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Division II
State of Washington
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No. 51579-2

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

ELIZABETH HOPE EVARTS,
Appellant,

v.

JEREMY EVARTS
Respondent.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Parenting Plan – January 26, 2018

1. The trial Court erred by stating Elizabeth Evarts has a long-term emotional or physical problem that gets in the way of his/her ability to parent. CP 606.

2. The trial Court erred by Elizabeth Evarts uses conflict in a way that endangers or damages other psychological development of a child. CP 606.

3. The trial court erred by finding that the psychological evaluation performed by Dr. James Manley of Elizabeth Evarts should be incorporated within the parenting plan as if fully set forth therein. CP 606.

4. The trial court erred by finding that the courts oral ruling given on January 26, 2018 should be incorporated in the parenting plan as if fully set forth therein. CP 606.

5. The trial court erred by finding the residential time of Elizabeth Evarts with her children should be limited and supervised and that the cost of supervision should be paid for by Elizabeth Evarts. CP 606.

6. The trial court erred by finding that major parenting decisions must be made by Jeremy Evarts. CP 606-607.

7. The trial court erred by finding that major decision-making must be limited because one of the parents has problems as described in paragraph 3.a of the parenting plan. CP 607

8. The trial court erred by finding the custodian of the minor children to be Jeremy Evarts. CP 607.

Verbatim report of proceedings – January 26, 2018

9. The trial court erred by finding Elizabeth Evarts is not going to have the children for a period of time. 1/26/18 VRP 9.

10. The trial court erred by finding that RCW 26.09.191(3)(e), the abusive use of conflict by the parent which creates a danger of serious damage to the child's psychological development and that RCW 26.09.191 (3)(g), such other factors or conduct as the court expressly finds adverse to the best interest of the child, limits the mother's contact with the children. 1/26/18 VRP 15.

11. The trial court erred by finding Ms. Evarts not credible. 1/26/18 VRP 15.

12. The trial court erred by finding Ms. Evarts testimony pretty arrogant and condescending regarding father's role. 1/26/18 VRP 16.

13. The trial court erred by finding it is very bad judgment to have the children vote on whether to switch a visitation day. 1/26/18 VRP 17.

14. The trial court erred by finding that the mother appears very sure of herself and very destructive in her storytelling. 1/26/18 VRP 18.

15. The trial court erred by finding the exhibits, especially the emails, exhibits 49, 50, 51, 52, 53, 54, and 55 are all hostile, rude and condescending as concerning the texts. 1/26/18 VRP 19

16. The trial court erred by finding trial Exhibit 75, the Christmas present for Jeremy Evarts from Elizabeth Evarts, the wrapped parenting plan, was sarcastic and was not serious. 1/26/18 VRP 19.

17. The trial court erred by finding Mr. Evarts testimony to be credible. 1/26/18 VRP 19.

18. The trial court erred by finding that Mr. Evarts' testimony describing a very good and happy marriage two years ago but that the mother was now making decisions that put their children at risk as an excellent summary of the evidence that was presented to the court and reflects the court's concerns about the mother's ability to safely parent for the children's mental health. 1/26/18 VRP 20.

19. The trial court erred by finding the father's testimony about the domestic violence struggle to be credible. 1/26/18 VRP 20.

20. The trial court erred by finding that at the time of trial there was a high level of interparental hatred by Ms. Evarts toward Mr. Evarts and that Ms. Evarts has done everything that she can to alienate the children from Mr. Evarts. 1/26/18 VRP 22 – 23.

21. The trial court erred by finding that the mother is not a victim of domestic violence and that her testimony was not credible. 1/26/18 VRP 22 – 23.

22. The trial court erred by finding that the high level of interparental conflict by Ms. Evarts toward Mr. Evarts is the basis for placing the children with Mr. Evarts and why there are such restrictions on Ms. Evarts contact with the children until Ms. Evarts gets some effective counseling to deal with her anger toward Mr. Evarts. 1/26/18 VRP 22 – 23.

23. The trial court erred by finding that it was not going to deal with the 2016 income tax refund. 1/26/18 VRP 24.

24. The trial court erred by failing to require Mr. Evarts to contribute toward Ms. Evarts court ordered counseling at $95 per week and court ordered supervised visitation, up to $450 per week. 1/26/18 VRP 28.

25. The trial court erred by finding that if the mother wants to make a major modification to the parenting plan then she will need to file a petition to modify, however, if mother seeks something close to a 50/50 parenting plan the mother doesn't need to file a petition to modify insofar as it is the court's goal to get somewhere close to a 50/50 parenting plan. 1/26/18 VRP 31.

Findings and Conclusions about a Marriage – January 26, 2018

26. The trial court erred by finding that each party should pay his/her own attorney's fees and costs. CP 603.

27. The trial court erred by finding that the courts oral rulings of October 23, 2017 and December 21, 2017, and the court's letter ruling of January 22, 2018 and the courts oral ruling of January 26, 2018 are incorporated within the findings and conclusions about a marriage by reference thereto. CP 604.

Verbatim Report of Partial Proceedings – October 23, 2017

28. The trial court erred by finding Ms. Evarts testimony was really, really frightening and deeply disturbing and really scary. 10/23/17 VRP 3 – 4.

