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COURT OF APPEALS
DIVISION III OF THE STATE OF WASHINGTON

ANDREA CLARE,
Respondent / Cross-Appellant,

v.

KEVIN CLARE,
Appellant / Cross-Respondent.

SECOND AMENDED BRIEF OF APPELLANT / CROSS-
RESPONDENT

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ASSIGNMENTS OF ERROR

Error is assigned to the following Findings of Fact:

1. Finding of Fact No. 34
2. Finding of Fact No. 73
3. Finding of Fact No. 74
4. Finding of Fact No. 75
5. Finding of Fact No. 107
6. Finding of Fact No. 110
7. Finding of Fact No. 130
8. Finding of Fact No. 139
9. Finding of Fact No. 142
10. Finding of Fact No. 144
11. Finding of Fact No. 155
12. Finding of Fact No. 163
13. Finding of Fact No. 164
14. Finding of Fact No. 170
15. Finding of Fact No. 172
16. Finding of Fact No. 173
17. Finding of Fact No. 177

Error is assigned to the following Conclusions of Law:

18. The trial court did not enumerate its Conclusions of Law. (See CP 2487) Error is assigned to the trial court's conclusions of law pertaining to the findings supporting the anti-stalking order, and to the findings supporting parental alienation.

STATEMENT OF THE CASE

A. Background Facts – 2005 Marriage until 2016 Petition for Dissolution.

Andrea Clare and Kevin Clare were married on June 25, 2005. CP at 2466. The parties had three children together, daughter Kennedy born April 7, 2009, son Canon on June 30, 2010, and son Cruz on August 31, 2013. CP at 379.

Ms. Clare, a licensed civil litigation attorney, was the family's primary source of income during the marriage, while Mr. Clare was the children's primary caretaker and a 'stay at home dad.' CP at 125–59, 288, 2441, 2444. Ms. Clare's profession often necessitated long workdays and hours. CP at 132–36, 140–41, 153–56, 2444.

The parties began living separate and apart on February 6, 2016. CP at 2466, 2481. From February 2016 to May 2016 the parties agreed to parenting schedule alternating weekly. CP at 189.

In March of 2016, the parties, in Ms. Clare's words, were "amicably" attempting to resolve their issues, including visitation of the children and sale of the family home. CP at 181.

In May 2016, Ms. Clare petitioned for divorce in Walla Walla County. CP at 2466, 2481. This petition did not request a restraining order. RP at 684:12-13

B. Background Facts – Pretrial Temporary Orders. August 2016 – August 2018.

1. August 2016 – April 2017.

In August 2016, Ms. Clare filed a second petition for divorce in Franklin County, this time with a request for a restraining order. CP at 2481. Ms. Clare requested she be granted majority custody. CP at 22. Ms. Clare alleged Mr. Clare was emotionally abusing the children and engaging in abusive use of conflict. CP 18-19. In response Mr. Clare obtained testimonials from unrelated third parties familiar with the Clare family, (CP 130-59), which contradicted the accusations made by Ms. Clare and confirmed the apperency of Mr. Clare’s parenting abilities:

I have had multiple play dates with the Clares and have witnessed Kevin doing almost all of the interaction with the children. . . . In my opinion if the courts were to choose where the kids should end up without a doubt Kevin would have the biggest role in their life as he already does today and always has had in the past.”

CP at 132–33 (Decl. of Marshal Smith, parent of child who is friends with Clare children).

Kevin and I have discussed the divorce on several occasions. Kevin has never said one ugly word about Andrea. . . . I have always thought women were better suited for parenting than men and wondered how Kevin would do. It was not long before I realized Kevin was a very good dad – probably one of the two best I have ever known. . . . There is no doubt in my mind that the children’s best interest would be served by enabling Kevin continue being the stay at home Dad the children have known and depend on.

CP at 134–36 (Decl. of Richard Leumont, neighbor of the Clares).

“The children always seemed to relate to Kevin better than Andrea. I believe the children have a stronger bond with Kevin because he has put in the time, love and effort to build it. . . . [Ms. Clare’s] accusations are absurd at best and libel at worst. Kevin cares to [sic] much about his children to fight that way.”

CP at 140–41 (Decl. of Dan Farrell, neighbor of the Clares, at their previous home).

“It was almost always Kevin who was outside with Kennedy, Canon, and Cruz. . . . In all, I believe that Kevin exercises the best judgment and provides quality time in caring for the children.”

CP at 153–54 (Decl. of Lynn Goulet, neighbor of the Clares).

