

COURT OF APPEALS
DIVISION II

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NO. 40513-0-II

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

THOMAS BENNER,

Appellant,

v.

ASHLEY BENNER,

Respondent.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

1. Where victims of abuse have fully testified about the abuse and been subject to cross-examination by the alleged abuser's legal counsel, must those same witnesses endure the trauma of testifying again at trial in the same case?

2. Are the Final Parenting Plan, Continuing Restraining Order, and Domestic Violence Order of Protection supported by the record?

3. Was the trial court required to consider the factors listed in RCW 26.09.187, when it had made specific findings under RCW 26.09.191?

4. Did the trial court abuse its discretion by giving the appellant the option to seek review of the parenting plan in the future, without filing a petition to modify it, if the guardian *ad litem* feels he has made progress in therapy?

5. Did the trial court err in deciding that the respondent would qualify as Peter Benner's *de facto* parent if the Washington Supreme Court later ruled the nonparental custody statutes do not provide stepparents with a remedy?

6. Is any error found by this Court harmless?

7. Should the respondent be awarded attorneys' fees on appeal?

II. STATEMENT OF THE CASE

A. Family History.

Between her sixth and seventh grade year, the Respondent, Ashley Marie Benner, met the Appellant, Thomas James Benner,¹ who had started dating Ashley's mother, Mary.² (CP 135:18-21). In addition to Ashley, Mary had two other children from a prior marriage, Michael and Theresa. (CP 135:18-21). Mary and Thomas married in 1992 or 1993. (CP 156:21). Ashley, Michael and Theresa were Thomas's step-children by marriage. During the marriage, Mary and Thomas had one child, Peter (DOB 12/14/1994).³ (CP 148:17).

Mary died in a car accident on August 29, 1996. (CP 157:1-2). Sometime after Mary's death, Thomas adopted Michael and Theresa, but did not adopt Ashley, who was 16 years old at the time of her mother's death. (CP 1, 143:15-16, 157:9-10).

Ashley became pregnant by Thomas when she was barely 18. (CP 137:12-13). Ashley and Thomas married on October 6, 1999; Ashley was 19 and Thomas was 5[1][sic]. (CP 78:2). Thomas and Ashley have three children from their marriage: Tristan (DOB 11/7/99), Mary Elizabeth

¹ Thomas was born on September 11, 1948, is 6'2" and weighs 260 lbs. (CP 62, 214). Thomas is also sometimes referred to as "TJ" in the transcripts.

² The parties, children and other family members share the same last name, Benner. For purposes of clarity, we refer to each by his or her first name; we intend no disrespect.

³ Peter is Ashley's half-brother and was her step-son; Ashley raised Peter since he was two years old. (CP 148:16-17, 149:23-4).

(DOB 3/25/03) and Thomason (DOB 10/1/07). (CP 1, 20). For the reasons set forth below, Ashley and Thomas separated on June 10, 2009. (CP 78:4).

Thomas was also married prior times. His first marriage was from approximately 1969 to 1982 to Jayne Dana Lambert. (CP 162:18). They had two children, Erik Benner and Jennifer van Wunnik (hereinafter “Jennifer”). (CP 162:19, 167:16-18).

B. Procedural Posture.

Three cases involving these parties were heard together (but not consolidated): a dissolution, a nonparental custody case and a petition for a domestic violence order of protection. On July 22, 2009, Thomas filed this dissolution action against Ashley in Pacific County Superior Court (Case No. 09-3-00068-4). This is the case *sub judice* on appeal.

On July 28, 2009, Ashley filed a petition for an order of protection for herself and all four children (Peter, Tristan, Mary Elizabeth and Thomason) alleging domestic violence (Pacific County South District Court Case No. 2009-17DV). On July 31, 2009, that case was transferred to the Pacific County Superior Court (Case No. 09-2-00312-4). On February 25, 2010, a permanent domestic violence order of protection was entered restraining Thomas from having any contact with Ashley. (CP 214-218).

On September 14, 2009, Ashley filed a petition for nonparental custody of Peter (Pacific County Superior Court Case No. 09-3-00085-4). On February 25, 2010, nonparental custody was granted to Ashley and a continuing restraining order was entered restraining Thomas from any contact with Peter. (CP 205-209, 210-213).

Thomas did not appeal the nonparental custody case (Case No. 09-3-00085-4) or the permanent domestic violence order of protection (Case No. 09-2-00312-4).

On August 17, 2009, Thomas filed a declaration and a hearing was set by Thomas's legal counsel for August 20, 2009, for approval of Thomas's temporary parenting plan filed on July 22, 2009. (CP 123-129, 98). The August 20, 2009, hearing was continued to September 14, 2009, until "an appropriate hearing assisted device can be made available" for Thomas, who is hearing impaired. In the interim, the trial court ordered no visitation for Thomas with any of the children. (CP 130, 131-132).

On September 1, 2009, Ashley's legal counsel entered notices of appearance. (CP 133). Ashley filed five declarations on September 14, 2009. (CP 135-140 (Ashley), 141-147 (Theresa), 148-155 (Peter), 156-161 (Michael), 162-166 (Jayne Lambert)). Ashley appeared for the September 14, 2009, hearing with three of the four witnesses prepared to testify in person as to the content of their declarations—some having

travelled from out of state to be present. (A real-time court reporter to accommodate Thomas's disability was also present). Thomas and his legal counsel failed to appear. (CP 174:20-23, 134). Ashley subsequently filed two more declarations on September 21 and October 2, 2009, from Thomas's children from his first marriage. (CP 167-171 (Jennifer), 179-184 (Erik), respectively).

The case was continued to September 24, 2009. (CP 99). On September 22, 2009, Thomas's legal counsel requested a continuance. (CP 172-174). Thomas acknowledged that the temporary hearing was "an opportunity for the Judge to rule and will be ruling on my future access to my children" (CP 173:22-24). Ashley's legal counsel filed a response setting forth Ashley's opposition to further continuances. (CP 175-178).

On September 24, 2009, the trial court denied Thomas's request for a continuance and a full day of testimony occurred from approximately 10:30 a.m. to 2 p.m., reconvened at 2:32 p.m. and went to the end of the day. (CP 99, RP at 88, 143, Sept. 24, 2009). In denying the continuance, the trial court specifically stated,

I'm going to deny the motion at this stage, listen to the testimony and make a determination if additional testimony should be allowed. That's not foreclosing [Thomas] from producing additional evidence. But he would need to make an offer of proof at the end of the testimony what he – who

he expected to call and what their anticipated testimony would be.

(RP at 13:4-11, Sept. 24, 2009 (emphasis added)).

Testimony was then taken from Ashley and Theresa, Michael (by telephone), Thomas, and Ken and Nathaniel Miller (witnesses on Thomas's behalf by telephone).⁴ Thomas was represented by legal counsel, who cross-examined (and re-cross) Ashley and her witnesses, and took direct (and re-direct) testimony of Thomas and his two witnesses. (*See generally* RP, Sept. 24, 2009). The trial court also met *in camera* with Peter, who was 14 years old at the time, after which the trial court stated,

Well I spent some quality time with Peter. He certainly is a remarkable, remarkable, remarkable young man. [] I think he is . . . I mean somebody is doing something right around here. [Peter]'s not at all complimentary, Mr. Benner, I will tell you that, and basically [Peter] confirms many of the statements made by Mrs. Benner. And there are some fond memories he has of you and him, but they are certainly overcome by a lot of bad memories.

(RP at 128:15-24, Sept. 24, 2009).

