III 563.

The domestic violence evaluator, Peg Cain, testified that Bruce needed treatment for domestic violence issues and the no contact order needs to stay in place. RP I 69. She said that, in the interview with Bruce, he had an agenda to talk about Karen's problems. RP I 130-134. He told her that he had a "short fuse" at the end of the relationship and that he physically moved Karen in the past; however, contradicting this, he indicated, on an anger assessment, that he never experienced any anger at all, and he also received invalid scores on the domestic violence test, revealing that he had been deceptive. RP 49-147.

Mary Anne Trause, Ph.D., the counselor for the daughter, believed that the girl had been negatively affected by Bruce. RP I 197. She was scared of him, because he got mad so easily. RP I 177. At home, she saw him yelling at her mother and telling lies about people. RP I 177-179, 195-233. At the visits, she felt uncomfortable, because Bruce blamed her mother; made her feel that he did not like her, by saying she was a lot like her mother; and persisted in going after her about the divorce and the litigation. RP I 183-191.

At the final visit, Bruce went after her personally for the first time. RP I 191. She was very scared and did not want to visit her father anymore. RP I 191-194.

Robin Jones, the director of Family Visitations, LLC, testified that Bruce yelled at her, accusing her of accommodating Karen. RP II 247-8 She said that Bruce did not follow policies during visits according to supervisors' notes and he wrote emails attributing false statements to her. RP II 248-257. They stopped offering visitation services to Bruce after all the supervisors refused to work with him due to his noncompliance.

April Godsey, a visitation supervisor at Family Visitations, testified about a frightening experience when, after everyone left

the building in the evening, Bruce suddenly became very aggressive and intimidating., demanding to see the case notes. RP III 284 -1287. Then, a client knocked on the door and Bruce just as suddenly changed his demeanor, pleasantly saying "Have a good evening," and left. RP II 287

Brigitte Arnette, a visitation supervisor, testified that while she facilitated the visits, from March to mid-July 2007, Bruce was increasingly inappropriate, pushing the limits of her policies, and making the children, especially the daughter, uncomfortable. RP II 296-357. He blamed Karen for his time being limited, for making unilateral decisions and for taking them away from him. RP II 321, 352. He questioned his daughter about her counseling if she was only said what her therapist told her to say. RP II 308-309, 325, 354-355.

Ms. Arnette saw that the girl, through her body language, was upset, anxious and uncomfortable during the visits. RP II 308-309, 311, 313, 321, 324, 325, 344, 347.

On July 11, 2007, she asked Bruce if he could be on standby for his visit, explaining that Karen took the son home for a bath, because he was complaining his bottom hurt, and she would bring him back for the visit. RP II 326-333.

Bruce demanded that she tell Karen that if she did not take the boy to the doctor, he would call child protective services. RP II 333-335. She told Bruce that Karen said the boy already feels better. RP II 335-336. He remained adamant, calling it an “ultimatum” even though she did not think it warranted. Karen relented, she said, and it turned out to be very hard, expensive and invasive for the boy. RP II 337.

Finally, she described the final visit, where Bruce persisted with intensity, in inappropriately questioning the children and blaming their mother. RP II 342-347. Afterward, Bruce cancelled all future visits, without telling the children. RP II 356.

Bruce Fischer, in his testimony, denied that he was ever abusive towards Karen. He claimed that he had been a victim of her domestic violence, since the start of the marriage. RP II 726. As for Karen’s “whole fear thing,” he asserted that he is “amazed at her acting ability.” RP IV 704.

He said that when they were first married, she hit him on the chest and, when the children were toddlers, she scratched him with her fingernails. RP VI 731. He further said that, over the past few years, she had outbursts of slapping, hitting, and pushing. RP IV 738. Her pattern, he explained, was to pursue him for days,

eventually attack him, and then become calm. RP VI 742. He didn't fear that she could hurt him physically, but he "was amazed at how much power and control she had been given over my life and over the lives of my children. And that scares me. RP IV 742.

Bruce denied that he isolated her, destroyed her things, or yelled at her routinely. RP VI 693, 743, 816. He depicted Karen as the aggressor in December 2005, saying he woke up to her screaming, wanting an apology. RP IV 694-695. She followed him to his home office, dumped a glass of water on him, then cleared his desktop of everything. RP IV 695-698. He said he just slid a couple of items off her desk in return. RP IV 698.

