



FILED

AUG 20 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS NO. 304523

In re the Marriage of:

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Kenneth Nichols,)	
)	Court of Appeals No 304523
Appellant,)	
)	
vs.)	Sup. Ct. No. 10-3-03142-0
)	
Gloria Nichols,)	
)	
Respondent.)	
)	
_____)	

APPELLANT'S OPENING BRIEF

Karen Lindholdt, WSBA #24103
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 Attorney for Appellant Kenneth Nichols



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I. INTRODUCTION

On December 27, 2010, Kenneth Nichols filed for divorce from Gloria Nichols after a three-year marriage and within days of Ms. Nichols bruising and cutting Mr. Nichols' arm by pushing the bedroom door into him. The couple has a daughter, Natalia, who was two years old at the time the divorce petition was filed. Although Ms. Nichols had been a primary parent through much of Natalia's life, the Commissioner ordered a temporary residential schedule that resulted in Mr. Nichols being the primary custodial parent pending the dissolution trial. *CP 123*. This Order was subject to a motion for revision, which was not granted. Domestic violence and child abuse issues would remain at the forefront of this case.

Prior to trial, Mr. Nichols attempted to conduct discovery pursuant to orders issued by the Court. This attempt was denied. Moreover, the trial court refused to allow Mr. Nichols to present evidence on Ms. Nichols' physical abuse of her children from a previous marriage under the guise that Mr. Nichols had not filed a witness list (though the names had been presented to the GAL as witnesses or had not been available until right before trial). Moreover, in spite of uncontroverted evidence at trial that Ms. Nichols physically abused Natalia (and in spite of Ms. Nichols' admission to one instance of slapping one of her children and raising her hand to hit the third), the court ordered that Ms. Nichols be given primary

custody of Natalia with limited visitation by Mr. Nichols. The trial court made this determination in spite of the fact that it acknowledged Ms. Nichols' need to "change her behaviors" and in spite of the trial court's recitation of Ms. Nichols' violent behavior that needed changing (according to the court). It appeared that the trial court made this ruling due in part to Mr. Nichols' failure to call the police when he witnessed Ms. Nichols physically abuse their child Natalia during the marriage.

In addition, and in contravention of the evidence, the trial court ruled that Mr. Nichols' separate property was community property and then divided that separate property equally with Ms. Nichols.

Mr. Nichols appeals the Decree of Dissolution, the Findings of Facts and Conclusions of Law, and the Final Parenting Plan and Division of Property, and asks that the Court of Appeals vacate the trial court's ruling and remand the matter back to the trial court.

II. ASSIGNMENTS OF ERROR/ISSUES

1. The trial court erred when it gave Ms. Nichols primary physical custody of the child Natalia when the evidence showed that she had a history of domestic violence and had engaged in abuse of children.

Is it error for the trial court to acknowledge a party's history of domestic violence and her abuse of children and then fail to limit that party's residential time pursuant to RCW 26.09.191?

2. The trial court erred when it refused to allow Mr. Nichols to take the depositions of Ms. Nichols and her YWCA advocate.

Is it error for the court to issue an order preventing discovery of issues involving the child until after the GAL report, but refuse to allow discovery on issues involving the child because the discovery cutoff date passed before the GAL report was issued?

Is it error for the trial court to refuse to allow the deposition of a party's advocate on the basis that the advocate may assert privilege when that advocate has spoken with the GAL, has claimed not to be therapist, and when the party already has waived privilege?

3. The trial court erred when it refused to permit testimony of Mr. Nichols' witnesses, especially when those witnesses would provide additional evidence of Ms. Nichols' abuse of children.

Is it error to issue any sanction against a party for failing to provide a witness list when the list of witnesses were provided to the GAL and were listed in the GAL report and so were already known?

Is it error to exclude a party's witnesses as a sanction for failing to file a witness list, especially when involving custody of a child?

4. The trial court erred when it found Mr. Nichols' separate property to be community property.

Is it error for the trial court to presume all property is community property unless proven otherwise?

Is it error for the trial court to find property to be community property when the uncontroverted evidence shows separate property, especially when the marriage lasted only three years?

Is it error to fail to consider additional evidence of the nature of property in a motion for new trial?

III. STATEMENT OF THE CASE

Kenneth and Gloria Nichols were married on July 7, 2007. *CP 3*. In 2008, the couple had the child Natalia. *Id.* (Ms. Nichols had two teen aged children from a previous marriage.) Three years after their marriage – on December 22, 2010 – the parties separated. *CP 4*. Also on December 22, Ms. Nichols was arrested for domestic violence against Mr. Nichols and went to jail. *CP 4*. Natalia was two years old at that time. *CP 3*.

It is undisputed that Mr. Nichols suffered bruising and cuts on his arm as a result of the December 22 altercation; that Ms. Nichols violated a protection order by returning to the home and yelling and banging on the door and window while Mr. Nichols was with Natalia inside; and that, while charges were dismissed, Ms. Nichols' violation of the protection order was active at the time of trial in that it would only be dismissed after a year if Ms. Nichols attended counseling. *See, e.g., CP 371*.

Mr. Nichols filed a petition for divorce on December 27, 2010. *CP 1-6*. On January 3, 2011, he filed a declaration stating that Ms. Nichols has a "violent temper and short fuse," that he had "witnessed her bashing Talia in the forehead with the palm of her hand for not eating in her high chair," and reported seeing her "throw Talia down when she is mad at her for not cooperating over something." *CP 108*. He filed a motion that requested, *inter alia*, that a guardian ad litem be appointed. *CP 109-110*.

Mr. Nichols also stated in his declaration that Ms. Nichols had pushed a door into him, causing the bruising that resulted in the criminal charge of domestic violence. *CP 92*. He also reported incidents of her temper that included dangerous driving and resultant gravel flying up and hitting him. *CP 93*. Ms. Nichols disputed the details of these accounts. *CP 113-118*. She did not dispute, however, that she came to the house, yelled, and banged on the door and window, even though Natalia was inside. *CP 92-93*. These actions violated a restraining order, *id.*, and resulted in additional charges (which were active at the time of the trial). *CP 371*.

