

No. 50190-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARINA NICOLE TURNER,

Respondent,

v.

RANDOM ERIK VAUGHN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE KITTY-ANN van DOORNINCK

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves an unmarried couple that remained in a committed intimate relationship (“CIR”) for 4 years and two months. The parties began dating in July 2011 and lived together from October 2011 through December 2015. During the relationship they held a marriage ceremony on the beach of Thailand, held themselves out as husband and wife, pooled their resources and conceived and parented two children.

The trial court properly found as a matter of fact that the parties were in a committed intimate relationship. The trial court has bifurcated the property and debt division of the trial and that is scheduled to be heard December 6, 2017.

Throughout the pendency of the case, Vaughn engaged in a series of bad acts:

- (1) He withdrew approximately \$1,000,000 in cash from a bank account in his name in violation of a restraining order.
- (2) Next, a hearing was held on August 23, 2016 which allowed Turner to relocate on a temporary basis to Los Angeles with the parties’ two minor children. A little after midnight that night of the hearing,

Vaughn and his girlfriend arrived at Turner's residence and stole her car with most of her and the children's personal belongings. The belongings included all of Turner's identification, credit/debit cards, driver's license, etc., etc. Vaughn then testified that he sold the car to his girlfriend, Allysa White for 10 dollars. RP 333.

- (3) This obviously caused Turner great inconvenience and she ended up having to fly with her mother and two young children to Los Angeles and navigate TSA with no identification. RP 432.
- (4) Vaughn refused to pay child support for many months. RP 195, 196.
- (5) Vaughn was verbally and emotionally abusive to Turner during his daily Skype calls and the trial court specifically found Vaughn "demonstrated that he was aggressive and unpleasant and not focused on the children during the videos." RP 161,162, 666.

The trial court repeatedly found Vaughn's testimony to not be credible. RP 655, 658, 659, 660.

This court should affirm the trial court's finding that a

CIR existed from October 2011 to December 2015. RP 655. Further, this court should affirm the trial court's ruling that there were no instances of misconduct, irregularity, nor any other improprieties by Turner or the trial court. Lastly, this court should award Turner her attorney fees on appeal because Vaughn's appeal is frivolous.

II. STATEMENT OF FACTS

The Court made a finding of a Committed Intimate Relationship based upon the primary case law regarding *Connell vs. Francisco*, 127 Wn.2d 339 (1995). RP 654. Specifically, the Court found there was continuous cohabitation between the parties between October 2011 to December 2015. RP 655. The Court also found Vaughn was not credible. RP 655, 658, 659, 660.

The first factor of *Connell vs. Francisco* is continuous cohabitation. RP 655. The parties began residing together in October 2011 in Lynnwood, WA. RP 33, 209, 210, 590. EX 14. Shortly after cohabitation in October 2011, the parties opened a joint bank account through Chase ending in 5526, which remained open through April 2016. RP 33, 590. This is the same account into which Turner took out average withdrawals of \$9,140 per month over a 14- to 16-month period. EX 105. The

parties also purchased a vehicle together in April 2012. RP 37. EX 18. The parties then moved to West Hollywood, CA and signed a lease together on September 13, 2012. EX 15. Exhibits also provide evidence of Vaughn's pay stub and utility bills with the West Hollywood address. EXs 22, 24 and 25. They also shared a vet bill from the pet hospital in West Hollywood for their dog on April 15, 2013. EX 23. There is the Chase bank statement solely in Vaughn's name with the West Hollywood, CA address dated May 24, 2013 through June 20, 2013. EX 97. The Bank of America Statements solely in Vaughn's name with the West Hollywood, CA address. EX 96. There were wedding invitations from Turner's relatives in April 2013, which was during the timeframe the parties were cohabitating in West Hollywood, California. EX 26. Vaughn was invoiced for advertising signs in Seattle, which was invoiced to his West Hollywood, CA residence on April 11, 2014. EX 6.