At the end of the nearly full day testimonial hearing on September 24, 2009, neither Thomas nor his legal counsel made an offer of proof of any witnesses or evidence that could be offered to controvert the

⁴ Nothing in the Millers' testimony contradicted the testimony of Ashley, Michael or Theresa. (*See generally* RP, Sept. 24, 2009).

testimony by Ashley or her witnesses. The trial court entered a temporary order to continue the orders already in place, which among other issues, placed all four children with Ashley, restrained Thomas from contacting Ashley and the four children, and found Peter to be the *de facto* child of Ashley. (CP 100-105; *see also* RP at 133:18-22, Sept. 24, 2009 (positing the issue of *de facto* vs. nonparental custody)).

The trial court stated,

Certainly with regard to primary residential placement, that should be with Mrs. Benner. And I'm going to reserve on the issue of visitation. There's [sic] a number of things I still need to reread in light of the testimony that I heard today. . . . I think two weeks from now we will have a report from Mr. Jacot[, the guardian ad litem (hereinafter "GAL")].

(RP at 134:16-22, Sept. 24, 2009; *see also, id.* at 134-136, Sept. 24, 2009 (trial court's discussion on how the trial court determines the veracity and integrity of witnesses)).

On October 13, 2009, Thomas's legal counsel withdrew. (CP 185-186).

On October 16, 2009, Scott Jacot, the GAL, issued his report. (CP 1-44). On October 23, 2009, Mr. Jacot issued a correction. (CP 42).

On November 9, 2009, based on a full day of testimony from witnesses, at least eight declarations, and the GAL report, the trial court issued a Memorandum Decision, and directed Ashley's legal counsel to

prepare Findings of Fact and Conclusions of Law consistent with the Memorandum. (CP 110-114 (Memorandum Decision); CP 113; *see also* CP 115-118 (Findings of Fact and Conclusions of Law)). A hearing was scheduled for November 19, 2009, to enter the Findings of Fact and Conclusions of Law.

At the hearing on November 19, 2009, Thomas was given a continuance to December 17, 2009, and the trial court authorized Thomas to sell assets to acquire money to retain new legal counsel, and requiring Thomas to document all sales. (CP 187-188). The trial court also ordered the GAL to investigate and confirm if email contact by Thomas with the children would maintain their confidential location. (CP 188).

On that same date, after the hearing concluded, court security provided by the sheriff's office submitted a declaration that Thomas took down the license plate number of the vehicle in the parking lot that had been driven to the courthouse by Ashley. (CP 189-190). Based on this new incident and his research, the GAL filed a report on the email issue and changed his prior recommendation of allowing email contact. (CP 191-192). Specifically, the GAL stated,

I do not believe any longer that it is safe to allow email communication. In my opinion Mr. Benner continues to demonstrate manipulative behaviors in a very intelligent and sneaky manner. Giving him access to the children via email puts them at risk of this manipulative behavior and

put their confidential address at risk as well. I believe Mr. Benner has demonstrated a desire to obtain the information despite the current restriction/restraining order.

(CP 192).

Thomas was allowed to read into the record his explanation for why he took down the license plate number. (RP at 42:25-44:17, Dec. 17, 2009). Thereafter, the trial court ruled Thomas would have no contact with his children, including no email contact. (*Id.* at 44:18-19).

On December 30, 2009, trial dates were scheduled for February 22, 2010 and February 25, 2010. (CP 193-194). On February 9, 2010, Thomas requested the trial date be rescheduled, based on motions he filed in December 2009 (in the protection order case, not the dissolution), but failed to set in for a hearing as required by the court rules. (CP 195). Ashley's legal counsel filed a response objecting to the rescheduling of trial pointing out Thomas's familiarity with the motion/hearing procedures, and his being *pro se* not being an excuse for his failure to follow the court rules. (CP 196-198, 197:1-6).

A few days later, Ashley's legal counsel filed a supplemental response to the same trial rescheduling request. (CP 199-204). Specifically, prompted by Thomas's request, in mid-January 2010, Ashley's legal counsel made the request on behalf of both parties to have witnesses testify by telephone, as was done on September 24, 2009. (CP

199:22-24). Ashley, at all times, indicated that testimony by telephone was entirely up to Thomas. (CP 200:1-2). Thereafter, Thomas changed his mind and indicated he did not want witnesses to testify by telephone. (CP 200:3-4). Thomas then used the excuse that he could not afford to have witnesses appear in person as a reason for why he wanted the trial date rescheduled, notwithstanding that both parties had been offered (and previously used) the accommodation of having witnesses testify by telephone. (CP 200:5-7; *see also* CP 201-204 (Ex. 1)).

At trial, Thomas further pursued this issue stating, “All of my witnesses are from out of state, and I did not have the money to bring them here. I was also not provided with a witness list from the opposition. So I’m unprepared for their witnesses. They gave me no witness list.” (RP at 15:2-6, Feb. 22, 2010). After some discussion, the parties and the trial court clarified that Ashley was not required to provide a list of witnesses unless it had been requested, and Thomas only asked for a list of expert witnesses, of which there were none. (*Id.* at 15-17).

On February 22, 2009, notwithstanding that the motions were not properly before the trial court, Thomas’s motions were considered by the trial court and denied. Thereafter, the trial court stated,

The Court previously, on September 24, 2009, heard [] extensive testimony regarding certain facts that may be at issue here. This court’s position after significant research

that those issues are res judicata or collaterally precluded from being challenged. To that end, the Findings of Fact and Conclusions of Law certified along with the Memoranda[sic] Decision that I've already filed, I'm going to make those Exhibit 1, and they'll be admitted into evidence.

(RP at 9:12-19, Feb. 22, 2010).

The following exchange then took place:

THE COURT: . . . I've decided issues that have not been appealed and, within this case, I think are the law of the case and, in this case, the facts of the case. That is, Mr. Benner, that you engaged in sexual abuse of children, which more or less by statute renders any attempt to have contact with them in any meaningful way useless. The idea being that we've had examination and cross-examination of witnesses which reflect on your parenting. And I don't believe that the law allows you to retry those cases or those – or put those people again through that kind of testimony.

MR BENNER: Your Honor, I was never accused of having inappropriate contact with my children.

THE COURT: I didn't say with your children. I said with children. And I believe that your wife at the time the contact occurred was your stepchild, as was her sister[, Theresa].

MR. BENNER: And I deny those allegations, sir.

THE COURT: And I found against you on those issues. And I am not, at his stage going to allow you to relitigate that issue. . . . The parties had an opportunity over a period – I think it was a two-day hearing – to bring in testimony on these issues. And I think the Court's resolution of those issues is final absent some kind of CR 60 motion to reopen on newly discovered evidence.

MR. BENNER: I did offer testimony that refuted

everything Ashley said, your Honor - -

THE COURT: You tried to - -

MR. BENNER: - - by Ken Miller and . . .

THE COURT: You tried to do that and was [sic], in my opinion, unsuccessful.

(*Id.* at 9:24-11:7).

The trial court did however offer Thomas the chance to present any new evidence not previously heard by the trial court:

THE COURT: Unless you have new evidence, then I'm not going to reopen those issues. And that's my decision. If you have new evidence, then you may present it. Okay. All right.

MR. BENNER: If you won't allow the children to be examined, I can't give you any new evidence, your Honor.

(*Id.* at 14:10-16).