At the preliminary hearing on January 4, 2011, the Commissioner ruled that Mr. Nichols would have primary custody of Natalia, with Ms. Nichols having Monday to Wednesday and then Monday to Thursday on alternating weeks. *CP 136*. Commissioner Jolicoeur did express concern that both parties had used law enforcement for legal benefits, and so did not issue domestic violence restraints. *Id.* But she specifically expressed to Ms. Nichols her concern about Ms. Nichols' lack of control:

I do have concerns about your reactions. I do. No one should be able to push your buttons to the point that you react this way. You should have more control than that. And I'm concerned about what it does to your child and to your other children. That will wash out in another courtroom one, in one which I'm not sitting. But I'm concerned about that. So it's apparent that we need to deal with being able to regulate your anger and if you get to that frustrated and you feel that control you need to deal with it otherwise it's going to spill out on your children.

CP 136. When the Commissioner ordered primary placement with Mr. Nichols, she noted, “I do have some concerns with mom’s anger and how she handles that.” *CP 137.* She stated, “Fortunately we have the resources to be able to appoint a GAL.” *CP 136.* Ms. Nichols attempted to revise the ruling, *CP 130*, but did not win this motion as to residential time. *CP 132.*

Pursuant to Mr. Nichols’ January 3, 2011 motion, *CP 109-110*, and pursuant to the court’s own oral ruling, *CP 137*, Heather Lund was appointed the guardian ad litem by order dated March 11, 2011. *CP 302-309.* This Order required the parties to comply with Local Rule 94.05(e) with regard to “discovery involving the child.” *CP 309, paragraph 3.9(b).* That Local Rule requires that discovery regarding the child be stayed in cases such as this one (where a motion for a guardian ad litem is made in a case where there is an allegation of abuse, neglect, and/or maltreatment). Moreover, it was the Court’s order that 94.05(e) be followed – that is, that discovery involving the child be stayed.

Discovery cutoff was June 30. *CP 351.* The GAL Report was filed on August 4. *CP 436-493.* On August 19, after unproductive discussions with opposing counsel, Mr. Nichols asked that the Court order depositions of Ms. Nichols, the GAL, and Ms. Nichols’ YWCA non-therapeutic advocate (who was interviewed by the GAL, *CP 383*). *CP 494.*

The trial court seemed amenable to allowing the depositions. *SRP*¹ 26, 30. However, opposing counsel objected. *See e.g. SRP* 29. Ultimately the trial court ruled that she would not allow the deposition of the YWCA advocate because of a claim of privilege, *SRP* 33 (even though Ms. Nichols had waived privilege since the YWCA advocate had spoken to the GAL, even though the YWCA advocate specifically stated to the GAL that she was not a therapist, *CP* 383, and even though both Mr. Nichols *and* the court noted that the YWCA advocate was non-therapeutic, *SRP* 21, 25). The trial court also denied the taking of Ms. Nichols' deposition for child-related issues on the basis that counsel for Mr. Nichols could have deposed Ms. Nichols prior to the issuance of the GAL report on child issues (in spite of the court's order mandating the parties to follow Local Rule 94.05(e), which stays discovery and in spite of the new information raised in the GAL report). *SRP* 30-33. The court held that Mr. Nichols could cross examine Ms. Nichols at trial instead, *SRP* 32, even though such exam would be subject to evidentiary rules (i.e., more restrictive than discovery, which allows questions that *could lead to* admissible evidence).

¹ "RP" stands for Report of Proceedings, and represents the dates of trial (October 5 and 7, 2011) as well as the date of presentment (November 11, 2011). "SRP" stands for Supplemental Report of Proceedings, and represents transcripts from January 13, 2011, September 8, 2011, and the beginning of trial on October 5, 2011.

The trial court did not change that ruling even when Mr. Nichols' attorney pointed out that one reason for his request to take Ms. Nichols' deposition was because, on August 9, 2011, the attorney had received a call from the uncle of Ms. Nichols' older child Nicholas that Nicholas was filing a petition for emancipation from Ms. Nichols because of her abuse of Nicholas. *SRP 31, CP 495*. In addition, he had just learned in the August 4, 2011 GAL report about the non-therapeutic counselor. *SRP 29*. As noted in the motion for discovery, *CP 494*, Nicholas had filed a Petition for Protection in which he alleged recent incidents in which Ms. Nichols "threw him [Nicholas] into a doorframe, kicked his sister Alexis, and stated she uses him as a 'whipping post.'" *CP 495*. The Petition for Protection was attached as an exhibit. *CP 500-505*. Still, the trial court denied the motion to depose Ms. Nichols. *SRP 33, CP 518*.

The trial court's ruling on discovery necessarily left unchallenged the remarks of the YWCA advocate – who was under the belief that Ms. Nichols was a victim, not a perpetrator – which included Ms. Nichols' self-report that she is a victim of domestic violence, and not a perpetrator, and that Ms. Nichols was "very actively engaged in counseling [as a victim, not a perpetrator], wants to learn and wants to educate herself," and that Ms. Nichols feels "safer with each appointment." *CP 383*.

Before trial, Mr. Nichols filed a “joint” trial management report with no cooperation from opposing counsel. *CP 801-811*. His report listed, as witnesses, individuals who had spoken to the GAL – i.e., Mark Miller (the father of Nicholas and Alexis – Ms. Nichols’ other children), Jody Locknikar, and Debra Fischetti – as well as Nicholas’ uncle (Tryg Aos), who was noted in the discovery motion as calling Mr. Nichols’ lawyer on August 9 to report Ms. Nichols’ abuse of Nicholas. *CP 803*. The basic substance of the witnesses’ testimony was summarized either in the GAL Report, *CP 401-404*, or in the Motion for Discovery filed August 19, 2011 (ten days after the Tryg Aos contact). *CP 494-496*. Because Mr. Nichols had not technically filed a witness list in court, however, the trial court excluded all these witnesses. *SRP 41*, and stated:

My concern mostly is there is a scheduling order in this case and that the scheduling order says witness list by 9/12. So whether they’re relevant or not relevant, you have deadlines on those orders that the Court did.

SRP 41.

The trial court also excluded Mr. Aos on the basis of hearsay, even though it did no analysis of the specific evidence, or of possible hearsay exceptions. *SRP 43-44*. Indeed, the court expressed no concern about the bruises Mr. Aos saw on daughter Alexis that were allegedly caused by Ms. Nichols’ abuse of her (i.e., the substance of Mr. Aos’ testimony). *SRP 44*.