Emails of the parties' communications between November 28, 2012 and August 2013 were admitted evidencing the parties' committed and intimate relationship that includes Vaughn stating, "I love you and thank you for taking me to the airport. I hope this trip is shorter than planned, so I can come home and kiss you. Thanks for always being there." EX 27. The

parties traveled to Thailand in May 2013 where the engaged in a private wedding ceremony on the beach and exchanged rings. RP 102. Photographs of the parties in Thailand and other family photographs. EX 11. Vaughn then refers to Turner as his wife in various cards. EX 80. Their child, Dean Turner was born December 20, 2013. Evidence of mail from the Lexington Apartments to both parties at their new residence in Seattle, WA on March 5, 2014 was provided. EX 13. The parties then signed a lease together for an apartment in Puyallup, WA on May 12, 2014. EX 16. Family Christmas Cards from 2014 and 2015 were admitted. EX 55.

The above also supports the second factor of *Connell vs. Francisco*, is the duration of cohabitation, which the Court found to be from October 2011 to December 2015. RP 655.

The third factor of *Connell vs. Francisco* is purpose of the relationship. RP 656. The Court found there was love, intimacy, cohabitation and shared life and goals. RP 656. The parties conceived three children during cohabitation; two of which were live births. Evidence of greeting cards, Vaughn's Facebook page where he holds himself out to be married and Facebook posts over the years evidencing a loving couple. RP 657. EXS 3, 4, 11. Email from Vaughn to Turner dated April 10, 2013 stating, "I

love you a ton, wish we had more cuddles this morning :-).” EX 21. The Court also made note that in several of the photographs, Vaughn is wearing a wedding ring. RP 657. Google Voice transcripts were also provided evidencing Vaughn’s co-worker and live-in paramour, Alyssa White communicating with Vaughn referring to Turner as “your wife” on February 11, 2016. RP 450-451. EX 53.

The fourth factor of *Connell vs. Francisco* is pooling of resources and services for joint projects. RP 657. The Court found there was no question that there was a joint account and that there’s indication of average monthly draws that Turner took out of the joint account. RP 657. EXS 12, 105. Court found Turner ran the household with this account in terms of taking care of bills. RP 657. Vaughn testified “this was money spent for personal living expenses not funds transferred out.” RP 557. Joint house cleaning payments endorsed by Turner from the joint account. EX 19. Turner also provided the 1099-K IRS Form from 2015 showing the Square Payment proceeds from Vaughn’s business ventures in the amount of \$2,227,463.97. EX 5.

The fifth factor of *Connell vs. Francisco* is the intent of the parties. RP 657. The Court found this factor goes along with the purpose of the relationship. RP 658. Court found there was

no controversy that there were three pregnancies, two live births. RP 658. The intent of the relationship was love. This factor is evident throughout the numerous exhibits to include, emails, photographs, cards, wedding ceremony, trips together, children, several joint leases, shared bank accounts, both parties sharing roles for supporting a family, etc.

III. REPLY ARGUMENT

Whether a committed intimate relationship exists is a question of fact, subject to the deferential "substantial evidence" standard of review. *In re Sutton & Widner*, 85 Wn. App. 487, 490- 91, 933 P.2d 1069, *rev. denied*, 133 Wn.2d 1006 (1997). This court must reject Vaughn's challenge to the trial court's determination that the parties were in a committed intimate relationship/equity relationship from October 2011 to December 2015.

A committed intimate relationship "is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). This was the very essence of the parties' four-year relationship.

As noted in *Byerly v. Cail*, 193 Wn. App. 677, 685-686 (Div II, 2014):

The committed intimate relationship doctrine serves to protect unmarried parties who acquire property during their relationships by preventing the unjust enrichment of one at the expense of the other when the relationship ends. *See In re Marriage of Pennington*, 142 Wash.2d 592, 602, (2000).

In deciding whether the parties had a committed intimate relationship, courts consider several nonexclusive factors, none of which necessarily has more significance than another: (1) continuity of cohabitation; (2) duration of the relationship; (3) purpose of the relationship; (4) pooling of resources and services for joint projects; and (5) the intent of the parties. *Pennington*, 142 Wn.2d at 601–05.