Similarly, after a full day of trial on February 22, 2010, the trial court revisited these issues, stating,

In this case, I have already found that you engaged in sexual abuse of a child. And that – those children were Ashley and her sister. I know you disagree with that. But there is nothing about the events of today or the demeanor of Ashley testifying or any other reason today that would make me change my opinion that that's exactly what happened.

(*Id.* at 196:18-25 (emphasis added)).

Since September 24, 2009, to present, the record does not reflect

any attempts by Thomas to make an offer of proof of any specific evidence or testimony, i.e., who he expected to call and what they might add that might controvert any of the testimony taken or evidence submitted prior to the trial court issuing its November 9, 2009, Memorandum Decision. (*See infra* RP at 13:4-11, Sept. 24, 2009).

Upon hearing argument on the law from Ashley's legal counsel on February 22, 2010, the trial court was persuaded that the nonparental custody petition was proven. Specifically, the trial court held that at the time the petition was filed, Thomas had acquiesced Peter's custody to Ashley, i.e., Peter was not in the custody of either Thomas or Mary, his biological parents, and the trial court had previously held that neither Thomas nor Mary is a proper custodian for Peter. The trial court further stated that if these findings are insufficient to provide an adequate remedy to Ashley, then the trial court finds Ashley to be a *de facto* parent. (RP at 200:14-201:2, Feb. 22, 2010).

With regard to any future contact, the trial court first discussed its concerns about the likelihood that Thomas will manipulate any future psychological evaluations. Specifically, Thomas filed Dr. Don True's psychological evaluation on February 18, 2010 and did not produce Dr. True at trial for direct testimony or cross-examination. The trial court admitted the evaluation over Ashley's legal counsel's objections. The trial

court reviewed the evaluation and stated,

It is extremely troubling to the Court that Mr. Benner misrepresented his son Erik's statement That's a clear misstatement. It's inexcusable and, in my opinion, it's a manipulation – attempted – and probably successful manipulation of Dr. True. It colors his opinion on everything.

(RP at 201:15-18, Feb. 22, 2010).

I really think that I don't know if that's ever going to be possible. I really think that Mr. Benner may be the brightest person in the room at any given time. And he must – he just might be smarter than anybody who does an evaluation. And I'm not sure we'll ever get an evaluation or whether the counseling is ever going to be such that anyone can be sure that there won't be a manipulation or some kind of bad things happen.

(*Id.* at 202:15-23).

I'm not going to foreclose future contact. And then I thought, 'Well, how do I resolve . . . keeping that door open with legitimate concerns for the best interests of the children not having contact?' And I came up – the only solution I came up with is Mr. Jacot. I know Mr. Benner does not think Mr. Jacot is educated enough. He thinks Mr. Jacot is not intelligent enough. But I have infinite faith in Mr. Jacot. I have seen him at work for years and rely on his opinion and [have] never been disappointed on I would say hundreds of cases. . . . I'm going to keep Mr. Jacot on as a [GAL] but only to receive reports from counselors indicating with regard to Mr. Benner progress in some kind of form that would lead [Mr. Jacot] to believe contact with the children would be appropriate.

(*Id.* at 202:25-203:17).

If [Thomas] wishes for the court to review the matter of visitation in the future, [Thomas] may seek mental health

counseling and have said counselor provide reports to [Mr. Jacot, who] shall carefully review these counseling reports to determine whether genuine progress appears to have been made, including [Thomas's] understanding the perspectives of his children and recognizing his role in the tragedy of this family's disintegration. The issue of visitation may be revisited by the court solely on the initiative of [Mr. Jacot], at such time as [he] assesses such progress to have been made.

(CP 88:7-11.)⁵

C. Evidence and Testimony Available to the Trial Court Prior to Issuing Its December 9, 2009, Memorandum Decision.

1. Sexual Molestation of a Child

Ashley: The molestation began during Ashley's sixth and seventh grade school year. (CP 135:18-137:12). Mary, Ashley's mother, woke her in the middle of the night and asked if she wanted to serve God or Satan and took Ashley into the marital bedroom where Thomas then had

⁵ In June 2010, while this appeal has been pending and without being at the initiation of the GAL as ordered by the trial court, Thomas filed various motions and set them in for a hearing before the trial court, and filed a new two-page psychological evaluation from Dr. True stating Thomas should be given visitation as soon as possible. (*See generally* CP 219-221 (Attachment 1 only, Psychological Consultation by Dr. True, June 16, 2010)).

The GAL filed a response rejecting the new evaluation stating that the document was not helpful to him or the court in any meaningful way and further stated,

[N]othing has changed in this case. There is no accepting of responsibility by [Thomas] in any way. No change in his approach, attitude, or position. The only new thing appears to be new manipulative comments that are pure speculation, baseless, and still made in the absence of new information or witnesses. Still, to this date, Mr. Benner fails to present one suitable witness to his claims outside of himself. That continues to be a very significant point.

(CP 243; *see also* CP 244-245).

sex with her and caused her to bleed. (CP 136:6-17). Over the years Thomas had sex with Ashley repeatedly and Mary would tell her it was what God wanted. (CP 137:1-5). Between the ages of 11 and 18, Thomas had sex with Ashley frequently and she was often taken out of school specifically to have sex with him. (CP 137:6-12). Mary put Ashley on birth control. (CP 137:7-8). Ashley never told anyone because Thomas and Mary told her they would go to jail and she and her siblings would be split up. (CP 137:9-11; *see also* RP at 22:13-23:9, Sept. 24, 2009).

Theresa also stated Thomas molested Ashley and although she never witnessed anything, she recalls Mary taking Ashley to the marital bedroom and Theresa would hear sounds. (CP 144:5-10). Theresa also recalls Ashley sleeping in Thomas's bedroom with Thomas and a girlfriend. (CP 144:11-14).

Theresa: The first time Thomas molested Theresa she was eight or nine years old. (CP 143:19). Her mom, Mary, brought Theresa into the marital bedroom and Thomas was on the bed and Mary wanted Theresa to touch Thomas sexually, and presented the idea to her that she would be serving God. (CP 143:20-23). When Theresa was 13 or 14 years old, Thomas put his hands in her vagina and told her she was serving God. (CP 144:1-4; *see also* RP at 42:17-43:11, Sept. 24, 2009).

2. Inappropriate Sexual Behavior

Thomas used Ashley to bring other women into the relationship. (CP 138:24-139:3). He had multiple affairs and wanted multiple wives and children. (CP 139:2-3). Thomas had a number of sexual affairs or encounters while married to Ashley, many of which Peter witnessed or heard. (CP 153:8-9).

During Thomas's first marriage, he had a large number of extramarital affairs and wanted his wife, Jayne Lambert, to participate in three-party sexual encounters, but she refused. (CP 164:10-13). Thomas told Ms. Lambert that during their marriage he slept with a 15 year old babysitter that lived down the street. (CP 165:1-4). Erik, Thomas's son from this first marriage, states Thomas had extramarital affairs. (CP 180).

When Peter was 13 years old, he asked Thomas for advice about a girl he liked. Thomas advised Peter to have sex with her as much as possible and then dump her. Thereafter, Peter sought more appropriate advice from two employees. (CP 150:1-4). When Peter was 10 years old, Thomas took him to Romania for an extended period of time. During that trip, Thomas had various sexual partners—encounters Peter walked in on, could hear or was kicked out of his own bed so Thomas could have sex. (CP 153:10-22).