At trial, and with regard to custody, Mr. Nichols testified to many instances of emotional and physical abuse by Ms. Nichols against the children and against himself that he either witnessed or suffered, and his concerns in that regard. *See generally RP 37-52; 71; 76; 91-92.*

As to Natalia: He testified he saw Ms. Nichols “bash” Natalia’s head back into the high chair and further described it as “knock[ing] her head pretty hard into the back seat of the high chair;” *RP 37*; Natalia was crying a lot at the time, *RP 37*. He had also seen Ms. Nichols “toss her around,” *RP 49*; one instance occurred when they were camping and Ms. Nichols “picked her up and threw her down,” *RP 50*; both Mr. Nichols and Ms. Nichols’ son Nicholas “called her on it,” *RP 50*; this caused Ms. Nichols to get “right back in both our faces,” *RP 50*; he also described two instances when they were on the bed watching TV when Natalia hit Ms. Nichols accidentally on the face and Ms. Nichols “threw her down, and her head could have hit [the wooden bed frame], and I said don’t ever let me see you do that again. I mean, significant force,” *RP 50-51*; and there were times he would come into a room to “witness Ms. Nichols leaving the room, Talia screaming her head off hanging onto her headboard” and he would think “What’s just happened?” *RP 50*; Mr. Nichols noted that Ms. Nichol “cannot control her temper and emotions, and to just do something like [throwing her] is just beyond my comprehension.” *RP 51.*

Mr. Nichols also testified he witnessed violence and anger by Ms. Nichols against others. For example, he testified there would be “intense yelling and screaming” between Ms. Nichols and her son Nicholas “mostly by Ms. Nichols,” *RP 39*; it was “like Armageddon in the house,” *RP 39*; the yelling could be about Nicholas not getting his homework done, or not getting the dishes done, or not putting the dishes in the dishwasher correctly, *RP 39*; one time it was because he opened an email account at his father’s home and did not get her approval first, *RP 39*; there were “lots of different issues, but she would definitely come down on him very intense, lots of, like I said, very intense yelling and screaming, lots of times where she would put him down. I told you a million times how to do this. You can’t do this. Your sister can do this,” *RP 39*; Nicholas would react by getting “very quiet,” though sometimes he would “yell back,” *RP 39-40*; Mr. Nichols would have to tell him to come out for dinner, he would get so withdrawn, *RP 40*; this would be a “daily occurrence,” *RP 40*.

With regard to Nicholas, Mr. Nichols would make suggestions to Ms. Nichols that were designed to lessen the tension in the home and that came from classes that the couple was taking. *RP 40*. These suggestions would work for awhile “but it came back in the same cycle again, and they would go in cycles.” *RP 40*.

As to Ms. Nichols' anger towards Mr. Nichols: he testified that the things that caused her to explode on him included "parenting issues" in that she would tell him he didn't know what he was talking about, *RP 41*; whether he could stay at home with Natalia when she drove the three-hour round trip to drop off the older children to visit their father, *RP 42*; in one such incident he had to call the police because she was screaming at him about not going and "eventually just burned out in the gravel, blasted me with gravel, and I called the police ... because she drove off down the [steep and potentially dangerous driveway] ... and that wasn't appropriate to be speeding off down that driveway with a small child in the car," *RP 42*; he had contact the police three times – this incident, once when he was grocery shopping, and the final one, *RP 46-49*, when she bruised his arm with the door (on December 22, 2010). *RP 43*. With regard to grocery shopping, he followed police advice and waited to go home until Ms. Nichols calmed down. *RP 44-45*. He stayed away two days. *Id.*

He described Ms. Nichols' physical manifestations of anger as:

[T]he volume of her voice, very mean demeanor on her face – she'll get right in your face. Especially she did that a lot with Nick. There's sometimes she has raised hands to go hit him and stopped. In incidences with me, if she's picked up a picture frame and threw at me – the case in December, turned around and just literally plowed the door into me. Mostly, like I said with Nicholas, it's been just instantly just start yelling, just getting in his face, and it happens in front of everybody in the house.

RP 42-43.

Mr. Nichols did not notice triggering events that would lead up to Ms. Nichols' outbursts. Instead "it was mostly a snap, a complete snap. She would find something that she didn't like, and it would instantly just blow up completely off the spectrum." *RP 41.* This was with both Mr. Nicholas and Nicholas. "She would just absolutely explode. She could be happy one second and absolutely explode the next second." *RP 41.*

Mr. Nichols was prevented from testifying as to what Nicholas' father Mr. Miller had said regarding abuse. *RP 71-73.* This was one of the witnesses the trial court already had excluded – and was information elicited by opposing counsel in that she had asked regarding Mr. Nichols' state of mind (i.e., had asked regarding his current concerns). *Id.*

Also at trial, and with regard to his separate property, Mr. Nichols testified that he had \$60,000.00 prior to the marriage, reflected in the balance of his separate account ending in 4586 (once the balance in his brokerage account had been transferred into it). *RP 88.* Other accounts had minimal balances in them. *RP 88.* Exhibits relating to these accounts were submitted. *Petitioner's Ex. 1-4.* Also submitted was evidence of the 2007 sale of separate property in the amount of \$23,000, of the parties' monthly house payment of \$2,593, and of the Nichols' taxable incomes in 2008 and 2009 being \$50,000 and \$42,000. *Petitioner's Ex. 5, 6, 11.*

In response, and with regard to custody, Ms. Nichols did not correct the record about the abuse of Natalia by her that Mr. Nichols witnessed. Ms. Nichols did deny generally that she “hit Natalia in anger,” *RP 199* (though she agreed she spanked her, *id.*), but she never addressed whether she pushed Natalia’s head back into the high chair (as testified by Mr. Nichols, see *RP 37*), or whether she threw Natalia from the bed or at other times (which also was Mr. Nichols’ specific testimony, *RP 49-51*). Thus, this physical abuse evidence against Natalia was uncontroverted.