Courts should not apply these factors in a hypertechnical fashion, but must base the determination on the particular circumstances of each case. *Pennington*, 142 Wn.2d at 602.

Whether the parties had a committed intimate relationship presents a mixed question of law and fact. *Pennington*, 142 Wn.2d at 603–03, 14 P.3d 764. Therefore, we defer to the trial court's unchallenged findings of fact, as well as challenged findings supported by substantial evidence in the record, but review de novo whether the trial court's legal conclusions properly follow from those findings. *Pennington*, 142 Wash.2d at 602–03, 14 P.3d 764. In this review, we neither weigh the evidence nor judge the credibility of the witnesses. *In re Marriage of Greene*, 97 Wn. App. 708, 714 (1999).

Byerly at 685-686.

- A. Substantial evidence supports the relationship meeting all five *Connell* factors that a committed intimate, equity relationship existed from December 2008 through February 27, 2015.**

As delineated specifically above in the Statement of

Facts, there is substantial evidence supporting the trial court's findings of fact that this relationship strongly and unquestionably meets all five of the *Connell* factors from October 2011 through December 2015.

B. There is no basis to grant a new trial based upon CR 59(a)(1) and (2) and should be denied.

CR 59 provides as follows:

NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors.

CR 59. (Emphasis added).

The Court did not make any final findings based on the declaration submitted by Turner. RP 668, 669. Specifically, the Court rescheduled the hearing in order to provide Vaughn an opportunity to respond. RP 668. Further, the Court reserved due to the declaration submitted by Turner related only to the parenting plan. There was nothing related to the CIR. Vaughn is attempting to have a “do over” on all issues.

Lastly, the Court did not make any findings or a final ruling on the parenting plan and set the matter over in order for Vaughn to provide a response to the Court in making a final determination regarding the parenting plan. Specifically, the order entered on March 9, 2017 states: “Pending a review hearing of April 6, 2017 at 1:00 pm, Mr. Vaughn shall remain on professionally supervised visitation in Los Angeles every other Saturday for two hours.” During the hearing, the court explained why it decided to reimpose supervised visitation and further stated that the order regarding supervised visitation was the court’s temporary order. RP 669. Further the Court stated, “So, I have grave concerns. I certainly would like Mr. Vaughn to respond, and if there’s any documents to support any of it one way or the other, I would really like to see that.” RP 668. The

Court merely stated that because of Turner's declaration the court would postpone a final decision on this issue until a future hearing. RP 668, 669. In fact, Vaughn has done this by subsequently filing both his and counsel's declarations.

This Court should note that Vaughn executed a Civil Rule 2A Stipulation and Settlement Agreement on July 22, 2017, which states on Page 2 Paragraph II(9), "All appeals related to parenting are dismissed with prejudice. The Civil Rule 2A Stipulation and Settlement Agreement is attached hereto as Exhibit "A" for reference.

Vaughn asserts a frivolous citing of RPC 3.5(A)&(B). Neither of these rules apply to the facts of this case.

RPC 3.5(a) prohibits a lawyer from seeking to influence a judge by a means prohibited by law. Filing a declaration, serving the opposing lawyer and providing a working copy to a judge is not prohibited by law.

RPC 3.5(b) prohibits a lawyer from ex parte communication with a judge during a proceeding. The filing of a declaration with contemporaneous service on opposing counsel with a copy to the judge is, by definition, not ex parte. There is no violation of RPC 3.5(b).

The law is otherwise: "Written communications with a

timely copy to opposing parties or their lawyers are not ex parte.” Tom Andrews et. al., THE LAW OF LAWYERING IN WASHINGTON, 8-20 (Wash. State Bar Assoc. 2012) (citing Restatement Third of the Law Governing Lawyers, §113, cmt. c). Washington Judicial Ethics Opinions have adopted this definition: “[C]ourts generally apply the term to mean communications made by or to a judge, during a proceeding, regarding that proceeding without notice to a party. *See State v. Watson*, 155 Wn.2d 574, 578-80, 122 P.3d 903 (2005).” Judicial Ethics Advisory Opinion 16-06 (September 9, 2016). Copy attached as Exhibit #2.

