

NO. 46888-3

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

ANGELA MIRANDA,

v.

CHRISTOPHER CRUVER

BY   
STATE OF WASHINGTON  
DEPUTY

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FILED  
COURT OF APPEALS  
DIVISION II

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**APPELLANT'S BRIEF**

Pierce County Superior Court Cause No. 14-3-02549-1  
Honorable Kathryn J. Nelson presiding at the trial court

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**ORIGINAL**

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## **I. IDENTITY OF PETITIONER**

Angela Miranda (mother) asks this court to overturn the decision of the trial court below and direct the trial court to enter the agreed parenting plan of 2011. In the alternative, mother asks this court to grant a new trial before a different trial judge and to direct the court on remand to enter specific findings as to the factors listed in RCW 26.09.197 and whether the limitations of RCW 26.09.191 should apply.

## **II. ASSIGNMENTS OF ERROR**

Petitioner Angela Miranda seeks this Court's review of the following decisions:

- 1 The trial court erred in setting the parenting plan for trial less than two months after mother filed a petition for residential schedule.
- 2 The trial court erred in entering a parenting plan giving primary placement of the children to the father and placing restrictions on the mother's residential time.
- 3 The trial court erred in denying Petitioner's Motion for Reconsideration, filed on October 24, 2014.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court committed reversible error when it assumed this case from another judge and entered a final parenting plan less than two months after petitioner filed her petition and before the respondent filed his response.
2. Whether the trial court committed reversible error when it denied a joint motion by petitioner and respondent to appoint a guardian ad litem (GAL).
3. Whether the trial court committed reversible error when it entered findings that mother had committed abuse and neglect despite the absence of any evidence that the children were harmed by the disciplinary practices in mother's home.
4. Whether the trial court committed reversible error when it entered findings that mother withheld the children despite the lack of a parenting plan.
5. Whether the trial court committed reversible error when it found that its finding of abuse dictated the placement of the children without considering substantial evidence that the risk of recurrence

was so remote that it would not be in the children's best interests to apply the limitations in RCW 26.09.191.

6. Whether the trial court committed reversible error by placing the children with the respondent in Arizona when the children had only visited the respondent in Arizona on two prior occasions for the summer and father failed to introduce sufficient evidence that placement of the children with respondent was in their best interests.

7. Whether the trial judge demonstrated bias against the mother that requires her disqualification from the case when:

a. The trial judge made comments at the July 31, 2014 hearing indicating that she had already decided in favor of the father prior to hearing any evidence in the parenting plan trial; and

b. The trial judge found at the October 24, 2014 hearing that the mother's exercise of her due process rights was itself an indication of risk to the children.

#### **IV. STATEMENT OF THE CASE**

The mother appeals the parenting plan that was ordered less than two months after she filed a petition to establish a residential schedule and obtained an ex parte order requiring the children's

immediate return to Washington State.

The children at issue in this case had resided with the mother in Washington State since birth. The father moved to Arizona in 2011 Verbatim Report of Proceedings (VRP) (August 14, 2014) at 21:1-2. There was no parenting plan entered, but the parties had attempted to enter one by agreement in 2011. VRP (August 14, 2014) at 47-48:24-4. The commissioner denied entry on July 23, 2012 under cause number 11-3-04678-7 and required the father to submit to a hair follicle test. CP at 190:10-13. The mother requested the father to help pay for the cost of filing a parenting plan. VRP (August 18, 2014) at 87:3-4. The 2011 parenting plan was eventually dismissed for lack of action. *Id.*

The mother resided in Washington State continuously with both children except for three occasions between 2011 and 2014 during which she sent the children to Arizona to stay with their father. VRP (August 14, 2014) at 46-47:17-20. The visits occurred in the summers of 2011, 2012, and 2014. *Id.* The longest visit was 8 weeks in 2012. VRP (August 14, 2014) at 46:19-20. Since October 2011, the mother has resided with the children and Thomas Bishop who has helped with the childcare and household responsibilities. VRP (August 14, 2014) at 23-24.

The mother testified that the 2012 visit with the father was detrimental to the children. The son, Cain, injured his foot early on in the

visit. VRP (August 14, 2014) at 48: 9-11. When he returned, the cast on his leg was filthy. *Id.* at 17-21. Both children had failed to complete the summer homework recommended by their teachers. VRP (August 14, 2014) at 49:19-20. Cain also refused to go to bed on time. VRP (August 18, 2014) at 41:14-21. The mother did not send the children down in 2013. VRP (August 14, 2014) at 50-51: 24-2. The father failed to file any petition to establish a parenting plan during this time. VRP (August 14, 2014) at 47:19-21. In the summer of 2014, mother consented to sending the children to Arizona to visit with their father. VRP (August 14, 2014) at 51: 16-19. The father was to return both children on June 30, 2014. VRP (August 14, 2014) at 51: 22-23.

The father failed to return the children to mother on June 30, 2014 or to provide her any information to her as to the children's whereabouts. VRP (August 14, 2014) at 52-53: 13-19, 7-9. Mother requested a welfare check to ensure the children were safe. *Id.* at 53: 15-16. Father later informed the mother that he had made a referral to CPS in Arizona. *Id.* at 10-11. On the same day, mother filed a petition to establish a parenting plan and filed for Ex Parte relief requiring the immediate return of the children. VRP (August 14, 2014) at 51-52: 25-5. She notified Mr. Cruver via text that she obtained the ex parte order returning the children. VRP (August 18, 2014) at 122:15-17.

After father notified her that a CPS investigation had commenced, mother called Washington CPS on July 1, 2014. She spoke Ms. Conklin on and made an appointment to have Ms. Conklin come to her home. VRP (August 14, 2014) at 84: 11-16. Ms. Conklin had to cancel the appointment less than 2 hours prior to when she was to be there. *Id.* at 84-85: 21-2. Mother called Ms. Conklin to let her know she was planning on picking up the children from Arizona. *Id.* at 85: 9-11.

CPS filed a dependency action and took the children into custody shortly after mother returned with them from Arizona. VRP (August 20, 2014) at 7: 9-14 CPS employee Kate Orlando drafted the petition using the intake from Arizona Child Protective Services. VRP (August 20, 2014) at 4: 18-20. The petition was based on allegations as to physical discipline and punishments used in the mother's home. VRP (August 20, 2014) at 4: 4-8. Ms. Conklin was assigned as the investigating social worker. VRP (August 14, 2014) at 83. Neither Ms. Orlando nor Ms. Conklin personally interviewed the children. VRP (August 14, 2014) at 83:12-14; VRP (August 20, 2014) at 14: 15-17. Mother was cooperative during the investigation. VRP (August 14, 2014) at 87: 4-8.

CPS dismissed the dependency after a temporary placement with the father pending further orders in the parenting plan trial. CP at 104. The CPS investigation was still ongoing during the trial. VRP (August 14,

2014) at 92:4-5.

Counsel for the mother informed the court on July 31, 2014 that the parties had agreed to continue the case and to appoint a GAL. VRP (July 31, 2014) at 3: 19-22. The only issue on which the parties disagreed was over the length of time needed for the continuance. *Id.* at 18. The court denied a continuance and denied appointing a GAL. *Id.* at 3:23-25. Counsel for father then argued that she had not had sufficient time to prepare the case. *Id.* 4, 6-8. The court then agreed to continue the case two weeks. *Id.* at 9: 8-14. Mother's counsel requested clarification as to whether the proceedings were to establish a final parenting plan or a temporary parenting plan. *Id.* at 10:9-15. The judge answered it would be a final parenting plan. *Id.*

There was a three day trial at which mother presented testimony from herself, Thomas Bishop, her employer, Thomas Bishop's mother Renea Bishop, the neighbor Heather Watt, and a friend, Sarah Urvina.

Both the mother and Mr. Bishop testified that they had a variety of discipline strategies and that physical discipline was not a first choice. VRP (August 14, 2014) at 141-42; VRP (August 18, 2014) at 38-40. The mother's witnesses testified that mother and Mr. Bishop were "loving, encouraging, supporting" and that the children seemed "fine, good, happy" in the mother's care. VRP (August 14, 2014) at 148, VRP (August 18,

2014) at 6.