Moreover, there was an assumption that Ms. Nichols accepted that she had a problem with anger and was, at a minimum, emotionally abusive to Natalia. For example, in direct examination, her attorney presumed that Ms. Nichols would need some kind of intervention to “stop” her from “being angry at Natalia or losing control.” *RP 197*. Her lawyer also noted, in direct examination, the GAL’s concerns about “this anger of yours.” *RP 197*. Ms. Nichols accepted the assumption and responded to the question of “what is going to stop [Ms. Nichols] from being angry at Natalia or losing control” by testifying she had gone to “some classes” – including a Women and Anger class – that had given her “coping mechanisms” such as “knowing what your triggers are, knowing that there’s a physical and psychological, physiological change that takes change and how to recognize that...” *RP 197-198*.

Ms. Nichols acknowledged that she “put [herself] into programs wherever I could find because obviously if these things are being said and if my kids are, also, making some of those statements, yeah, I was not acting appropriately. I was taking out my frustrations, and my unhappiness was coming through with all of my relationships, and I needed to do something about it.” *RP 207.*

Ms. Nichols also testified that she did not get a domestic violence perpetrator assessment even though she was ordered to get one, even though she did “look into it” through the Tapio Center and a couple other centers (implying that she was aware that one was needed). *RP 191, 234-236.* At another point she stated she did not do the assessment because she could not afford the \$200 or \$300 (depending on location). *RP 191.*

As to abusing the other children: Ms. Nichols testified that she slapped her son Nicholas on one occasion, but otherwise he was a liar. *RP 226-227.* Ms. Nichols essentially admitted she had raised her hand to hit daughter Alexis in that she agreed Alexis believed it happened – she just didn’t remember. *RP 227-228.* (This comports with Mr. Nichols’ memory of seeing Ms. Nichols raise her hand to hit Nicholas at times. *RP 43.*) Ms. Nichols agreed her older children were ordered into counseling, and that her son Nicholas ran away from her home on August 9, 2011 and had been gone from the home until right before trial on October 5, 2011. *RP 228.*

Moreover, Ms. Nichols did not refute the evidence that she emotionally abused her children. In fact, Ms. Nichols only testified that there was less arguing in her home during the two months Nicholas was gone because “when somebody’s not there to argue with, it’s not going to happen. So yeah, we didn’t have arguing when he wasn’t there.” *RP 230*. In addition, while Ms. Nichols attempted to justify the bruising on Mr. Nichols’ arm, *RP 197*, she did not dispute that she caused the bruising.

Also in response, with regard to property, Ms. Nichols testified that she would be unable to assist in the understanding of the parties’ finances, and brought in no income. *RP 177*. She did use as an exhibit a document from an account but did not know the origin of that document. Mr. Nichols had already testified that this document was a red herring as it was closed in 2009 and only related to his separate property. *RP 88*.

After the dissolution trial, the court granted primary custody to Ms. Nichols. *CP 532*. It so ruled in spite of the fact that it acknowledged the reports of physical abuse by Ms. Nichols of the couple’s now-three-year-old child Natalia (including that he watched Ms. Nichols “bash” Natalia in the forehead with the base of her hand with enough force to push Natalia’s head back against the high chair, and that he had seen Ms. Nichols throw Natalia across the bed or room when she was angry, and that there were times he heard Natalia cry out when he was not in the room). *CP 527*.

It also made this ruling even though it acknowledged that some of the incidents of domestic violence involved Ms. Nichols' older child Nicholas, *CP 527*; that Mr. Nichols felt threatened by Ms. Nichols on various occasions including December 22, 2010 when she "shoved the bedroom door into him, *CP 526-527*; that Ms. Nichols faced a charge of violating a protection order that was on a stipulated order of continuance for a year on the condition that Ms. Nichols attend counseling, *CP 527*; that Ms. Nichols "admitted to her anger" and that she "agreed she has unresolved issues from her past," *CP 527*; that "the GAL expressed Gloria Nichols' need for a DV Perpetrator Evaluation and her need for classes on dealing with the anger," *CP 530*; that the GAL "was not opposed to anger management classes," *CP 530*; that the "important factor for the GAL's recommendation [that Ms. Nichols] have primary custody] was that Ms. Nichols recognized her need to change her behaviors," and that "this also became an important factor to the Court." *CP 530*.

The trial court also concluded that the DV perpetrator evaluation "might enlighten Mrs. Nichols on her understanding as to what triggers her anger and the conflict," but that "the individual counseling from the YWCA seems to be *making her aware* as to the *need* for the change." *CP 530 (emphasis added)*.

At no time in granting primary custody to Ms. Nichols did the trial court reference the statutory requirements of RCW 26.09.191 – which do not allow for such a result when there is a history of domestic violence or physical or emotional abuse of a child. Nor did the trial court fault Mr. Nichols in these areas (other than to assert that it had concerns about Mr. Nichols having conflict resolution problems with “significant others” that he might have in the future based on past conflict resolution problems with past significant others). *CP 530*. Indeed, the court adopted the GAL’s finding that Mr. Nichols’ home was “free of conflict.” *CP 530*.

In addition, the trial court held that the parties had no separate property. *CP 532*. The trial court did not credit Mr. Nichols with his property he testified to be separate – with exhibits – on the erroneous basis that “the general rule assumes that the property is community property,” *CP 532*, and that Mr. Nichols had the burden of a “clear tracing” of the property “from before marriage to separation” in order to have it be declared separate. *CP 532*. According to the court, “Without a clear showing, then it will be presumed to be community.” *CP 532*. The court ordered that the “brokerage account” be split equally between the parties in spite of the fact that it no longer existed, *id.*, and required proof of the balance on all accounts from the date of separation before dividing. *Id.*

When Mr. Nichols provided the documentation requested, he asked the trial court to review again the documents in question and whether his separate accounts were community property. *CP 540-544*. Specifically, he noted that his savings account ending in 4586 had always been separate, *CP 540, CP 535*; that these amounts were from the sales of his two properties prior to the marriage, *CP 535*; that the amounts in his brokerage account also had been separate and accumulated prior to marriage, *CP 535*; that he transferred funds from his brokerage account into his savings account for a balance of approximately \$60,000 in the beginning of 2009 (which aligned with his testimony, *RP 88*), and that no contributions to that account had been made during the marriage, *CP 536, 654 (i.e., exhibit 7 in attachments)*; that Ms. Nichols was never listed on these accounts, *CP 536*; that the efforts to make this an account for the marriage by depositing funds into it and increase the savings was consistently ineffective, *CP 537-539*; and he consistently had to remove from the savings account any amounts he deposited from the checking account because the family could not accrue savings. *RP 58; CP 537-539*. This representation comported with the documents he produced, *see e.g., CP 607-653*, since any deposits were immediately withdrawn and the savings account balance only depleted rather than increased.