Vaughn does not deny receiving service of Turner’s declaration and in fact acknowledges receipt of the declaration states they knowingly did not respond. RP 667. By definition there was no ex parte communication.

Respondent’s counsel attempts to morph the service of the declaration into an ex parte communication because there was no motion filed, and he received no notice that the court would receive a working copy. There is no Superior Court rule or Pierce County Superior Court Local Rule that requires that the filing party provide notice that a working copy is provided to the judge.

Vaughn decided because of the lack of an unrequired

notice that he need not take any further action. He knew that the declaration was filed the day before the court was to announce its ruling on various issues from the first part of the trial of this case. He knew that the declaration contained information that negatively attributed certain actions towards Vaughn. Despite this information Vaughn took no action. Vaughn's decision to take no action does not make the filing of the declaration and the providing of a copy to the judge an improper communication.

In contrast, there are lawyer discipline cases where lawyers engaged in ex parte conduct that violated RPC 3.5(b). One lawyer was suspended for 18 months for misconduct that included sending a trial judge two letters in response to the opponents motion for a default judgment based upon the lawyer's discovery rule violations. *In re McGrath*, 174 Wn.2d 813, 280 P.3e 1091 (2012). The lawyer's first typewritten letter addressed the motion for default and attacked the opposing party's Canadian citizenship. *Id.* at 827. The second handwritten letter attacked the opposing party as an "alien" and requested that the judge freeze her assets. *Id.* Neither the opposing counsel nor his client were aware of these letters. *Id.* at 828. The lawyer admitted that the two letters were "inappropriate" because they were ex parte contact. *Id.* The Supreme Court found a violation of RPC 3.5(b) and RPC

8.4(h). *Id.* at 830.

There was no irregularity in the proceedings of the Court, or abuse of discretion by the trial court judge which prevented Vaughn from having a fair trial.

C. There is no basis to support the trial court judge's recusal based upon violation of CJC 2.9.

Vaughn's claim of judicial bias is based in part upon the court's statement at the end of the trial that it would end Vaughn's supervised visitation. A court's oral opinion is not a judgment, and the court may freely change its mind until formal judgment is entered. The Washington Supreme Court previously noted: "[A] trial judge's oral decision is no more than a verbal expression of [its] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963); *Carns v. Shirley*, 44 Wn.2d 662, 269 P.2d 804 (1954). Therefore, the fact that the court changed its opinion after reviewing the declaration fails to prove a lack of impartiality. This is especially true because the court planned to revisit the issue at a review hearing on April 6, 2017.

The recusal request is also based in part upon CJC, Rule 2.9(a) which prohibits a judge from considering an ex parte communication. No ex parte communication occurred. This rule is not a basis for the judge to recuse herself.

Vaughn's brief also claims that CJC Rule 2.11 requires that a judge recuse herself in any proceeding where the judge's impartiality might have been reasonably questioned. The Code of Judicial Conduct defines "impartiality" as the absence of bias or prejudice in favor of, or against parties or particular parties, as well as the absence of an open mind in considering issues that may come before the judge.

A judge's finding that a party is not credible as the judge indicated during the March 9, 2017 hearing is not a demonstration of bias. RP 655. This kind of finding is a required part of a judge's decision when resolving the issues before the court.

The judge kept an open mind regarding the issue of supervised visitation. She did not issue a final ruling. She ruled that, until the April 6, 2017, hearing she was re-imposing supervised visitation. This temporary order with a future hearing date permits Vaughn to have his "day in court" on the issues and provide evidence and argument to support his position. Vaughn and his counsel both filed declarations addressing this issue, and

since the issue was resolved at a future hearing by agreement of the parties pursuant to Civil Rule 2A Stipulation, the judge's March 9, 2017, ruling and order does not demonstrate a bias or prejudice against Vaughn.