Both mother and her partner Thomas Bishop testified that they had used small amounts hot sauce and small slices of habanero peppers for discipline with the children. VRP at 82; 140 (August 14, 2014); VRP at 44-46 (August 18, 2014). Neither child had been given hot sauce or pepper slices for two years. VRP at 46 (August 18, 2014). Neither Cain nor Aryana experienced any difficulty breathing or any medical complications after peppers or hot sauce had been used. VRP at 44-46 (August 18, 2014). The investigating social worker testified that she had heard of hot sauce and peppers as a discipline technique but was not aware of any specific studies on any dangers to children. VRP at 99 (August 14, 2014).

Mother and Thomas Bishop testified that they used spanking on limited occasions and had developed specific guidelines limiting spankings to five swats with an open palm. VRP at 77 (August 14, 2014). These guidelines were implemented after an occasion on which Thomas Bishop used a belt to spank Cain and then called to discuss the incident with mother. *Id.* No marks were left on either child as a result of any spanking of the children, including the occasion on which a belt was used. VRP at 48-49 (August 18, 2014).

Mother and Thomas Bishop testified that both children were engaged in numerous family activities and were doing well medically and

in school. VRP at 38-45 (August 14, 2014); VRP at 51 (August 18, 2014). The investigating social worker also confirmed the children were doing well. VRP at 87-88 (August 14, 2014). There had been no prior CPS referrals for either Mother or Thomas Bishop. VRP at 88 (August 14, 2014).

The testimony did not support any findings that either child had been locked in a cage or shed. Both mother and Mr. Bishop testified that after the children had returned in 2012 both children had behavioral issues. VRP at 48-50 (August 14, 2014); VRP at 41-42 (August 18, 2014). After Cain refused to go to bed one night, mother informed him that there was a bedtime in her house that he was expected to follow. VRP at 41 (August 18, 2014). Cain then stated that he would rather live in the shed. VRP at 80-81 (August 14, 2014); VRP at 42 (August 18, 2014). Cain expressed no fear and could leave at any time as the door was not locked. VRP at 42 (August 18, 2014). After approximately one minute, the mother opened the door and asked Cain if he still wanted to live in the shed. He said no, and there were no further incidents regarding the shed. *Id.*

Mother and Thomas Bishop testified that they did not own a dog but had temporarily cared for a friend's dog about a year prior. VRP 42-43 (August 18, 2014). Ms. Conklin testified that she did not observe either a dog or a dog cage when she visited the home in the course of her

investigation. VRP at 87 (August 14, 2014).

There was also testimony that the children were sometimes put in “time outs” where they had to stand on their tip toes to keep still. VRP at 107 (August 14, 2014). Neither child was punished if they touched their heels down during the time out. *Id.* The mother also “grounded” the children on several occasions. While they were grounded the children were expected to sit at the table and leave only to use the bathroom. VRP at 106 (August 14, 2014). The children also ate meals during the groundings and mother encouraged them to use this time to work on their homework. *Id.*

The court entered a written decision on August 22, 2014 finding that mother had committed both physical abuse and emotional abuse. The court cited to the testimony of the CPS workers (neither of whom had personally interviewed the children) as supporting its findings. CP at 124. The court did not enter findings on whether there was a future risk of harm to the children. *See* CP at 123-28.

The findings of fact and conclusions of law entered on September 19, 2014 incorporated the parenting plan by reference. CP at 140-143. Without further elaboration, the parenting plan provided that “Physical, sexual or a pattern of emotional abuse of a child” and “A parent has withheld from the other parent access to the child for a protracted period

without good cause” as the basis for restrictions on the mother’s residential time. CP at 129-39. The parenting plan contained no section regarding future risk of harm to the children. *Id.*

Mother moved the court to reconsider its ruling and requested the court adopt her parenting plan or, in the alternative, lift the restrictions on her visitation. CP at 155-160. The court declined to do so. CP at 208. At the motion for reconsideration the court commented that the fact that mother “is attempting to convince this court that she didn’t abuse...[is] symptomatic of her frame of mind, which makes her a risk to these children.” VRP at 21 (October 24, 2014). The court entered no findings and made no further comment as to future risk of abuse.

## V. ARGUMENT

### A. Summary of Argument

To be sustained on appeal, the trial court’s orders must be supported by substantial evidence. *See e.g. Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C.*, 152 Wn.2d 387, 391, 91 P.3d 745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *See e.g. State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025, 72 P.3d 763 (2003). The findings of fact must support the conclusions of law.

*See e.g. State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115(1994). Even when mislabeled as findings of fact, the court reviews conclusions of law de novo. *See e.g. Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

Whether the court's exercise of discretion is based on untenable grounds or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other. *See e.g. State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "When the State seeks to deprive a person of a protected interest, procedural due process requires that the person receive notice of the deprivation and an opportunity to be heard to guard against an erroneous deprivation of that interest." *Pal v. Washington State Department of Social and Health Services*, No. 45594-3-II (Feb. 3, 2015) at 7.<sup>1</sup>

In this case, the court abused its discretion by (1) Scheduling a trial and entering a final parenting plan less than two months after petitioner filed to establish a parenting plan<sup>2</sup>; (2) Denying a joint motion to appoint a

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<sup>1</sup> Citing *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

<sup>2</sup> As discussed below, trial was originally set for July 31, 2014, but the court continued this date. Trial took place August 14, August 18, and August 20 of 2014.

Guardian Ad Litem (GAL); (3) Entering a finding of child abuse without any evidence that the children were harmed; (4) Entering findings of emotional abuse and neglect without any evidence of harm or specific findings as to harm; (5) Failing to consider the future risk of harm as provided by RCW 26.09.191; (6) Placing the children with father despite father's failure to provide evidence as to several key factors required by RCW 26.09.187; (7) Making comments at the July 31, 2014 and October 24, 2014 hearings indicating (a) the judge had decided the case prior to hearing any testimony and (b) the judge viewed mother's exercise of her due process rights to present evidence as itself a basis of risk to the children.

#### B. The Court Abused Its Discretion in Scheduling Orders

The trial court abuses its discretion when it fails to allow the parties reasonable time to prepare for trial. *See e.g. Custody of R.*, 88 Wn. App. 746, 758, 947 P.2d 745 (1997)<sup>3</sup> (“The trial court abused its discretion in denying a continuance...At the very least the trial court should have allowed the parties reasonable time to prepare for a full hearing...”).

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<sup>3</sup> *Superseded on other grounds by Tostado v. Tostado*, 137 Wn. App. 136, 151 P.3d 1060, 151 P.3d 1060 (2007) (explaining that modifications to UCCJEA had removed the best interests of the children requirement in determining jurisdiction).

In this case, the Petition was filed on June 30, 2014. CP at 55. The case was assigned to Judge Costello. *Id.* The state filed for dependency on July 11, 2014 as to each child and a shelter care hearing was held on both matters on July 17, 2014 before Judge Nelson.<sup>4</sup> The parenting plan case was consolidated with the dependency case.<sup>5</sup> The state dismissed the dependency case on the July 17, 2014 hearing after the court put the children with the father on a temporary basis.

The court scheduled the parenting plan trial on July 31, 2014.<sup>6</sup> The father appeared with his newly retained attorney. Counsel for both parties moved the court for appointment of a Guardian Ad Litem and a continuance to allow time to prepare the case. VRP (July 31, 2014) at 3-4, 6. 8. Originally, the court denied any continuance and denied appointment of a Guardian Ad Litem stating: “You don’t need a guardian ad litem. We’re going to hear this case now and get it done.” VRP (July 31, 2014) at 3. After counsel for the father explained that the parties were not in agreement and the investigation was ongoing, the court commented “And that’s why we’re here today, so I can learn these things. Today is the trial date. We need to go forward today.” VRP (July 31, 2014) at 4. After

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<sup>4</sup> See [http://linxonline.co.pierce.wa.us/linxweb/Case/CivilCase.cfm?cause\\_num=14-7-01328-4](http://linxonline.co.pierce.wa.us/linxweb/Case/CivilCase.cfm?cause_num=14-7-01328-4)

<sup>5</sup> See [http://linxonline.co.pierce.wa.us/linxweb/Case/CivilCase.cfm?cause\\_num=14-3-02549-1](http://linxonline.co.pierce.wa.us/linxweb/Case/CivilCase.cfm?cause_num=14-3-02549-1)

<sup>6</sup> *Id.*

further objection to proceeding, the court granted a continuance of just two weeks. VRP (July 31, 2014) at 9.