By letter the court seemed to accept Mr. Nichols' characterization of the property as separate but *now* would not reverse its ruling because there was a "history of intent to co-mingle funds from the savings to the checking and checking to savings." *CP 812*.

Mr. Nichols filed a motion for new trial, *CP 769-798*. He argued that the trial court erred in disallowing depositions before trial on the basis that the discovery cutoff date had passed because the parties were ordered to stay discovery related to the child in the March, 2011 GAL order. *CP 770-771*. Mr. Nichols also argued that the court erroneously excluded witnesses, *CP 771-774*, and that the court used an improper standard when determining separate versus community assets. *CP 774*.

The trial court denied this motion. *CP 799-800*. In its denial, the court erroneously stated that there was "no motion made" for a GAL, *cf. CP 109-110 (Mr. Nichols' motion) and CP 137 (the court's own motion)*, and reached the erroneous conclusion that the GAL's order referencing Local Rule 94.05(e) did not create a stay. *CP 800*. The court also ruled that any order staying discovery "would have only related to the child and not to the respondent or other witnesses," *CP 800*, failing to recognize that Mr. Nichols had only sought depositions on child-related issues, *see SRP 24*. The court also failed to acknowledge the new information because of the GAL report and because of the events related to Ms. Nichols' son.

As to the exclusion of witnesses, the trial court erroneously stated that the proffered witnesses had only irrelevant information and that Tryg Aos – the older children’s uncle – would testify to hearsay evidence. *CP 800*. The court made this latter ruling even though it had never evaluated the specifics of the evidence or the potential hearsay exceptions. *CP 800*. The trial court made no ruling on the new trial motion regarding property.

This appeal followed.

IV. ARGUMENT

The trial court erred in this case in two overarching ways – first with regard to custody, and second with regard to its characterization of all property as community. We seek reversal on both counts.

First as to custody: the court erred when it granted primary custody to Ms. Nichols, the respondent and mother, who was an admitted abuser of children and had a history of domestic violence. The evidence at trial was more than sufficient to make this finding – and the trial court did, in fact, acknowledge this evidence while still granting primary custody of the couple’s three-year-old child Natalia. This was error. Compounding that error was the trial court’s erroneous decisions to (a) refuse to allow Mr. Nichols to take the depositions of Ms. Nichols and her YWCA advocate, and (b) exclude Mr. Nichols’ witnesses who could have shed additional light on Ms. Nichols’ emotional and physical abuses of her children.

Second, as to property: The trial court erred in failing to identify Mr. Nichols' separate property as separate in this short, three-year marriage. This error was not harmless, especially given the fact that the marriage itself was of short duration and so there would be no need to divide assets evenly (as case law may require in a long-term marriage). As such, the trial court should be reversed and the matter remanded to have property properly identified.

A. Standard of Review

The determination of a parenting plan must be in the best interest of the child and based on the statutory criteria set forth in RCW 26.09.184, 26.09.187, and 26.09.191. Generally, a trial court's rulings on the provisions of a parenting plan are reviewed for an abuse of discretion. *In re Marriage of Littlefield*, 133 Wn. 2d 39, 46, 940 P.2d 1362 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.* at 46-47. A trial court's decision is unreasonable if it is outside the scope of acceptable choices, given the facts and the acceptable legal standard. *Id.* at 47. A decision is based on untenable reasons if it is based on an incorrect standard or if the facts do not meet the requirements of the correct standard. *Id.* A decision is based on untenable grounds if the factual findings are unsupported by the record. *Id.*

Statutory interpretation is a question of law reviewed de novo. *In re Marriage of Caven*, 136 Wn. 2d 800, 806, 966 P.2d 1247 (1998). A court errs in establishing a parenting plan if it fails to follow statutory procedures. *In re Marriage of Watson*, 132 Wn. App. 222, 230, 130 P.3d 915 (2006). A trial court's characterization of property as community or separate is reviewed de novo. *In re Marriage of Chumbley*, 150 Wn. 2d 1, 5, 74 P.3d 129 (2003).

B. The court erred in awarding custody to Respondent when the evidence showed that she had a history of domestic violence and she physically and emotionally abused her children.

Pursuant to RCW 26.09.191(2), a parent's residential time with a child in a parenting plan "shall be limited if it is found" that the parent has a history of domestic violence² or if the parent "has engaged in," *inter alia*, physical abuse of a child or a pattern of emotional abuse of a child. RCW 26.09.191(2)(a)(ii) and (iii). RCW 26.09.191(1) requires no mutual decision-making when a parent has engaged in these activities. Thus, and as is clear from the statute, "RCW 26.09.191(1) and (2) require the court to restrict a parent's contact and involvement with the child if the court finds that a parent has ... abused a child, or if the parent has a history of domestic violence..." *In re Marriage of Watson*, 132 Wn. App. at 232.

² It must result in physical harm or a fear of it. RCW 26.09.191(2)(a)(iii).

These provisions are not optional. *See, e.g., Mansour v. Mansour*, 126 Wn. App. 1, 9-10, 106 P.3d 768 (2004):

RCW 26.09.191 is unequivocal. Once the court finds that a parent engaged in [inter alia] physical abuse, it must not require mutual decision-making and it must limit the abusive parent's residential time with the child.

Mansour, supra, at 10. And while a court may mitigate the harshness of such a result by applying RCW 26.09.191(m) and 2(n), "the court must first conclude that RCW 26.09.191(2) applies, and then make specific findings that justify any modification of the limitations." *Id at 10.* This would include requiring the trial court to "expressly find" that the contact "will not cause physical ... or emotional abuse or harm to the child" and that "the probability" of the parent'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..." *RCW 26.09.191(n)(2).*

Here, none of these procedures were followed in spite of the fact that the trial court acknowledged the reports of physical abuse of Natalia, CP 527, that Nicholas was a victim as well of Ms. Nichols, CP 527, that Mr. Nichols felt threatened by Ms. Nichols, CP 526-527, that Ms. Nichols "admitted to her anger and that she has unresolved issues from her past," CP 527, and that it was "an important factor to the Court" that Ms. Nichols recognized the "need" to "change her behaviors." CP 530.