“I have witnessed many of times the children around both of the parents until the summer of 2014. Everything I have seen over those years were how both parents were good parents and the kids loved both their mom and dad dearly. . . . I have never seen [Mr. Clare] lose his temper, behave rudely or inappropriately. Not with his children, Addy [Ms. Clare], or neighbors. . . . I believe it would be

heartbreaking to these kids if they didn't get to be with their dad at least half of the time. . . . Their dad has always been heavily involved in their lives and has done the majority of the raising of these children.”

CP at 155–56 (Decl. of Peggy Farrell, neighbor of the Clares, at their previous home).

In late August 2016, despite Ms. Clare’s proposed parenting plan, the trial court granted Mr. Clare primary custody following her petition for divorce. CP at 190. Mr. Clare was awarded visitation every weekday and Ms. Clare every weekend. *Id.*

2. April 2017 – January 2018

On April 6, 2017 Ms. Clare moved the court for a temporary order granting, *inter alia*, increased visitation amounting to 50/50 visitation. CP at 271-277. In doing so, she conceded Mr. Clare was a good parent:

[Mr. Clare] has a vital role to serve in my kids’ lives. For this reason, I support a 50/50 plan with week on week off.

CP at 260.

I want the court to know that the kids are very well adjusted to the transfers as we have been separated for 14 months now. **They are very loved and taken care of well by each parent** with the additional support of grandparents on both sides whom the kids have a significant bond.

...

I am asking the court to adopt the plan proposed by Mason Pickett at our last hearing. **I have given that plan a lot of thought and believe it is in the best interest of the children. . . .** This plan results in equal time with each parent. **I truly believe this is what the kids want - fairness as to quality of time and equal quantity of time with each parent.**

...

I explained that in order **to preserve our friendly relationship** and be able to better co-parent, we should at least try to discuss options of compromise.

...

I have consistently proposed joint residential custody - however that looks, I just want equal time because I believe our kids need both parents as much as possible.

...

I conclude that we do not need a GAL.

CP at 278-88 (emphasis added).

Mr. Clare's April 11, 2017 declaration echoes the "friendly relationship" and efficacy of coparenting described by Ms. Clare:

Ms. Clare and I see each other at soccer games and often sit next to each other with the kids during the games. I am pleasant and talkative with Ms. Clare about the children's schedule, school, etc.

CP at 320 (April 11, 2017).

This “friendly relationship” is further illustrated by the fact that the parenting plan proposed by Ms. Clare increased the number of exchanges and contact between Ms. Clare and Ms. Clare. CP at 279, 324.

Ms. Clare also reiterated the children’s need for both parents:

Ms. Clare seeks equal time with the children year-round. Mr. Clare desires a 50/50 schedule in the summer and requests majority of time during the school year. Mr. Clare bases his position on his work schedule, claiming he is available during the school year. **There is no dispute both parents are adequately equipped to provide loving care to the children. The only issue is time.**

CP at 272 (emphasis added). Ms. Clare also cited RCW 26.09.002 emphasizing that:

The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered[.]

CP at 272–73.

On April 13, 2017, Ms. Clare’s counsel represented to the court, when asked, that Mr. Clare did not require a psychological evaluation. CP at 411.

On May 25, 2017, the trial court approved Ms. Clare’s proposed 50/50 visitation plan. CP at 324. No RCW 26.09.191 (“191”) restrictions were requested by Ms. Clare. See CP at 271-289, 323-324.

3. January 2018 – January 2019

On January of 2018, Ms. Clare moved to force a sale of the marital home and objected to the appointment of a GAL. CP at 327-38, 349-57. Ms. Clare specifically noted that “[t]here have been no allegations that either parent is unfit per RCW 26.09.191.” CP at 335. Ms. Clare stated, “the mother’s position for a permanent plan has all along been to equally share residential custody of the children.” CP at 354.

Ms. Clare indicated, however, that she intended to put pressure upon Mr. Clare in the coming months: “I submit that he will not get reasonable until he has some ‘skin in the game’ or is otherwise affected by this lengthy court process. . . . He loses nothing by dragging this out because my starting position is an equal split.” CP at 328.

Despite Ms. Clare’s objection, the trial court appointed a GAL, Laura Vaughn. CP at 379-83.

On February 7, 2018 Ms. Clare submitted a declaration stating:

My position has not changed. From the beginning to this day, I want a 50/50 division of the children and the assets. More importantly, neither of us are ‘the better parent’. . . _our children need both of us, equally and as much as possible, in their lives to be successful adults.

CP at 359–60. On February 21, 2018 Ms. Clare submitted a declaration reaffirming her desire for 50/50 visitation. CP at 384-87.