He further claimed that Karen "threatened to destroy all my property," so he calmly grabbed her sweater – not her neck – and said "that would be the same as her destroying everything in the house." RP IV 699-701

Bruce blamed the incident over the Christmas cards on Karen, calling her "disingenuous" for not mailing them. RP IV 703. He said he was angry, so he walked in the room where Karen and her brother were chatting, "interrupted their -- their tea and conversation. And I said I can't believe you didn't mail my Christmas cards" and went upstairs. RP IV 703-704.

He also denied that he blocked her from leaving the home in March 2006, saying he just wanted to know where she was going. RP IV 824.

In the end, Bruce made it clear that he would not enter the domestic violence treatment program, even if ordered to do so, objecting that Karen was using this as “a strategic weapon in the divorce process.” RP IV 872-874. He would appeal the ruling. RP IV 873.

Several people filed declarations in Bruce’s support.

A childhood friend, Mark Ricci, said he saw scratches on Bruce’s arm years earlier. RP IV 674. John Hare, a board member of the son’s little league team, said Bruce was kind to the team players. RP IV 681.

Another friend, Amy Jo Coates, agreed, saying she never saw Bruce have an outburst at the ball game. RP IV 706. A neighbor, Jamie Powell, called him a “great father.” RP IV 780-781.

The testimony of the guardian ad litem, Nancy Hanrahan, was given in the form of a prior video deposition, as she was medically fragile. RP IV 637. She supported Bruce and did not believe he was a domestic violence perpetrator. However, she did not have contact with the parents of the children during 2007. She

did not know that the order of protection was entered against Bruce, after he was found to have committed domestic violence in a hearing in August 2006.

Ms. Hanrahan also did not know that domestic violence could occur without a criminal charge or that a victim could obtain a civil protection order. However, she would not agree to revise her opinion based on this information.

On September 5, 2007, the trial court, ruling orally, found that Bruce had a history of acts of domestic violence and would therefore enter a parenting plan, with the required restrictions, under RCW 26.09.101. RP 09-05-07, 8-17. The court also found that past violence and present fear of further violence, and entered a renewed order for protection. RP 09-0-5-08 17.

On October 3, Bruce filed a notice of appeal, designating for review the renewed order for protection, and also the original order for protection, entered 13 months earlier, and the order denying reconsideration of it. CP 555-570.

At a presentation hearing on October 3<sup>rd</sup>, the court entered the other final orders,, including the parenting plan, the findings of fact and conclusions of law, the decree of dissolution, and the order of child support. CP 1028-1035, 1036-1041, 1042-1059, 1060-

1061. The parenting plan contained limitations on Bruce for engaging in a history of acts of domestic violence. CP 573-575. He was required to participate in a domestic violence treatment program and was only allowed to see his children in supervised visits until he completed the program. CP 980, 984.

Both the renewed protection order and the parenting plan were approved and incorporated in the findings, as well as in the decree, where the parties were also required to comply with these orders. In addition, in the decree, the court divided the parties property and liabilities, ordered the home to be sold, and awarded \$15,000 in attorney fees to Karen, among other things.

Bruce promptly filed a second notice of appeal on October 17, designating the parenting plan. CP 1062. He did not seek review of the other final orders which were entered in the dissolution case.

#### Post-trial litigation

After the trial, Bruce litigated heavily, resulting in the entry of twelve additional orders. The thrust of this litigation appears to be Bruce's efforts to get Karen out of the family home and to occupy it himself, refinancing it, instead of selling it. On March 19, 2009, Bruce filed his final notice of appeal, designating for review one of

these orders, entered on March 18, 2008, in which the court denied his request to occupy the home and required him to continue his efforts to refinance it, among other things. CP 1478. The three appeals were consolidated.

#### **IV. Argument**

##### **A. Introduction.**

This appeal only concerns the propriety of the trial court's decision to establish the final parenting plan and to renew the order for protection, following the trial in August 2007. Bruce, in his opening brief, attempts to relitigate the entire case. He fails to recognize that, on appeal, review generally is limited to specific assignments of error by the trial court, contained in appealable orders, that were designated for review, in a timely notice of appeal. He also fails to recognize his burden of demonstrating that the court's challenged findings are not supported by substantial evidence. Instead, he invites the appellate court to consider his presentation of the case and to make new findings that his wife was actually the perpetrator of domestic violence—and not him. His invitation should be rejected. The challenged findings—that Bruce has a history of domestic violence, for the purpose of making the parenting plan—are supported by substantial evidence in the

record. The unchallenged findings—including that Bruce has a history of domestic violence, but for the purpose of issuing an order of protection—are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

**B. The claimed errors and issues that are unsupported by argument should not be considered on appeal.**

Bruce assigns error to numerous rulings of the trial court and sets out the issues that pertain to them. App. Br. at 1-8. However, he abandons 10 of the contended errors, making no argument in support of them. Contentions unsupported by argument or citation of authority will not be considered on appeal. In re Marriage of Wallace, 111 Wn. App. 697, 45 P.3d 1131 (2002); RAP 10.3(a)(5). Accordingly, the abandoned claims--8, 9, and 11-18--should not be reviewed.