In truth, the trial court was forced into such an acknowledgement. Ms. Nichols admitted slapping her son Nicholas, *RP 226-227*, did not deny raising her hand to hit her daughter Alexis (and admitted that Alexis believed this happened), *RP 227-228*, never denied pushing Natalia off the bed or in the room, and never denied pushing Natalia's head back with such force that her head hit the back of the high chair. Moreover, Ms. Nichols agreed that she had an anger problem, *RP 197-198*, and agreed that she was not fighting with her son Nicholas only because he wasn't in her house in the months preceding trial. *RP 230*. She had a continuance for dismissal on the violation of the order of protection, which did require counseling and which typically requires an admission of guilt. *CP 527*.

In fact, had the trial court applied the statute once it made these findings of physical and emotional abuse, it necessarily would have limited Ms. Nichols' time with Natalia – and would not have found an exception to that rule since such an exception would have required finding that “the probability” of the parent'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...” *RCW 26.09.191(n)(2)*. The court's ruling, *CP 530*, reflected the trial evidence – that Ms. Nichols was perhaps making progress in dealing with her anger, but that her progress was ongoing – her journey was not complete – the likelihood of recurrence was not “remote.”

Indeed, it was the trial court that noted that Ms. Nichols only acknowledged her “*need to change her behaviors,*” CP 530 (*emphasis added*), and that her YWCA was “*making her aware as to the need for a change,*” CP 530 (*emphasis added*), not that she had *actually succeeded* in changing them. Thus, a correct application of the statute – or any application of the statute for that matter – would have resulted in primary custody to Mr. Nichols with limited residential time to Ms. Nichols. The opposite occurred instead. This is error. It is especially error when this Court reflects on what is at stake – no less than the mental health and well being of a three-year-old child who has no defenses of her own.

Ms. Nichols has admitted to a pattern of emotional abuse of her children, and of physically slapping her eldest child. She has failed to deny several instances of pushing Natalia violently, of pushing Natalia’s head back in her high chair, and of raising her hand to her third child. There are allegations of physical abuse against Mr. Nichols, and a photo of the bruising and scratches she left on his arm. There is admitted emotional abuse. The court had a responsibility to apply RCW 26.09.191. Instead, the court never mentioned the statute and gave primary custody of Natalia to Ms. Nichols – the perpetrator. This was legal error, did not comport with the facts elicited at trial, or the evidence before the court (and found by the court) as a result of that trial. The decision must be reversed.

C. The trial court erred when it refused to allow Mr. Nichols to take the depositions of Ms. Nichols and her YWCA advocate.

As noted above, the court refused to allow Mr. Nichols to depose Ms. Nichols and her YWCA advocate with regard to child issues even though the court order had stayed all discovery involving the child and even though there was new evidence regarding the eldest child and abuse, and even though the YWCA advocate was not a therapist. This was error.

At the outset, the ruling was improper because Mr. Nichols was following the court's own March 11, 2011 order appointing the GAL that required that the parties follow Local Rule 94.05(e), *CP 309, paragraph 3.9(b)*, and that Local Rule required that all discovery involving the child was stayed until the guardian ad litem report was filed. The GAL report was filed August 4, 2011 – two months after the general discovery cutoff date. It was an abuse of discretion to prevent discovery related to Natalia when that very discovery was stayed until after the discovery cutoff date (and was issued due to motions by Mr. Nichols and the court commissioner because of a concern about abuse, *CP 110, 136*). (the court's ruling to the contrary notwithstanding, *CP 800*). This error was compounded by the fact that several new issues had just arisen – both in the GAL report itself and because the children's uncle had made contact with Mr. Nichols' counsel, alerting him to abuse evidence. *CP 494-505*.

In addition, and even if Mr. Nichols were to be deemed to have misunderstood the March, 2011 GAL order (and in that, we do not see how he was wrong), imposing a sanction of simply refusing to allow the depositions was error.

In a similar case involving non-compliance with a scheduling order, the Washington Supreme Court ruled that limiting discovery and eliminating a legal issue for the non-compliant party is improper without a finding of willfulness and without a consideration of lesser sanctions. *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 933 P.2d 1036 (1997). In that case, a party had discovery limited and witnesses struck because the attorney had not filed witness lists on time, and according to the court's scheduling order. The Washington Supreme Court ruled that this was error. It held that, when a court is punishing a discovery violation, it "should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery." *Burnet*, 131 Wn. 2d at 495-96. For instance, in this case the court could have considered sanctions "that could have advanced the purposes of discovery and yet compensated [Ms. Nichols] for the effects of the discovery failings." *Burnet*, 131 Wn. 2d at 497. Thus, the *Burnet* case would permit discovery, but with monetary penalties attached, unless there is willfulness – which there is not, here.

Here, there is no question that Mr. Nichols' counsel believed discovery as to Natalia was stayed until the GAL report was issued. If he had conducted discovery about Natalia, he believed that it would have violated the March 13, 2011 order that invoked Local Rule 94.05(e). And while we also submit that it *would* have violated the order, it is clear that, at a minimum, Mr. Nichols' counsel had no *intent* of thwarting the court's orders but only of following them. Discovery should have been allowed.

This becomes especially true since new evidence had surfaced since the issuance of the GAL order – and had come to the attention of Mr. Nichols' counsel only a week or so before he filed his motion, seeking this additional discovery (after CR 26(i) conferences were unsuccessful). Specifically, Mr. Nichols' counsel had received a call from the older children's uncle regarding abuse in Ms. Nichols' household of the older children – both Nicholas and Alexis. *See, e.g., CP 494-505*. In addition, Mr. Nichols had just learned through the GAL's August 4 report of Ms. Nichols' counseling at the YWCA, and that Ms. Nichols was asserting victim, not perpetrator, status. *CP 383*. These new issues should have been explored through deposition. The court erred in not allowing it.

This was not an instance where the discovery could not be had. Trial was not scheduled for another month. The expectation was that the depositions would take three half days. Not allowing it was error.

