

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

**NO. 35836-4**

**FILED**

JAN 07 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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**IN RE:**

**WESLEY PRUITT,**

**APPELLANT**

**AND**

**JENNIFER PRUITT n/k/a HASTY,**

**RESPONDENT**

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**RESPONSIVE BRIEF OF RESPONDENT**

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## STATEMENT OF THE CASE

Wesley Pruitt and Jennifer Hasty began their relationship while residing in the state of Texas and married on August 8, 2008. **RP 138, line 25.** They had two children during their marriage: Keagan, age 6 at the time of trial, and Haley, age 3 at the time of trial. **RP 138, lines 18-22.** The parties lived in the state of Texas until the spring of 2013, when they relocated to Spokane, Washington. **RP 541, lines 14-25.** Both parties, and the children, resided in Spokane County, Washington at the time of separation on June 1, 2016. **RP 479, lines 14-24.**

At trial, Ms. Hasty testified that Mr. Pruitt committed acts of both physical and verbal domestic violence against her prior to the date of the parties marriage. **RP 531, lines 4-12.** In addition to being verbally abusive, Ms. Hasty testified that Mr. Pruitt would tackle or wrestle her to the ground and would then lay on top of her and not let her get up. She further testified that he would use his body weight to restrain her from moving and that she would not be able to breathe. She went on to testify that at times he would cover her mouth with his hand. **RP 532, lines 4-25 and RP 533, lines 7-17.** Ms. Hasty testified that this took place each day

from January 2009 until the birth of the parties' son. **RP 534, lines 5-8.** While pregnant with the parties' son, Ms. Hasty testified that Mr. Pruitt would not lay on top of her but would still force her to the ground and restrain her on the ground on a daily basis. **RP 534, lines 5-8, lines 8-16 and lines 21-22.** Ms. Hasty testified that she told Mr. Pruitt's mother about the abuse but nothing changed. **RP 535, line 14.** She further testified that she did not call the police because she was embarrassed and did not want anyone to know that she was being abused. **RP 535, lines 1-5.**

Ms. Hasty testified that verbal abuse on the part of Mr. Pruitt directed at her also took place on a daily basis. **RP 536, lines 1-24.** She further described the controlling nature of Mr. Pruitt prior to Keagan's birth. **RP 537, lines 1-14.**

Ms. Hasty testified that after the birth of Keagan, Mr. Pruitt continued to be verbally and physically abusive on a daily basis, and in the same manner, except on those days when he traveled out of town. **RP 538, lines 17-25.** Ms. Hasty testified that Mr. Pruitt also began abusing Keagan both verbally and physically, describing him holding Keagan down as he would her, except he would not lay on top of him for "full

submission”. **RP 540, lines 1-12.** When he would restrain Keagan, he would restrain him for “maybe five minutes” and that he would put his hands over Keagan’s mouth, just as he did with Ms. Hasty. **RP 540, lines 21-24 and RP 541, lines 1-2.**

After the parties move to Spokane in the spring of 2013, the same level and manner of physical and verbal violence continued on the part of Mr. Pruitt against both Ms. Hasty and Keagan, except that Mr. Pruitt began laying on top of Keagan in the same manner in which he would lay on top of Ms. Hasty. **RP 541, lines 14-25 and RP 542, lines 1-25.** Further, not only was Keagan verbally and physically abused directly, he also witnessed the verbal and physical abuse of Ms. Hasty by Mr. Pruitt. **RP 543, lines 4-12.** After the birth of the parties’ daughter, Haley, Mr. Pruitt began restraining her as he did when Keagan was an infant, and would also use his hands to cover her mouth while doing so. **RP 545, 14-25 and RP 546, lines 1-7.**

Ms. Hasty testified that she did not call the police in Spokane out of fear, out of embarrassment and out a concern that no one would believe her if she came forward. **RP 551, lines 17-23.** In order to document the abuse, Ms. Hasty took videos of Mr. Pruitt abusing Keagan and gave the

videos to Child Protective Services and the police. **RP 547, line 16-18.**

Ms. Pruitt then sought and obtained a temporary order for protection against Mr. Pruitt that was served on June 1, 2016. **RP 361, lines 15-20.**

That matter went to a contested hearing at which both parties were represented by counsel and resulted in the entry of a full protection order for one year. Mr. Pruitt's subsequent motion to revise the entry of the order was denied. **RP 362, lines 13-14.**