On the morning of the re-scheduled trial date, counsel for the mother objected to proceeding because father had failed to file a response. VRP (August 14, 2014) at 4. Technically a response was not even due on the day of trial as father was served out of state and mother had filed on June 30, 2014. *Id.* CR 12 (a) (3).

It was error of law for the court to proceed to trial on August 14, 2014 after only 45 days had elapsed since the mother had filed her petition on June 30, 2014. State law provides that no final parenting plan shall be entered sooner than ninety days after filing and service. RCW 26.09.181 (7) (Procedure for determining final parenting plan) (emphasis added).

In addition, due process required the mother have over 60 days from the date of filing so that father could file a response and mother could develop her case. Setting the case more than 60 days out would also have given the mother the option to request appointment of a GAL at her expense or to retain an independent parenting investigator.<sup>7</sup>

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<sup>7</sup> If a GAL had been appointed, the parties would have sixty days after the filing of the report to prepare for trial or to discuss a settlement based on the GAL's recommendations. *See* RCW 26.12.175 (1) (b).

The court's scheduling orders deprived mother of due process for three additional reasons. First, the mother was denied the opportunity to review father's response to her petition. The father never filed a response to mother's petition at all. Because the father failed to file a response, the issue was never ripe for trial and a decision on the merits was premature.

Second, the parties were denied the opportunity to engage in meaningful settlement negotiations. In Pierce County, a settlement conference is required in parenting plan cases pursuant to PCLR 94.04 (d). Where a settlement conference is required pursuant to local rule, state law requires that it occur prior to entry of a final parenting plan. RCW 26.09.181 (5). Under the original scheduling order issued, a settlement conference date was to be set with the volunteer settlement conference judge by September 15, 2014, and the trial was to be held on March 9, 2015. CP at 55. By scheduling the trial for August 13, 2014—just over two weeks after counsel for father entered her notice of appearance—the court created a situation where both parties' attention was focused on preparing for trial, rather than exploring a possible resolution of the case.

Third, the parties were denied of any opportunity to engage in discovery. Under CR 30, 33, and 36, the mother was entitled to submit requests for production, interrogatories, and requests for admission. The court's scheduling of the trial date so soon after mother filed her petition

prejudiced her ability to adequately present her case as she had no ability to engage in normal discovery and had no ability to learn what information father would present until trial.

For example, it was not until the father testified on August 18, 2014 that mother learned that Cain had first mentioned hot peppers just days into the visit. VRP (August 18, 2014) at 123. This information was in stark contrast to father's earlier implications that he had not learned about peppers or the other disciplinary tactics until shortly before he was required to send the children back to Washington. VRP (August 18, 2014) at 95. If mother had had this information earlier, she would have been able to better advocate for herself at the shelter hearing and at the trial.

In addition, the quick trial setting prevented the mother from introducing testimony that she could have obtained had the father accepted her offer to pay for the children to receive counseling. Mother speculated that the children should have counseling due to the stress of the proceedings, however father declined her offer to pay for counseling. VRP (August 14, 2014) at 62-63; Mr. Cruver did not take the children to a counselor at all until mother filed a motion for reconsideration. VRP (August 18, 2014) at 115; VRP (October 24, 2014) at 5. Because the father had failed to take the children to a counselor prior to trial, the mother was

unable to produce any testimony from an expert witness who had actually interacted with the children.

C. The Court Abused Its Discretion in Denying a Joint Motion to Appoint a Guardian Ad Litem (GAL)

It was reversible error for the court to deny a joint motion to appoint a GAL to fully investigate this highly contested case. The law requires more than just “the evidence—often partisan produced by the adversaries.” *Marriage of Waggener*, 13 Wn. App. 911, 915, 538 P.2d 845 (1975). “[T]he court should not, where deficiencies in the proof are present, decide the case in the traditional manner on the evidence adduced by the litigants.” *Id.*

In *Waggener*, the court overturned the trial court’s entry of a parenting plan because there had been no independent investigator even though the parties had failed to make a motion to the court to appoint a GAL. 13 Wn. App. at 912-913.

In contrast, the parties here jointly moved for appointment of a GAL because of the nature of the allegations. VRP (July 31, 2014) at 3. The court denied this request. *Id.* At trial, the court relied entirely on the testimony of two CPS employees, neither of whom had interviewed the children personally. VRP (August 14, 2014) at 83, VRP (August 20, 2014) at 14. In addition CPS had voluntarily dismissed its dependency petition

before trial and had not yet concluded its investigation at trial. VRP (August 14, 2014) at 92.

The CPS worker Kate Orlando's testimony revealed significant bias against the mother. For example, Ms. Orlando flatly refused to admit that children could "sometimes be inaccurate reporters." VRP (August 20, 2014) at 14. She also threatened to file a new dependency petition if the court placed the children in mother's care. VRP (August 20, 2014) at 12-13. In relying on Ms. Orlando's testimony, the court accepted the view that the choice in placement was not between the father and the mother, but between the father and foster care. For these reasons, the CPS investigation was neither independent nor sufficient.

Because the court failed to appoint a GAL despite a joint motion from both the father and the mother, it failed in its primary legislative role to ensure that its orders were in the best interests of the children. A GAL could have observed the children with both parents, could have interviewed the children, and could have provided input regarding any required parenting classes or counseling that was needed. The court's failure to appoint a GAL over the joint motion of the parties was an abuse of discretion.

D. The Court Erred in Finding Abuse and Neglect Despite No Evidence of Harm

**1. No Evidence of Abuse**

It was error to find that abuse and neglect had occurred when the father's evidence was limited to the testimony of CPS workers who had not interviewed the children personally. Father also produced no evidence as to any harm to the children.

The burden was not on the mother to disprove abuse. Rather, the father bears this burden. In *Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (2006), the trial court made a finding that the mother had failed to prove sexual abuse occurred despite her testimony of disclosures of sexual abuse and a physical examination that did not rule out the possibility of abuse. *Id.* at 226. The Court of Appeals reversed the trial court's imposition of restrictions based on what it characterized as a "lingering suspicion that [father] sexually abused [his child] even though insufficient evidence shows that he did so." *Id.* at 236.

As in *Watson*, the pending CPS investigation cast a "lingering suspicion" over mother that she had abused the children despite any evidence to support this. The burden lay with Mr. Cruver to prove abuse occurred. Because the CPS investigation was incomplete and no GAL was appointed, there was no sufficient basis to find abuse or neglect. The

court's finding that the mother had committed abuse or neglect despite any evidence of harm was an abuse of discretion.

The law requires more than just “the evidence—often partisan produced by the adversaries.” *Marriage of Waggener*, 13 Wn. App. 911, 915, 538 P.2d 845 (1975). “[T]he court should not, where deficiencies in the proof are present, decide the case in the traditional manner on the evidence adduced by the litigants.” *Id.* It was error for the court to make findings of abuse in this case without an independent investigation. The court relied on mother's admissions as to physical discipline to support its findings of abuse and neglect. CP at 24. However, the physical discipline to which mother admitted does not rise to the level of abuse as defined by statute.

State law “shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare, and safety.” RCW 26.44.010. “Nothing in this chapter may be used to prohibit the reasonable use of corporal punishment as a means of discipline.” RCW 26.44.015 (2).

The definition of abuse specifically excludes “conduct permitted under RCW 9A.16.100.” RCW 26.44.020. This provision allows “the physical discipline of a child ...when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian.” RCW 9A.16.100. The statute

does not specifically mention significant others involved in co-parenting, but does “encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children.” *Id.*

Here, the trial court’s letter ruling was that physical abuse “included the spankings (some with a belt) and the use of peppers and pepper sauce as discipline, being forced to stand on tip toe, groundings for up to 12 hours per day with only bathroom breaks and meal restrictions. CP at 124. Because none of these practices are covered in the per se definition of child abuse under RCW 9A.16.100 (Use of force on children)<sup>8</sup>, the court must make specific findings as to actual harm caused by these practices. Without these specific findings, the court intrudes on the constitutionally protected right to parent one’s child. *See e.g. Katare v. Katare*, 125 Wn. App. 813, 826, 105 P.3d 44 (2004) (“We conclude that the court may not impose limitations or restrictions in the absence of express findings under RCW 26.09.191. We also conclude that any limitations or restrictions

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<sup>8</sup> RCW 9A.16.100 provides:

The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child’s breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. (Emphasis added).

imposed must be reasonably calculated to address the identified harm”).

