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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

ANGELA MIRANDA,

v.

CHRISTOPHER CRUVER

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**APPELLANT'S REPLY BRIEF**

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

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## I. INTRODUCTION

Over one third of Respondent's brief is devoted to arguing that the court has subject matter jurisdiction to enter agreed parenting plans prior to the expiration of the statutory 90 day period.<sup>1</sup> This argument is unresponsive as a lack of subject matter jurisdiction was not one of Appellant's<sup>2</sup> assignments of error. In addition, Respondent's arguments regarding Mother's disciplinary practices are addressed and rebutted in great detail in Mother's brief.<sup>3</sup> Therefore, Mother will not directly address these arguments here.

Instead, this reply brief will focus the court's attention on four issues:

1. The court's scheduling orders were contrary to the agreement of counsel and prejudicial to Mother;
2. The court's entry of a final parenting plan with the expressed goal of maintaining the status quo was contrary to statute and case law;
3. It was error for the court to fail to enter findings on future risk; and

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<sup>1</sup> Response Brief at Pg. 8-14

<sup>2</sup> Hereinafter "Mother"

<sup>3</sup> Mother presented extensive argument that her disciplinary practices did not harm the children and thus did not rise to the level of abuse. *See* Appellant Brief at p. 8-10; 21-27; 30; 33 (February 11, 2015).

4. Respondent implicitly concedes that the trial court was biased based on a prior dependency petition that the court had dismissed.

## II. REPLY ARGUMENT

### A. The Scheduling Orders Were Contrary to the Agreement of Counsel and Prejudicial to Mother

The procedural posture of this case was highly contested from the beginning. The adversarial posture of the parties required the court to apply extra diligence in safeguarding the due process rights of all parties. A concern for stability through quick resolution of issues is secondary to the need to safeguard due process when a parent's constitutional right to parent their children is at issue.

For example, in *In re CRB*,<sup>4</sup> the trial court entered a final order on a May 9, 1990 review hearing that terminated mother's parental rights because the child had been found by DSHS to be dependent and the mother could not be located. Although mother's attorney requested the court proceed based on the trial schedule to a final hearing on the merits set for October 15, 1991 (5 months subsequent), the court denied this motion. *CRB*, 62 Wn. 608 at 613.

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<sup>4</sup> 62 Wn. App. 608, 814 P.2d 1197 (1991).

Citing its belief that there would be no change in the child's situation, the court terminated the mother's parental rights without adherence to the trial schedule. *Id.* On appeal, the Court of Appeals reversed. While noting that a child has a "right to a stable home," the court concluded that the trial court had violated Mother's due process rights. *Id.* at 606.

In this case, both parents argued for primary placement of the children. While this case does not involve termination of parental rights, the father accuses the mother of abusing the children.<sup>5</sup> Mother argues that her disciplinary practices did not rise to the level of abuse.<sup>6</sup> Mother's constitutional right to parent her children was at stake because father was asking to relocate the children from Washington to Arizona and place restrictions on Mother's residential time. *Cf. CRB*, 62 Wn. App. at 615 ("[A] natural parent's interest in the care and custody of his or her child is a 'fundamental liberty interest'" (internal citation omitted)). Given the highly adversarial nature of the proceedings and the restrictions on Mother's residential

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<sup>5</sup> Respondent renews these accusations in his response brief. *See* Response Brief at 1-6.

<sup>6</sup> Appellant's Brief at 20-28.

time, Mother's due process rights were violated by the rushed nature of the proceedings and by the court's stated desire to enter a parenting plan that would maintain the status quo.

Counsel for both parents argued against an expedited trial setting and requested the appointment of a Guardian Ad Litem (GAL). VRP (July 31, 2014) at 3: 19-22. Although Respondent now insists there was no error with the court's scheduling orders, at the time counsel argued strenuously that she had not had sufficient time to prepare the case. *Id.* 4, 6-8. Respondent's brief does not address (and therefore implicitly concedes) that the expedited trial setting precluded normal discovery, investigation, and negotiation processes. *Cf. State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (noting that by failing to respond in a brief, the State "concedes this point").

But for the fact that the court placed children with the Respondent, he would be raising the same issues to this court on review. The law must be applied fairly and evenly to all litigants. The fact that Respondent argued for following the regular trial schedule and appointing a GAL at the trial court prevents him from

contesting these issues now.

B. The Court's Goal of Entering a Final Plan Implementing the "Status Quo" Was Contrary to Statute and Case Law

The statutes and case law are clear that the court is not to blindly follow the "status quo" in determining the provisions of a final parenting plan. In enacting RCW 26.09.187, the Legislature was "concern[ed] that the parent who had been awarded temporary residential placement of the child *not* be given unfair advantage when the permanent parenting plan was entered." *Marriage of Kovacs*, 121 Wn.2d 795, 808, 854 P.2d 629 (1993); *See also In re Marriage of Watson*, 132 Wn. App. 222, 234, 130 P.3d 915 (2006) ("the provisions of a temporary parenting plan or other temporary order should not adversely affect the final determination of a parent's rights") (emphasis added). RCW 26.09.060 (10 (a)) ("A temporary order ...[d]oes not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding").

Even where a parent obtains a protection order restricting the other parent's time, the court may not rely on the sole fact of the protection order to determine the final parenting plan.

[A] court may not allow a protection order to serve as a de facto modification of a parenting plan...A trial court runs afoul of these rules and abuses its discretion when it orders restrictions...based on the adverse effects of the court's own temporary orders.