**C. Review is limited to the renewal of order for protection and the parenting plan, both entered following the dissolution trial in 2007.**

Bruce challenges trial court decisions, ranging from the order for protection, entered on August 18, 2006, to the recently renewed order for protection, entered on September 5, 2008. However, only two decisions are properly before the appellate court for review: the order on renewal of the order for protection, entered on

September 5, 2007, and the final parenting plan, entered on October 3, 2007. CP 395-396. 979-985. All of the other trial court decisions were not properly designated for review, not subject to any exceptions to the exclusionary rules, or not reviewable as a matter of right.

**1. The order for protection and the orders denying reconsideration and revision of it are not reviewable.**

On September 17, 2007, Bruce filed his first notice of appeal, designating the order for protection and the order denying his petition, dated August 18, 2006; the order denying reconsideration and an agreed temporary order, dated September 12, 2006; and the renewal of the order for protection, dated September 5, 2007. CP 555-570. The notice of appeal must be filed within thirty days of entry of appealable order, or court of appeals will be without jurisdiction to consider the order. Kelly v. Schorzman, 3 Wn. App. 908, 478 P.2d 769 (1970); RAP 5.2(a). Accordingly, only the last of the designated orders was timely filed.

In addition, Bruce did not file a notice of appeal, designating the order denying revision, entered on October 20, 2006. This would have been the appealable order in the protection order proceeding. It is clearly too late to seek review of this order now.

**2. Finding of fact and conclusions of law, decree of dissolution, and order of child support are not reviewable.**

Bruce contends that errors exist in the findings of fact and conclusions of law, the decree of dissolution, and in the order of child support, entered after the dissolution trial. See, App. br. at 2, 6, 7, 37-39. He did not file a notice of appeal, designating them for review. They also do not fall into the exception, under RAP 2.4(b), because the two orders properly on appeal--the renewed order for protection and the final parenting plan--can be reviewed without considering the merits of these other final orders. Accordingly, these orders are not reviewable, and his challenges to them should not be considered.

**3. The post-trial order of March 18, 2008, is not an appealable final order.**

Bruce, in his third notice of appeal, incorrectly designated for appeal an interlocutory order, entered about five months after the final orders were entered in the case. CP 1478. The order pertains to an ongoing dispute over the family home. The order is not before this court for review as a matter of right, under RAP 2.2(a). It is not reviewable on this appeal.

**4. The additional post-trial orders are not reviewable.**

Bruce contends that at least 11 trial court decisions, entered after the final orders at the trial, both modify orders before this court for review and are consolidated for review. See App. br. at 18. He is mistaken. He did not file separate notices of appeal for these orders.

A party “may only obtain review of the decision on the post judgment motion by initiating a separate review”, according to the applicable rules, with certain exceptions that do not apply here. RAP 7.2(e). They do not fall into the exception under RAP 2.4(b), because they were made and entered after this Court accepted review.

The 11 or so decisions are therefore not reviewable. Accordingly, the many assignments of errors, and the issues pertaining to them, related to these decisions should be disregarded. The objectionable assignments of error and issues are 1, 4, 5, 7-13, 17-18.

**D. Substantial evidence supports the finding that Bruce had a history of acts of domestic violence.**

Bruce contends that the trial court erred in finding that he had a history of acts of domestic violence. Specifically, he asserts

that the only evidence at trial in support of this finding was Karen's testimony, which he characterizes as "self-serving and uncorroborated", because the supporting testimony by declarations, which were considered at the protection order hearing in August 2006, were not before the trial court. App. Br. at 19.

An appellate court will uphold a finding of fact if substantial evidence exists in the record to support it. Burrill v. Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002). Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. Id. So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it. Id. This is because credibility determinations are left to the trier of fact and are not subject to review. Id.