29. The trial court erred by finding that the children should go immediately to their father and that the mother should have supervised visitation since the court doesn't know what else to do to protect the children. 10/23/17 VRP 5 – 6.

30. The trial court erred by finding that there is no respect, that there's hatred, and that there is bitterness from mother to father. 10/23/17 VRP 5.

31. The trial court erred by finding that the mother should have supervised visitation until the court gets the psychological evaluations. 10/23/17 VRP 5.

Verbatim Report of Proceedings Review Hearing – December 21, 2017

32. The trial court erred by finding that the court's concern for the mother as set forth in Dr. Manley's report is Dr. Manley's statement that "however, her elevated level of defensiveness, repressed anger, along with her negative and polarized perspective of Mr. Evarts, may emotionally impact the children" and the court's finding that it does impact the children and that the children are to stay with Mr. Evarts. 12/21/17 VRP 5.

33. The trial court erred by finding that the mother's supervised visitation would continue until there's been some significant psychological intervention consistent with what Dr. Manley has recommended, with a nonreligious licensed psychologist or counselor, Masters level counselor, to deal with some of the anger and deregulation that's been listed in the report. The therapist needs to have a copy of Dr. Manley's report as well as Lori Harrison's report. 12/21/17 VRP 5.

34. The trial court erred by finding the house should be awarded to Mr. Evarts and the children should move in there with him because that's what's best for them and that should occur sooner rather than later. 12/21/17 VRP 6.

35. The trial court erred that the mother should have continued supervised visitation three times a week. 12/21/17 VRP 7.

36. The trial court erred that Mr. Evarts should continue to document events and that will go into decision-making in six months. 12/21/17 VRP 14.

Final Divorce Order – January 26, 2018

37. The trial court erred by finding that the respondent must pay spousal maintenance in the amount of $1,500 per month for six months and then in the amount of $1,000 a month for six months commencing February 1, 2018 and allowing petitioner's child support obligation to be offset against these payments. CP 595.

38. The trial court erred by finding each spouse will pay their own attorney's fees and costs. CP 595.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court error by entering the parenting plan which placed primary custody of the children with the father, imposed RCW 26.09.191 restrictions on mother and required professionally supervised visitation?

Assignment of Error 1

Assignment of Error 2

Assignment of Error 3

Assignment of Error 4

Assignment of Error 5

Assignment of Error 6

Assignment of Error 7

Assignment of Error 8

Assignment of Error 9

Assignment of Error 11

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Assignment of Error 22

Assignment of Error 25

Assignment of Error 29

Assignment of Error 31

Assignment of Error 32

Assignment of Error 33

Assignment of Error 34

Assignment of Error 35

2. Did the trial court error by limiting mother's spousal maintenance to six months at $1,500 and an additional six months at $1,000?

Assignment of Error 10

Assignment of Error 12

Assignment of Error 24

Assignment of Error 37

3. Did the trial court error by not awarding the appellant any attorney's fees for legal representation during the dissolution proceeding?

Assignment of Error 10

Assignment of Error 12

Assignment of Error 13

Assignment of Error 26

Assignment of Error 38

4. Did the trial court error by not granting the appellant/mother her motion for recusal?

Assignment of Error 15

Assignment of Error 16

5. Did the trial court err by not addressing the distribution of the 2016 Federal Income Tax returns refund?

Assignment of Error 23

STATEMENT OF THE CASE

A dissolution proceeding with minor children underlies this appeal. At issue is the trial court's ruling that places the parties' four minor children with the respondent/father and provides the mother with supervised visitation.

Also at issue are issues involving the parenting plan; the award of spousal maintenance; attorney's fees; and distribution of a tax return.

Factual Background

The appellant wife and respondent husband married on March 4, 2000. CP 601. They separated on August 15, 2016. CP 601. The appellant/mother filed for legal separation on August 29, 2016. On February 14, 2017 the appellant/mother filed an amended petition for divorce. CP 209-213. For the 15 years prior to separation the mother has been a stay-at-home mother and the father has had a management position with Armstrong Flooring. 10/19/17 VRP 25-26.

The parties have for minor children: Odellia Evarts, age 15; Gideon Evarts, age 12; Josephine Evarts; age 10 and Ezekiel Evarts, age 8. CP 603.

Procedural Background

August 15, 2016

Appellant/mother files for a Petition for Order for Protection in Pierce County Superior Court under cause number 16-2-02629-5. EX 5.

August 29, 2016

Appellant/mother files a petition for legal separation (CP 64-69) and obtains a restraining order which leaves the mother and children in the family home and continues to exclude the father from returning to the family home. CP 70-75; 97-101.

September 27, 2016

A temporary parenting plan was entered with no RCW 26. 09. 191 restrictions. CP 193-203. The children are placed primarily with the mother with the father having three mutually agreeable weekends per month. The court authorized the appointment of a guardian ad litem. CP 187-192 The court entered a "scope order" directing the Guardian ad litem to consider the parenting ability of both parents as well as the domestic violence by the father together with how the parent's religious beliefs could impact parenting. CP 204.

January 4, 2017

Pierce County attorney Dolores Sarandos was appointed as guardian ad litem.