The uncontested evidence was that both children saw the doctor regularly and were thriving. Both children were involved with school activities and the Seahawks booster club. VRP (August 18, 2014) at 51. Prior to Mr. Cruver’s allegations, there was no CPS history with mother. VRP (August 14, 2014) at 88. There was no evidence of physical or emotional harm to either child. Neither the letter ruling nor the parenting plan made any findings as to any physical effects from the physical discipline. CP at 123-28; 129-39. Although the court commented mother “engaged in minimizing and denying the impacts on the children,” it did not state what the alleged impacts were. CP at 124.

Further, the investigating social worker conceded that the length of time that discipline had occurred and the severity of discipline were both important factors to consider:

- Q: Physical discipline of a child. Is that always child abuse?
- A: No.
- Q: And what factors would you look at to make that determination?
- A: Different factors. The age of the child, if it’s a vulnerable child, the severity of the discipline. Are there marks? Are there bruises? There’s all kinds of multiple things that are taken into consideration.
- Q: Would you also take into account the recency with which the corporal punishment occurred?

A. Yes.<sup>9</sup>

The testimony at trial was that neither Mother nor Thomas Bishop have used hot sauce or peppers in several years and that only small amounts were used. VRP (August 14, 2014) at 140; VRP (August 18, 2014) at 44-46. There were no physical effects from the use of hot sauce or peppers. VRP (August 18, 2014) at 44-46. On the one occasion a belt was used to spank one of the children, it did not leave lasting marks. VRP (August 18, 2014) at 47-48. The use of tip toes for “time outs” was explained as a way to keep the children still. VRP (August 14, 2014) at 107. There was no evidence that this practice harmed the children. On the occasions during which the children were grounded, they were given food, bathroom breaks, and encouraged to do their homework. VRP (August 14, 2014) at 106. None of these practices constitute physical or emotional abuse.

By relying solely on testimony of two CPS workers, neither of whom had interviewed the children, the court improperly shifted the burden on mother to prove the abuse had not occurred. This was an abuse of discretion. *See e.g. Watson*, 132 Wn. App. at 236-37 (“The court’s express finding that the evidence was insufficient to disprove abuse suggests that

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<sup>9</sup> VRP (August 14, 2014) at 90-91 (Testimony of investigating social worker).

the court improperly shifted the burden of proof to [father] to disprove the allegations after determining that [mother] failed to meet her burden of proving them.”). In this case, the children were described as happy and doing well in school and involved in extracurricular events. Thus, the father failed to meet his burden. The trial court’s finding of abuse was based on mere suspicion. As in *Watson*, it was abuse of discretion to rest on mere suspicion as the basis of restrictions.

## **2. No Evidence of Emotional Abuse or Neglect**

The trial court also entered a finding that “Mother engaged in ...emotional abuse of the children.” CP at 124. Specifically the court found that the peppers and pepper sauce, the timeouts with the use of tip toes, the spankings, and the grounding of the children were “also emotional abuse.” *Id.* This finding was without any further elaboration as to how these practices harmed the children either physically or emotionally and were an abuse of discretion.

Moreover, the court’s finding that the “children ...[were] put in a dog cage and shed”<sup>10</sup> was contrary to the evidence. Both the mother and Thomas Bishop testified that only the son Cain entered the shed, that his entry was voluntary, and that he was there for less than a minute and able

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<sup>10</sup> CP at 124.

to leave. VRP (August 18, 2014) at 41-42. This one incident was for an instructional purpose—namely to show Cain that his mother’s house has rules such as going to bed on time, and that it was better to live in the house with its rules as opposed to the child’s proposed alternative of living in the shed. *Id.* None of the CPS employees who testified had spoken to the children or had personal knowledge of the events. VRP (August 14, 2014) at 83, VRP (August 20, 2014) at 14.

By commenting that the mother “admitted” the discipline as a basis for its findings, the court implicitly found the mother’s testimony credible. CP at 124. The court’s further finding that mother “engaged in minimizing and denying the impacts on the children”<sup>11</sup> is unsupported by the record.

There was no evidence as to any harm of the children from any of the methods of discipline. Moreover, the court’s findings as to “minimization and denying” improperly shifted the burden to disprove abuse. The burden to disprove abuse did not rest on the mother. Instead, the burden to prove abuse rested on Mr. Cruver. He failed to meet his burden. The court’s improper burden shifting was an abuse of discretion. *See e.g. Watson*, 132 Wn. App. at 236-37 (finding that the trial court abused its discretion by shifting the burden to the other parent to disprove

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<sup>11</sup> CP at 124.

abuse and basing restrictions in the parenting plan on its “lingering suspicion.”)

E. The Court Erred in Finding that Mother Withheld the Children Despite the Lack of a Parenting Plan

In this case, there was neither a temporary parenting plan nor a permanent parenting plan in effect prior to September 19, 2014. CP at 211. Yet the court ruled that mother had voluntarily withheld the children from father. CP at 130. Because there was no parenting plan in effect, there was no requirement on mother to produce the children for visitation. Indeed, it was the father who had voluntarily withheld the children from the mother in violation of the Ex Parte order of June 30, 2014 when he failed to return the children to Washington as previously agreed with mother. VRP (August 14, 2014) at 52-54.

Moreover, the mother had adequate justification for not sending the children to the father’s house in Arizona for the summer of 2013. As she testified, the son had injured his foot while at father’s home and returned with a dirty cast. The children also both had also failed to do the homework their teachers had recommended and exhibited behavioral issues at mother’s house such as a refusal to go to bed on time. VRP (August 14, 2014) at 48-49; VRP (August 18, 2014) at 41. Despite the mother opting not to send the children to Arizona, the father failed to

initiate any parenting plan. VRP (August 14, 2014) at 47. This failure to proactively seek a parenting schedule indicated father's acceptance of mother's judgment that the children should not visit him for the summer of 2013.

F. The Court Erred in Failing Make Findings as to Future Risk of Harm

RCW 26.09.002 provides that "the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent ...required to protect the child from the physical, mental, or emotional harm" (emphasis added). For this reason, the court may order placement with a parent even if it makes a determination that abuse had occurred and has wide latitude to decide what restrictions, if any, are necessary to safeguard the child while maintaining the status quo as much as possible.

If the court expressly finds based on evidence that contact between the parent and the child will not cause physical ...harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a), (b), and (m) (i) and (iii) of this subsection ...then the court need not apply the limitations of (a), (b), and (m) (i) and (iii) of this subsection.

RCW 26.09.191 (n) (emphasis added).

“Trial courts have broad discretion to create parenting plans tailored to the needs of the individuals involved ...” *In re Marriage of Chandola*, 180 Wn.2d 632, 658, 327 P.3d 644 (2014). This discretion is broad enough to permit the court to not apply limitations on a parent’s residential time even if it makes a finding that abuse or neglect occurred. *See* RCW 26.09.191 (n).

Washington courts have yet to create a standard for when the risk of harm is “so remote that it would not be in the child’s best interests to apply the limitations of (a), (b), and (m) (i) and (iii)” of RCW 26.09.191. However, in interpreting RCW 13.34.136 (permanency plan of care), the court addressed what constituted a “risk of harm” to the children. “The legislatively-mandated risk of harm must be an actual risk, not speculation” *Dependency of T.L.G.*, 139 Wn. App. 1, 17-18, 156 P.3d 222 (2007) (finding that “While these parents may well have acted inappropriately five years ago, that incident is ancient history in the lives of this family. Something more than opinions based on a single incident is necessary to support a finding of risk of harm”) *Id.* at 18. When RCW 26.09.191 is at play, the court must make specific findings. *See e.g. Kinnan v. Jordan*, 131 Wn. App. 738, 752, 129 P.3d 807 (2006) (specific findings as to factors in RCW 26.09.191 is mandatory). In making findings on future risk of harm, the court can consider the “potential for

progress” by a parent in their efforts to improve their parenting skills.