When Michael was in high school, Thomas told one of Michael's

friend's girlfriends when he gave her a ride to have sex with Michael. (CP 159:16-20). Michael listened to Peter, then 12 years old, ask Thomas about what was a transvestite and Thomas proceeded to take pleasure in explaining in extreme, graphic, disgusting and inappropriate detail. Ashley attempted to stop Thomas, but he continued. (CP 159:21-160:1; *see also* RP at 63:2-13, Sept. 24, 2009).

During Thomas's first marriage, his son, Erik, recalls being four years old and Thomas making him sit outside the door of Thomas's classroom and keep watch while Thomas had sexual encounters with students. Erik could hear things and walked in and saw things. (CP 180:17-25). Erik recalls around the age of six or seven years doing the same when Thomas worked at A&M. (CP 180:23-25).

Thomas had MySpace pages that stated he wanted to "meet pretty girls, (err . . . women)" and "bi-sexual woman (but straight is good too)." He also indicated he was interested in communal living. (CP 16).

3. Physical Abuse

Thomas repeatedly stated he has never abused anyone. "I have no history of violence. I have never attacked [Ashley] in any way." (CP 124:26-28). "There has never been violence towards the children." (CP 125:24-25). "Thomas denies ever [sic] abusing Ashley or any of the children." (CP 17). "Thomas says he's not a violent man." (CP 4). "Q:

Have you ever physically abused Peter? A: No.” (RP at 107, Sept. 24, 2009). “Q: Have you ever verbally or physically abused Ashley? A: She told me I did. And I . . . didn’t think I ever did. . . . I never felt I was abusive to her.” (*Id.* at 108).

Thomas threw Ashley up against a corner in a workshop with his hand around her neck and threw things at her. (CP 137:21-25; *see also* RP at 17:2-7, Sept. 24, 2009). Thomas has also thrown objects at Peter. (CP 149:8-10; *see also* RP at 21:21-22, Sept. 24, 2009).

Ashley woke up with Thomas on top of her strangling her. (CP 137:22-25; *see also* RP at 17:8-11, Sept. 24, 2009). Thomas acknowledged this occurred. (RP at 108:14-19, Sept. 24, 2009).

Thomas threw Tristan, then three years old, out of a boat. (RP at 17:14-18:12, Sept. 24, 2009). Thomas acknowledged this occurred, but minimizes the incident stating the discipline was effective. (CP 17).

Thomas strangled Peter and threw him up against a wall with his head just missing a rusty nail on the wall and Peter being so scared that he wet himself. (CP 139:12-15, 149:1-7, 145:23-146:7; *see also* RP at 21:4-18, 41:16-42:12 Sept. 24, 2009). Thomas states he does not remember the incident but that it may have happened; and if it did happen, Peter, Ashley and Theresa are exaggerating. (CP 17).

When Erik was 13 years old, Thomas beat Erik and threw him

through a wall. That incident was the last visitation, because Erik refused to go back thereafter. (CP 180:12-14, 168:10-11).

In 2009, the police were called when Thomas sent Tristan, then nine years old, up the mast of the boat and Tristan slipped out of the Boson's chair and Peter had to go up on a rope step to retrieve his brother. (CP 150:10-21; *see also* RP at 18:13-20:9, Sept. 24, 2009). Thomas acknowledged this did occur, but minimized the incident and stated Tristan was never in danger. (CP 17).

Thomas kicked Michael repeatedly while he was sitting on the ground. (CP 158:18-22; *see also* RP at 59:7-15, Sept. 24, 2009). With humor, Thomas told Michael how he had disciplined Nathaniel Miller by punching him in the stomach. (CP 158:23-159:1; *see also* RP at 59:24-60:17, Sept. 24, 2009); corroborated by Nathaniel Miller, RP at 93:1-11, Sept. 24, 2009).

Thomas punished Peter with a belt. (CP 148:25-149:1). Erik describes that Thomas would "whip me bloody" sometimes on a weekly basis and would "always loop it and snap it so I knew it was coming." (CP 179; *see also* CP 165:13-15).

4. Emotional Abuse / Threatening Harm to Self or Others

Thomas threatened to kill Ashley and him. (RP at 24:8-9, Sept. 24, 2009). Near the end of the marriage, Thomas removed himself from the

family home, took a gun, went to the beach and planned to commit suicide, which Thomas acknowledges occurred. (CP 16-17, 128). Thomas threatened or attempted to harm himself. (CP 154:10-11). Thomas also may have tried to overdose on blood pressure medications, which occurred when Peter was staying with Thomas. (CP 154:11-1; *see also* CP 16-17).

Thomas called Ashley names and yelled at her. (RP at 24:3-9, Sept. 24, 2009). Thomas swears at Peter, calls Peter names and tells him he should not have children. (CP 149:15-19 (“klutz,” “airhead,” “idiot”); CP 139 (“dumb,” “should not procreate”); CP 149:15-17 (“go to hell,” “don’t deserve to have children”); RP at 63:16-25, Sept. 24, 2009 (“rock head” or “didn’t inherit [Thomas’s] genes”). When the family dogs went to the bathroom in the studio, Thomas told Peter to “clean it up or you’ll be dead by morning.” (CP 152:2-6).

Thomas’s first wife stated he was “verbally and emotionally abusive to me. Soon after we married, he began telling me regularly, several times a week that I was a ‘useless piece of shit,’ ‘fat and ugly,’ and other demeaning things.” (CP 163:18-20).

Thomas regularly told Erik “you’re worthless,” and “you’re no good.” (CP 180:1-4). Thomas told Erik he was a “terrible child, not worth anything, would not amount to anything when he grew up.” (CP

165:14-15).

When Jennifer was six or seven years old, while at Pier I Imports, Thomas became outraged when he realized she had her ears pierced and grabbed her by her arm drove her to Ms. Lambert's home and pushed Jennifer out of the car, threw her bag out after her and drove away without knowing if Ms. Lambert was home. (CP 168:12-19, 165:6-13).

Except when testifying in court, July 29, 2009, was the last time Peter saw Thomas when Thomas dumped Peter at Ashley's home with no clothes. (CP 154:14-17, 7). Peter believed his father was cutting all ties with him. (CP 7).

Thomas told Michael that he had permission to shoot a neighbor in the chest and once in the head. (CP 159:2-8; *see also* RP at 61:13-62:8, Sept. 24, 2009). Thomas told Michael to tell 9-1-1 that if they did not come and resolve a problem regarding Air Force personnel on his land that he was going to go out and start shooting. (CP 159:9-14; *see also* RP at 60:18-61:12, Sept. 24, 2009).

Thomas made veiled threats, never actually denying outright that he would not kill Ashley. "Does my military experience mean I'm going to kill my wife? Given the millions of veterans who have the same skills and training that I do and don't kill their wives I'd say the chances of me

killing her would be so small as to be nonexistent.” (CP 125:11-13).⁶

5. Control & Manipulation

The children were unable to establish friendships because they moved often and Thomas did not act appropriate around other children, so parents did not let children come to the Benner home. (CP 6-7). The family moved at least four times in the past nine years. (CP 116:10-14).

Thomas has “no regard for the rules[,]” is “deceiving and manipulative.” (CP 160:9-13). Thomas was “very controlling about my whereabouts. He always wanted to know where I was going and when I would be back. I was not allowed to have friends.” (CP 164:4-5). He is a “cruel and controlling man.” (CP 166:4-7). “[Thomas] is very manipulative. He will put on a façade and say what he thinks you want to hear, until you’ll believe anything.” (CP 169:9-10). “[Thomas] is a gifted manipulator of people.” (CP 18).