This becomes compelling in this case because of the parallels between the types of allegations. Specifically, and paralleling Mr. Nichols' consistent testimony that Ms. Nichols would "throw" Natalia on the bed or across the room, *CP 108; RP 37*, the information regarding Nicholas was that Ms. Nichols "threw" him into a doorframe, *CP 495*. Not allowing the exploration of the details of the alleged abuse against Nicholas necessarily masks the details of potential abuse against three-year-old Natalia.

It is also compelling simply because a child's safety is at stake. As noted in *Atkinson v. Atkinson*, 38 Wn. 2d 769, 771, 231 P.2d 641 (1951), "[I]t seems to us that in this most difficult of all problems, the custody of children, the trial court should seek all the light available."

Indeed, in another custody matter, the Court of Appeals has held that the trial court should have reopened the case to consider the testimony of the child's therapist who would testify that the transfer of custody from father to mother would be extremely detrimental to the child's well being. See *In re Custody of Stell*, 56 Wn. App. 356, 370, 783 P.2d 615 (1989). There, the Court averred that even if the trial court technically was right (that the evidence had been available to the mother prior to trial), and thus could deny the motion, the nature of the matter – child custody – mandated a different result. *Stell* cited to *Atkinson* in reaching this conclusion and holding that the court should "seek all the light available."

In this case, the evidence already was clear that Ms. Nichols was both emotionally and physically abusive to her children and that she had a history of domestic violence that involved physical abuse. The trial court should have allowed the depositions as it had an obligation under the law to “seek all the light available.” To not do so was error. If this Court remands rather than reverses entirely, we ask for that opportunity now.

D. The court erred in refusing to permit testimony of Mr. Nichols’ witnesses, especially when those witnesses would provide additional evidence of Ms. Nichols’ abuse of children.

“Discovery sanctions are generally within the sound discretion of the trial court.” *Teter v. Deck*, 274 P.3d 336, 341, ___ Wn. 2d ___ (2012). “However, the court may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction.” *Id.* As noted in *Burnet*, *supra*, “a trial court may impose only the most severe discovery sanctions upon a showing that (1) the discovery violation was willful or deliberate, (2) the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the court explicitly considered less severe sanctions.” *Id.* “Discovery sanctions that trigger consideration of the *Burnet* factors include exclusion of witness testimony.” *Id.* Findings regarding the *Burnet* factors *must* be made on the record. *Id.* Where a case has already been decided on the merits, a new trial is the appropriate remedy (and not a remand for a *Burnet* analysis). *Teter*, 274 P.3d at 343.

Moreover, “where a witness does not become known until shortly before trial and prompt answer is made upon discovery of such witness the court should not exclude the witness's testimony.” *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 350, 522 P.2d 1159 (1974) (quotation omitted).

Here, the trial court excluded essentially all of the witnesses Mr. Nichols intended to call regarding Ms. Nichols’ abuse of her older children. At no time did the trial court assert that there was willfulness on the part of Mr. Nichols regarding a failure to note the existence of these witnesses. Indeed, while Mr. Nichols had not filed the technical witness list, he had already identified these witnesses – and the substance of their testimony – through either the GAL Report, CP 401-404, or through his motion for discovery, CP 494-505.

In fact, the lateness of the witness list – by two weeks – was partly due to Ms. Nichols’ counsel’s failure to respond to inquiries from Mr. Nichols’ counsel. Specifically, witness lists were to be filed with the joint trial management report, CP 351, but Mr. Nichols’ attorney could not get Ms. Nichols’ attorney to confer, SRP 36. Finally, he presented the report by himself, a week before trial. CP 801-811 (see date of September 29, 2011). Trial did not begin until October 5 – a week after the original trial date (that was noted in the scheduling order, CP 351).

Moreover, whether a technical “witness list” was filed, the existence of the witnesses was already known and documented, either because the witness had been identified to the GAL as such, CP 401-404, or because (in the case of the older children’s uncle Trys Aos), Mr. Nichols had noted his existence his discovery motion, CP 494-505. The substance of the witnesses’ expected testimony was also noted in either the GAL report or in the discovery motion. For example, Mr. Miller – the older children’s father – was expected to testify about the physical and emotional abuse suffered by his children at the hands of Ms. Nichols (as related to the GAL and documented in the August 4 GAL report, CP 403). Tryg Aos – a new witness since the GAL report was issued – would testify to bruises and reports of abuse as noted in the discovery motion, CP 494-505. Other witnesses would identify Mr. Nichols as a loving father to Natalia. See CP 401-403. Debra Fischetti, his ex-wife, would address the GAL’s speculations regarding how Mr. Nichols resolved conflict. SRP 38.

The trial court’s reasoning for excluding the testimony was on the basis of the witness list not being provided according to schedule:

My concern mostly is there is a scheduling order in this case and that the scheduling order says witness list by 9/12. So whether they’re relevant or not relevant, you have deadlines on those orders that the Court did.

SRP 41. This directly violates *Burnet, supra* (a case with similar facts).

The trial court also excluded Mr. Aos on the basis of hearsay, even though it did no analysis of the specific evidence, or of possible hearsay exceptions. *SRP 43-44*. The various exceptions – including present sense impression, excited utterances, etc. – could not be evaluated by the trial court as no discovery was had on Mr. Aos’ potential testimony so no transcript of it was available for evaluation. This did not seem of concern to the court. Indeed, the court expressed no concern about the bruises Mr. Aos saw on daughter Alexis that were allegedly caused by Ms. Nichols’ abuse of her (i.e., the substance of Mr. Aos’ testimony). *SRP 44*. The court expressed more concern about keeping the trial to two days rather than four. *SRP 42*. Yet legal principles in the state of Washington would have mandated that the court have an interest in this evidence. See, e.g., *Atkinson v. Atkinson*, 38 Wn. 2d 769, 771, 231 P.2d 641 (1951) (“[I]t seems to us that in this most difficult of all problems, the custody of children, the trial court should seek all the light available.”). Standing on this sort of form over substance just to keep a trial on schedule is the antithesis of the *Atkinson* principles, and was error here.