*Mansour v. Mansour*, 126 Wn. App. 1, 10, 106 P.3d 768 (2004)

In this case, the court made no findings as to future risk of harm. CP at 140-143, 129-39. The undisputed testimony was that the last spanking of either child occurred in March and it was “a swat with a hand.” VRP (August 18, 2014) at 48. There had not been any bruising or marks on either child as a result of any spanking, including the sole occasion a belt was used. VRP (August 18, 2014) at 48-49. It had been two years since hot sauce or peppers were used with either child. VRP at 46 (August 18, 2014). The mother and her partner denied locking Cain in a shed and testified that the shed was not capable of locking and that Cain voluntarily entered into the shed and remained inside for approximately one minute with his mother on the other side of the door. VRP (August 18, 2014) at 41-42.

Neither child had ever been locked in a dog cage. VRP (August 18, 2014) at 42-43. There was one occasion a year ago where the mother had agreed to watch a friend’s dog, but that the dog kennel did not have a lock and Cain would play in the cage voluntarily. *Id.* This testimony was uncontroverted at trial as father introduced no witnesses that had interviewed the children and the court failed to appoint a GAL to investigate. The investigating social worker testified that she saw no dog

cage and no signs of a dog when she visited the home. VRP (August 14, 2014) at 87.

Both mother and Mr. Bishop have demonstrated their willingness to improve their parenting skills. They have completed a nine-week parenting class through Catholic Community Services that they had paid in advance of trial. VRP (August 14, 2014) at 66-67, 130-33. Regarding the classes, mother testified:

And we also learned ... different ways to discipline, things like calming the child before doing a timeout, a simple timer the kids have to watch to actually calm themselves down. Other things, like timeouts ... in a room, like in their bedroom first, before putting them in the corner. So I learned different techniques that I didn't know about before, and that, you know, Tom and I had talked about maybe implementing if we get the kids back.

VRP (August 14, 2014) at 133 (emphasis added).

Mother and Thomas Bishop also completed a risk assessment indicating that they were both low risk to abuse. VRP (October 24, 2014) at 10-11, CP at 158. Justin Washington conducted the assessment. *Id.* His assessments have been relied on by this appellate court in *In re Welfare of R.S.G.*, 174 Wn. App. 410, 415, 299 P.3d 26 (2013).

Neither the court's letter ruling nor the findings or parenting plan addressed any future risk of harm. The only time the trial judge referenced

a risk of harm was in an oral statement after denying the mother's motion for reconsideration. The court commented:

I see no reason whatsoever to correct any portion of my ruling...I'm, frankly, thinking it's symptomatic of Mother that she won't undergo such coaching and she is attempting to convince this court that she didn't abuse. I think that's very symptomatic of her frame of mind, which makes her a risk to these children.

VRP (October 24, 2014) at 21 (emphasis added).

The assertion that the mother's mere exercise of her due process right to have her case heard in a court of law would be itself a risk of future harm was improper and an abuse of discretion. *See e.g. Pal*, No. 45594-3-II at 7 (Feb. 3, 2015) (affirming a party's due process right to contest allegations of abuse of a vulnerable adult).

Parents have a right to raise their children without undue state interference. *See e.g. In re Custody of Brown*, 153 Wn.2d 646, 652, 105 P.3d 991 (2005) (citing *In re Custody of Smith*, 137 Wn.2d 1, 20-21, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)); *see also Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (right of Amish parents not to send kids to school after eighth grade); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (right of parents to send kids to parochial school). In exercising that right, parents are in need of a "wide

sphere of discretion." *Borst v. Borst*, 41 Wn.2d 642, 656, 251 P.2d 149 (1952).

In this case, mother was exercising her opportunity to be heard as to whether her disciplinary practices were reasonable given that they caused no lasting harm to her children and given that the children were thriving in her care. When the court entered a parenting plan restricting her residential time, the mother presented additional evidence and argument that she was not a risk to her children. The fact that the only criterion that the court appeared to weigh in evaluating future risk of harm was the mother's exercise of her due process rights to guard against an erroneous deprivation of her parental rights was itself a violation of the mother's due process rights.

G. The Court Erred in Placing Children With Father Without Making Specific Findings as to the Factors in RCW 26.09.187

RCW 26.09.187 sets out seven factors the court must consider in creating a final parenting plan. In this case, the court made a finding of abuse and concluded that the restrictions in RCW 26.09.191 were dispositive. CP at 126; 130. However, the court entered no specific findings as to the criteria in RCW 26.09.187. CP at 140-43. Although the letter ruling of August 22, 2014 does address some of the criteria in RCW 26.09.187, a letter ruling is superseded by the findings and judgment. *See*

*e.g. Osborne v. Osborne*, 60 Wn.2d 163, 167, 372 P.2d 538 (1962) (A court is free to change its mind “at any time before the entry of his final order or judgment”).

At trial, the mother introduced substantial evidence at trial that the RCW 26.09.187 factors weighed in her favor. As discussed above, RCW 26.09.191 is not dispositive when the risk of harm is minimal. Because the balance of evidence weighed in favor of placement with mother, the placement of the children with the father was outside the range of acceptable choices and constituted an abuse of discretion.

**(i) *The relative strength, nature, and stability of the child's relationship with each parent;***

The children have a stronger relationship with mother than father. For over three years, the children have lived with mother exclusively. VRP (August 14, 2014) at 21. They have only visited Mr. Cruver three times since he moved to Arizona. VRP (August 14, 2014) at 46-47. Mother has invested significant time and energy in raising the children to be good responsible citizens. She has involved the children in the Seahawks kids clubs, participated in community and extracurricular activities with them, taken them to doctor’s appointments, and encouraged their educational development. VRP (August 14, 2014) at 28-29, 38-41.

Mother testified that she made a special emphasis to motivate the children to attend college and has encouraged the children to do summer homework activities as recommended by their teachers. VRP (August 14, 2014) at 29-30. The children have done well in mother's care.

Mr. Cruver has had limited contact with the children since he moved in 2010. VRP (August 14, 2014) at 46-47. The mother testified that Mr. Cruver would call only "once every one to two months." VRP (August 14, 2014) at 47. Prior to the underlying proceedings, father never initiated any efforts to get a parenting plan in place. *Id.*

**(ii) *The agreements of the parties, provided they were entered into knowingly and voluntarily;***

There was a prior agreement between the parties filed December 20, 2011 under Cause number 11-3-04678-7 and signed by both parties that provides for placement of the children with the mother with visitation in the summers with Mr. Cruver. VRP (August 14, 2014) at 47-48. The father admitted this agreement placed the children in the mother's primary care. VRP (August 18, 2014) at 124.

**(iii) *Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;***

Testimony at trial showed that for over three years, mother has assumed all parenting functions. VRP (August 14, 2014) at 21. The

children are healthy and well nourished. VRP (August 14, 2014) at 87-88, 102. They are doing well in school. VRP (August 14, 2014) at 88. They are involved in extracurricular activities and in community activities with mother and Thomas Bishop. VRP (August 14, 2014) at 28-29, 38-41.

On the other hand, Mr. Cruver's behavior while living in the home was not conducive to positive parenting. Mr. Cruver admitted that he used marijuana every night while he was supposed to be watching the children. VRP (August 18, 2014) at 107 (emphasis added). He also admitted to having two convictions for Marijuana. *Id.* Mr. Cruver admitted to going through court proceedings related to domestic violence against the mother. VRP (August 18, 2014) at 113-114. Mother testified that Mr. Cruver had violated a no-contact restraining order that was put into effect in the domestic violence case. VRP (August 14, 2014) at 16.

Mother testified that she had significant concerns with Mr. Cruver's parenting. She explained that Mr. Cruver "allowed them to be up all hours of the night even though they need to be asleep." VRP (August 14, 2014) at 11. The children would be "in soiled diapers" in Mr. Cruver's care, and he would "be smoking marijuana or doing other drugs in the house" and "would leave paraphernalia out" where the children could reach it. *Id.* The children also missed school more frequently when Mr. Cruver was responsible for taking them to school. VRP (August 14, 2014)

at 13. While in his care, the children did not complete their recommended summer homework. VRP (August 14, 2014) at 49.

Mother testified that she was the parent who attended the PTA meetings and the children's doctors' appointments. VRP (August 14, 2014) at 12. Although mother worked, she would also spend time with the children when she was home and would color with them, help prepare them for school, and assume "duties of feeding, bathing, and taking care of them and making sure that they were well-groomed and ready...for the day." VRP (August 14, 2014) at 12-13.