6. Unsafe/Unhealthy Living Situation

During the time this case was pending for trial, Thomas was residing on a sailboat in dry dock at the Port of Ilwaco boatyard. (CP 2, 150:22-23). The living conditions on the boat were very bad. (CP 150:22-151:10). Tristan brought home bedding from the boat that was

⁶ See also “Your Honor, If I wanted to know where Ashley lived, it would be extremely easy for me to find out.” (RP at 24:18-20, Dec. 17, 2009).

full of mold. (CP 139:22-25, 151:4-6). There was a large gaping hole under plywood that exposed the engines. There was a 12-foot drop from the stern down to the ground with a ladder to board the boat. (CP 139:24-140:5, 151:6-9). There was no toilet, just a port-a-potty about 100 feet away. (CP 150:23-25). There were chemicals everywhere on the boat. (CP 150:24-151:5). The table was covered with Thomas's computer so Peter ate his meals in his bed. (CP 151:10-15).

III. ARGUMENT

A. The Trial Court Properly Considered Evidence Received Earlier in the Same Case.

1. Consideration of Testimony Heard at a Temporary Orders Trial and Findings Made Based on that Testimony Does Not Violate RCW 26.09.060(10).

RCW 26.09.060(10)(a) provides, "A temporary order, temporary restraining order, or preliminary injunction: (a) Does not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding." This is in part because the factors to be considered in making a temporary order are slightly different from the factors to be considered in making a permanent order. Temporary orders favor maintaining status quo. *See, e.g.*, RCW 26.09.197; RCW 26.09.060(10); RCW 7.40.020; RCW 7.48A.090; RCW 48.31.190(3).

RCW 26.09.060(10) does not, however, address testimony given at an evidentiary hearing related to temporary orders or findings of fact made by a judge after hearing such testimony. The factors are no different when making findings of fact based on testimony taken at a hearing regarding temporary orders, as opposed to testimony taken at a final trial. Here, the trial court weighed the opposing testimony offered by Thomas and by Ashley and found the testimony by Ashley's witnesses more credible. (CP 112). This is the same way a court would determine facts at a trial.

The trial court did not base its rulings at trial on the temporary parenting plan or temporary restraining order, but rather on evidence it heard during the hearing on temporary orders and on its Findings of Fact and Memorandum Decision. The trial court's Findings of Fact were not labeled "temporary" findings; they were determinations of the facts of the case, after a great deal of evidence was presented. (CP 115). Consideration of the facts already established did not violate RCW 26.09.060(10).

2. The Trial Court May Take Judicial Notice of the Contents of the Record in the Immediate Case.

Trial courts have "broad authority to avoid unnecessary proof of established facts." *Rogstad v. Rogstad*, 74 Wn.2d 736, 743, 446 P.2d 340 (1968). One way to do this is to take judicial notice of such facts. By

taking judicial notice of facts already established in the matter or not reasonably in dispute, a court can “reduce[] trial time,” helping to “relieve court congestion.” *Id.*

The trial court cannot take judicial notice of “records of other independent and separate judicial proceedings.” *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003). Neither is it appropriate for a judge to take judicial notice of oral testimony he or she recalls hearing in a prior case. *Vandercook v. Reece*, 120 Wn. App. 647, 651-2, 86 P.3d 206 (2004). To utilize decisions or findings from a separate legal proceeding, the trial court must resort to the use of doctrines such as collateral estoppel or res judicata.

However, judicial notice may properly be taken of determinations of fact previously made in a case. “A court of this state will take judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary, or supplementary to it.” *Swak v. Department of Labor & Industries*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952); *see also In re Adoption of B.T.*, 150 Wn.2d at 415. This includes facts in the record from earlier proceedings in the same case. *Perrault v. Emporium Department Store Co.*, 83 Wash. 578, 581, 145 P. 438 (1915) (after new trial awarded on first appeal, judicial notice taken of facts in record of first trial); *In re Parkes' Estate*, 101 Wash. 659, 662-63, 172 P. 908 (1918) (in

action to establish trust and claim against decedent's estate, judicial notice taken of record in probate proceedings); *State ex rel. McDowall v. Superior Court*, 152 Wash. 323, 325, 277 P. 850 (1929) (in supplemental proceedings, judicial notice taken of record in original action); *Cloquet v. Dept. of Labor & Industries*, 154 Wash. 363, 364, 282 P. 201 (1929) (in workmen's compensation case involving aggravation of injuries, judicial notice taken of record in prior case involving same injury); *In re Laack's Estate*, 188 Wash. 462, 464, 62 P.2d 1087 (1936) (in a second appeal involving the same transaction in a probate case, judicial notice taken of prior record); *In re Guardianship of Robinson*, 9 Wn.2d 525, 536, 115 P.2d 734 (1941) (in proceeding to remove guardian, judicial notice taken of record in guardianship proceedings).

The trial court had a great deal of evidence before it when making findings of fact after the September 24, 2009, hearing. In addition to the testimony from that hearing, the trial court had declarations, a letter submitted by Thomas, and an extensive report from the GAL. Although the trial court improperly characterized its use of this evidence and its prior findings of fact as collateral estoppel or res judicata, the evidence was properly used under the doctrine of judicial notice. It is apparent that the trial court here was unsure what label to put on this doctrine, but this does not render use of the evidence and findings improper. *See Thomas v.*

French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (“A trial court's ruling on the admissibility of evidence will not be disturbed on appeal if it is sustainable on alternative grounds.”).

Although the trial court initially stated it would not allow further litigation on the issues of Thomas’s parental fitness and whether he sexually abused children (RP at 9:13-10:9, 10:18-22, Feb. 22, 2010), the trial court informed Thomas that he could introduce any evidence that had not already been heard (*Id.* at 14:10-13) and did in fact permit Thomas to argue extensively about these issues (*Id.* at 39:19-40:6, 59:24-62:4, 170:11-171:14, 173:17-19, 191:9-194:13). In addition, the trial court revisited these issues at the end of the trial, ruling that no evidence or argument presented at trial changed his prior findings or conclusions on those issues. (*Id.* at 196:18-199:16). The trial court did not merely make final its conclusions from the September 24, 2009, hearing; rather, the trial court took judicial notice of those prior findings and considered that evidence, along with additional evidence and argument, in making its final rulings in the case.

- 3. It Is Contrary to the Interests of Judicial Economy to Require a Witness to Repeat His or Her Prior Testimony, Where the Witness Has Fully Testified on an Issue Earlier in the Case and Been Subject to Cross-Examination by the Opposing Party.**

Judicial economy is an important consideration in our justice system. *E.g.*, *State v. Bythrow*, 114 Wn.2d 713, 723, 790 P.2d 154 (1990) (“Foremost among these concerns is the conservation of judicial resources and public funds.”). Separate criminal trials are strongly disfavored because of concerns for judicial economy. *Id.*; *In re Davis*, 152 Wn.2d 647, 711-12, 101 P.3d 1 (2004) (“A defendant seeking to sever trial from a codefendant has the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy.”). Civil Rule 12 defenses and objections must be consolidated in a single motion, in the interests of judicial economy. CR 12(h); *see also Kahclamat v. Yakima County*, 31 Wn. App. 464, 466, 643 P.2d 453 (1982). For the sake of judicial economy, all claims and counterclaims arising out of the same transaction or occurrence must generally be joined in the same action, or they are waived. CR 13(a); *Landry v. Luscher*, 95 Wn. App. 779, 782, 976 P.2d 1274 (1999). Judicial economy is also one of the considerations underlying certification of a class in a class action lawsuit. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 822, 64 P.3d 49 (2003).