October 2, 2017

Guardian ad litem Sarandos issued a report. EX 2. The Guardian ad litem, in her report, reports that the father believes that his wife is unwell, that she is delusional, and that her hostility continues to increase. The Guardian ad litem met and interviewed the children on several different occasions. The Guardian ad litem also had reviewed evaluations performed on both parents by Lori Harrison of Advantages Plus Counseling for mental health with parenting and anger management components for both parents. EX 3 and 82.

The Guardian ad litem recommended that the mother be named primary residential parent and that when communication between the parents improved that decision-making should change from sole decision-making to the mother to joint decision-making. The Guardian ad litem further recommended that the parents engage in parallel co-parenting classes. The Guardian ad litem additionally recommended that the father and children engage in family therapy with an experienced therapist. The

Guardian ad litem indicated that all of the children mentioned to her that their father gets angry very quickly and yells a lot. The Guardian ad litem concluded that the father needed to deal with this issue as it caused the children to be afraid of him. EX 2.

October 19, 2017

This matter proceeded to trial before the Hon. Kitty-ann van Doorninck, Pierce County Superior Court, on Thursday, October 19, 2017. 10/19/17 VRP 1-155.

The mother testified that even though she had a bachelor of science degree in horticulture specializing in small farms, and more specifically Mediterranean farming tailored for Southern California she had not worked during the past 15 years in order to stay home with the children. 10/19/17 VPR 25. The mother testified that she had been primarily involved with the children's schooling (10/19/17 VPR 29); their counseling (10/19/17 VPR 31); and with their medical/dental care. (10/19/17 VPR 34).

The appellant/mother testified as to the basis for a petition for domestic violence protection order that she had filed. 10/19/17 VPR 43.

The appellant/mother testified as to financial issues. One of the issues involved a 2016 federal income tax return which the

mother claimed that she never signed nor did she receive any refund therefrom. 10/19/17 VPR 52. She requested 50% of the tax refund. 10/19/17 VPR 52.

The petitioner requested an award of spousal maintenance in the amount of $7000 a month together with child support in the amount of $1696 per month. The request for spousal maintenance was for 4 years. 10/19/17 VPR 58.

The petitioner further requested an award of attorney's fees for the proceedings and testified she had not received any temporary award of attorney's fees. 10/19/17 VRP 59.

During cross-examination the appellant/mother was asked questions about the respondent/father. One of those questions dealt with the husband's alleged infidelity. 10/19/17 VRP 95. The mother responded that she had observed her husband receiving oral sex and that her husband had drugged her. 10/19/17 VPR 95.

The appellant/mother testified that her husband would drug her by putting a drug into her drink. 10/19/17 VRP 99. The appellant mother testified that she had repressed memories that were coming back about driving with her husband to Fremont and meeting with people at a sexual type of club. 10/19/17 VRP 100. The mother recognized certain individuals at the club. She

recognized several by name and among others, identified Pierce County Superior Court Commissioner Clint Johnson by name. 10/19/17 VRP 100. The appellant and respondent knew Court Commissioner Johnson through their church. 10/23/17 VRP 208.

The respondent/husband testified that his gross taxable income for 2016 was $163,000. 10/19/17 VRP 134.

When the respondent/father was questioned whether or not his relationship with his daughter had been fractured, as referenced by the Guardian ad litem in her report, the respondent/father said no, he did not think it was fractured. 10/19/17 VRP 143.

The respondent testified that he provided the guardian ad litem with updated information on the case, including copies of emails, every week or two. 10/23/17 VRP 220-221.

When questioned by his attorney, the respondent/father provided the following statement about his wife: "she's my favorite person in the world and I love her to death, still to this day." 10/19/17 VRP 152.

Toward the end of trial the respondent/father's counsel indicated that he had spoken with Court Commissioner Clint Johnson who was willing to testify if the court thought it was

necessary. The court responded that it was "absolutely not necessary." 10/19/17 VRP 227 – 228.

During the appellant/mother's cross-examination she was questioned as to why she would call her husband by his last name, Evarts, or his middle name, Lucius. She testified that she had previously called him by the name of Evarts since all of his athletic friends call him by that name as well. 10/19/17 VRP 69. One of the respondent's trial witnesses, Jodi Durr, testified that she would hear the appellant/mother refer to her husband using his last name. 10/19/17 VRP 240.

Trial resumed on Monday, October 23, 2017. Shortly before the trial testimony concluded the petitioner/mother was asked that during the previous three days, upon reflection, whether or not she would recant any of her previous testimony. Her response was no, she had spoken the truth. 10/23/17 VRP 250.

Immediately following closing arguments the trial court provided an oral ruling pertaining to parenting issues. The court stated:

> Ms. Evarts, your testimony was really, really frightening to me. Disturbing, frightening. I don't know whether it's true or not, doesn't sound like it

> to me, but I don't know. If it's not true, you've really slandered some people. And one of them is one of my judicial colleagues, which is a problem for him. So it's either true or it's not true. If it's true, he's a monster. If it's not true, you're a monster. There is no other way to say it.
>
> I need some help to sort this out. So I'm going to order psychological evaluations of both of them. I need to have more information. I respect Lori Harrison, as well. She didn't find any diagnosis with Mr. Evarts. She did find that Ms. Evarts had an adjustment disorder with anxiety and dependent personality. So she found a little something, at least. But I need to have a PhD level evaluation.
>
> Since Thursday and your testimony, I have worried about your children. I worried about this case. I have been doing this for almost 20 years, and I've never heard anything like this before. And it's deeply, deeply disturbing. Except for in a criminal context, I must say, things happen in that context. But not with a dissolution, not when we are talking about children and we're talking about people's lives. So it's really scary to me. 10/23/17 VRP 280 – 281.