**1. Karen's testimony was credible and Bruce's was not.**

At trial, Karen testified at length about how Bruce was abusive toward her during their marriage, with his rage, threats, and physical abuse increasing in the final eight months. The court, in its oral ruling, considered her testimony "credible" and "genuine", noting that often there are no witnesses to domestic violence, which

generally takes place behind closed doors. RP 09-05-07 at 8, 9, 10.

The court had the opposite opinion of Bruce, calling his testimony "on the issue of domestic violence is incredible." RP 09-05-07 at 8-9. These credibility determinations are properly within the broad discretion of the trial court.

**2. Karen's testimony was consistent with other witnesses'.**

The testimony of many witnesses at trial was consistent with Karen's description of Bruce's issues with rage and control. Two of the visit supervisors, Robin Jones and April Godsey, described how Bruce threatened and intimidated them

The next supervisor, Brigitte Arnette testified how Bruce made the children feel uncomfortable, questioning them about the legal proceedings, their involvement with their counselors, and blaming their mother for the circumstances. RP II 338-357. She also testified how Bruce threatened to report Karen to Child Protective Services when he missed a visit with his son, whose bottom hurt.

The daughter's counselor, Dr. Trause, testified to the girl's experience with Bruce, as well as her own. The girl was afraid of

her father. RP I 77. She told how he raged and blamed her mother in the home, and how he was continuing to do this at the visits, making her uncomfortable. RP I 177-233. She was uncomfortable in the visits with him and, eventually, did not want to visit him at all. RP I 191-194. Dr. Trause also told how Bruce demanded her case notes, tried to intimidate her, and threatened to get them by subpoena. RP I 49-147.

The domestic violence evaluator, Peg Cain, testified that Bruce had issues with power and control, explaining how, in testing, he denied any experience of anger at all and was deceptive, and how in interviews he admitted anger and intimidating, physically aggressive acts toward Karen. RP I 49-147.

Even the guardian ad litem, Nancy Hanrahan, who believed that Bruce was not a perpetrator of domestic violence, noted his issues with anger and control. She recommended continuing supervised visits for the daughter, who told her that she is uncomfortable being with her father unsupervised.

The court also weighed the existence of the protection order against Bruce, as permitted by RCW 26.09.191(2)(n). RP 09-05-07 at 8.

As a whole, this evidence is sufficient to support the trial court's finding that Bruce has a history of domestic violence.

**3. The trial court did not find that Karen committed domestic violence.**

Bruce next contends that the trial court erred in not finding that Karen actually was the perpetrator of domestic violence, based on his "unbiased" evidence that she repeatedly assaulted him. At trial, this evidence consisted of the testimony of his friend, Mark Ricci, who said that he saw "a huge scratch" on Bruce's arm. RP IV 730. It also was the journal entry, saying she slapped him and threw water on him. Ex. 145. He also refers his mother's testimony about the scratches. App. Br. at 22-23. However, this testimony took place at the hearing regarding the protection orders in August 2006, which are not part of this appeal.

Bruce fails to recognize that the trial court is free to accept testimony or other forms of evidence that contradict his version of events. The reviewing court defers to the trial court because of its unique opportunity to personally observe the parties and the witnesses. Standing Rock Homeowners' Assoc. v. Misich, 106 Wn. App. 231, 244, 23 P.3d 520 (2001).

Above all, Bruce wants the appellate court to assume the trial court's role, in bench trial, as the trier of fact, and, based on his presentation of evidence, find that Karen committed domestic violence. This is not the role of the reviewing court.

Bruce further contends that the trial court, motivated by gender bias, minimized Karen's behaviors as just "acting out" or as "reactive." App. Br. at 21-23, 37. This contention is not supported by the record. The court did not find that Karen was the physical aggressor, even though it believed that she threw water on him and may have stuck him. RP 09-05-07, 14-15. The court instead found that Bruce was attempting to depict her as the aggressor, in order to avoid his own issues with domestic violence:

I have little doubt that Ms. Fischer threw a glass of water on you once, and she may have even struck back at you. But I cannot conceive that she would have been the physical aggressor. Your public behavior, as reported in this trial, and even the behavior that I have observed in court, belies the truth of these allegations. I do not believe that you were ever afraid or felt threatened by Ms. Fischer's behavior, that she controlled your behavior, and in fact that was your testimony. You were never frightened or threatened by her.

Mr. and Ms. Fischer, the two of you have had plenty of marital problems, but Mr. Fischer, you are the one with the domestic violence problem.

RP 09-05-07, 14-15.

Bruce fails to cite to any evidence in the record that would suggest that the court exercised its discretion for untenable reasons for finding that Karen was not the physical aggressor. Rather, Bruce's testimony that he was not afraid of her is sufficient evidence to support this finding.