The very next day, on February 22, 2018, Ms. Clare submitted a contradicting declaration requesting primary custody and accusing Mr. Clare of being an unfit parent. CP at 388-89. She also requested Mr. Clare undergo a mental health evaluation. CP at 392.

Despite this, Ms. Clare's still requested 50/50 visitation during summer and again indicated 191 restrictions against Mr. Clare were inappropriate. CP at 390-404.

On March 9, 2018 Ms. Clare asked for a revised visitation schedule which would have increased exchanges between her and Mr. Clare. CP at 423-24; 435.

On July 23, 2018 GAL Laura Vaughn filed her first full GAL report. CP at 828-1005. Despite Mr. Clare's more favorable work schedule regarding visitation, CP at 1270, 1274, the report omitted that Mr. Clare had a better work schedule under the statutory factors CP at 1000-1001. The GAL recommended a 50/50 visitation schedule. CP at 1000-1005.

On July 31, 2018, Ms. Clare moved to restrict Mr. Clare's visitation and relocate the children to a different school district, alleging the children were faring poorly. CP at 1324-27. Ms. Clare's motion relied on the reports of her "experts" Chuck Derry and Dr. Mindy Mechanic, both of whom had never met, communicated with, or interacted with Mr. Clare or the Clare

children. CP 1312–23. The children’s therapists and teachers had indicated there was no issue with parenting. CP at 961–64, 970–78.

Mr. Derry conceded that he relied exclusively upon pleadings and the GAL report and had never met the Clare Children or Mr. Clare. CP at 1318. Mr. Derry conceded he considered all of Ms. Clare’s representations, whether or not disputed by Mr. Clare, as fact. CP at 1129-32.

The GAL submitted a supplement to her report on August 3, 2018. CP at 1338-1382. The GAL having recommended 50/50 visitation in her July 23, 2018 report, subsequently recommended Mr. Clare have visitation only every other weekend relying on Mr. Derry’s and Dr. Mechanic’s speculations to conclude Mr. Clare was alienating Ms. Clare from the children. CP at 1338-1342.

On August 14, 2018, the GAL submitted a second supplement adopting Mr. Derry’s conclusions wholesale. CP at 1434-41. This was despite the GAL specifically noting “[Mr. Derry] does not have a four-year degree.” CP at 1435. The GAL adopted Mr. Derry’s conclusions regarding “impact on Kennedy, Canon, and Cruz” and questioning by the father, despite Mr. Derry’s only claimed expertise being in intimate partner violence. CP at 1438. The GAL even noted that Ms. Reeve, the children’s counselor, stated, “she’s not hearing or seeing symptoms” and “[t]he children haven’t brought up the questioning by their father.” CP at 1442.

C. Background Facts - Ms. Clare's Allegations of Stalking and Domestic Violence. March 21, 2018 - August 22, 2018.

On March 21, 2018, Ms. Clare filed a Petition for an Order of Protection. See CP at 488. Contemporaneously, Ms. Clare introduced allegations that “Mr. Clare is very controlling” and that Mr. Clare and his attorney Ben Dow were accessing her work email and calendar. CP at 443-44. On March 28, 2018 Ms. Clare disclosed Chuck Derry and Dr. Mindy Mechanic, Ph.D., as expert witnesses to testify to alleged domestic violence and coercive control. CP 456–58.

On March 21, 2018, Ms. Clare also filed a Complaint in Federal Court alleging that Mr. Clare and Mr. Dow hacked into her email. CP at 578-79. That claim has since been dismissed with prejudice, with the court specifically noting that Ms. Clare failed to demonstrate any evidence of access by Mr. Clare.¹ *Telquist McMillen Clare PLLC v. Clare*, No. 4:18-CV-05045-SAB, 2019 WL 7819648, at *3 (E.D. Wash. Dec. 2, 2019).

On April 13, 2018 Mr. Clare submitted a declaration demonstrating the inconsistencies between Ms. Clare's behavior and her request for a

¹ The Federal court specifically found that: “Plaintiffs have failed to establish Mr. Morgan's qualifications as an expert witness. Plaintiffs do not introduce any evidence that Mr. Morgan is an expert; rather, Plaintiffs' statement of facts and Mr. Morgan's declaration only show that Mr. Morgan is an employee with an IT management company retained by Plaintiff's law firm, and that he reached conclusions regarding who accessed Plaintiff's email. Furthermore, neither the statement of facts nor Mr. Morgan's declaration contain information about how Mr. Morgan reached his conclusions.” *Telquist McMillen Clare*, 2019 WL 7819648, at *3.

protection order. CP at 470. On April 18, 2018 Ms. Clare submitted a reply declaration: claiming she was the victim of “coercive control” in an “abusive relationship” during the marriage, and as a result “it is not in the best interests of the children to co-parent and share decision making.” CP at 474. Despite these allegations, as of April 18, 2018, Ms. Clare had not yet set a hearing for her motion for a protection order. *See generally* CP. On Ms. Clare’s “coercive control” and email hacking allegations coincided with the court’s deliberation regarding Ms. Clare’s request for primary custody. CP at 390-404; 516.