The court continued by stating:

> It's what to do with the kids that I struggle with. I really do. I don't disagree with having them go immediately to their father and having supervised visitation for you, because I don't know what else to do to protect them. I don't know what else to do.
>
> As I said, I've lost a lot of sleep about this. I read a lot of the exhibits. I read a lot of the exhibits that are the texts in the communications, just as Mr. Loran said. There is no respect there. There is hatred,

> there is bitterness. Your credibility is questionable for me. But as I said, I need help with that. 10/23/17 VRP 281 – 282.

The court continued by stating:

> I hope, I hope that through this process – this is temporary, this is only temporary – that we can move closer. You guys couldn't decide yourselves, so then you bring it to me. Then there's this incredible testimony that happens on Thursday, and I'm struggling with what to do with it the whole time. 10/23/17 VRP 282.

The court continued by stating:

> And I can't – I can't let you be with them unsupervised right now. I just can't. I don't know what else to do. 10/23/17 VRP 282

In addressing the issue of psychological evaluations of the parties the court stated:

> I think there are a lot of fine people at Pacific Psychological Services, Dr. Manley and his crew. 10/23/17 VRP 281.

The court entered an order appointing Dr. James Manley, Pacific Psychological Services, to perform the psychological evaluations. The court ordered that the children shall reside with their father beginning immediately and mother may have

supervised contact, up to three times per week, two hours per visit, paid by the mother, with the children. The court further ordered that the mother shall not call, text, or email the children unless supervised, nor shall her friends or family members. The supervisor was designated as Kate Lee. The order was temporary in nature and was to be reviewed by the judge on December 21, 2017. CP 300-301.

On December 21, 2017, at the review hearing, the court stated: "so this is a review that I set after trial, having spontaneously made a couple of little rulings. And I did receive Dr. Manley psychological evaluations and I reviewed them and there is also an appraisal of the family home." 12/21/17 VRP 3.

Dr. Manley performed a collateral evaluation on the appellant/mother. Dr. Manley was provided all of the mother's Thursday trial testimony, as required by the court. Dr. Manley had the benefit of Lori Harrison's evaluation as well as being able to speak with collateral sources, such as the respondent/father. CP____

Dr. Manley stated:

> In conclusion based on the available information, Ms. Evarts suffers from a dependent personality with histrionic personality traits. This condition leaves her indecisive and vulnerable to influence by others. While Ms. Evarts report of verbal domestic abuse seems plausible, I do not find her claims of being drugged, moved, and led to engage in sexual acts in front of strangers credible. In addition, her report of hundreds of instances of physical domestic violence is also unlikely. Still there is ample report of Mr. Evarts' dis-regulated anger and implied violence through aggressive behaviors. CP____.
>
> I also conclude Ms. Evarts has solid parenting competencies. She is not viewed as a risk for physical child maltreatment. However, her elevated level of defensiveness, repressed anger, along with her negative and polarized perspective of Mr. Evarts may emotionally harm the children. CP____.
>
> Ms. Evarts appears to be a mother who has a good foundation of parenting skills. During the observation session, she approached her interactions with her children with a kind and soft tone. Her past visits have gone well. CP_____

Dr. Manley recommended that Ms. Evarts could profit from an active engagement in consistent, weekly individual counseling for 12 months with a licensed mental health provider. Dr. Manley further stated that "there is no reason to think Ms. Evarts cannot parent her children during this period". CP___.

The court, at its December 21, 2017 review hearing, after indicating that it had reviewed the reports from Dr. Manley wanted to ask the petitioner/mother some questions under oath. The first question was: "last we were here was October 23. Can you tell me what efforts you made to get a job". 12/21/17 VRP 4.

Dr. Manley's report does not find that the petitioner/mother is delusional or that she is paranoid schizophrenic. Dr. Manley, when addressing the appellant/mother's Thursday testimony simply indicated that he did not believe it to be credible. CP____.

Dr. Manley stated in his report of the appellant/mother: "however, her elevated level of defensiveness, repressed anger, along with her negative and polarized perspective of Mr. Evarts, may emotionally impact the children." The court immediately made a finding that it does impact the children and that the children are going to live with Mr. Evarts. CP____.

The court concluded by stating it was going to continue with supervised visitation until there's been some significant

psychological intervention consistent with what Dr. Manley recommended. 12/21/17 VRP 5. The court at its December 2017 hearing awarded the family home to the husband and directed the mother to vacate by December 31, 2017. 12/21/17 VRP 7.

The court allowed that the appellant/mother would contact the children by text and phone and that is going to happen due to the children's ages. 12/21/17 VRP 7.

With regard to the utilization of a counselor for the appellant/mother the court indicated that Dr. Manley could be the referral source. 12/21/17 VRP 8.

The court indicated that the spousal maintenance would be reduced to $2000 per month. 12/21/17 VRP 13.