Judicial notice was particularly appropriate here, where Thomas specifically told the trial court he had no new evidence to present on those issues and no witnesses present other than himself. (RP at 14-15, Feb. 22,

2010). Contrary to the assertions in Appellant's brief, the trial court did not foreclose Thomas from presenting new evidence on parenting issues. The trial court stated, "Unless you have new evidence, then I'm not going to reopen those issues. . . . If you have new evidence, then you may present it." (*Id.* at 14:10-13). Thomas responded that because the trial court had denied his motions to have psychological testing of the children done, "I can't give you any new evidence." (*Id.* at 14:14-15). Ashley's legal counsel also noted, "We are presenting exactly the same witnesses, which he had the opportunity to examine before." (*Id.* at 15:11-13). It would have been a needless waste of limited judicial resources to have the same witnesses testify to the same facts in the same case, where they were previously cross-examined by Thomas's legal counsel, and Thomas had nothing new to present.

4. It Is Contrary to Public Policy to Retraumatize a Victim of Domestic Violence by Forcing Him or Her to Repeat Testimony about the Abuse, Which Was Previously Given in the Same Case.

Washington State has a clear public policy of "protecting domestic violence survivors and their families and holding their abusers accountable." *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 205, 193 P.3d 128 (2008). In 1979, the legislature recognized a "present and growing need to develop innovative strategies and services which will

ameliorate and reduce the trauma of domestic violence.” RCW 70.123.010. Testifying in court about their abuse can be traumatic for victims of domestic violence, particularly when they are cross-examined by their abuser himself, as here. See Office for Victims of Crime, U.S. Dep’t of Justice, Breaking the Cycle of Violence: Recommendations to Improve the Criminal Justice Response to Child Victims and Witnesses, NCJ #176983, ii, 4 (OVC Monograph, 1999), <http://www.ojp.usdoj.gov/ovc/publications/factshts/monograph.htm>.

In this case, Thomas was using the court system to continue to gain access to and control Ashley. He repeatedly requested continuances (CP 132, 134, 172-74, 187, 195; RP at 190:24-191:5, Feb. 22, 2010), recorded the license plate number of the vehicle Ashley was driving (CP 189-90), and brought frivolous motions even after the final orders were entered, in blatant disregard of the court’s instruction to go through the GAL to raise allegedly changed circumstances (CP 241-44). During the trial, Thomas used the opportunity to personally cross-examine Ashley and his right to interrupt her testimony by objecting to attempt to control, manipulate, and provoke her. (RP at 67:9-68:5, 84:25-85:9, 86:13-87:16, 91:16-93:7, 94:25-95:17, 98:5-18, 99:21-100:16, 107:3-7, 114:2-14, 121:1-17, Feb. 22, 2010). He behaved similarly during his cross-examination of Peter. (*Id.* at 165:20-166:5, 167:5-16).

The impact of Thomas's behavior showed in Ashley's demeanor in the courtroom and ability to testify. (*See id.* at 117:22-119:5 (trial court's discussion with Ashley about her testimony and demeanor), 151:4-152:9 (trial court's questioning of the GAL about Ashley's testimony and demeanor), 199:3-19 (trial court's assessment of Ashley's demeanor)). Ashley was traumatized simply by having to testify about any abuse in front of Thomas and be cross-examined by him personally. Given the abusive manner in which Thomas behaved during testimony and its plain effect on Ashley, re-testifying at trial about the long-term, horribly disturbing abuse she experienced would have been extraordinarily traumatic to Ashley. Subjecting her to this additional trauma would controvert Washington State's clear public policy of protecting victims of domestic violence from further abuse and trauma.

5. Thomas Had Adequate Notice of the Hearing on September 24, 2009.

As Thomas notes, due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *In re Marriage of McLean*, 132 Wn.2d 301, 308, 937 P.2d 602 (1997), (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)).

This hearing was continued several times, but the notices, taken together, show that the hearing on September 24, 2009, was to take testimony in order to decide what temporary orders, if any, should be entered in the case. It was also scheduled for a final hearing on the domestic violence order for protection. (RP at 3:24-4:2, 4:11-14, Sept. 24, 2009; CP 132, 107; *see also* RP at 7:1-7, 10:14-24, Sept. 24, 2009).

Although only temporary orders were entered after the September 24, 2010, hearing, Thomas understood that the case presented at that hearing could affect the future of his relationship with his children. The protection order included the parties' three children (CP 54:12-13, 131-32), and a motion was before the trial court to add Peter to the protection order (RP at 4:3-20, Sept. 24, 2009). Thomas's own statements indicate that he knew access to the children was at issue at this hearing and he intended to vigorously present his case. (CP 173:22-24). In fact, he did just that, with his legal counsel presenting witnesses by telephone and cross-examining all of Ashley's witnesses.

Thomas has never offered any witnesses he wished to examine or other evidence he would have presented given more time or opportunity, even though the court told him repeatedly he could. Thomas himself testified extensively on parenting issues at the September 24, 2009, hearing, submitted voluminous declarations on these issues, and was

permitted to essentially testify a second time at the December 17, 2009, hearing by reading in all of his substantive disagreements with the trial court's findings.

In addition, the trial court held open the possibility for Thomas to present additional evidence to be considered after the September 24, 2009, hearing, but instructed Thomas he would need to make an offer of proof regarding this evidence at the end of the September 24, 2009, hearing. (RP at 13:8-10, Sept. 24, 2009). Thomas did not make the requested offer of proof, despite being represented by legal counsel at the time. The trial court did not render a ruling until a month after that hearing, waiting for the GAL to report on his investigation. (*Id.* at 136:9-16; CP 110).

Thomas could have submitted additional evidence to the trial court or the GAL during this time for consideration, but he did not. Thomas had a full and fair opportunity to present his case at the September 24, 2009, hearing, knowing that a final order might be entered restricting contact with his children.

6. To the Extent this Court Deems Thomas's Evidence Was Excluded, He Failed to Preserve the Issue for Appeal by Not Making an Offer of Proof.

A ruling admitting or excluding evidence may not be the basis for error unless "a substantial right of the party is affected and . . . [where] the ruling is one excluding evidence, the substance of the evidence was made

known to the court by offer or was apparent from the context within which questions were asked.” Rule of Evidence 103(a)(2). As noted above, Thomas did not make any offer of proof of witnesses he expected to call but for the trial court’s decision not to re-hear the same evidence on parenting issues, let alone offer what he expected their testimony to be. To the contrary, *he had no witnesses present* and no testimony he could offer that the trial court had not previously heard and considered. Because Thomas never made any offer of proof after either the September 24, 2009, hearing or the February 22, 2010, trial—while represented by legal counsel or not—he has not preserved this issue for appeal.

B. The Final Parenting Plan, Continuing Restraining Order, and Domestic Violence Order of Protection Are Supported by the Record.

1. The Orders Are Supported by Evidence Considered by The Trial Court at the September 24, 2009, Hearing.

As discussed above, the trial court properly considered its prior findings. The trial court found Thomas engaged in a history of acts of domestic violence and sexual abuse of a child. The trial court also found that restrictions that could be placed on Thomas’s contact with the children would be inadequate to protect the children. These are the exact findings needed to support the final parenting plan, restraining order, and

order of protection. These findings were based on a full day of testimony describing the abuse in detail and thus, well supported.