On June 5, 2018, with Ms. Clare’s proposed parenting plan (granting her primary custody) still pending, Ms. Clare claimed to be deathly afraid of Mr. Clare, and that Mr. Clare was stalking her. CP at 540-545. Her reasoning was that Mr. Clare was uncomfortable, during their marriage, with Ms. Clare socializing alone with other men, due to her prior infidelity, and speculation, without evidence, that he was presently stalking her. CP at 540-45.

On May 24, 2018, Ms. Clare even attempted, without leave of the court, to retroactively amend her March 21, 2018 petition for a protection order to add harassment, by substituting a page when attaching to a subsequent declaration. CP 552-63.

On June 8, 2018 Ms. Clare submitted a declaration, without any evidence whatsoever, that Mr. Clare had placed a GPS tracking device on her vehicle, claiming she had “failed to mention” it in prior declarations. CP at 590-91. Mr. Clare categorically denied any and all stalking or tracking device allegations, noting the total absence of evidence. CP at 601.

On June 20, 2018, Ms. Clare, in support of her motion for a protective order, which was filed March 21, 2018 as an anti-stalking order, submitted a brief raising for the first time a request for a domestic violence protection order “and/or” anti-harassment order. CP at 670. Contemporaneously, Ms. Clare alleged that Mr. Clare’s private parenting journal, which Ms. Clare obtained through discovery, was “further evidence of harassment and stalking.” CP at 679.

The GAL’s July 23, 2018 report contained Ms. Clare’s stalking and “coercive control” allegations and request that the GAL interview Ms. Clare’s experts. CP at 860. The report assumes otherwise unfounded allegations by Ms. Clare regarding stalking as fact. CP at 853, 861.

The GAL’s August 3, 2018 supplement, recounted Mr. Derry’s and Dr. Mechanic’s conclusions, based solely on Ms. Clare’s representations, that Mr. Clare was a batterer, harasser, and stalker. CP at 1338-1382.

On August 6, 2018, Ms. Clare obtained, for the first time, a written protection order—temporary, which expired in 14 days. CP at 1403-05. On

August 9, 2018, Mr. Clare promptly and articulately responded to and denied Ms. Clare's August 6, 2018 allegations.

The GAL's August 14, 2018 second supplement adopted Mr. Derry's speculation that Mr. Clare was a batterer. CP at 1434-41.

D. Background Facts - August 22, 2018 – January 2, 2019

On August 22, 2018, the court simultaneously heard oral arguments regarding Ms. Clare's request for a protection order and request for primary custody. August 22, 2018 RP at 1-40. The judge granted the protection order pending trial stating "I think the fears, at least, have a basis in fact." August 22, 2018 RP at 8-9. The protection order was not enforceable, as Ms. Clare, an attorney, never reduced it to a written order. See generally CP. Ms. Clare was granted primary custody based upon the speculation from Mr. Derry and Dr. Mechanic contained in the GAL reports. August 22, 2018 RP at 37-38; CP at 1526. Finally, Mr. Clare was ordered to undergo a psychological evaluation. August 22, 2018 RP at 38.

On November 2, 2018, Ms. Clare moved the court to reduce Mr. Clare's visitation to supervised visits. CP at 1560. On November 7, 2018, Dr. Ronald Page Ph.D., submitted his court ordered evaluation of Mr. Clare to the court. CP at 1561-1568. Dr. Page concluded that "there is nothing in Mr. Clare's history, interview presentation, or testing which rises to the level of diagnostic categorization[.]" CP at 1566. Dr. Page also stated "Mr.

Clare should not be misrepresented as a self-interested abuser with current motivation to dominate and control Mrs. Clare ... I found no legitimate basis to assume this man would not be a suitable parent for primary or shared custody[.]” CP at 1567. Finally, Dr. Page noted “I have no idea to what extent Mrs. Clare has created stress for the children as I have not examined her.” CP at 1567.