**E. The trial court properly made the restrictive parenting plan.**

Bruce contends that the trial court abused its discretion in placing restrictions on his residential time and his decision making rights in the parenting plan. His position seems to be that, based on evidence that he was a good father, especially with the guardian ad litem's recommendations, as well as on the court's finding, in its oral ruling, that he was an active and involved parent, the court should have made a parenting plan without these restrictions, guided by the standard of the best interests of the child and the statutory factors, set out in RCW 26.09.187(3)(a).

**1. A restrictive parenting plan is required under RCW 26.09.191 (1) and (2).**

Bruce is correct that generally the court is to make a parenting plan that encourages the relationship of each parent to the children. However, the residential schedule must "be consistent with RCW 26.09.191." RCW 26.09.187(3)(a). The court is only to

consider the statutory factors, such as the relationship between the parent and the children, where the limitations of RCW 26.09.191 "are not dispositive of the child's residential schedule." RCW 26.09.187(3)(a).

Mutual decision-making or designation of a dispute resolution process other than court action shall not be required where there is a history of acts of domestic violence:

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: ... (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) ...

RCW 26.09.191(1).

Residential time with a child also must be restricted where there is a history of acts of domestic violence:

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: ... (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) ...

RCW 26.09.191(2)(a).

Here, after the trial court found that Bruce had a history of acts of domestic violence, it was required to make the restrictive parenting plan, under RCW 26.09.191(1) and (2). Accordingly, the court acted properly in doing so.

**2. The limitations imposed where reasonably calculated to protect the children.**

Bruce's contention that the court imposed these restrictions, based on gender bias, is contradicted by the great care it took to ensure the restrictions were "reasonably calculated" to protect the children, while allowing Bruce the opportunity to immediately resume visits with them.

(m)(i) 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. The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

RCW 26.09.191.(2)(m)(i).

The trial court, in fashioning the restrictions, considered that Bruce was an engaged parent who "needs to be involved in the lives of these children." RP 09-05-07 at 16. Wanting to see the visits resume and concerned that Bruce twice stopped them, the

court set out a relatively brief program for resuming unsupervised visits within two months of enrolling in domestic violence treatment and even normalizing visits, with consecutive overnights, on completion of the program. CP 574; RP 09-05-07 at 16-17. Further, in light of his "impressive parenting skills", the court allowed him to immediately start supervised visits, even if he did not enter treatment. RP 09-05-07; RP 15-16; CP 574.

The court, in imposing the restrictions, carefully balanced Bruce's issues with domestic violence, his parenting skills, and the children's need for their father. This was a proper exercise of discretion. There is nothing in the record to suggest that the court's discretion was guided by any improper motive.

**3. Bruce was not forced to admit guilt to a wrongful act.**

Finally, Bruce contends that he has been forced to admit guilt to a wrongful act, in violation of his constitutional rights. App. br. at 36. However, he fails to cite to any place in the record showing that he has been ordered to such a thing. An independent review of the massive record reflects that he is not required to do so. This contention is baseless.

**F. The trial court properly issued a renewed order of protection.**

Bruce takes the position that the trial court may not renew an order for protection, unless there is a new act that inflicts fear or a specific harm to be avoided. App. br. at 19, 29-30, 32-34. This is incorrect.

A party seeking a protection order must allege the existence of domestic violence and declare the specific facts and circumstances from which relief is sought. RCW 26.50.030(1). But the burden of proof shifts when a petitioner seeks to extend a 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". RCW 26.50.060(3). Rather than bar new protection orders, RCW 26.50.060(3) shifts the evidentiary burden from the restraining to the restrained party. Accordingly, Karen did not need to prove that Bruce engaged in domestic violence when she requested the renewal of the order of protection at trial. She only needed to show a past history of abuse or threatened abuse plus a present fear. Spence v. Kaminski, 103 Wn. App. 325, 332-33, 12 P.3d 1030 (2000). A new act of domestic violence is not required to obtain an

extension of a protection order. Barber v. Barber, 136 Wn. App. 512, 150 P.3d 124 (2007).

At trial, Karen made the requisite showing, testifying that she was afraid of him, as he refused to do the required treatment; he was threatening people, including judges; he used the children to get at her, by threatening to call Child Protective Services; and he sent her the message, in the songs on the CD he made for their son, that he was going to win. RP II 498-504. This was sufficient evidence to support the trial court's finding of the existence of a present fear of further violence. RP 09-05-07 at 17.