After review of the videos and statement submitted by Ms. Hasty, the Spokane Police Department made a referral to Child Protective Services. **RP 31, lines 24-25.** Pursuant to that referral, Keagan was interviewed by Karen Winston at Partners with Families and Children, while a police officer observed the interview. **RP 85, lines 9-12.** Theresa Forshag at Partners with Families and Children reviewed the three videos taken by Ms. Hasty and issued a written report. **RP 44, lines 20-25, RP 69, lines 20-25 and RP 70, lines 5-8.** Both Ms. Winston and Ms. Forshag found that Keagan had been emotionally and physically abused by his father. **RP 45, lines 1-20 and RP 70, lines 5-8.** In her report, Ms. Forshag stated that on the videos she observed Mr. Pruitt lying on top of Keagan while Keagan coughed and said he could not breathe. **RP 81, lines 9-25.**

She stated that Keagan appeared to be actively struggling, trying to push Mr. Pruitt off, and could be heard to say, “I can’t breathe, get off of me, get off of me”, while crying hysterically. **RP 81, lines 9-25.** Mr. Pruitt was observed to remain on top of Keagan despite his struggles and exclamations. **RP 81, line 9-25.** The guardian ad litem testified at trial that what Ms. Forshag described is consistent with what she observed when she watched the videos. **RP 82, lines 2-3.**

During the interview with Karen Winston, Keagan reported his father tackling him and then laying on top of him until he could not breathe. **RP 82, lines 9-25.** He stated that his father would put his hand over his mouth so that he could not breathe except through his nose. **RP 83, lines 9-25.** He stated that he would tell his father to get off and that his father would respond by putting his hand over his mouth. **RP 83, lines 9-25.** He further talked with Ms. Winston about his father attacking his mother and how he needed to save his mother from his father. Keagan further reported that he felt that his father needed to get out of the house. **RP 84, lines 1-20.** This led to Ms. Winston’s recommendation that Mr. Pruitt have no unsupervised contact. **RP 84, lines 1-22.**

Mr. Pruitt was arrested on June 27, 2016 and charged with three

counts of domestic violence against children. **RP 32, lines 4-6.** The criminal case against Mr. Pruitt was subsequently dismissed. **RP 85, lines 21-25.**

The Child Protective Services investigation resulted in a finding of child abuse against Mr. Pruitt as to both Keagan and Haley. **RP 51, lines 19-22.** The finding as to Haley was subsequently changed but the guardian ad litem who reviewed the records was unable to testify as to what ultimate finding was made. **RP 32, lines 6-8.**

After a contested family law hearing on visitation, Mr. Pruitt was allowed therapeutic contact with the minor children, which began in December 2016, with weekly one-hour visits. **RP 59, lines 1-12.** An individual counselor was also ordered to be appointed for Keagan which ultimately resulted in the appointment of Dr. Hille who continued to work as Keagan's counselor through trial. **RP 55, lines 1-17.** Ms. Hasty's request that Mr. Pruitt submit to a domestic violence perpetrator's evaluation was denied by the court. **RP 106, lines 1-5.**

After the date of the temporary order hearing, Mr. Pruitt enrolled in and completed a Circle of Security Program, however, the guardian ad

litem testified that she was familiar with that program and that it would not qualify as a Domestic Violence Perpetrator's Program. **RP 107, lines 15-19.**

At trial Mr. Pruitt submitted a Domestic Violence Perpetrator assessment done by Ginger Johnson who was employed by Abuse Recovery Ministry Services at the time of the evaluation. **RP 202, line 10.** Ms. Johnson testified at trial in October 2016 that she had completed the evaluation in December 2016. **RP 202, line 16-19.** She further testified that such evaluations are only good for six months. **RP 223, lines 5-10.** When asked about her specific recollections regarding information she had received and relied upon in making her assessment, Ms. Johnson testified that she no longer had access to the case file, that she had completed thirty cases since completing the assessment and stated, "I cannot rely on my memory of this case." **RP 232, lines 8-14.**

Ms. Johnson was able to testify as to what was in her written report and stated that the report contained a list of documents that she received and reviewed. **RP 213, lines 15-20.** Ms. Johnson stated that she did not recall being given any videos to review. **RP 217, lines 3-5.** She further testified that she could not recall whether she had been made aware of the