Moreover, the trial court conducted no *Burnet* analysis. And such analysis was explicitly required to exclude witnesses, with the appellate court specifically prohibited from substituting its own evaluation. *Blair v. Ta-Seattle East No. 176*, 171 Wn. 2d 342, 351, 254 P.3d 797 (2011).

As with the depositions, excluding this testimony is especially compelling because of the parallels between the types of allegations. Specifically, and paralleling Mr. Nichols' consistent testimony that Ms. Nichols would "throw" Natalia on the bed or across the room, *CP 108, RP 37*, the information regarding Nicholas was that Ms. Nichols "threw" him into a doorframe, *CP 495*. In addition, not allowing the individuals with knowledge of Ms. Nichols' abuse of children is contrary to the principles of RCW 26.09.191. This is the kind of evidence that requires inspection, not elimination on the basis of a technical violation of a scheduling order. The fact that Alexis was bruised should have alerted the court to further inspection of the evidence, with an eye towards evaluating admissibility – not dismissing it out of hand. And the prejudice is clear, since primary custody went to the perpetrator. In *Stell*, evidence was allowed after the trial even though it technically could have been refused, because the issue involved the care of a child. *In re Custody of Stell*, 56 Wn. App. 356, 370, 783 P.2d 615 (1989). Nothing less should be done on behalf of Natalia, where it was a technicality that prevented the evidence's admission.

In sum, this case should be reversed and remanded to allow witnesses to testify pursuant to evidentiary rules. We do so request (if the Court does not reverse and remand for application of RCW 26.09.191 on the face of the evidence already elicited at trial).

- E. The trial court erred when it found Mr. Nichols' separate property to be community property.

The character of property as separate or community is determined at its date of acquisition. *In re Estate of Borghi*, 167 Wn. 2d 480, 484, 219 P.3d 932 (2009). Property is presumed separate if it was owned before the marriage. RCW 26.12.010; .020; see *Borghi*, *supra* (presumption is well established); *Brown v. Brown*, 100 Wn. 2d 729, 737, 675 P.2d 1207 (1984). “Property acquired during marriage has the same character as the funds used to purchase it.” *In re Marriage of Chumbley*, 150 Wn. 2d 1, 6, 74 P.3d 129 (2003).

Once the separate property is established, there is a presumption that it remains separate. *Borghi*, 167 Wn. 2d at 484. Indeed, this is of great import in the state of Washington: “possibly more than in any other area of the law, presumptions play an important role in determining ownership of assets and responsibility for debt in community property law.” *Id.* (quoting 19 Kenneth W. Weber, *Washington Practice: Family and Community Property Law*, § 10.1, at 133 (1997)). “[T]he right of the spouses to their separate property is as sacred as the right in their community property...” *Borghi*, 167 Wn. 2d at 484 (quoting *Guye v. Guye*, 63 Wn. 2d 340, 352, 115 P. 731 (1911)).

The party *attempting to rebut* the presumption of separate property must have clear and convincing evidence. *Borgi*, at 484, n.4 (*interpreting “direct and positive” evidence as meaning “clear and convincing”*).

Separate property will remain separate property through changes and transitions if the separate property remains traceable and identifiable. *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 865, 855 P.2d 1210 (1993). Only if the property gets so commingled that it is “impossible” to distinguish or apportion it does the entire amount become community property. *Id.* Commingling occurs if (1) a substantial amount of separate property is (2) intermixed with (3) a substantial amount of community property to the extent that (4) it is no longer possible to identify whether the remainder is the separate property portion or the community property portion. *In re Marriage of Shui and Rose*, 132 Wn. App. 568, 584, 125 P.3d 180 (2005); *In re Skarbek*, 100 Wn. App. 444, 448 (2000) (*only if money is “hopelessly commingled” will it be community property*).

In this case, the court initially and erroneously ruled that the property in the separate account (containing \$42,000) was community property because the court erroneously held that “the general rule assumes that the property is community property,” CP 532, and that Mr. Nichols had the burden of a “clear tracing” of the property “from before marriage to separation” in order to have it be declared separate. CP 532.

Subsequently, the trial court (presumably realizing the legal error in the above conclusion), did reconsider but this time ruled that it was community property because of a “history of intent to co-mingle funds from the savings to the checking and checking to savings.” *CP 812*. Yet this is not the standard of law (i.e., “hopelessly commingled”), and did not comport with the evidence, which showed that any monies deposited in the separate savings account would be withdrawn since the parties were unable to keep savings due to expenses. And there was a base foundation of funds that remained in that account (that was under only Mr. Nichols’ name) that had nothing to do with the little bits of monies that came in and out of the account periodically (always at a loss to the account). *See, e.g., CP 607-653*. Thus there was no “commingling” of the kind or to a degree that made it “no longer possible to identify whether the remainder is the separate property portion or the community property portion.” *In re Shui and Rose, 132 Wn. App. at 584; see also Skarbek, 100 Wn. App. at 448*.

Moreover, a review of the parties’ income, *see Petitioner’s Ex. 11*, showed that they barely would be able to make ends meet, much less save thousands of dollars in their short, three-year marriage. In fact, their monthly house payment alone of \$2,593, *see Petitioner’s Ex. 6*, which is \$31,116 for the year, took up more than half their \$50,000 net income in 2008 and almost all their \$42,000 income in 2009. *Petitioner’s Ex. 11*.

Given the above, the court erred. Its ultimate conclusion that Mr. Nichols' savings account ending in 4586 is separate property should be upheld, but its subsequent conclusion that the property was commingled should be reversed and remanded with instructions that the property be designated as wholly separate property.³

V. CONCLUSION

For the foregoing reasons, Mr. Nichols asks this Court to reverse the trial court's granting of custody to Ms. Nichols, with instructions that the court limit her custody due to RCW 26.09.191 considerations. In the alternative, he asks that the Court remand the case for a new trial that includes the excluded witnesses, and that allows for the deposition of Ms. Nichols and her non-therapeutic YWCA advocate prior to that trial. In addition, Mr. Nichols asks this Court to reverse the trial court's various rulings regarding his separate property and remand with instructions that the court treat the savings account ending in 4586 as separate property.

Respectfully submitted this 20th day of August, 2012.


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³ The court also erred in failing to actually rule on the new trial motion on this issue. *See CP 799-800, and lack of consideration of property issue.*