Mr. Cruver was not involved with either child's schooling and did not volunteer or attend PTA meetings. VRP (August 14, 2014) at 12-13. The mother made the doctor's appointments and ensured the children received regular medical care. *Id.* When Mr. Cruver was in the house, it was mother who would volunteer in Aryana's classroom. VRP (August 14, 2014) at 13. Mother was able to be involved because her work schedule was primarily at nights, so she was available to her children during the days. *Id.*

***(iv) The emotional needs and developmental level of the child;***

As discussed above, Mr. Cruver's failure to be involved with the children's education and failure to encourage the children to do their recommended summer homework indicates his lack of attention to the

children's developmental needs.

Further, testimony showed that Mr. Cruver failed to enroll the children in counseling despite mother's efforts to pay for counseling. VRP (August 18, 2014) at 115; VRP (October 24, 2014) at 5. This shows that the mother is more attuned to the children's emotional needs.

**(iv) *The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;***

The children have significant relationships with extended family members, neighbors, other children at their Washington school, and care givers in Washington including Thomas Bishop. VRP (August 14, 2014) at 45. The children are involved in community activities like the Seahawks kids club. VRP (August 14, 2014) at 39-41. Aryana has also been involved in safety patrol and track. Mother and Cain have attended Aryana's track practices. VRP (August 14, 2014) at 45. As the children have lived in Washington all their lives with only temporary visits with the father, their main relationships and activities have been in Washington with mother.

**(v) *The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule;***

This factor did not apply as the children were 10 and 6 years old at the date of the trial. Moreover, the court failed to appoint a GAL to interview the children as to their preferences. The court's finding in the

letter ruling that “In reporting the abuse, the children have indicated with whom they feel safe, their Father”<sup>12</sup> is not supported by the evidence or reflected in the Findings of Fact and Conclusions of Law entered on September 19, 2014. CP at 140-43.

**(vi) *Each parent's employment schedule, and shall make accommodations consistent with those schedules.***

The court found that “Both parents work and are with the children outside of work and the children’s schooling.” CP at 127. Mother testified that her employer was very accommodating of her schedule. VRP (August 14, 2014) at 70. Indeed, the employer herself testified that she had accommodated the mother’s absences from work for the trial. VRP (August 18, 2014) at 23.

Mother currently works a day shift as a manager for All Creatures Animal Hospital. VRP (August 14, 2014) at 76. The mother has ample support for childcare when she is unavailable. Her support network includes her partner Thomas Bishop as well as her mother, Martina Gardite, and her neighbor, Heather Watt. VRP (August 18, 2014) at 70. All three have assisted mother by providing childcare in the past. *Id.*

As the children have not been with father for very long, little

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<sup>12</sup> CP at 126-27.

evidence is available as to father's childcare arrangements. Father did testify as to family in the area but did not state whether they provided childcare. VRP (August 18, 2014) at 79. Moreover, father's wife did not testify at trial. Her work schedule is unknown as is any evidence as to her relationship with Aryana or Cain.

H. The Trial Judge Demonstrated Bias Requiring Disqualification

Justice must satisfy the appearance of impartiality. *State v. Romano*, 34 Wn. App. 567, 662 P.2d 406 (1983); *Brister v. Council of City of Tacoma*, 27 Wn. App. 474, 619 P.2d 982 (1980); *Chicago, Milwaukee, St. Paul and Pac. RR. Co. v. Washington State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1976) (judiciary should avoid even mere suspicion of irregularity, or appearance of bias or prejudice).

If a judge demonstrates bias against a party in the proceedings, the court of appeals may remand the issue to be heard before a different judge. *See e.g. Custody of R.*, 88 Wn. App. at 762-63. In *Custody of R.*, the court's comments on the record that it was displeased with the mother "coupled with the trial court's denial of [mother's] requested continuance" required the case to be remanded before a different judge "to promote the appearance of fairness. *Id.* at 763. *See also State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996) ("Due process, the appearance of

fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) also require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned").

In this case, the judge indicated prior to the commencement of trial that she had already made up her mind to enforce the “status quo” of the children residing in Arizona that she herself had created by returning the children to Arizona by order of July 17, 2014 at the shelter care hearing.

THE COURT: Who are the children placed with?

MS. VERIB: They are currently with my client, the father, in Arizona. They were placed there by Your Honor—

THE COURT: Right...So we're ripe for a hearing on the parenting plan.<sup>13</sup>

After father's attorney objected that she needed an appropriate amount of time, the court commented:

THE COURT: I do not—you do not understand. We have a status quo. We have a situation. We now need a parenting plan to go with that situation.<sup>14</sup>

The court's comments indicate that the court was biased from the start against mother. The trial judge had made up her mind even before hearing any evidence the mother presented. Her final orders did, in fact, produce a “parenting plan to go with [the] situation” the court created by placing the children with the father in the dependency proceedings.

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<sup>13</sup> VRP (July 31, 2014) at 6.

<sup>14</sup> *Id.* (Emphasis added).

The appearance of fairness required that the court hear and consider the mother's evidence and testimony that the best interests of the children would be served by placing them primarily in her care. It also required that the court hear and consider mother's testimony and evidence that she did not commit abuse or neglect. In addition, the appearance of fairness required the court to hear and consider mother's testimony and evidence that even if her disciplinary practices rose to the level of abuse or neglect, there was little risk for future abuse or neglect.

The judge violated both the appearance of fairness and the mother's due process rights by announcing at the beginning that she had already made up her mind to maintain the children in their father's care. Worse, the trial judge held the mother's exercise of her due process rights to a full and fair hearing against her.

The mother filed a motion for reconsideration asking the court to reconsider its orders placing the children with the father. CP at 155-160. In the alternative, the mother asked for the court to at least lift the restriction of a parenting supervisor in favor of other restrictions that would not pose the same logistical hurdles. VRP (October 24, 2014) at 11.

The parenting plan's requirement of parenting supervisor for the mother's next times together<sup>15</sup> posed difficulties because father's residence is in Arizona, and the mother's residence is in Washington. CP at 158. Thus, as an alternative to placing the children with her, mother offered a plan which did not require a parenting coach but specified that restrictions were not needed because of the mother's completion of parenting classes and the low risk finding by Justin Washington. VRP (October 24, 2014) at 11. The court denied mother's motion for reconsideration as to placement and declined to lift restrictions on the mother.

In an oral ruling, the court found that the mother's request for reconsideration was itself indicative of a future potential for abuse:

THE COURT: I see no reason whatsoever to correct any portion of my ruling...I'm frankly thinking it's symptomatic of Mother that she won't undergo such [parenting] coaching and she is attempting to convince this court that she didn't abuse. I think that's very symptomatic of her frame of mind, which makes her a risk to these children.

VRP (October 24, 2014) at 21 (emphasis added).

The court's comments on July 31, 2014 and October 24, 2014 combined with the denial of a joint motion to continue the case for the purpose of

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<sup>15</sup> CP at 130.

appointing a guardian ad litem show the trial judge was biased against the mother. Thus, as in *Custody of R*<sup>16</sup>, the case should be assigned to another judge on remand.

## VI. CONCLUSION

For the foregoing reasons, this Court should remand the case to reinstate the parenting plan the parties agreed to in 2011 giving the mother primary placement. In the alternative, this court should order a new trial and an independent investigation. The trial court should be directed to enter specific findings as to factors set forth in RCW 26.09.187 and whether the limitations of RCW 26.09.191 apply.

Dated this 11<sup>th</sup> day of February, 2015

Respectfully submitted,

LAW OFFICES OF  
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By   
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<sup>16</sup> *Custody of R.*, 88 Wn. App. 746, 758, 947 P.2d 745 (1997)

CERTIFICATE OF SERVICE

I, Beverly M. Ibsen, certify under penalty of perjury of the laws of the State of Washington that on February 11, 2015, I caused to be served a copy of the above document entitled "BRIEF OF APPELLANT" on the interested parties in this action, by United States, First Class Mail, Postage Pre-Paid, addressed to the Respondent at the following last known address:

Christopher Cruver, Respondent  
3348 Karen Avenue,  
Kingman, AZ 86401

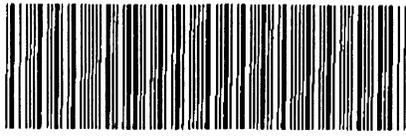
DATED this 11<sup>th</sup> day of February, 2015 at Gig Harbor, Washington.