On November 16, 2018, the court denied Ms. Clare’s Motion for supervised visitation. CP at 1678. The Court noted in its ruling that “this case started out with two parents complementing each other and say this is a case where we have two good parents.” CP at 1678:6-8. Following, the November 16, 2018 hearing, the GAL refused to submit her reports to Mr. Clare’s counsel. CP at 1623, 1688-95, 2166.

On December 7, 2018, Mr. Clare was ordered to obtain a second psychological evaluation by Dr. Kenneth Cole, PsyD. CP at 1685. Dr. Cole determined that “Mr. Clare possesses the basic personal attributes necessary for safely and effectively parenting his children[,]” and “it is my clinical opinion that no compelling evidence was presented that supported the allegations that Mr. Clare has engaged in Intimate Partner Violence (IPV) or unusual Coercive Control behaviors in his relationship with Andrea Clare.” CP at 2218.

On December 11 and 19, 2018, Mr. Clare's expert witness, Dr. Marnee Milner, J.D., Ph.D, an attorney, registered GAL, and clinical and forensic psychologist, submitted her expert reports to the court. CP at 1698, 1704. Dr. Milner noted confirmatory bias in the GAL investigation of Ms. Clare's claims. 1706-11. Dr. Milner noted the GAL submitted a supplemental report on a specific issue without having interviewed Mr. Clare concerning the issue. CP at 1707. Dr. Milner noted the issue of the GAL's interview with a non-fact witness Dr. Mechanic. CP at 1707 ("Ms. Vaughn's discussion with Dr. Mechanic was also a violation of professional conduct and completely outside the accepted standard of practice."). Dr. Milner identified a litany of errors in the GAL investigation and report. CP at 1704-28. Dr. Milner also identified errors regarding Ms. Clare's allegations of Intimate Partner Violence and Coercive Control. CP at 1713-16. Finally, Dr. Milner identified that Dr. Mechanic, violated APA ethics Code 9.01 and APA Forensic Guidelines 9.03 as she diagnosed and commented on Mr. Clare's behavior "without examination." CP at 1719.

On December 24, 2018, the court ordered the GAL to finally produce her report to Mr. Clare, despite the GAL's objections to Mr. Clare's subpoenas. CP at 2181.

E. Trial – January 2, 2019

At trial Ms. Clare relied almost entirely on her own testimony and the testimony of the GAL to support her restrictions on Mr. Clare's visitation and decision making. Each party submitted their own proposed findings and conclusions of law to the trial court. CP at 2297–309 (Mr. Clare's); 2326–75 (Ms. Clare's). Ms. Clare's findings contain facts as early as 2007 concerning her allegations of “coercive control.” CP at 2330.

1. Chuck Derry's Testimony.

Mr. Derry testified that he has no formal college degree, and no formal “Intimate Partner Violence” training despite claiming to be qualified as a testifying expert on IPV. RP at 121-22. The Court admitted Mr. Derry as an expert despite Mr. Clare's objection. RP at 119-20; 125:12. Mr. Derry had no recollection of previously testifying as an expert in a civil case. RP at 167. Mr. Derry had met Ms. Clare for the first time the previous night and spoke to her once or twice previously by phone for fifteen minutes. Mr. Derry never examined, spoke to, or interacted with Mr. Clare. RP at 158:4-12. When asked, concerning Mr. Clare's refutations, “[d]o you know whether Mr. Clare has actually engaged in all the behaviors that Mrs. Clare has alleged?”, Mr. Derry replied, “I believe Miss Clare” RP at 164:13-15. Mr. Derry concluded that Mr. Clare engaged in IPV without identifying the factual

basis or his reasoning and offering only a conclusory statement conceding that he weighed disputed statements in favor of Ms. Clare. RP at 153-54.

2. Dr. Kenneth Cole.

Dr. Cole is a licensed clinical psychologist in the state of Washington. RP at 303:5. Dr. Cole testified at length about the nature and validity of the tests he performed on Mr. Clare concerning intimate partner violence, Kevin's psyche, and Kevin's fitness as a parent. RP 304-305. Mr. Clare was negative for every indicator on Danger Assessment Scale and was given a 1 rating. RP at 306:14-17. Dr. Cole testified Mr. Clare is non-aggressive. RP at 306-08. Dr. Cole testified that all aspects of Mr. Clare's Parent/Child Relationship Inventory were within normal range, the parenting stress index was within normal range, and Mr. Clare was adequately stable emotionally to parent. RP at 307-09

Based on the evidence presented by both sides, there was no indication of intimate partner violence or coercive control. CP at 308:12-19. Dr. Cole opined that Mr. Derry and Dr. Mechanic breached the standard of care by coming to "onerous conclusions about [Mr. Clare's] behavior and character" without talking to him. 310:7-10. Dr. Cole testified that the standard of care requires at minimum to have

spoken to Mr. Clare and perform some kind of assessment. RP at 310:11-19.

