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IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

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In re the Marriage of:

WESLEY S. PRUITT,

Appellant,

and

JENNIFER L. PRUITT,

Respondent.

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APPELLANT'S REPLY BRIEF

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## A. ARGUMENT

This Court must reverse the decision of the trial court in regard to the final parenting plan that was entered and the valuation of pre-marital contributions to Mr. Pruitt's 401(k) account as both errors constitute an abuse of the trial court's discretion. *In re Parentage of J.H.*, 112 Wn. App. 486, 492, 49 P.3d 154 (Div. 2, 2002) (abuse of discretion standard in final parenting plans).

- a. **This Court must reverse the trial court's decision regarding the parenting plan and adopt a parenting plan that contains appropriately tailored restrictions with regard to Mr. Pruitt's contact with his children.**

The parenting plan here entered into by the trial court failed to give an adequate explanation and appropriately tailor the restrictions placed on the father to the harm the restrictions sought to prevent. The record at trial shows no incidences between Mr. Pruitt and his children or wife had taken place during the course of the dissolution case, despite the previously granted protection order against him. Although counsel argues that these restrictions and visitation ordered was supported by the record, this is not enough to satisfy the necessary requirements. The trial court must make specific findings in regard to these limits, which it neglected

to do here. This warrants that this case be remanded back to the trial court for further review.

- i. **The trial court erred by entering a final parenting plan with restrictions against Mr. Pruitt which are not tailored to the facts here and the harm the limits were intended to prevent.**

In regard to the trial court's ruling for the parenting plan, it states the following in relevant part:

The Court will place the children primarily with Ms. Pruitt. The Court will find that domestic violence has occurred in the past by Mr. Pruitt against Ms. Pruitt and the children. Accordingly, a .191 restriction is ordered. Decision making is awarded to Ms. Pruitt; . . . The Court declines to enter a Protection Order. The Court will not order a second domestic violence evaluation of Mr. Pruitt. He is ordered to engage in and complete a DV treatment program commencing that within the next sixty (60) days. No other treatment condition is imposed upon Mr. Pruitt given his compliance with therapeutic visitation over the last year. . . . The Court is reluctant to enter a plan that does not have finality to it. However, the Court is not read to step to a "traditional" plan at this time.

CP 180, at 5. There is nothing within the Court's ruling that explains why these limits were ordered beyond the fact that DV had been found in a previous court order to have occurred. There was zero discussion on Mr. Pruitt's present or future risk of harm to the children, credibility of Mr. Pruitt in trial, failure to grant Ms. Hasty's request for protection order, why exactly additional

treatment was ordered, and why the court was hesitant to even enter into the type of restrictive parenting plan.

Ms. Hasty can argue that Mr. Pruitt's history in the record supports these limitations, the Court has to go beyond just that in their analysis. (*See generally* Resp. Brief at 19-31). The Court cannot simply look at a history of DV under RCW 26.09.191 and then assume restrictions without clearly stating it's reasoning for why they are necessary. The court **must** describe how the precise restriction imposed is reasonably calculated to prevent the harm identified. *In re Marriage of Katare*, 125 Wn. App. 813, 826, 105 P.3d 44 (Div. 1, 2004). Although this is a discretionary determination which differs in every single case, the Court's discretion here cannot be adequately identified in its ruling.

If the trial court believed that there was present or future risk of harm in implementing these restrictions, then what in the record supported that conclusion? What kind of weight did the Judge give to the GAL's testimony and the information from the treatment providers? What about the consistency in therapeutic visits? Why were overnights or a transitional/expansive parenting plan not justified based on Mr. Pruitt's treatment history? If the

trial court believed that another DV treatment program was necessary, then why?

Parties cannot speculate as to the Court's intentions without clear statements delineating its rationale. This ruling leaves open too much room for misinterpretation. Here, there very well may have been a reasonable calculation made in the Honorable Judge Clarke's mind. However, the issue then becomes Mr. Pruitt having the right to know and understand exactly why the Court felt its discretion required that these limitations be ordered.

ii. **The trial court erred in adopting a final parenting plan that essentially eliminates Mr. Pruitt's residential time without a sufficient basis, and with no findings that it is necessary to protect the children's best interests.**

Mr. Pruitt had been living with his children on a full-time basis (except for when traveling for work) up until this court action was filed in 2016. Thereafter he was essentially given therapeutic and later monitored contact based on Mr. Pruitt's prior actions and Ms. Hasty's statements about such. After Judge Clarke ordered that this visitation continue as the final parenting plan, Mr. Pruitt was left no other option except to follow the court's order and thereafter appeal this decision this Honorable Court. What was in the children's best interests under RCW 26.09.184 and 26.09.187

has yet to be determined and the question of necessity in ordering restrictions has not been adequately supported by the findings.

As already discussed at length, no specific findings were made by Judge Clarke to indicate that Mr. Pruitt having expanded and eventually unmonitored residential time was contrary to the children's best interests. **The words "best interests of the child" are not even stated in the court's ruling.** *See generally* CP 180.