Karen Winston interview of Keagan or the reports of Ms. Winston and Ms. Forshag and no such reports were listed as having been reviewed. **RP 219, lines 9-12 and RP 221, lines 14-25.** She testified that she was not aware the criminal case against Mr. Pruitt was dismissed without prejudice nor why it had been dismissed without prejudice. **RP 222, lines 4-12.** She further testified that she did not consider the fact that a protection order had been issued against Mr. Pruitt after a contested hearing to be a finding that domestic violence had in fact occurred. **RP 223, lines 4-25.** Regarding the lack of filed police reports regarding domestic violence, Ms. Johnson admitted that there are many domestic violence cases that go unreported to the police or to third parties. **RP 226, lines 4-8.** In her testimony, Ms. Johnson testified that she did not recall the allegations made in the police report. **RP 229, lines 13-15.** She further testified that she did not recall whether Mr. Pruitt was accused of engaging in one act of domestic violence or accused of a pattern and history of domestic violence. **RP 232, lines 1-6.**

When asked if she had attempted to contact Jennifer Pruitt as part of a victim impact assessment, Ms. Johnson stated that she could not answer that question because she was no longer employed by the agency.

She went on to state that someone else at the agency would have made that contact but that it would not have been her. **RP 207, lines 1-12.** Ms. Johnson's report made no mention of contact by anyone at the agency with Ms. Hasty. **Ex P-6.**

Ms. Johnson testified that in answering questions, Mr. Pruitt was found to be of medium risk regarding truthfulness. **RP 211, lines 19-24.** She testified that although that did not mean that he was lying, he did portray himself in the best possible light. **RP 212, lines 1-2.** When asked about specific examples of behaviors such as physically lying on top of someone until they agree to submit to you, Ms. Johnson admitted that such behaviors could be indicative of power and control issues. **RP 226, lines 18-20.** Her answer was the same regarding such behaviors as controlling household finances, limiting a partner's access to transportation and demanding a partner get permission before leaving the home. **RP 226, lines 12-26 and RP 227, lines 1-15.**

Although Ms. Johnson concluded that Mr. Pruitt engaged in behaviors that could be indicative of abuse, based on the information she was provided at the time, Ms. Johnson concluded that Mr. Pruitt did not need treatment. **Ex P-6.**

The guardian ad litem, Mary Ronnestad, testified extensively at trial regarding her contacts with the parties, third party witnesses and experts involved with the children, as well as her review of records such as police reports, CPS reports, the videos taken by Ms. Hasty and the reports of Ms. Winston and Ms. Forshag. Ms. Ronnestad testified that she continued to receive contacts from Mr. Raugust, the therapeutic visitation counselor, right up until the time of trial. **RP 62, lines 15-25.**

Although Ms. Ronnestad was only provided the Domestic Violence Perpetrator's Assessment done by Ginger Johnson at the time of trial, she testified she had reviewed the evaluation. **RP 65, lines 1-9.** She further testified that after reading what had been submitted by Ms. Johnson, she was still recommending another evaluation with the full opportunity for participation by Ms. Hasty, a review of the videos and a full review of all reports. **RP 66, lines 7-22.**

Ms. Ronnestad testified that Mr. Raugust had reported to her that progress had been made in the relationship between the children and their father. **RP 62, lines 15-25.** She further testified that Dr. Hille had reported that although she was not asked to make recommendations, she would support some expansion of parenting time for Mr. Pruitt. **RP 58,**

**lines 1-3.** By the time of that report from Dr. Hille, Mr. Pruitt's time with the children had already been expanded to allow for visits monitored by Mr. Pruitt's parents on three days of each month. **RP 70, lines 21-23.**

Ms. Ronnestad further testified that she believed Ms. Hasty's statements about being afraid of Mr. Pruitt to be credible. **RP 116, lines 7-11.** She further testified that in her experience as a guardian ad litem, it is not uncommon that no one else viewed the abuse and that such abuse often takes place behind closed doors. **RP 89, lines 3-5.** Although Mr. Pruitt described the behaviors with Keagan viewed in the video as "play", Ms. Ronnestad testified that no other individual she had spoken with who had viewed the videos described the behavior as playful. **RP 89, lines 10-13.**