Dr. Cole testified that there is a difference between stalking behavior and mere inquiry to confirm fidelity within a committed relationship RP at 320-321. Dr. Cole contradicted Mr. Derry's conclusions and testified that there was nothing in Ms. Clare's declarations that suggested IPV. RP at 322-323.

F. Post-Trial Conduct by Ms. Clare

Subsequent to the court's final entry of the parenting plan awarding primary placement and sole decision making to Ms. Clare as well as a protection order against Mr. Clare, Ms. Clare chose to attend Kennedy's soccer game knowing Mr. Clare would be there as it occurred during his very limited residential time. CP at 2377-78, 2382-401. Ms. Clare even approached the area was standing, forcing Mr. Clare, per the court's protection order, to walk over 50 feet away. CP at 2377. Flippanly, Ms. Clare admitted the incident took place. CP at 2402-05. No action was taken by the trial court as a result. See generally CP.

ARGUMENT

A. The Trial Court Improperly Relied on a Biased GAL Investigation of Ms. Clare's Allegations

GALs have an unequivocal duty to maintain fairness, objectivity, and independence. GALR 2(b) (“A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom.”)

GALs must not accept parties’ claims at face value:

It has long been a concern of the legislature that GALs, who are appointed in family law matters to investigate and report to superior courts about the best interests of the children, do their important work fairly and impartially. Following public outcry about perceived unfair and improper practices involving GALs, the legislature adopted RCW 26.12.175 to govern the interactions of courts and GALs and our Supreme Court adopted the GALR. These measures are intended to assure that the welfare of the children whose parents are involved in litigation concerning them remains the focus of any investigation and report, and that acrimony and accusations made by the parties are not taken up by an investigator whose only job is to report to the court after an impartial review of the parties and issues.

In re Marriage of Bobbitt, 135 Wn. App. 8, 24–25, 144 P.3d 306 (2006).

On July 23, 2018, having interviewed fact witnesses, Mr. Clare, Ms. Clare, and the children, the GAL recommended 50/50 visitation. CP at 1001. On July 27, the GAL reviewed Dr. Mechanics speculative report. CP at 1341, 1356-66. On July 31, the GAL reviewed Mr. Derry’s speculative report. 1341, 1367-81.

Subsequently, on August 3, 2018 the GAL recommended primary placement with Ms. Clare as a result of reviewing and incorporating the “reports” of Mr. Derry and Dr. Mechanic:

Mr. Clare has systematically alienated the children from their mother not only now but during the marriage. This GAL believes that continuing to leave the children on a 50/50 visitation schedule is not in their best interest as there is no current plan in place to insure [sic] that the children are not questioned by Mr. Clare, getting assessment and or treatment for Mr. Clare and/or ensuring that Mr. Clare does not continue to alienate Mrs. Clare from children.

CP at 1339. The GAL relied entirely on the speculation of Ms. Clare’s experts, taking those speculations as facts. CP at 1341–42. At no point have Ms. Clare’s experts ever interviewed or otherwise engaged Mr. Clare or the children. CP at 1356-81; RP at 158. Mr. Derry and Dr. Mechanic violated the standard of care for subject assessment by not even speaking with, much less examining Mr. Clare. RP at 310. Those conclusions about Mr. Clare, regurgitated in the GAL report are baseless and serve no evidentiary function.

On August 13, 2018, the GAL stated:

This GAL maintains the recommendation that Kevin Clare receive a forensic psychological evaluation with a trained evaluator who is highly skilled and knowledgeable about the dynamics of IPA, particularly coercive control. While Mr. Derry states that Kevin Clare is well aware of his behaviors this GAL is still concerned that there could be some

underlying mental health issues contributing to Kevin Clare's behaviors.

This GAL would further recommend that Mr. Clare enroll in a Batterer's Intervention Program (BIP).

If Kevin Clare isn't diagnosed with a mental health illness, this should not be indicative that he has not engaged in parental alienation, emotional abuse of a child and/or abusive use of conflict nor should it be indicated nor should it be indicative that he will not engage in these behaviors in the future.

CP at 1443.