At no point herein is Mr. Pruitt attempting to minimize his responsibility for what occurred, but the Court has to make explicit findings about their concerns and why restrictive actions are taken. Although restrictions are mandatory upon a finding that domestic violence has occurred, this next step to tailor the restrictions is one that Judge Clarke unfortunately left out of his ruling, causing him to abuse his discretion when he eliminated nearly all residential time for Mr. Pruitt with his children.

**iii. The trial court erred adopting a final parenting plan that requires future litigation without clarifying that the plan constitutes only an interim parenting plan.**

In the interests of creating finality to cases and avoiding future litigation, explanation of findings are unequivocally required and an interim plan was an available and appropriate alternative to the Court's ruling. *In re Marriage of Possinger*, 105 Wn. App.

326, 337, 19 P.3d 1109 (Div. 1, 2001) (interim residential plan to revisit issues rather than modification statutes). Ms. Hasty in her response gives only reasons for why she believes the restrictions were necessary based on the record, and fails to explain her position on why an interim residential plan was not appropriate altogether if clear and decisive steps forward for Mr. Pruitt would have been elaborated on.

Ms. Hasty argues that *Possinger* allows the trial court to push off the determination of what is in the best interests of the child and determine that at a later date. (Resp. Brief at 29-30). However, in *Possinger*, both parents there were experiencing transitions in their work schedules over the subsequent year after trial, as well as one of the children starting elementary school, and the court there chose to set a review hearing after mediation to see what plan was appropriate. *See generally* 105 Wn. App. at 328-30.

There were no RCW 26.09.191 restrictions that were at issue in *Possinger* and both parents there had relatively equal residential time with both children after trial and prior to court review. *Id.* at 328-29. Moreover, the Court there delineated out the specific reasoning for the lack of finality in the plan, noting that although such an order was not ideal, it was appropriate based on

specific findings in the record which the court cited to. *Id.* This case is clearly distinguishable from the current situation between the parties here, including untailed .191 restrictions and very limited visitation time with Mr. Pruitt.

Moreover, the *Phillips v. Phillips* case, 52 Wn.2d 879 (1958) supports an argument for Mr. Pruitt as well. Although an interim plan was ordered there based on the mother's future compliance with the parenting plan and fostering the father's relationship with the child, the court there could not say whether an abuse of discretion took place. *Id.* at 881-82. However, the trial court had made clear findings based on the record as to why such an interim plan was necessary, including the fact that it limited the father's visitation time. *Id.* at 883.

Despite Ms. Hasty's argument, it was the court's duty to state its reasoning for the limits it gave and likely would have prevented future litigation if, at a minimum, such reasoning was given in its ruling. As the ruling states, this final parenting schedule is "a plan that does not have finality to it." CP. 180, at 5. This lack of finality has resulted in the current appeal. Mr. Pruitt requests that this Honorable Court reverse and remand this case back to the trial court in regard to the unsupported parenting plan.

- b. **This Court must reverse the trial court's decision with regard to the equalization payment, and ensure that all growth on Mr. Pruitt's pre-marital contributions toward his 401(k) account were considered before making a final determination as to the division of assets.**

“A trial court's characterization of property as community or separate is reviewed de novo.” *In re Marriage of Chumbley*, 150 Wn.2d 1, 74 P.3d 129 (2003) (citing *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (Div. 3, 2000)). Separate property will remain separate property through changes and transitions, if the separate property remains traceable and identifiable; however, if the property becomes so commingled that it is impossible to distinguish or apportion it, then the entire amount becomes community property. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5-6, 74 P.3d 129 (2003) (citing *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 865, 855 P.2d 1210 (Div. 1, 1993)). Mr. Pruitt provided the necessary information to allow the trial court to make an appropriate determination by clear and convincing evidence. The issue is that the court did not understand and overly complicated the division of the community property from the 401 (k) Tier II benefit of Mr. Pruitt's under the Railroad Retirement Act.

Counsel for Ms. Hasty argues in response that the burden is on the person seeking the separate property determination to prove clearly and convincingly that the asset is such. (*See generally* Resp. Brief at 31-35). This was done during trial, when Mr. Pruitt presented evidence of the pre-market crash value of the 401(k) account, just one calendar year prior to the parties' marriage. Additionally, Ms. Hasty provided no basis or explanation in testimony of why she in fact disputed Mr. Pruitt's valuation of his pre-marital contributions to the 401(k) account. RP. 558, ln. 2-6.

The case of *In re Marriage of Shui and Rose*, 132 Wn. App. 568 (Div. 1 2005) is merely persuasive authority as a Division 1 case and is also clearly factually distinguishable here. There, the relevant issue involved stocks that were both community and separate, which were then sold in entirety and were later placed into 4 different investment accounts. *Id.* at 573-74. Only 1 of these accounts included both parties' names, the other 3 were only in the husband's name. *Id.* The Court there found that the commingling of the separate and community assets was such that it was nearly impossible to trace and separate them out amongst each other.