The court instructed Mr. Evarts to continue to document the mother's posting of things online and that information would go into the decision making in six months. 12/21/17 VRP 14.

The next hearing was on January 19, 2019. The appellant/mother had to cut back on visitation due to the expense of the visitation costing her $450 a week. The visitation supervisor, Kate Lee, had filed a letter with the court. 1/19/18 VRP 4. CP 385-386. The respondent/father, in response to the declaration from Kate Lee, filed his own declaration claiming that the children were doing better than they were. 1/19/18 VRP 9. That they were doing very well. That their behavior under his care is not what's described by the visitation supervisor. The mother claimed that her 14-year-old daughter, Ellie, was having a full emotional breakdown by the end of visitation. Mother claimed that Ellie's grades were plummeting. 1/19/18 VRP 10-15.

The court stated that it was looking to the appellant/mother to make some progress in her therapy before anything changes. 1/19/18 VRP 16. The court indicated that it recognized that supervised visitation was not ideal, but that's the way it was going to stay until the appellant/mother makes more progress. 1/19/18 VRP 16.

The court reiterated that the parenting plan is temporary and not the final resolution. 1/19/18 VRP 17.

Once again the court inquired as to whether or not Ms. Evarts is looking for a job. 1/19/18 VRP 19.

On January 26, 2018, three months post trial, the court made findings with regard to the parenting issues. 1/26/18 VRP 14. The court found RCW 26. 09. 191 factors applicable to the mother under sub paragraph 3(e), abusive use of conflict, and under sub paragraph 3(g), such other factors. 1/26/18 VRP 15. The parenting plan includes a RCW 26.09.191(3)(b) limitation. CP 606.

The court found that the appellant mother had done everything she could do to alienate the children from the father and that she was not a victim of domestic violence. 1/26/18 VRP 22. The judge stated those were the reasons that she placed the children with the respondent father and why there are such restrictions on the mother's contact with the children until she gets

some effective counseling to deal with her anger toward Mr. Evarts. 1/26/18 VRP 22-23.

The court continued by stating that the parenting plan was still a temporary parenting plan and the parties would hopefully move toward something normal. 1/26/18 VRP 23.

The court ordered spousal maintenance in the amount of $1500 for six months and $1000 a month for an additional six months. The court directed that the child support from the mother to father would be the statutory minimum, $50 per child, until a review hearing in June. 1/26/18 VRP 23.

The court declined to give the mother any financial assistance from the father for her court ordered counseling at $95.00 a week and visitation at $150.00 a session, up to $450.00 a week. 1/26/18 VRP 28.

The court declined to address the 2016 federal income tax refund. 1/26/18 VRP 31.

The court again indicated that the parenting plan was temporary in nature and that the court was hoping to be able to make some significant changes by June. The court indicated that if the mother wanted to make a major modification she would need to file a petition to modify, but if she wanted something closer to a 50/50 parenting plan she did not need to file a petition to modify in so far as that was the court's goal.

The court denied the mother's motion for recusal. CP 425, CP 426-438. 1/26/18 VRP 31-32.

By the time of the June 29, 2018 review hearing Ellie, the parties' oldest child, had run away from the father's residence. 1/26/18 VRP 3-5.

On June 22, 2018, the petitioner/mother filed a declaration for the June 29, 2018 hearing and attached to her declaration was a declaration from Kate Lee, visitation supervisor. CP____. Kate Lee, aka Kate Lee Russell, filed declarations on June 27th, 2018 and June 25, 2018. CP_____.

The court indicated that it's concern with the appellant/mother was the psychological impact and alienation of affections that were rampant in the trial. 6/2918 VRP 9.

The court made inquiry as to whether or not it should speak with Ellie in chambers and the respondent/father indicated that it would be appropriate. 6/2918 VRP 10.

The court interviewed Ellie in chambers. Ellie stated that she was terrified and felt hopeless at her father's residence. She indicated that sometimes she is suicidal and sometimes she just couldn't trust herself. 6/2918 VRP 12.

When asked by the judge what Ellie wanted to do her response was that she wanted the judge to listen. 6/2918 VRP 19.

When asked by the judge whether or not Ellie was fearful of her father Ellie stated that sometimes her father is physical but other times it was just his words. She stated that his use of words is terrifying. Ellie stated that he uses them to make a person feel hopeless and like trash and that you can't do anything and that

there is no point in anything. Ellie further informed the judge that the respondent/father tells the children that the petitioner/mother is mentally ill and they are never going to see her again, except for visitations on Thursdays. 6/2918 VRP 19-20. Ellie stated that when she ran away and her father found her, he tried to drag her. 06/29/18 VRP 16.

Ellie states that she is even scared when she is at school because she knows what's going to happen when she goes home. 6/29/18 VRP 22.

When asked by the court whether or not she could say anything good about her father, her response was no. Ellie indicated that she lost all love for her father when he threw her brother to the ground and tried to convince the other children that it never happened. 6/29/18 VRP 24.

Ellie told the judge that she was angry with the judge. She was angry because the judge took the children from their mother. 6/29/18 VRP 25.

Ellie further informed the judge that her father takes whatever happens and lies about it. 6/29/18 VRP 26.