In contravention of GALR 2(b) the GAL contacted and interviewed only Ms. Clare's experts even going so far as to incorporate their speculations and attach their "reports." CP at 1341-42, 1356-66, 1367-82, 1434-41, 2263. In contrast, the GAL never reached out to Mr. Clare's expert, Dr. Marnee Milner J.D., PhD. See generally CP; RP. Whereas the GAL incorporated and attached Mr. Derry's and Dr. Mechanic's reports, her billing statements reflect she spent only .2 hours reviewing Dr. Milner's voluminous report. CP at 2262.

The GAL took Ms. Clare's representations and accusations at face value. See generally CP at 828-1005, 1338-1382, 1434-1441. The GAL assumed the speculations and conclusions of Ms. Clare's "experts" as facts. Id. The GAL did not investigate or take seriously Mr. Clare's concerns. Id. The GAL, relying on Ms. Clare's "experts" changed her position from 50/50 visitation, to primary placement with Ms. Clare in a span of eleven days.

CP at 1338-1342. The GAL objected to producing her report to Mr. Clare and did so only when ordered by the court on December 24, 2018 just nine days in advance of trial. CP at 1623, 1688-99, 2166, 2181. The GAL ignored the reports of Mr. Clare's experts, and the neutral psychologists that the court ordered Mr. Clare to be evaluated by. CP 1338-82, 1434-41. This conduct does not maintain substantive fairness, nor the appearance of fairness as dictated by GAL rules. GALR 2(b).

The GAL's investigation into alleged cyberstalking and email hacking was also tainted by bias. The GAL only interviewed Ms. Clare's "expert," Dan Morgan.² CP at 538. The GAL did not speak with Mr. Clare's expert on this issue. CP 537-539, see generally CP. The GAL adopted Mr. Morgan's conclusory statement wholesale stating "[b]ased on this additional contact this GAL's belief is that there was an Apple device in Pasco which was randomly accessing Mrs. Clare's e-mails and calendar." Id. The GAL exceeded the scope of her duties in opining on highly technical email hacking issues, in violation of GALR 2(j).³

The GAL's conduct by her failure to investigate disputed statements of Ms. Clare and Mr. Clare in favor of Ms. Clare, in regard to both the

² The federal district court determined Mr. Morgan not a qualified expert and his testimony inadmissible. *Telquist McMillen Clare*, 2019 WL 7819648, at *3.

³ The federal district court also ruled there was no evidence that Mr. Clare accessed Ms. Clare's email. *Telquist McMillen Clare*, 2019 WL 7819648, at *3.

parenting and protection order issues, violates GALR 2(b) and was expressly admonished in *In re Bobbitt*, 135 Wn. App. at 26. (“the GAL refused to meet with Bobbitt or to interview his references despite continuing the investigation and contacting other witnesses, and despite knowing that he wanted to engage in the investigatory process well before trial.”). At trial, the GAL was Ms. Clare’s most important and most favorable witness, testifying for two and a half days. RP January 2-3, pg. 204-357; RP January 3-11, pg. 5-88, 170-284.

The GAL also exceeded her scope and qualifications in violation of GALR 2(j) by opining on what she believes constitutes emotional abuse of the Clare children, and the impact the alleged abuse has had on the children. Additionally, the GAL exceeded GALR 2(j) by opining on the technical issues of alleged hacking.

B. The Trial Court Erred in Relying on Inadmissible Expert Opinions Provided by Mr. Derry and Dr. Mechanic.

The trial court has the inherent obligation to exclude evidence as irrelevant, inadmissible, or prejudicial. *Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991). “Essentially, the trial court acts as a gatekeeper and can exclude otherwise admissible evidence” if it fails to meet evidentiary standards. *State v. King Cty. Dist. Court W. Div.*, 175 Wn. App. 630, 638, 307 P.3d 765 (2013).

“Generally, expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact.” *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014).

“Though the expert need not have personal, firsthand knowledge of the evidence upon which he or she relies, the evidence must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” *In re Keefe*, 159 Wn.2d 822, 831, 154 P.3d 213 (2007).

The trial court relied heavily, either directly or indirectly through GAL reports, on the opinions of Dr. Mechanic and Mr. Derry regarding the welfare of the children and regarding battery allegations. CP at 2440-41. Mechanic and Derry both conceded they never met, evaluated, or attempted to evaluate Mr. Clare offered their “evaluation” of Mr. Clare solely based on information supplied by Ms. Clare. CP at 1356–66 (Mechanic); 1367–82 (Derry); RP at 158. Such “evaluations” are not “helpful” as they lack factual basis. Moreover, the “evaluations” violated the standard of care. RP at 310.