Here, there the focus is not on the issue of commingling, rather the issue is mainly on pre-marital valuation – for which Mr. Pruitt presented un-contradicted testimony showing that his 401(k) account had a value of about \$78,000 prior to the 2008 market crash. RP. 191, ln. 8-10, 17, 23-25. This is much different than the subsequent after market crash valuation of only \$15,391.85. RP. 191, ln. 13. Since the difference in valuations is nearly \$60,000, this pre-marital valuation which the Trial Court adopted ultimately leaves also \$30,000 more to Ms. Hasty then should have been allotted to her in the final division of assets.

Moreover, counsel claims that a trace was needed to show separate funds and because this was not done then Mr. Pruitt's burden of proof has not been met. (Resp. Brief at 34). This argument is misleading to this Court, as the appropriate evidence *was* submitted at trial to show the pre-marital contributions, the growth on any contributions, and ultimately all that was needed was for Judge Clarke to use a share-based formula instead of dollar valuation. There are certainly more ways than one to value and divide retirement accounts. An expert was not needed to explain to the trial court how to value the 401(k) account based on the number of shares and value of each share at various points in time.

Counsel for Ms. Hasty, essentially tries to argue that the information Mr. Pruitt provided to the trial court was insufficient to allow for the division and classification as he requested. (Resp. Brief at 34-35). However, as previously discussed, Mr. Pruitt presented statements at trial showing the 401(k) dollar value, details of where funds were invested, amount of each investment, and to what extent that fund was contributed to during that investment period (by Mr. Pruitt and his employer BNSF). In calculating the community portion, Judge Clarke took the total value at the date of separation minus the value prior to marriage (taking into account the market crash value 1/5 of previous value). This would have been more accurately calculated by looking at the number of shares with the given information. Moreover, this would have made the growth on separate and community portions

As asserted previously, the 401(k) statements show the precise number of shares of each fund were owned at the time each statement was issued. This was more than ample information to compare the number of shares before marriage and at separation in relation to the values of each share at that point in time. Such an analysis would allow for the appropriate 401(k) valuation and growth to be determined.

However, the Court was unsure of exactly how Railroad Retirement Accounts divided into two different tiers (called Tier 1 and Tier 2), and this lack of knowledge was evident in the Judge's ruling: "The exact nature of these benefits, including eligibility and vesting, was not placed into evidence, so the Court is on some uncertain grounds in dealing with these assets." CP 180, at 2. This error led to the Judge ultimately unfairly dividing the Tier 2 benefits of Mr. Pruitt's 401(k) with a specific valuation and determination of it as community property. Each statement that Mr. Pruitt provided included the necessary information from which the Judge could have calculated out and made the correct classification and division amongst the parties.

Mr. Pruitt respectfully requests that this Court remand this case for further proceedings in regard to the value of pre-marital separate property contributions to Mr. Pruitt's 401(k), to appropriately value Mr. Pruitt's separate property interest therein which is supported by the record, and to make findings as to the appropriate categorization of this account. The trial court must be further instructed to calculate any division of property and equalization payment in light of the appropriate valuation of Mr. Pruitt's 401(k) pre-marital contributions.

## B. CONCLUSION

This Court must reverse the lower court's decision regarding restrictions in the final parenting plan against Mr. Pruitt and remand the matter with instructions for the trial court to establish a plan that specifically *tailors* any necessary restrictions to the facts and the potential harm the restraints are intended to prevent. Without such findings, the trial court has abused its discretion.

With respect to the allocation of assets and liabilities, this Court must remand this issue to correctly value Mr. Pruitt's pre-marital contributions, including growth, and to determine the fair and equitable allocation of marital assets based on an accurate valuation and designation of the 401(k). Without taking the necessary steps to calculate these values and growth, the trial court has abused its discretion.

As such, the decision of Judge Harold Clarke III must be reversed in regard to the final parenting plan and the 401(k) division, and should be remanded back to the trial court for further determinations to be made. Both issues rest on untenable grounds and are ripe for review by this Honorable Court of Appeals.

Respectfully submitted this 13th day of March, 2019.

A handwritten signature in black ink, appearing to read "Briana Gieri". The signature is written in a cursive style with a horizontal line underneath it.

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**AFFIDAVIT OF SERVICE**

I, BRIANA M. GIERI, upon penalty of perjury under the laws of the State of Washington, declare that on the 13<sup>th</sup> day of March, 2019, I served by email a copy of the Appellant's Reply Brief to the following persons at the included addresses below:

Jennifer Hasty, Respondent  
C/O Jason Nelson  
JasonRNelsonLaw@gmail.com  
Attorney at Law

DATED this 13<sup>th</sup> day of March, 2019.

A handwritten signature in cursive script that reads "Briana M. Gieri". The signature is written in black ink and is positioned above a horizontal line.

BRIANA M. GIERI, WSBA #53970  
Declarant

**ROBERT COSSEY & ASSOCIATES**

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**Transmittal Information**

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