The best interests of the child[ren] is the standard by which a court determines and allocates parental responsibility. *In re Parentage of Schroeder*, 106 Wn.App. 343, 349, 22 P.3d 1280 (2001). This is the standard the court applied in response to the declaration. The court found, for now, that the children's best interests were served by requiring that Mr Vaughn have only limited supervised visitation. A court's application of the correct legal standard does not demonstrate bias.

During the March 9, 2017, hearing the judge announced that she found that Vaughn had, based upon the trial evidence, including Vaughn's contacting CPS in February 2017, engaged in abusive use of conflict which created a danger of serious damage to the child's psychological development. RP 660.

The judge also remarked, while explaining her finding of a committed intimate relationship that: "Mr. Vaughn, apparently denies any kind of relationship, and I will make a specific finding that I do not find him credible." RP 655.

The judge also indicated that she was going to find .191

factors against Vaughn and stated: “I have indicated before, I have huge concerns about his credibility.” RP 659. She continued: “I have huge concerns about his ability to follow a court order — any court order — or a contract for that matter, as the evidence was clear that he violated the contract of the visitation supervisor.” RP 659.

The judge very correctly made these decisions after hearing the trial evidence. A losing party does not prove bias by complaining about adverse judicial decisions.

Because there was no improper ex parte communication with the judge, neither RPC 3.5 (a) or (b) nor CJC Rule 2.9 or 2.11 require that the judge recuse herself. witness.

The judge’s decisions about Vaughn’s credibility and his abusive use of conflict are based upon the evidence at trial. These determinations do not show a bias or prejudice against Vaughn.

The judge permitted Vaughn to submit more evidence to support his position on April 6, 2017. Thus, before she makes a final decision, Vaughn will be heard.

There was no improper ex parte communication. They also demonstrate that Vaughn made a knowing decision to take no action rather than take steps to determine whether the court received a working copy of Turner’s declaration. RP 667.

Vaughn's decision does not mean that the trial court's consideration of Turner's declaration was improper.

The law of ex parte communications does not support this motion. Respondent cannot base a motion upon the prohibition against ex parte communication when none occurred.

Vaughn's argument lacks factual or legal support and is designed to get a new judge so that the process can restart. With a restart, perhaps Vaughn can prevail on the issues he lost after the trial. This is an improper purpose.

As an aside, Turner is asking that this Court independently review the opinions of Lee Ripley and Peter Jarvis (CP 87-137) as additional legal authority on these issues regardless of whether or not the trial court considered them or gave them any weight.

D. This court should award attorney fees to Turner because the appeal is frivolous pursuant to RAP 18.9.

Turner requests attorney fees under RAP 18.9 because Vaughn's appeal is frivolous.

"An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal."

Advocates for Responsible Dev. V. Wash. Growth Mgmt.

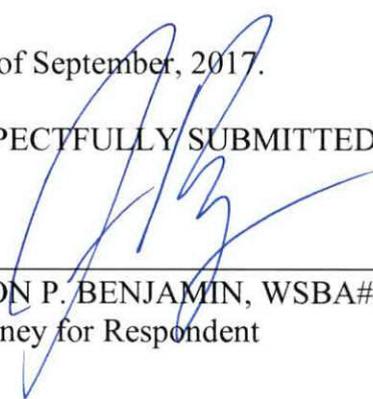
Hearings Bd., 170 Wn.2d 577, 580 (2010). An appeal is not frivolous where the appellate raises even one debatable issue. *Advocates*, 170 Wn.2d at 580. In this appeal, there is not even one debatable issue.

IV. CONCLUSION

Based upon the foregoing, this court should affirm the trial court in all regards. This court should reject Vaughn's appeal and award Turner her attorney fees on appeal.

Dated this 13th day of September, 2017.

RESPECTFULLY SUBMITTED,



JASON P. BENJAMIN, WSBA#25133
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on the 13th day of September, 2017, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

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DATED this 13th day of September, 2017, at Tacoma,
Washington.


Lindsay Bertrand

"EXHIBIT A"

THE SUPERIOR COURT OF WASHINGTON STATE FOR PIERCE COUNTY

Regarding the Matter of:

MARINA TURNER, Petitioner,

and

RANDOM VAUGHN, Respondent.