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Beverly M. Ibsen, WSBA No. 42889  
Attorney for Appellant

10/28/2014 3804 0081



14-3-02549-1 43534400 ORDYMT 10-28-14



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

ANGELA DAWN MIRANDA,

Cause No: 14-3-02549-1

Petitioner(s) ,

ORDER

vs.

(OR)

CHRISTOPHER EUGENE CRUVER,

Respondent(s)

The Petitioner's motion for reconsideration under CR 59 is denied.

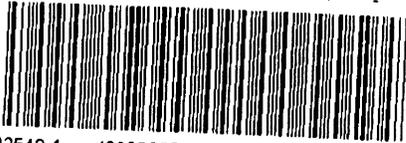
DATED this 24th day of October, 2014.

[Signature] JUDGE KATHRYN J. NELSON

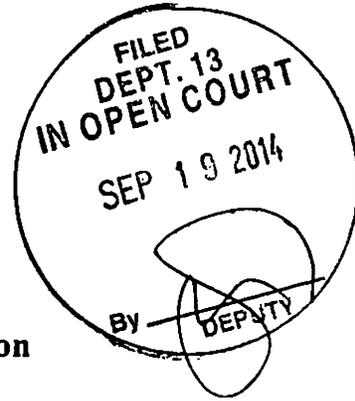
[Signature] Attorney for Plaintiff/Petitioner WSBA# 42889

[Signature] Attorney for Defendant/Respondent WSBA# 43703

Beverly Ibsen



14-3-02549-1 43332005 PP 09-23-14



Superior Court of Washington  
County of Pierce

In re the parentage of:

Aryana Cruver and Cain Cruver

Angela Miranda

Petitioner,

and

Christopher Cruver

Respondent

No. 14-3-02549-1

Parenting Plan

Proposed (PPP)

Temporary (PPT)

Final Order (PP)

This parenting plan is:

proposed by Christopher Cruver

*It is Ordered, Adjudged and Decreed:*

**I. General Information**

This parenting plan applies to the following children:

<u>Name</u>	<u>Age</u>
Aryana Cruver	10
Cain Cruver	6

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Tacoma, WA 98405  
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**II. Bases for Restrictions**

*Under certain circumstances, as outlined below, the court may limit or prohibit a parent's contact with the child(ren) and the right to make decisions for the child(ren).*

**2.1 Parental Conduct (RCW 26.09.191(1), (2))**

The mother's residential time with the children shall be limited or restrained completely and mutual decision-making and designation of a dispute resolution process other than court action shall not be required because this parent and a person residing with this parent has engaged in the conduct which follows:

Physical, sexual or a pattern of emotional abuse of a child.

**2.2 Other Factors (RCW 26.09.191(3))**

The petitioner's involvement or conduct may have an adverse effect on the child(ren)'s best interests because of the existence of the factors which follow:

A parent has withheld from the other parent access to the child for a protracted period without good cause.

**III. Residential Schedule**

*The residential schedule must set forth where the child(ren) shall reside each day of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions, and what contact the child(ren) shall have with each parent. Parents are encouraged to create a residential schedule that meets the developmental needs of the child(ren) and individual needs of their family. Paragraphs 3.1 through 3.9 are one way to write your residential schedule. If you do not use these paragraphs, write in your own schedule in Paragraph 3.13.*

**3.1 Schedule for Children Under School age.**

There are no children under school age.

**3.2 School Schedule**

Upon enrollment in school, the children shall reside with the [x] father.

Supervised Contact between the mother and children together with a parenting coach during the next times with the children. Supervised visitation to continue until positive feedback from the parenting coach shows mother has learned and demonstrated the skills to safely parent the children. Proof of positive feedback shall be documented and sent to the father and or his attorney as well as to the Court.

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Mother to complete her 9 week parenting class she is currently enrolled in. Documentation of completion shall be sent to the father and or to his attorney, and to the Court.  
Mother is to have a parenting coach to assist mother with parent skills and assess the situation to coach mother. The parenting coach shall be provided with all of the dependency and other related background information, including information on mother's accident and .20 blood draw result.  
Parenting coach to be paid for by the mother. Parenting coach to take place in AZ while mother is visiting with the children at supervised visitation.

**3.3 Schedule for Winter Vacation**

The children shall reside with the [X] father during winter vacation, except for the following days and times when the children will reside with or be with the other parent:

Parents alternate winter/Christmas every other year. Dad to have Even years, mom to have odd years. Winter break starts the day after school gets out and ends one day before school starts and includes New Years Eve and day.

Children to be returned to AZ, flight to land no later than 2pm or agreed upon by both parents one day prior to school starting.

A-4



1 as long as it does not exceed the 4 days a month. Mom shall give at least 14 day's notice to dad  
2 that she will be exercising these holidays. Children to be returned to dad by no later than 6pm the  
3 day before school starts.

4 **3.8 Schedule for Special Occasions**

5 The residential schedule for the child(ren) for the following special occasions (for example,  
6 birthdays) is as follows:

	With Mother (Specify Year <u>Odd/Even/Every</u> )	With Father (Specify Year <u>Odd/Even/Every</u> )
7 <u>Mother's Day</u>	_____	_____
8 <u>Father's Day</u>	_____	_____
9 <u>Children's Birthday</u>	_____	_____

10 The above noted Mother's Day holiday and Children's Birthdays are available if mother chooses to fly to  
11 AZ and shall have the entire weekend for mother's day, her birthday and the children's birthdays. Visits  
12 shall be Thursday – Sunday. Mom is responsible for children getting to school on time. Thursday after  
13 school 4:30pm mom to pick them up from school, to Sunday 6pm.

14 Extra visits: mom to have one 4 day weekend per month if mom travels to AZ and gives dad at least 14  
15 days notice to dad. Mom to pick children up after school on Thursday from school and to return to dad  
16 6pm Sunday night. Mom only gets these extra visits in months there is not already a 4 day holiday or  
17 special occasion. Only one 4 day per month, either for a holiday, or special occasions, or an extra  
18 weekend.

19 \*\*\*\*As long as supervised visitation is still in place- mom is to return the children at the end of her  
20 supervised visitation for that day, each and every day of her 4 day with the children. Supervised visitation  
21 not to start prior to 8:30am and not to end later than 6pm, so as to not interfere with the children's  
22 bedtime schedule.

23 **3.9 Priorities Under the Residential Schedule**

24 [x] Paragraphs 3.3 - 3.8 have priority over paragraphs 3.1 and 3.2 in the following order:

25 Rank the order of priority, with 1 being given the highest priority:

26 <u>  1  </u> winter vacation (3.3)	<u>  2  </u> holidays (3.7)
<u>  5  </u> school breaks (3.4)	<u>  6  </u> special occasions (3.8)
<u>  3  </u> summer schedule (3.5)	<u>  4  </u> vacation with parents (3.6)

27 **3.10 Restrictions**

28 The Mother's residential time with the children shall be limited because there are limiting factors  
29 in paragraphs 2.1.

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2 **3.11 Transportation Arrangements**

3 Transportation costs are included in the Child Support Worksheets and/or the Order for Child  
4 Support and should not be included here.

5 Transportation arrangements for the child(ren) between parents shall be as follows:

6 Mother is to pay for supervised visits and parenting coach

7 Mother is not to drive with the children in the vehicle if mother is likely to fall asleep at the  
8 wheel.

9 Father to pay for summer, winter and spring vacation for the children's airplane tickets. If mother  
10 needs to fly with the children. Mother to pay for her own airplane tickets.

11 Mother to pay for Thanksgiving and any extra visits throughout the year.

12 All flights where the child travel to see their mother shall be reasonable hours. Children's return  
13 flights to AZ shall land no later than 2pm on the day of return, unless otherwise agreed to.

14 If mother is flying to AZ to see the children, father shall bring children to mother provided that  
15 the location of where the mother is staying, or the children are being brought to is not more than  
16 25 minutes from father's residence. Mother shall not be alone in the car with the children while  
17 supervised visitation is still in place.

18 While supervised visitation is in place, the mother shall pay for a transporter a; if the designated  
19 location for the supervised visits are more than 25 minutes away from father's residence.

20  
21 **3.12 Designation of Custodian**

22 The children named in this parenting plan are scheduled to reside the majority of the time with  
23 the [x] father. This parent is designated the custodian of the child(ren) solely for purposes of all  
24 other state and federal statutes which require a designation or determination of custody. This  
25 designation shall not affect either parent's rights and responsibilities under this parenting plan.