2. The Orders Are Supported by Additional Evidence Presented at Trial on February 22, 2010.

Although the trial court gave significant weight at trial to its prior findings, the final orders were not based entirely on evidence from the September 24, 2009, hearing. Ashley testified further at trial regarding domestic violence, Peter testified at trial, and the GAL testified at trial about his investigation and recommendations. At the end of the trial, the trial court revisited the RCW 26.09.191 limiting factors,⁷ noting that nothing in the evidence presented at trial changed his prior opinion that Thomas sexually abused two children, and had a history of committing domestic violence against Ashley and Peter. (RP at 196:18-199:16, Feb. 22, 2010). The trial court also found that the requirements for nonparental custody of Peter were met, noting that he had not previously been prepared to so find. (*Id.* at 200:14-17).

3. Denial of any Residential Time for Thomas Was Supported by the Specific Finding that no Restrictions Placed on Thomas's Time Would Adequately Protect the Children.

RCW 26.09.191(2)(m)(i) requires:

⁷ RCW 26.09.191(2)(a) provides: "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: . . . (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; . . ."

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.

The Findings of Fact signed on December 17, 2009, as well as those signed on February 25, 2010, included a finding that “limitations on [Thomas’s] residential time with the children would not adequately protect the children from the harm or abuse that could result” from that residential time. (CP 117:4-5, 80:11-15). The trial court was initially inclined to grant e-mail contact with the children (CP 110), but changed this decision based on additional evidence. Evidence supporting this change and the final parenting plan included the GAL’s supplemental report on the safety of e-mail contact (CP 191-92), the declaration of Deputy Michael Hess that Thomas had written down the license plate number of Ashley’s vehicle (CP 189-90), the GAL’s testimony regarding contact with the children (RP at 134:19-138:5, Feb. 22, 2010), Thomas’s apparent badgering of witnesses and attempts at manipulation during trial (*e.g., id.* at 67:9-68:5, 84:25-85:9, 86:13-87:16, 91:16-93:7, 94:25-95:17, 98:5-18, 99:21-100:16, 114:2-14, 121:1-17, 130:11-23, 147:1-150:6, 165:20-166:5, 167:5-16), Thomas’s misrepresentations to the psychologist who evaluated

him (*id.* at 43:20-46:14), and Thomas's own statement in court that he could easily find Ashley if he wanted to (RP at 24:18-20, Dec. 17, 2009).

C. The Trial Court Was Not Required to Consider the Factors Listed in RCW 26.09.187.

RCW 26.09.187(3) lays out criteria to consider in determining the residential provisions of a final parenting plan. The trial court must consider each of these criteria “[w]here the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule.” RCW 26.09.187(3)(a). In this case, the court found Thomas had engaged in a history of acts of domestic violence and sexual abuse of a child. When these findings are made, the offending “parent's residential time with the child *shall* be limited.” RCW 26.09.191(2)(a) (emphasis added). In addition, the trial court specifically found no restrictions on Thomas's contact with the children would adequately protect them, requiring the trial court to deny Thomas any contact with the children. RCW 26.09.191(2)(m)(i). These findings dictated the parenting plan. Thus, the trial court did not need to go on to consider the factors listed in RCW 26.09.187(3).

D. The Trial Court Acted Within Its Discretion in Giving Thomas the Option to Seek Review of the Parenting Plan if the GAL Felt He Made Progress in Therapy.

The trial court ruled in the final parenting plan that Thomas would have no residential time with the children, but included a provision that allowed Thomas to have the trial court review the matter of visitation without petitioning for modification, if he obtains counseling, provides reports from his counselor to the GAL, and the GAL determines that “genuine progress appears to have been made.” (CP 88:5-11). “The issue of visitation may be revisited by the court solely on the initiative of the GAL, at such time as the GAL assesses such progress to have been made.” (CP 88:5-11).

In his brief to this Court, Thomas assigned error to the trial court’s decision to prohibit him from having residential time with the children “unless the GAL initiates a request to the court.” (Br. of Appellant 1). Thomas’s brief provides no argument as to why it was improper to make the GAL essentially a gatekeeper for this additional opportunity, and because of this, he has waived this argument. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). However, we address the issue briefly here in case the Court wishes to consider it.

This provision in the Parenting Plan does not remove Thomas’s right to later petition to modify the parenting plan under RCW 26.09.260. Under RCW 26.09.260, though, Thomas would have to make a specific showing before the trial court would consider modifying the parenting

plan; for major changes of the parenting plan, a substantial change in the circumstances of the petitioner or the children would be required. RCW 26.09.260(1). Finding that contact with the children would be appropriate once Thomas reached a certain point in therapy (RP at 202, Feb. 22, 2010), the trial court crafted an alternative way for Thomas to seek review without having to make the showing required by RCW 26.09.260.

In light of the history of this case, it was appropriate for the trial court to require Thomas to go through the GAL to utilize this extra opportunity. Thomas had brought many motions already and made the same arguments again and again. Concerns had repeatedly been raised about Thomas attempting to manipulate others. The trial court could see the potential for Thomas to abuse any door left open. To prevent pointless hearings on frivolous motions, the trial court required that the GAL filter Thomas's information and requests and initiate a request for court review if the GAL felt real progress had been made. This balanced the trial court's desire to give Thomas an opportunity to better himself and his situation, with the risk of wasting the trial court's precious resources and allowing Thomas to use the court system to continue his abuse and control of Ashley.

E. The Trial Court's Conclusion that Ashley Would Qualify as Peter Benner's *De Facto* Parent Is Proper, Because It Is Conditioned on

a Subsequent Determination that the Nonparental Custody Statutes Do Not Provide Ashley a Remedy.

The equitable remedy of *de facto* parentage is not available to a former stepparent who can seek nonparental custody of a former stepchild under RCW 26.10.030. *In re Parentage of M.F.*, 141 Wn. App. 558, 565-571, 170 P.3d 601 (2007), *aff'd*, 168 Wn.2d 528, 228 P.3d 1270 (April 1, 2010). This is because there is an adequate remedy available to such a stepparent under the statutory scheme. *Id.* If the statutory scheme were to be later found unconstitutional, so that it was no longer available to stepparents, a stepparent would no longer have any statutory remedy. At that point, *de facto* parentage would be available as a remedy.

At the time of trial in February 2010, *M.F.* was on review in the Washington Supreme Court. Although the Washington Supreme Court ultimately affirmed *M.F.* in April 2010, this outcome was not known to the trial court when it was making findings a month earlier. In light of this uncertainty, the trial court properly addressed *de facto* parentage.

The trial court's conclusion here was conditional: "*If . . . there is no proper remedy at law under the third-party custody petition procedure,*" either because the nonparental custody statutory scheme is later invalidated or because the Supreme Court later reversed *M.F.*, then Ashley

meets the definition of a *de facto* parent. (RP at 200:24-201:2, Feb. 22, 2010 (emphasis added)). This is precisely in line with *M.F.*

Argument over whether Ashley was properly determined to be a *de facto* parent misses the point, though. The trial court concluded that Ashley should be given nonparental custody of Peter. Ashley does not need to be a *de facto* parent to have nonparental custody; anyone other than a legal parent can petition for nonparental custody. RCW 26.10.030(1). Thomas has not appealed the nonparental custody determination (Pacific County Superior Court Case No. 09-3-00085-4).

F. Even if this Court Determines the Trial Court Erred in Considering Previously Received Evidence, the Error Is Harmless.