Cause No: 16-3-00665-4

Civil Rule 2A Stipulation
and Settlement Agreement

No Clerk's Action Required

I. Finality/Enforceability of Stipulation: The parties signing this Stipulation understand and agree:

a. **Legally Enforceable Agreement.** The terms of this Stipulation constitute a legally binding agreement in full settlement of all claims encompassed within this document. They agree to seek court approval of it by such orders as are required to make it fully effective and enforceable.

b. **Finality and Enforceability.** Even though final documents need to be entered by the court, this Stipulation itself is a legal document, fully binding upon signing and enforceable by court action.

c. **Assistance of Counsel.** Each party is represented by counsel in the negotiation, review and approval of the Stipulation; or has had it reviewed by their own counsel; or has had ample opportunity to meet with counsel of their own choosing to review all documents prior to signing.

d. **Voluntariness.** This Stipulation is entered into freely and voluntarily, with no coercion, force or undue influence employed in the negotiation or signing of this Stipulation by any person.

e. **Non-reliance.** In signing this document, each party declares that they are doing so without reliance on any representations other than those expressly set forth herein or adopted herein.

f. **Fairness.** The parties acknowledge and stipulate that this settlement is fair and equitable, and is in the best interests of their children, if any. They request court approval of this settlement.

g. **Certification by Parties.** The parties certify upon penalty of perjury according to the laws of Washington that they have fully disclosed all facts material to the resolution of the issues encompassed by this agreement within their knowledge.

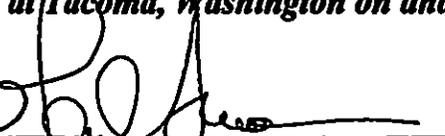
"EXHIBIT"

h. Copy Valid as Original. A photocopy of this document shall be valid as a duplicate original.

II. Parenting Plan Order: The parties have 2 minor, dependent children Dean Vaughn and Hank Vaughn.

1. Random to have the boys July 29 & 30, August 5 & 6 and Aug 12 to 20.
2. Random to have the boys 9 days per month (third week) until boys January 2018, then he will have 10 days per month (third week) thereafter and one 14 days period (in lieu of a 10 day period) for a month in the summer.
3. Each party to have Christmas Eve/Day as a block every other year. *Thanksgiving every other year; Halloween every other year*
4. Parties (Marina & Random to be present) to exchange at Ontario, CA police station. *Until Dean starts school. Thereafter the exchange would occur within Child's School district.*
5. No Skype visits. *EXCEPT BY A DEED WITH NON-RESIDENTIAL PARENT*
6. No mail or packages to Marina's home or PO Box. *EXCEPT BY A DEED WITH NON-RESIDENTIAL PARENT*
7. Unfounded CPS reports are a violation of a court order and subject to contempt. *related to parenting*
8. All appeals to date are dismissed with prejudice. *Neither party to harass the other.*
9. All contempt actions to date are dismissed with prejudice.
10. Marina is primary caretaker/custodian.
11. Once each child begins Kindergarten, then the boys not to miss school for visits for either parent. *Enroll in and*
12. Random to complete the 10 to 12 parenting classes prior to visit to going to 100 steps.

This agreement is approved in full settlement of the issues described above. It is signed at Tacoma, Washington on and is effective as of this 22nd day of July, 2017.


MARINA TURNER, Petitioner


RANDOM VAUGHN, Respondent


JASON BENJAMIN, WSBA #25133
Attorney for Petitioner


CLAYTON R. DICKINSON, WSBA#13723
Attorney for Respondent

* Neither party to falsify photos or other evidence to make false claims of abuse about the other parent to CPS or the police.

** In any year that mother has Christmas or Thanksgiving Father will enjoy a different 9 day block of visitation if mother's time takes father's time

BENJAMIN & HEALY

September 13, 2017 - 4:51 PM

Transmittal Information

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Appellate Court Case Title: Marina N. Turner, Respondent v. Random E. Vaughn, Appellant
Superior Court Case Number: 16-3-00665-4

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