In making recommendations, Ms. Ronnestad expressed that she had advised both parties' attorneys that she would have liked to have additional information before making recommendations, **RP 110-112.** However, Ms. Ronnestad did recommend continuing monitored and therapeutic visits and an additional evaluation of Mr. Pruitt, as well as a review in six months. **RP 72, lines 1-25, RP 73, lines 19-22 and RP 117, lines 7-11.** Ms. Ronnestad further recommended that Mr. Pruitt comply

with any treatment recommendations. **RP 76, lines 1-4.**

Mr. Pruitt testified about the domestic violence allegations. Mr. Pruitt testified that he had not engaged in abuse of Ms. Hasty or the children. **RP 357, lines 4-20.** When asked if Ms. Hasty, during what he had described as a good marriage, just one day decided to accuse him of domestic violence and managed to convince experts of the same, Mr. Pruitt responded that she did do so, just one day out of the blue. **RP 453, lines 14-20.** However, when asked whether he thought the conclusion of Karen Winston that he had engaged in child abuse, as reported through the guardian ad litem, was wrong, Mr. Pruitt answered “No.” **RP 454, lines 3-7.** Mr. Pruitt did testify that he would have completed a domestic violence perpetrator’s program if it was recommended he do so. **RP 375, lines 16-18.**

At trial, Mr. Pruitt also offered testimony from other relatives. Mr. Pruitt’s sister, Amy Grafa, testified that her brother and sister-in-law had a typical marriage with ups and downs but that they were happy most of the time, **RP 240, lines 1-3.** However, on cross-examination Ms. Grafa denied seeing Mr. Pruitt engage in any of the behaviors that he admitted engaging in to Ms. Ginger Johnson and that Ms. Johnson testified could be

indicative of an abusive relationship. **RP 257, lines 20-25, RP 258, lines 1-16.** Mr. Pruitt's mother, Melissa Pruitt, also testified to not observing many of the behaviors admitted to by Mr. Pruitt. **RP 274, lines 1-25, RP 275, lines 1-25.** Mr. Pruitt's father stated that the allegations were false. **RP 298, lines 10-12.**

After considering all of the trial testimony and exhibits, the Honorable Harold Clarke III, Spokane County Superior Court Judge, found that Mr. Pruitt had engaged in acts of domestic violence against Ms. Hasty and the Pruitt children and ordered that such a finding be made pursuant to RCW 26.09.191. **CP 343.** He declined to enter a protection order but did order restraints regarding behaviors of the parties and the locations of exchanges and ordered sole decision-making to Ms. Hasty. The court also ordered that Mr. Pruitt should engage in and complete a domestic violence perpetrator's treatment program. **CP 343.**

Regarding the residential provisions of the parenting plan, Judge Clarke found that the current temporary schedule should remain in effect, which continued the monitored and therapeutic visits as recommended by the guardian ad litem. **CP 343.** In addition, he ordered additional monitored contact on holidays. **CP 343.** Regarding a review of the court

order, rather than allow for review after six months as proposed by the guardian ad litem, Judge Clarke allowed Mr. Pruitt to seek a review regarding his residential time after only three months of DV treatment.

**CP 343.** As set forth in his written ruling, Judge Clarke anticipated that if Mr. Pruitt was progressing in treatment and there were no other significant issues, visitation would be anticipated to move forward to unmonitored daytime contact. **CP 343-344.**

Regarding the financial issues in this matter, Mr. Pruitt's positions on various financial issues changed multiple times. Prior to the start of trial, the court ruled on Ms. Hasty's motion in limine to exclude Mr. Pruitt from taking a new position as to an alleged separate interest in the family home on the first day of trial. Judge Clarke ruled that Mr. Pruitt could not offer any testimony to support that new position as it was prejudicial to Ms. Hasty. **RP 10, 14-25 and RP 11, 1-10.**

Later, while discussing various benefits in Mr. Pruitt's name as a result of his employment, Mr. Pruitt again changed his position on the separate versus community nature of an asset, leading his own attorney to ask the court for time to address the issue with his client during a break,

stating “I really need a five-minute break with my client to understand his position. In my opinion it’s changed several times. I don’t know even what his position is on it.” **RP 186, 3-7.**

Mr. Pruitt then testified that he had an interest in a 401(k) account related to his employment and the account was valued at \$78,000.00 in 2007. **RP 191, lines 8-10.** He then testified that the account balance was \$15,391.85 as of 2008, the same year the parties married. **RP 191, line 13.** He testified that the drop in value was due to the stock market but offered no other evidence beyond his testimony itself. **RP 191, lines 14-17.** He further testified that the court should set his separate interest at \$78,000.00 solely because the market subsequently increased. **RP 192, lines 1-2.** As found by Judge Clarke, the balance at the time of marriage was \$15,391.85 and that no evidence was offered that the court could rely on to segregate out earnings on the original balance versus earnings on the post-marital contributions. **CP 340.**

## **ARGUMENT**

An appellate court reviews a trial court’s relocation decision for abuse of discretion. **In re Marriage of Horner**, 151 Wn.2d 884 (2004).