**3.13 Other**

**3.14 Summary of RCW 26.09.430 - 480, Regarding Relocation of a Child**

This is a summary only. For the full text, please see RCW 26.09.430 through 26.09.480.

If the person with whom the child resides a majority of the time plans to move, that person shall  
give notice to every person entitled to court ordered time with the child.

If the move is outside the child's school district, the relocating person must give notice by

1 personal service or by mail requiring a return receipt. This notice must be at least 60 days before  
2 the intended move. If the relocating person could not have known about the move in time to give  
3 60 days' notice, that person must give notice within 5 days after learning of the move. The notice  
4 must contain the information required in RCW 26.09.440. See also form DRPSCU 07.0500,  
5 (Notice of Intended Relocation of a Child).

6 If the move is within the same school district, the relocating person must provide actual notice by  
7 any reasonable means. A person entitled to time with the child may not object to the move but  
8 may ask for modification under RCW 26.09.260.

9 Notice may be delayed for 21 days if the relocating person is entering a domestic violence shelter  
10 or is moving to avoid a clear, immediate and unreasonable risk to health and safety.

11 If information is protected under a court order or the address confidentiality program, it may be  
12 withheld from the notice.

13 A relocating person may ask the court to waive any notice requirements that may put the health  
14 and safety of a person or a child at risk.

15 Failure to give the required notice may be grounds for sanctions, including contempt.

16 If no objection is filed within 30 days after service of the notice of intended relocation, the  
17 relocation will be permitted and the proposed revised residential schedule may be confirmed.

18 A person entitled to time with a child under a court order can file an objection to the child's  
19 relocation whether or not he or she received proper notice.

20 An objection may be filed by using the mandatory pattern form WPF DRPSCU 07.0700,  
21 (Objection to Relocation/Petition for Modification of Custody Decree/Parenting Plan/Residential  
22 Schedule). The objection must be served on all persons entitled to time with the child.

23 The relocating person shall not move the child during the time for objection unless: (a) the  
24 delayed notice provisions apply; or (b) a court order allows the move.

25 If the objecting person schedules a hearing for a date within 15 days of timely service of the  
objection, the relocating person shall not move the child before the hearing unless there is a clear,  
immediate and unreasonable risk to the health or safety of a person or a child.

#### IV. Decision Making

##### 4.1 Day to Day Decisions

Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent. Regardless of the allocation of decision making in this parenting plan, either parent may make emergency decisions affecting the health or safety of the children.

##### 4.2 Major Decisions

Major decisions regarding each child shall be made as follows:

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4 2. Additional time for mom to visit: Mom may fly to AZ whenever she has the ability outside of  
5 the residential schedule as long as she gives dad at least 14 days' notice and it does not interfere  
6 with dad's residential and or holiday or special occasion times, and it does not interfere with the  
7 children's school or extra- curricular activities or any already previously scheduled events. Mom  
8 may do this up to one time a month, but not on top of already scheduled time with mom per other  
9 visits.

10 3. NO Corporal punishment: No form of any corporal punishment at all of any kind by mother  
11 or father or any significant other. Mom and dad shall agree upon the type of punishment and  
12 come up with what they think is fair and reasonable.

13 4. Alcohol and drugs: No consumption of alcohol by mom when the children are in mom's care.  
14 No use of any drugs by both parents or significant others. Neither parent nor significant other to  
15 be intoxicated while the children are present in their care.

16 5. Access to Information: Each parent shall have the right to equal access to all of the child's  
17 medical, physiological, psychiatric, counseling, criminal, juvenile, and education records and to  
18 any information relevant to the child's best interests or welfare – including, but not limited to, any  
19 records kept or maintained by the State of Washington, the Department of Health and Social  
20 Services, and Child Protective Services consistent with Washington State law and HIPPA.

21 \* Mother to provide accurate social security cards for both children, as well as the birth  
22 certificates for each child to the father no later than one week after the final parenting  
23 plan is entered by the Court (September 26, 2014 deadline to provide above mentioned  
24 documents to father)

25 6. Enrichment Activities: Each parent shall be responsible for keeping himself/herself advised  
of athletic and social events in which the child participates. Both parents may participate in  
school activities for the child regardless of the residential schedule.

7. Child's Involvement: Neither parent shall ask the child to make decisions or requests  
involving the residential schedule. Neither parent shall discuss the changes to the residential  
schedule which have not been agreed to by both parents in advance. Neither parent shall advise  
the child of the status of child support payments or other legal matters regarding the parents'  
relationship. Neither parent shall use the child, directly or indirectly, to gather information about  
the other parent or take verbal messages to the other parent.

8. Derogatory Comments: Neither parent shall make derogatory comments about the other  
parent or allow anyone else to do the same in the child's presence. Neither parent shall allow or  
encourage the child to make derogatory comments about the other parent.

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9. Notification of Extraordinary Information: Each parent shall notify the other parent as soon as possible, and within 1 hour is preferable, upon receipt of extraordinary information regarding the child, such as emergency medical care, major school discipline, unusual or unexplained absence from the home, or contact with the police or legal authority.

10. Child Grievances: Each parent agrees to encourage the child to discuss a grievance with the parent directly with the parent in question. It is the intent of both parents to encourage a direct child-parent bond.

11. Emergency Contact: medical forms, school forms, and extracurricular forms, Both parents shall be listed as emergency contacts on all forms.

12. Family Wizard: Both parents shall use Family Wizard and both parents shall pay equally. All communication between mom and dad shall take place through family Wizard. Family Wizard to be set up within 30 days of the entry of the final parenting plan. All communication prior to Family Wizard being set up shall be by email only.

13. Body Modification: Both parents shall have joint decision making on body modification of any kind, to include piercings, and tattoos.

14. Each Parent's home: each parent shall respect the rights of the other parents house, and shall not dictate what the other parent may or may not allow for the children, as long as it is not detrimental to the children.

15. Social media: each parent shall control social media in their home and allow reasonable social media that is age appropriate for the children

16. Counseling: Children are to be enrolled in individual counseling as soon as possible and no later than 30 days from the date of this order. Mother is to provide father with all necessary information to allow father to enroll the children in counseling and shall cooperate with father to provide insurance coverage to allow the children to be enrolled in counseling. Any uncovered expenses associated with counseling for the children shall be borne equally by both parents.

17. Tax claim on children: Father to claim the children for 2014 and 2015 and in future years mom to have even years starting in 2016 and dad to have odd years.

### VII. Declaration for Proposed Parenting Plan

[X] (Only sign if this is a proposed parenting plan.) I declare under penalty of perjury under the laws of the state of Washington that this plan has been proposed in good faith and that the statements in Part II of this Plan are true and correct.

Chris C...  
Father

9-10-14 Kingman AZ  
Date and Place (City and State) of Signature

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Mother \_\_\_\_\_ Date and Place (City and State) of Signature \_\_\_\_\_

**VIII. Order by the Court**

It is ordered, adjudged and decreed that the parenting plan set forth above is adopted and approved as an order of this court.

**Warning:** Violation of residential provisions of this order with actual knowledge of its terms is punishable by contempt of court and may be a criminal offense under RCW 9A.40.060(2) or RCW 9A.40.070(2). Violation of this order may subject a violator to arrest.

When mutual decision making is designated but cannot be achieved, the parties shall make a good faith effort to resolve the issue through the dispute resolution process.

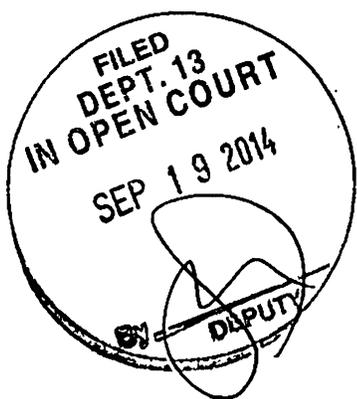
If a parent fails to comply with a provision of this plan, the other parent's obligations under the plan are not affected.

Dated: 9/19/14 <sup>KJN</sup>

Kathryn J. Nelson  
Judge/Commissioner  
**KATHRYN J. NELSON**

Presented by:  
Tarah M. Verib  
Signature of Party or Lawyer/WSBA No. 43703  
Tarah Verib

Approved for entry:  
Beverly Ibsen  
Signature of Party or Lawyer/WSBA No. 42889  
Beverly Ibsen



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