Ellie stated that the respondent/father says that the petitioner/mother is alienating the children from their father. However, Ellie believes that it is the father who is alienating the children from the mother. The father prohibits the children from talking to their mother about anything and prohibits them from talking to anyone who knows their mother, including the neighbor, since the neighbor's sister is a friend of the appellant/mother. 6/29/18 VRP 27.

Ellie concluded by telling the judge that she was not going back to her father's residence and that she would go to Remann Hall or to a foster home first. 6/29/18 VRP 27.

The court concluded by telling Ellie that the court heard her loud and strong and that the court was really concerned about Ellie's education. 6/29/18 VRP 28.

The court, following the conversation with Ellie, entered an order which the court had already typed out prior to meeting and speaking with Ellie. 6/29/18 VRP 33.

The court indicated that the other three children would remain with their father and Ellie would live with her mother. The court further indicated that the other children would not have any direct contact with their sister, Ellie, the petitioner/mother, or through third parties, in person, in writing, or electronically. The court did allow the that the mother could arrange for supervised visitation between the siblings at mother's expense. 6/29/18 VRP 33-34.

The court reduced the mother's residential time with the three remaining children to one supervised visitation per week, for two hours, with a professional supervisor. 6/29/18 VRP 34.

The father inquired about the father's contact with Ellie and the court indicated there should not be any contact between the father and Ellie until Ellie's counselor thinks it is appropriate. 6/29/18 VRP 34.

The court thought it would be helpful for Ellie to have a counselor that could, perhaps, help get her motivated. 6/29/18 VRP 35.

The court again indicated that this was a temporary order. 6/29/18 VRP 37.

At the July 19, 2018 hearing the court indicated that it did not want any future reports from the supervised visitation agency unless there is something dangerous that they would normally report to everyone anyway. 7/19/18 VRP 11; 13

The court stated that the court's concern with the petitioner/mother is not her relationship with the children, because the court knows that she is a good mother. The court knows that the mother handles the children really well and is very supportive and loving to them. The court's issue is what she does about the father and the kinds of things she does and the way she tries to manipulate things. The court was concerned that the mother filed a domestic violence protection order for Ellie in Thurston County.

The court viewed the protection order as a means of alienating the father. 7/19/18 VRP 12.

The court required the mother to file a motion and to have a hearing for the release of Ellie's in chamber interview with the judge. Following hearing the court authorized the release of the interview transcript. 7/19/18 VRP 14.

The court further chastised the mother by stating: "in the domestic violence protection order it says 'the court ordered the father not to have contact with her' the court did not put that in the order; that's not what the order says." 7/19/18 VRP 15.

The court further indicated that there was no court order prohibiting the father from having contact with Ellie and that if the court needs to, a visitation schedule will be issued. 7/19/18 VRP 16.

At the review hearing on August 17, 2018 the court determined that additional instruction needs to be provided to the appellant/mother's counselor. The court wanted mother's

counselor to help the mother figure out how the mother can support a positive relationship between all of the children, particularly Ellie, and their father. The court was concerned about the children's knowledge of what occurs in court hearings. 8/17/18 VRP 4. The court was further concerned that Ellie was communicating with her father through the Our Family Wizard. 8/17/18 VRP 4-5. Notwithstanding the issues identified above the court stated that Ellie was living in the right place and that she was safe in her mother's home. 8/17/18 VRP 8-9.

The court concluded that the mother had not made progress and that her counselor needs to address with the mother appropriate parenting in terms about talking about court hearings and what the children need to know and what they don't need to know. 8/17/18 VRP 10.

The court declined to set another review hearing. The court indicated that the attorneys know how to get a hold of the court. 8/17/18 VRP 13.

The mother's counselor, recommended by Dr. Manley, filed a letter indicating that the mother was fully compliant with her counseling program. CP_____

ARGUMENT

I. THE TRIAL COURT ERRED BY ENTERING THE PARENTING PLAN WHICH PLACED PRIMARY CUSTODY OF THE CHILDREN WITH THE FATHER, IMPOSED RCW 26.09.191 RESTRICTIONS ON THE MOTHER AND REQUIRED PROFESSIONALLY SUPERVISED VISITATION.

Standard of Review

The standard of review of the parenting plan issued by a trial court is abuse of discretion. *In re marriage of Littlefield,* 133 Wash.2d 39, 46, 940 P.2d 1362 (1997). An abuse of discretion is when the decision is manifestly unreasonable or based upon on tenable grounds or untenable reasons. *Id* at 46 – 47, 940 P.2d 1362.

Upon review findings of fact will be treated as verities as long as they are supported by substantial evidence. *Ferree v. Doric Co.*, 62 Wash.2d 561, 568, 383 P.2d 900 (1963).

Substantial evidence is evidence that that would be sufficient to persuade a fair-minded person of the truth of the matter asserted. *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wash.2d 543, 561, 14 P.3d 133 (2000).

RCW 26.09.002 sets forth the policy of the state of Washington with regard to parenting plans. The statute provides that in any proceeding between parents that the best interest of the child shall be the standard by which the court determines and allocates the parties parental responsibility. The policy further provides that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interest. The policy further provides that the best interests of a child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability and physical care. The policy can concludes by stating 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 necessitated by the changed relationship of the parents or is

required to protect the child from physical, mental or emotional harm.