A trial court abuses its discretion when the trial court's decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. **In re Marriage of Crump**, 175 Wn. App. 1045 (2013). As set forth in **In re Jannot**, 110 Wn. App. 16, 22, affirmed in part, 149 Wn.2d 123 (2002):

**The abuse of discretion standard is not, of course unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his or her discretion if the decision is completely unsupported, factually. On the other end of the spectrum, the trial judge abuses his or her discretion if the discretionary decision is contrary to the applicable law.**

And as stated in **In re Marriage of Littlefield**, 133 Wn.2d 39, 47 (1997),

**A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.**

The trial court's challenged findings are reviewed for a

determination of whether there is a sufficient quantity of evidence to persuade a fair-minded, rational person that the premise is true. **In re Marriage of Griswold**, 112 Wn. App. 333 (2002). “The absence of a finding on an issue is presumptively a negative finding against the person with the burden of proof.” **George v. Helliard**, 62 Wn.App 378 (1991)

**The court did not err when it entered a final parenting plan including restrictions on Mr. Pruitt’s residential time.**

RCW 26.09.191(2)(a) specifically provides that a parent’s residential time with a child shall be limited if the parent has been found to have engaged in a history of domestic violence as defined in RCW 26.50. In the present case, Judge Clarke specifically found that Mr. Pruitt had committed acts of domestic violence against Ms. Hasty, Keagen Pruitt and Haley Pruitt. Absent a finding under RCW 26.09.191(n) that contact with Mr. Pruitt would be unlikely to cause harm and that the probability of future domestic violence was remote, limitations were required to be applied. Pursuant to RCW 26.09.191(m)(i) the limitations imposed must be reasonably calculated to protect and provide for the safety of the children and the other parent. Such limitations may include supervised contact and the requirement to complete an applicable treatment program.

RCW 26.09.191(n) further provides that what weight the court gives to the entry of a protection order is discretionary. In the present case, a protection order had been entered against Mr. Pruitt based on his acts of domestic violence.

Contrary to the argument of Mr. Pruitt, the limitations imposed by Judge Clarke were reasonably calculated to protect and provide for the safety of the children and Ms. Hasty. Although the court did not renew the protection order after one year, Judge Clarke limited exchanges of the children to public locations. He further denied Mr. Pruitt's request for joint decision-making. **CP 343-344.**

Considering the substantial testimony regarding Mr. Pruitt's history of domestic violence, the previous entry of a protection order, the finding of abuse by CPS, the reports of Ms. Winston and Ms. Forshag, the filing of criminal charges against Mr. Pruitt, the guardian ad litem's testimony that Ms. Hasty's fear of Mr. Pruitt was credible and the inadequacies of the Domestic Violence Perpetrator's Assessment submitted by Mr. Pruitt, the trial court was correct to include the further requirement that Mr. Pruitt complete a domestic violence perpetrator's program.

Further, the court's order that therapeutic and monitored visits continue for a period of time was appropriate considering the testimony in this matter. Contrary to the argument of Mr. Pruitt, the guardian ad litem specifically recommended that monitored and therapeutic visits continue, after consulting with Dr. Hille and Mr. Raugust. **RP 72, lines 1-25 and RP 74, lines 19-22.** Although progress had been made, the guardian ad litem was not prepared to recommend even the lifting of requirement that Mr. Pruitt's residential time be monitored. The trial court had the opportunity to hear the testimony of the guardian ad litem and read her report in full. In her testimony and in her report, she discussed what she had learned from both Dr. Hille and Mr. Raugust. The trial court also had the benefit of hearing and observing the testimony of each party both as to the allegations of domestic violence and as to the issue of limitations.