At this point, the burden shifted to Bruce to prove he "will not resume acts of domestic violence". He made no attempt to do so at trial. He instead attempted to prove that there never was history of abuse to warrant an order of protection at all. This question already was litigated and decided in the affirmative in August 2006 and upheld on revision in October 2006. CP 121. The finding was unchallenged and is a verity on appeal. Hill, 123 Wn.2d at 644. Having failed to make the showing required to successfully oppose a petition to renew, the trial court properly issued the renewed order for protection.

**G. The trial court properly made post-decree decisions.**

Bruce contends that the trial court improperly entered at least 11 post-trial orders that will change decisions being reviewed without first obtaining the permission of the appellate court. This contention is without merit.

After the trial in August 2007, the trial court made a number of decisions regarding the disposition of personal and real property. Bruce designated only one of these decisions, entered on March 18, 2008, for appellate review, even though it was an interlocutory order.

The March 18, 2008, order did not effect a decision being reviewed. Bruce did not file a notice of appeal, designating the findings of fact and conclusions of law or the decree of dissolution. These orders contained all of the provisions regarding property. CP 1028-1059. As the order of March 18, 2008, is the only decision involving property that was designated in a notice of appeal, it could not possibly affect an order being reviewed.

**H. Bruce should not be awarded attorney fees on appeal.**

The Court should deny Bruce's request for attorney fees, based on the parties' relative needs and ability to pay. He testified at trial that he earns between \$10,000 and \$11,000 a month. RP -.

Last year, Karen entered work full time, as a speech therapist, on a contract basis, earning around \$30 an hour. RP 691. He may have spent a good deal of money in attorney fees; however, between the two of them, he has the relative ability to pay Karen's legal fees, not the other way around.

#### **V. Motion for Attorney Fees**

The Court should find this appeal frivolous and award Karen attorney fees. RAP 18.9(a) permits an award of sanctions against a party who files a frivolous appeal. An appeal is frivolous if there are no debatable issues upon which reasonable minds may differ and it is so devoid of merit that there is no possibility of reversal. In re Marriage of Wagner, 111 Wn. App. 9, 18, 44 P.3d 860 (2002).

Not a single issue raised by Bruce is debatable. Above all, he seeks to retry his case on appeal. The majority of his challenges pertain to orders he did not timely appeal. He failed to cite to facts in the record over 100 times, as well as to relevant legal authority, turning the preparation of a response into an unnecessary expenditure of time and money.

Moreover, in a similar vein, Bruce should pay Karen's fees because of his intransigence. The law is well established that intransigence will support an award of attorney's fees. In re

Marriage of Mattson, 95 Wn. App. 592, 605-06, 976 P.2d 157 (1999). Not only was this appeal pointless, it was expensive. After four years of intense litigation, Bruce subjects Karen to another round of litigation without any credible legal and factual basis. This is simple intransigence.

Finally, Bruce should pay Karen's fees because of his greater ability to do so, just as the trial court did. RAP 18.1 and RCW 26.09.140. The record established that Bruce earns a significantly greater income than Karen and has the ability to pay her attorney fees.

## **VI. Conclusion**

In sum, the trial court's findings that Bruce had a history of domestic violence and that Karen did not were supported by substantial evidence. There is nothing in the record to suggest that the court, in making its rulings, was improperly motivated against Bruce or was seeking to punish him. On the contrary, the court informed him that it hoped the classes would be a learning opportunity and that he would resume his visits with his children,

even if he refused to participate in it. He can only blame himself for rejecting this opportunity.

Dated this 20<sup>th</sup> day of February 2009.

RESPECTFULLY SUBMITTED,

  
J. Anne Redford-Hall, WSBA# 27963  
Attorney for Respondent

**DECLARATION OF MAILING**

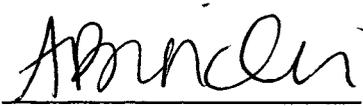
I, Amber Binchi, paralegal at the Redford Law Firm, declare under penalty of perjury under the laws of the State of Washington that the following persons were served with this Responsive Brief of Respondent via first class mail:

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

Bruce Fischer  
4425 Roxanna LP SE  
Lacey, WA 98503

STATE OF WASHINGTON  
BY  DEPUTY  
CLERK OF COURT  
COUNTY OF THURSTON  
SUPERIOR COURT

DATED: February 20<sup>th</sup>, 2009

  
Amber Binchi, Paralegal