“Evidential error is harmless if, without it, the trial court would necessarily have arrived at the same conclusion.” *Vandercook*, 120 Wn.App. at 652. Here, Ashley had all the witnesses who testified at the September 24, 2009, hearing present and prepared to testify again at trial. Had the trial court not considered the prior testimony and findings, these same witnesses would have presented the same testimony. Thomas never indicated that he had any specific cross-examination he wished to conduct that was not already conducted by his legal counsel at the September 24, 2009, hearing. In fact, as noted above, Ashley’s legal counsel specifically stated that all the witnesses were present if Thomas wished to cross-

examine them, and the trial court informed Thomas that he could present any new evidence he had, which would include new impeachment evidence. Thomas did have the opportunity to cross-examine both Ashley and Peter, and was given significant latitude in doing so. Thomas, by contrast, did not have the two witnesses present who had testified by telephone on September 24, 2009. Had the trial court not admitted the prior evidence, the same testimony would have been given again, minus Thomas's two witnesses, and the trial court would logically have reached the same result, if not one less favorable to Thomas.

Error in the exclusion of testimony may be harmless if substantial evidence has already been admitted on the issue. *Holmes v. Raffo*, 60 Wn.2d 421, 424, 374 P.2d 536 (1962). As previously discussed, the trial court had a great deal of evidence before it when making the rulings after the September 24, 2009, hearing, including voluminous declarations by Thomas and Thomas's testimony. In addition, Thomas was allowed to essentially re-testify on December 17, 2009, as to each of the judge's findings. (RP at 6:17-19:12, Dec. 17, 2009). The trial court's December 17, 2009, Findings of Fact and Conclusions of Law were based on Thomas's testimony, as well as that of Ashley, her witnesses, and Thomas's witnesses. Thomas already had a full and fair opportunity to be

heard by the trial court, and any error in precluding him from repeating prior testimony was harmless.

In addition, Thomas was given every opportunity to make his case. The trial court granted multiple continuances. (*E.g.*, CP 130, 134, 187). Thomas was represented during the September 24, 2009, hearing (CP 106), although his legal counsel withdrew soon thereafter. (CP 185-86). With legal counsel, Thomas was in a better position to effectively examine and cross-examine witnesses at that hearing than he was at trial when he no longer had legal representation. The trial court allowed Thomas to sell marital assets to raise the money to secure new legal representation. (CP 187). Ashley's legal counsel offered to allow him to present testimony by telephone at trial, so that he could present out-of-state witnesses without paying for their travel; Thomas decided not to accept this offer. (CP 201-04). The trial court admitted evidence offered by Thomas at trial that it noted was likely inadmissible. (*See, e.g.*, RP at 42:13-18, Feb. 22, 2010). Evidence was also admitted at the September 24, 2009, hearing, in the form of a letter that was not signed under penalty of perjury. (RP at 71:5-73:9, Sept. 24, 2009). The trial court gave Thomas "quite a lot of leniency" with regard to the rules of evidence and procedure. (RP at 13:25-14:2, Feb. 22, 2010).

G. Even if this Court Finds Error that it Deems to Not Be Harmless, It Would Not Be Appropriate to Remand for a Full New Trial.

Thomas asks this Court to reverse the trial court's final orders and remand for a new trial. (Appellant's Br. at 15). However, a number of issues were decided at trial after full litigation on February 22, 2010, and have not been appealed. For example, property and child support issues were extensively litigated on February 22, 2010, and the nonparental custody decree has not been appealed. Should this Court decide that the trial court committed reversible error, this Court should specify the narrow issues to be decided on remand.

H. Respondent Should Be Awarded Attorneys' Fees on Appeal.

Thomas should be ordered to pay reasonable attorneys' fees and costs to Ashley for responding to his appeal. Generally, an appellate court may award attorneys' fees if the applicable law grants the prevailing party a right to recover fees. *Belfor USA Group, Inc v. Thiel*, 160 Wn.2d 669, 670, 160 P.3d 39 (2007); *see also* RAP 18.1(a). Statutory authority to grant attorney's fees to Ashley is provided by RCW 26.09.140, which states, "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney fees in addition to statutory costs."

A party may recover reasonable attorney's fees even if legal services are provided at no cost. *Holland v. Boeing Company*, 90 Wn.2d 384, 392, 583 P.2d 621 (1978). In *Holland*, the court upheld an award of attorney's fees where the litigant received legal representation through a union. *Id.* Ashley has received legal representation in this matter by the Northwest Justice Project (NJP) at no cost to her. However, the fact that a party has been represented by a legal services program and paid no actual attorneys' fees is immaterial to the determination of reasonable attorneys' fees. *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683, 687-688, 598 P.2d 404 (1979). Effective March 15, 2010, the Legal Services Corporation (NJP's federal funding source) repealed its regulatory prohibition on the claiming and collection of attorney's fees, permitting NJP to request and receive such fee awards. 45 C.F.R. parts 1609, 1610 and 1642. NJP has incurred statutory costs and attorney costs in this action which are very significant for a legal services program. Thus, pursuant to RAP 18.1, Ashley respectfully requests an award for reasonable attorney fees and appellate costs for having to defend against this appeal.

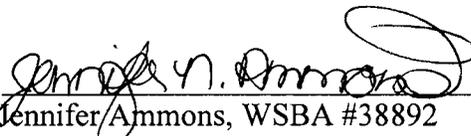
IV. CONCLUSION

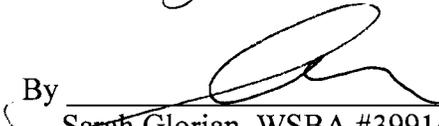
The trial court did not abuse its discretion in taking judicial notice of findings previously made after a full day of direct and cross-examination of witnesses and extensive evidence, including declarations

and the GAL's reports. Thomas had a full and fair opportunity to litigate issues related to the parenting plan throughout this case. The trial court based its final Findings of Fact and Conclusions of Law on facts previously established, a second full day of testimony at trial, and even inadmissible evidence offered by Thomas. Ashley had the same witnesses who testified previously present at trial and prepared to testify, while Thomas had only himself present to testify. It would have wasted the court's time and unnecessarily retraumatized Thomas's victims to require them to present the same testimony again at trial. This Court should affirm the trial court's orders, finally giving Ashley peace.

RESPECTFULLY SUBMITTED this 3rd day of November 2010.

NORTHWEST JUSTICE PROJECT
Attorneys for Respondent Ashley Benner

By 
Jennifer Ammons, WSBA #38892

By 
Sarah Glorian, WSBA #39914

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:)	
)	
THOMAS JAMES BENNER,)	
)	Case No. 40513-0-II
Appellant/Petitioner,)	
)	Affidavit of Service
and)	
)	
ASHLEY MARIE BENNER,)	
)	
Respondent.)	

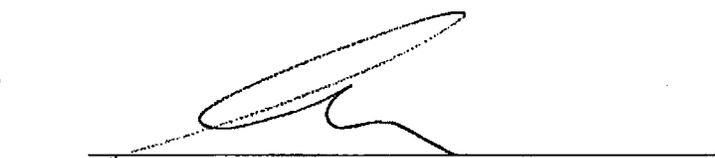
On November 3, 2010, I sent by regular US mail one original and one copy of the Brief of Respondent to the Court of Appeals, and one copy of the Brief of Respondent to:

Scott Alan Campbell
Attorney for the Appellant/Petitioner
Olson Zabriskie Campbell
104 W Marcy Avenue
Montesano, WA, 98563-3616

Courtesy copy mailed to: Scott Jacot, Guardian *Ad Litem*.

I, Sarah Glorian, declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of November 2010.



Sarah Glorian / WSBA No. 39914