Regarding the issue of progress, Mr. Pruitt misrepresents the testimony of the guardian ad litem when he states in his brief that she testified that Mr. Pruitt had "already taken significant strides, and that the only additional recommendation she would make would be for him to complete a new domestic violence evaluation. A review of the pages cited by Mr. Pruitt in his brief, **RP 67 and RP 68,** make clear that the guardian

ad litem actually testified as follows: “. . . That has been the difficulty for me in this case, because Mr. Pruitt has done a lot of things. His contacts with the children have been very, very good through Mr. Raugust. But my difficulty is, I simply can't ignore the things that are out there. And so I wanted them to be addressed to be able to move on in the parenting plan.” **RP 67 and RP 68.** After concluding her investigation and considering even the recent contact with Mr. Raugust and Dr. Hille, the guardian ad litem was still recommending only therapeutic and monitored contact. Further Ms. Ronnestad's proposal regarding a review of the parenting plan called for a six month period of review versus the three month period ordered by the trial judge. **RP 72, lines 1-9.**

Mr. Pruitt's allegation that Ms. Hasty was coaching the children to make allegations was not supported by the evidence. Mr. Pruitt was observed physically abusing Keagan on video. Two child abuse experts concluded the behavior was child abuse. Ms. Hasty is not alleged to have orchestrated the events set forth in the videos.

Regarding the issue of concern of coaching Keagan as the case progressed, the guardian ad litem specifically testified that neither Mr. Raugust nor Dr. Hille accused Ms. Pruitt of coaching the children. **RP 77,**

**lines 4-25 and RP 78, lines 1-10.** In fact, the guardian ad litem testified that Dr. Hiller offered alternative reasons why Keagan made statements considered out of character for his age. **RP 78, lines 1-10.** Even if such a concern existed, it would not excuse the physical abuse of the children by Mr. Pruitt.

In argument, Mr. Pruitt further argues that limitations should not have been imposed because Dr. Hille did not express any concerns about Mr. Pruitt. However as the guardian ad litem testified, Dr. Hille was appointed as the counselor for Keagan and was not asked to make recommendations. Given the nature of her involvement, she did not express concerns about either parent. **RP 56, lines 24-25, RP 57, lines 1-25 and RP 58, lines 1-3.**

In crafting the limitations in this case, Judge Clarke had to craft restrictions that took into account domestic violence directed not just at Ms. Hasty but also at the children in this matter, as well as Mr. Pruitt's continual denial that any such domestic violence had occurred. In order to address this issue, Judge Clarke ordered Mr. Pruitt to complete a domestic violence perpetrator's program and then ordered the continuation of monitored and therapeutic visits as recommended by the guardian ad

litem, pending verification that Mr. Pruitt was progressing in the program and there were no other significant issues. In order to then give guidance to a future judicial officer, Judge Clarke even went so far as to suggest how visitation should move forward at the three month review, assuming compliance and no significant issues.

In argument, Mr. Pruitt appears to argue that Judge Clarke did not meet the requirements set forth in **Katare v. Katare**, 125 Wn.App 813 (2004) in that he did not specifically articulate the reason why limitations were being imposed on Mr. Pruitt's contact with the children. However in **Katare**, the focus of the appellate court's reasoning was that the trial court did not articulate whether the court found that the potential risk of abduction of the child warranted the imposition of the limitations ordered. In this case, why the limitations were imposed is not ambiguous. The trial court found that Mr. Pruitt engaged in a history of domestic violence as defined in RCW 26.50, resulting in the requirement of limitations absent a finding that that there was no probable risk of future harm. Mr. Pruitt then argues that the guardian ad litem testified that there had not been allegations made of negative contact on the part of Mr. Pruitt during his period of monitored and therapeutic visits. However, the guardian ad

litem also testified that she did not believe it was unusual for Mr. Pruitt to refrain from such behaviors while visits were monitored and in a therapeutic setting. **RP 72, lines 1-5.**

**The court did not err regarding the adoption of the final parenting plan.**

Contrary to the argument of Mr. Pruitt, the parenting plan adopted by the court does not minimize Mr. Pruitt's contact with the children to the point that he has essentially no residential time. In his ruling, Judge Clarke ordered contact consistent with the July 28, 2017 order which had already expanded Mr. Pruitt's contact. Further, he allowed Mr. Pruitt the opportunity to further increase his contact with the children by enrolling and progressing in an appropriate treatment program. In doing so, Judge Clarke decreased by half the review time suggested by the guardian ad litem and provided direction regarding how Mr. Pruitt's residential time should be expanded.