RCW 26.09.004(2) define parenting functions. The statute defines parenting functions as to supporting the physical needs of the child as well as maintaining a loving stable environment, assisting the child with educational needs and in developing and maintaining appropriate interpersonal relationships.

RCW 26.09.184 identifies the objectives of a permanent parenting plan which includes the child's physical and emotional stability. The objectives also include minimizing each child's exposure to harmful parental conflict.

RCW 26.09.187(3) identifies the factors that the court shall consider when entering a final order parenting plan when the limitations of RCW 26. 09. 191 are not dispositive.

RCW 26.09.191 provides for restrictions in parenting plans. Subparagraph 3 of the said statute identifies factors which,

if found by the court, may preclude or limit any provision of the parenting plan. The pertinent subparagraphs include:

> (b) A long-term emotional or physical impairment which interferes with the parents performance of parenting functions as defined in RCW 26.09.004;
>
> (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
>
> (g) Such other factors or conduct as the court expressly finds adverse to the best interest of the child.

Imposing restrictions on parenting plans requires more than the normal hardships which predictably result from a dissolution of marriage proceeding. *Littlefield*, 133 Wash.2d 39 at 55, 940 P.2d 1362 (1997).

In order to sustain a RCW 26.09.191(3) finding there must be substantial evidence supporting the finding and the finding must meet the requirements of the subsection of the statute. A finding of a long-term emotional impairment which interferes with the parents performance of parenting functions as defined in RCW 26.09.004 requires substantial evidence of a mental health

issue which has interfered with parenting. *In re Marriage of Gohar*, 69920–2– I, 70420–6–I (2014), unpublished opinion.

The use of RCW 26.09.191(3) limitations must be analyzed against the statutory provisions favoring maintaining relationships between parents and children when setting a residential schedule in a dissolution proceeding. *In re marriage of Underwood*, 181 Wn.App. 608, 612, 326 P.3d 793 (2014). The trial court must consider these policy directives before effectively eliminating residential time based solely on RCW 26.09.191(3). *Id.* at 612. The trial court must explain why the imposition of RCW 26. 09.191(3) factors support the parenting limitations imposed. *Id* at 613.

The Underwood court further suggests that the trial court should make specific findings with regard to each child individually. *Id* at 613.

Although RCW 26.09.191(3)(e) does not require that serious damage to a child's psychological development has occurred it does require that there is substantial evidence that

creates a danger of serious damage to the child's psychological development. *In re marriage of Burrill*, 113 Wn App. 863 at 871, 56 P.3d 993 (2002).

In *re the Marriage of Bodge*, 76954–5–I (2018), unpublished opinion, addressed a RCW 26.09.191(3)(e) claim. The trial court found that the mother had portrayed the father in a negative light and that this portrayal had adversely impacted the father's relationship with the children. The Court of Appeals disagreed finding that there was not substantial evidence. The Court of Appeals noted that the record did not show that the mother had voiced her negative views of father in front of the children and that the father did not produce evidence that the mother's negative portrayals of father had negatively impacted his relationship with the children. Furthermore, the Court of Appeals noted that the father had not testified about any negative impact of any such portrayal.

RCW 26.09.191(g) allows the court to find such other factors or conduct that the court expressly finds adverse to the best interest of the children. Our Supreme Court has addressed what type of an adverse effect to the children's best interest a trial

court must find before imposing parenting plan restriction. In *re the Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014), the court found that restrictions imposed under RCW 26. 09. 191(3)(g) must be reasonably calculated to prevent relatively severe physical, mental, or emotional harm to a child. *Id* at 636. The court held that before imposing RCW 26. 09. 191(3)(g) restrictions a trial court must find more than the normal hardships which predictably result from a dissolution of marriage proceeding. In *re Marriage of Katare*, 175 Wn.2d at 36 (2012). The court continued by stating: "while the court 'need not wait for actual harm to accrue before imposing restrictions', it may impose restrictions only where substantial evidence shows that a danger of... damage exists." *Katare* at 35 – 36. *Chandola* held that using the catchall provision, RCW 26. 09.191(3)(g) required a specific and fairly severe harm to the child. *Id* at 648. The court stated that a trial court abuses its discretion if it imposes a restriction under

RCW 26.09.191(3)(g) that is not reasonably calculated to prevent such a harm. *Id* at 648. The *Chandola* court stated that: "any other conclusion leaves families vulnerable to a trial court's biases. By requiring trial courts to identify specific harms to the child before

ordering parenting plan restrictions, RCW 26.09.191(3) prevents arbitrary imposition of the court's preferences." *Id* at 6555.

II. THE TRIAL COURT ERRED BY LIMITING MOTHER'S SPOUSAL MAINTENANCE TO SIX MONTHS AT $1500 PER MONTH AND AN ADDITIONAL SIX MONTHS AT $1000 PER MONTH.

RCW 26.09.090 provides the factors for awarding spousal maintenance. In a dissolution proceeding the court may grant spousal maintenance in such amounts and for such periods of time as the court deems just, without regard to misconduct after consideration of statutory factors.

The trial court can consider the property division in determining spousal maintenance and can likewise consider spousal maintenance in its determination of its property division. See *In re Marriage of Crosetto*, 82 Wn.App. 545, 559, 918 P.2d 954 (1996).