*Kovacs*, 132 Wn. App. at 234-35.

In this case, the court ordered temporary placement of the children with Respondent in a dependency proceeding (later dismissed) and then announced the goal of maintaining this status quo prior to hearing any evidence at the trial:

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>7</sup>

Thus, rather than consider all the evidence and testimony for its own merits, the court simply relied on the status quo it had created by its own temporary orders. Because the court is not to consider a temporary placement as dispositive, it was legal error for

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<sup>7</sup> VRP (July 31, 2014) at 6 (emphasis added).

the court to allow the dependency placement to color its decision-making.

C. It Was Error to Fail to Enter Findings on Future Risk

At trial, Mother presented a two-part argument to the court. She first presented testimony and argument that the disciplinary practices in her home did not rise to the level of abuse or neglect. This argument is addressed in detail in Mother's opening brief and will not be repeated here. The Respondent fails to address the second part of Mother's argument. Namely, Mother argued that even if her disciplinary practices rose to the level of abuse, the risk of future harm was so remote that the court was free to enter a parenting plan without any restrictions on the mother's residential time.<sup>8</sup>

Specifically, the court is free to place children in the home of a parent who has been found to have committed abuse or neglect in the following circumstance:

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

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<sup>8</sup> Appellate Brief at 28-32

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).

Mother introduced evidence and testimony that there was a low risk of future abuse to explain to the court why it was in the children's best interests to be placed in her home. Mother introduced un rebutted testimony that the children had never suffered lasting harm, that a significant period of time had passed since many of the objected-to disciplinary practices had occurred, and that both she and her partner Tom had taken extensive parenting classes to learn disciplinary strategies that did not involve corporal punishment.<sup>9</sup>

Specifically, 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

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<sup>9</sup> See Brief of Appellant at 23-24, 28-33.

the kids back.

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

On her motion for reconsideration, Mother introduced an expert's evaluation of her and her live-in partner that there was a low risk of abuse in the future. 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). The court ignored mother's testimony and evidence by failing to enter findings on risk. Instead, the only mention the court made concerning risk was that mother's exercise of her due process right to argue that the disciplinary practices were not abuse "ma[de] her a risk to [her] children." VRP (October 24, 2014) at 21.

At best the court ignored Mother's repeated invitations to make findings on an issue clearly before the court that was relevant to determining the best interests of the children. At worst, the court made an oral finding that mother's exercise of her due process rights was itself evidence of risk of future harm. Under either scenario, the court showed bias against Mother and the case should be remanded

for a new trial before a different judge.

D. Respondent Implicitly Concedes the Trial Court Was Biased

Respondent concedes that the court's determination of abuse rested entirely on the determinations of two social workers.<sup>10</sup> Neither social worker personally interviewed the children. VRP (August 14, 2014) at 83:12-14; VRP (August 20, 2014) at 14: 15-17. Moreover, the dependency petition was dismissed prior to trial.<sup>11</sup> By relying entirely on the CPS investigation and disregarding all evidence to the contrary, the trial court demonstrated bias against Mother. As discussed above, this bias was present from the beginning in the court's expressed desire to enter a final parenting plan that upheld the "status quo."

At trial, the court must make its own findings and conclusions regarding whether abuse occurred, the risk of future abuse, and what parenting plan is in the best interests of the children. In making these determinations, the court is not bound by any prior investigations. *Cf. In re Marriage of Swenson*, 88 Wn. App. 128, 138, 944 P.2d 6

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<sup>10</sup> Response brief at 18-19.

<sup>11</sup> Appellate Brief at 18-19.

(1997). Rather, the court must consider all testimony, evidence, and argument and make independent findings. *Id.* at 141 affirming that the trial court should “examine[] the GAL report and the particular facts,” balance the “interests of all parties involved,” while ensuring the children’s “best interests [remain] paramount.”

In this case, the supervisory social worker Kate Orlando testified that the choice facing the court was whether to place the children in foster care or with their father. VRP (August 20, 2014) at 12-13. This framing of the issue struck at the heart of Mother’s constitutional right to due process. The court had a duty to make an independent evaluation of all of the evidence and testimony and to make independent findings on whether abuse occurred and, if so, what the future risk of abuse would be without restrictions on mother’s residential time.

The Respondent’s brief argues that the dependency proceedings and the social worker’s conclusions settled the matter.<sup>12</sup> In effect, this is an argument that the court had no independent duty to make findings and no duty to consider the evidence mother

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<sup>12</sup> Respondent’s brief at 18-19.

presented that put the discipline into context or showed that it was not likely to occur in the future. As a state agency, it is CPS that is bound by the court's findings, not the other way around. To conclude that a court was free to disregard mother's evidence and testimony or that the court was bound by a CPS investigation destroys the notion of due process and renders the entire trial a farce.

### III CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and grant the relief Mother requests in her Appellant Brief.

Dated this 22<sup>nd</sup> Day of April, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Beverly M. Ibsen, certify under penalty of perjury of the laws of the State of Washington that on April 22, 2015, I caused to be served a copy of the above document entitled "APPELLANT'S REPLY BRIEF" on the interested parties in this action, by personal delivery to the office of Tracey Munger, attorney for Respondent, at the following address:

Tracey Munger, Attorney at Law  
1008 S. Yakima Ave. Suite 201  
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DATED this 22<sup>nd</sup> of April, 2015 at Gig Harbor, Washington.



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