In argument, Mr. Pruitt cites to **RCW 26.09.187(3)** which does require the court to make residential provisions for each child which encourage each parent to maintain a loving, stable and nurturing relationship with the child. However, Mr. Pruitt ignores the following

sentences in **RCW 26.09.187(3)**, which specifically require the residential provisions to be consistent with **RCW 26.09.191** and state that the factors to be considered in adopting a parenting plan should only be considered to the extent that **RCW 26.09.191** limitations are not dispositive.

Regarding the issues of Mr. Pruitt, Judge Clarke based the limitations imposed on the history of domestic violence of Ms. Hasty and the Pruitt children. Therefore, it was appropriate for Judge Clarke to allow Mr. Pruitt to seek review regarding whether his time needed to be monitored or take place in a therapeutic setting if he was making progress in treatment for his domestic violence issues.

Contrary to Mr. Pruitt's argument, Judge Clarke in no way "effectively eliminated all residential time" between Mr. Pruitt and the children. The only way that would happen is if Mr. Pruitt chose not participate in therapeutic visits and chose not to exercise monitored visitation, with his parents as monitors. Otherwise, Mr. Pruitt has contact as expanded in July 2017 and was given the opportunity to further expand his time after only three months of compliance and progress.

Mr. Pruitt's further objection regarding the parenting plan is that it did not allow him overnight residential time with the children, even at the

point of a three month review. However, at the point of the three month review, Mr. Pruitt will have only completed one-quarter of the domestic violence perpetrator's program he was ordered to complete. Whether or not he will complete the entire program is unknown, as is whether he will successfully complete the program. It would not have been appropriate for Judge Clarke to continue to speculate about what the future parenting plan may look like should Mr. Pruitt fulfill all of the requirements ordered by the court.

Mr. Pruitt's final challenge to Judge Clarke's ruling on the parenting plan is his argument that the plan itself invites future litigation. In **Phillips v. Phillips**, 52 Wn.2d 879 (1958), the supreme court upheld the trial court's decision to delay a finding regarding whether there should be a permanent change of child custody for a period of six months, during which the mother's compliance with the court orders could be monitored. The supreme court found that the trial court did not abuse its discretion in ordering a trial period during which the effectiveness of the court order could be observed. This issue has been addressed in many additional cases, most notable **Marriage of Possinger**, 105 Wn.App 326 (2001), which held that in situations where it is necessary to serve the best

interests of the child, the trial court can defer permanent decisions for a period of time following entry of a final divorce decree. The Possinger court made clear that given the preference for finality, this discretion should be exercised sparingly. Possinger, at 337.

In the present case, Judge Clarke entered an order that allows for a review in three months. The purpose of the review is to determine whether Mr. Pruitt's contact with the children should move to unmonitored, non-therapeutic visits. His decision took into account the recent expansion of Mr. Pruitt's contact in July 2017 and the concern of the guardian ad litem that additional time was needed before further expansions of residential time should be determined. His decision also allowed for an opportunity to determine whether Mr. Pruitt would take seriously the court's concerns regarding the history of domestic violence and engage in, and progress in, a domestic violence perpetrator's program.

In order to address the issue of whether the plan would encourage future litigation, Judge Clarke took the additional step of including in the order his thoughts regarding what he would expect to see happen regarding the expansion of contact should Mr. Pruitt engage in, and progress in, the court-ordered program. As the Possinger court made

clear, the plan entered is a permanent parenting plan incorporated into the terms of a decree of dissolution, however, the three month review ordered by the court would not require a finding of adequate cause.

It should also be noted that the proposed parenting plan submitted by Mr. Pruitt at trial also allowed for a graduated schedule in terms of his contact with the children, subject to recommendations of the therapeutic visitation counselor, Jason Raugust. **RP 394, lines 10-14.** This was despite the fact that Mr. Raugust would not appear to testify at trial in this matter. **RP 394, lines 22-24.**

**The court did not err regarding the division of assets.**

At trial, Mr. Pruitt testified that he contributed to a 401(k) account prior to marriage. At the time of the parties marriage, the value of that account was \$15,391.85. **RP 191, line 13.** After the parties marriage, Mr. Pruitt continued to contribute to the 401(k) account. At the time of separation, the value of the account, which now contained the pre-marital contributions and the post-marital contributions, was valued at \$282,609.60. **RP 190, line 8.**