The purpose of spousal maintenance is to help support a spouse until he or she is able to become self-supporting. In *re marriage of Irwin*, 64 Wn.App. 38, 55, 822 P.2d 797 (1992).

The award of spousal maintenance is within the discretion of the trial court. In *re Marriage of Bulicek*, 59 Wn.App. 630, 633, 800 P.2d 394 (1990). The only limitation on the amount of, or the duration of, spousal maintenance under RCW 26.09 090 is that, in light of the relevant factors, the award must be just. *Id* at 633.

The standard of review of a spousal maintenance order is abuse of discretion. In *re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984).

III. THE TRIAL COURT ERRED BY NOT AWARDING THE APPELLANT ANY ATTORNEY FEES FOR LEGAL REPRESENTATION DURING THE DISSOLUTION PROCEEDINGS.

RCW 26.09.140 allows the trial court, after considering the financial resources of both parties, to require a party to pay a

reasonable amount for the cost to the other party for reasonable attorney's fees for maintaining the cause of action.

In determining if a trial court should award attorney's fees "the court considers the parties relative need versus ability to pay." In *re Marriage of Spreen*, 107 Wn.App. 341, 351, 28 P.3d 769 (2001).

The standard of review is abuse of discretion. *Id* at 351.

To determine the appropriate amount of attorney's fees to award the court should consider: 1. The factual and legal questions involved; 2. The time necessary for preparation and presentation of the case; and 3. The amount in character of the property involved. In *re Marriage of Knight*, 75 Wn.App. 721, 730, 880 P.2d 71 (1994). The trial court must, on the record, identify the method it used to calculate the award of attorney's fees. Id at 729.

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IV. THE TRIAL COURT ERRED BY NOT GRANTING THE APPELLANT'S MOTION FOR RECUSAL.

In *re Davis*, 152 Wn.2d 647, 101 P.3d 1, (2004), our state Supreme Court stated:

> It is unquestionably true, as Davis points out, that trial before an unbiased judge is an essential element of due process. *Johnson v. Mississippi*, 403 U. S. 212, 216, 91 S.Ct. 1778 (1971). At a minimum, due process "requires a 'fair trial in a fair tribunal,' before a judge

> with no actual bias against the defendant or interest in the outcome of his particular case". *Bracy v. Gramley,* 520 U.S. 899, 904-905, 117 S.Ct. 1793 (1997). There is a presumption that a trial judge properly discharged her official duties without bias or prejudice. *Kay Corp. v. Anderson*, 72 Wash.2d 879, 885, 436 P.2d 459 (1967). The party seeking to overcome that presumption must provide specific facts establishing bias. See *State v. Post*, 118 Wash.2d 596, 619 n.9, 826 P.2d 172, 837 P.2d 599 (1992). Judicial rulings alone almost never constitute a valid showing of bias. See *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147 (1994).

The Davis court denied the defendants claim of bias indicating that there was no evidence in the record that the trial judge had a personal interest in the outcome of the hearing. *Id* at 693.

V. THE TRIAL COURT ERRED BY NOT ADDRESSING THE DISTRIBUTION OF THE 2016 FEDERAL INCOME TAX RETURN REFUND

RCW 26.09.080 requires the court to dispose of the property of the parties.

VI. ATTORNEY FEES

RAP 18.1 (a) provides:

Generally, if applicable law grants to a party the right to recover reasonable attorney's fees or expenses on review before

either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specified that the request is to be directed to the trial court.

RCW 26.09.140 provides:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceedings under this chapter and for reasonable attorney's fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.
>
> Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.
>
> The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

The Appellant requests and award of attorney's fees for this appeal. The Respondent earns more than what the Appellant earns, and therefor she is entitled to attorney's fees based upon need and ability.

The testimony during trial did not support the factors required to show alienation and its impact upon the children, not did it support any other 26.09.191(3) limitations.

VII. Conclusion

The trial court was deeply troubled by the testimony pertaining to a judicial colleague. The judge's comments immediately following closing argument clearly pertained to the mother's testimony involving to the judicial colleague and not to alienation of the father.

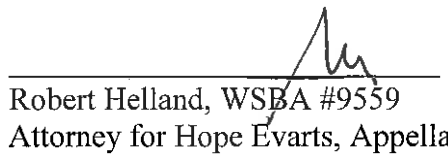
It was only after the court received the psychological evaluation of the mother from the court's appointed evaluator, Dr. Manley, which did not find that the mother was delusional and after Dr. Manley's report found that the mother could adequately parent the children, that the court switched its focus toward alienation. By relying on a RCW 26.09.191(3) limitation, the court avoided any RCW 26.09.187(3) analysis.

The testimony during trial did not support the factors required to show alienation and its impact upon the children

The appellant is requesting that the appellate court find that the RCW 26.09.191(3) factors have not been established and that the parenting plan should be consistent with the recommendations of the Guardian ad litem herein.

DATED this 12th day of September 2018

RESPECTFULLY SUBMITTED,



Robert Helland, WSBA #9559
Attorney for Hope Evarts, Appellant

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II, by personal service and delivered a copy of this document via US POSTAL SERVICE:

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Signed at Tacoma, Washington on this 12th day of September 2018.

Robert Helland WSBA 9559

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