Although Mr. Pruitt offered testimony regarding the value of the

account at the time of marriage, he did not call any witnesses to testify about what the value of that \$15,391.85 would be worth at the time of separation. Instead, Mr. Pruitt argued that in 2007, the account value was in excess of \$78,000.00, before the market declined, and that the court should therefore accept that as the value of his separate interest. Mr. Pruitt called no witnesses to testify about market fluctuations in the intervening years of the marriage nor did he call witnesses to testify regarding the specific performance of the funds in which the 401(k) dollars were held. Mr. Pruitt also failed to offer into evidence any statements showing the value of the 401(k) fund each year during the parties marriage, which may have provided some insight to the court. Finally, Mr. Pruitt did not offer testimony regarding each year's contributions into the account versus the change in account value due to market gains and losses. When asked if he had provided statements in his exhibit book regarding this issue, Mr. Pruitt admitted that he had not. **RP 404, lines 16-20.**

Ms. Hasty did not dispute that Mr. Pruitt had \$15,391.85 in 401(k) funds at the time of marriage. The issue is that at the time of the parties separation, the account held the separate funds of Mr. Pruitt, the community contributions during the marriage and the accumulations on

both the separate and community funds.

Mr. Pruitt asserted at trial that more than \$62,000.00 of the account should be considered as market gains on the \$15,391.85 in the account at the time of marriage and therefore it should be considered his separate property. The burden is on the spouse claiming separate funds to clearly and convincingly trace them to a separate source. **Marriage of Chumbly**, 150 Wn.2d 1 (2003).

In **Marriage of Shuie and Rose**, 132 Wn.App 568 (2005), the husband argued that a portion of funds in investment accounts was his separate property. It was not disputed that the husband had exercised stock options, some of which were separate and some of which were community, and then sold the stock and deposited it into one account. **Shuie** at 583. The funds in that account were later divided into four accounts. The husband attempted to establish his separate interest in the account by applying the percentage equal to the value of the separate options when they were exercised divided by the value of the options as a whole when they were exercised. **Shuie** at 584-5. The court held that was

not sufficient tracing. In particular, the court found that the exercise of each option yielded different amounts of cash depending on the market at the time they were exercised. **Shuie** at 585.

In the present case, Mr. Pruitt did not even attempt to trace the funds in any real way. Instead, he argued that before the market crash that took place a year before marriage, he had over \$78,000.00 in his account and therefore the court should find that \$78,000.00 was his separate property. Even if the court were to look at his argument as a claim that the original \$15,391.55 in contributions existing at the time of marriage accumulated interest of more than \$63,000.00 during the marriage, no evidence would support such a conclusion. With each year of marriage, the contributions made would have likely varied and the funds in which the contributions were invested would have had different rates of return. There was simply no evidence that would have led the court to conclude as Mr. Pruitt alleged.

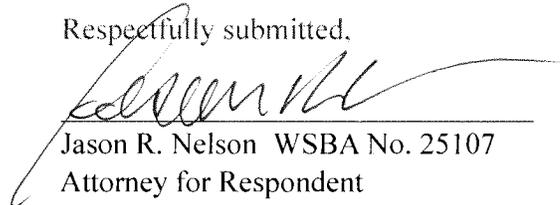
This issue was not left unaddressed by Judge Clarke in his written decision. Judge Clarke specifically stated, “There was no evidence upon which the Court can segregate out earnings on the original balance. Additionally, there is no evidence upon which the Court can segregate out

the earnings on post-separation contributions, so the increase in the account will be considered community, except for the contributions Mr. Pruitt and his employer have made to the account over the last seventeen months.” **CP 34.**

### **CONCLUSION**

Mr. Pruitt’s appeal should be denied. The trial court did not err in imposing restrictions on Mr. Pruitt’s residential time, nor did it err in adopting a plan subject to review at a later date. Further, the trial court did not err in its division of the 401(k) account in Mr. Pruitt’s name.

Respectfully submitted,



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Attorney for Respondent

**DECLARATION OF SERVICE**

I, Cheryl Growt, under penalty of perjury pursuant to the laws of the State of Washington, declare that on this 7th day of January, 2019, I sent out via messenger service a copy of this brief to be delivered to petitioner's attorney Robert Cossey, 902 N. Monroe Street, Spokane, WA 99201.

Signed at Spokane, Washington on this 7th day of January, 2019.

  
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CHERYL GROWT, Legal Assistant