Derry and Mechanic’s “evaluations” of Mr. Clare also violated APA Forensic Guidelines 9.01, 9.02, and 9.03. APA Forensic Guideline 9.01 states:

Use of Appropriate Methods

Forensic practitioners strive to utilize appropriate methods and procedures in their work. When performing examinations, treatment, consultation, educational activities, or scholarly investigations, forensic practitioners seek to maintain integrity by examining the issue or problem at hand from all reasonable perspectives and seek information that will differentially test plausible rival hypotheses.

(emphasis added). APA Forensic Guideline 9.02 reads:

Use of Multiple Sources of Information

Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible (AERA, APA, & NCME, in press). When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.

(emphasis added). Mr. Derry and Dr. Mechanic disregarded Guidelines 9.01 and 9.02 and instead evaluated Mr. Clare by assuming all facts asserted by Ms. Clare as true, while ignoring Mr. Clare's assertions, and often weighing evidence. Dr. Mechanic states:

The record reflects numerous ways in which Mr. Clare used power and control over Ms. Clare, including justifying his monitoring of her whereabouts because she had a relationship with another man before their marriage, through the use of tracking applications, like "find my iPhone," monitoring her call/text log on her phone, and hacking into her work email account via- her iPad. It is notable that these harassing and monitoring acts occurred both during their marriage and post-separation.

CP at 1357–58. Derry likewise weighed evidence:

Kevin Clare has used physical abuse, stalking and he is using the children against Andrea Clare. Kevin Clare continues to make false statements and misrepresentations. He has seen the false statements in this GAL' s report and then in other places. . . . There has been impact on Kennedy, Canon and Cruz. Both Kennedy and Canon are both seeing therapists at this time to address issues of anxiety and/or depression which has emerged since the separation has occurred.

CP at 1438 (emphasis added).

Dr. Mechanic and Mr. Derry violated the standard of care by offering opinions without evaluating Mr. Clare and basing instead those opinions on one-sided representations by Ms. Clare. The trial court's admission, use, and reliance on the testimony and declarations of Mr. Derry and Dr. Mechanic as expert witnesses was in error. ER 702, 703. The use of those opinions, and the underlying speculative facts, on pages 1-8 of the letter ruling, CP 2438-2445, and The Findings Based on Those Offered by Petitioner, No.'s 14, 16, 34, 73, 155,, 163, 172, 173, CP 2466-80, and possibly all were tainted by this inadmissible testimony. The Trial Court specifically adopted the theories of IPV and coercive control which was central to both the parenting plan providing Mr. Clare very limited visitation, the protection order, and the order that Mr. Clare attend domestic violence training.

C. Mislead by the GAL, the Trial Court Made Several Findings of Fact Not Supported by Substantial Evidence.

Because the trial court relied on the GAL's biased fact finding as well as inadmissible expert testimony, it made findings of fact which are not supported by substantial evidence. Findings of fact must be supported by substantial evidence. *Katara v. Katara*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). Substantial evidence is "evidence sufficient to persuade a fair-minded person of the truth of the matter asserted." *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014).

Broadly, the trial court erred in finding that Mr. Clare excessively questioned the Clare children, that the Clare children were subject to emotional abuse (potential or actual) from Mr. Clare, that Mr. Clare stalked Ms. Clare, that Mr. Clare hacked Ms. Clare's emails, and that Mr. Clare "coercively controlled" Ms. Clare during and after their marriage. Those specific Findings Based on Those Offered by Petitioner which are not supported by substantial evidence are 16, 19, 24, 31, 33, 34, 42, 43, 52, 54, 61, 64, 73, 74, 75, 102, 107, 110, 118, 119, 130, 139, 144, 146, 149, 164, 170, 172, 173, and 177. CP at 2466-80.

1. There was not substantial evidence to find Mr. Clare "Excessively Questioned" the Clare children or that such questioning would or could result in emotional abuse.

The allegation of emotional abuse of the Clare children is not well founded as Ms. Clare a) did not testify that the Clare children have suffered any emotional damage, See generally RP at 714-826, 932-1116, or about any behavior by the children that would indicate such damage, Id., b) has not offered any corroborating proof from any of the children's evaluators, teachers, psychologists (or anyone else) as to any actual emotional damage, Id. and c) failed to offer any expert testimony, at trial or before, as to whether Mr. Clare's conduct could even potentially result in emotional damage to the Clare children. Such failures alone should be fatal to this allegation.

However, there is actual, independent, third-party evidence that the opposite is true. The GAL indicates in her report that as of June 5, 2018, the GAL was still in favor of a 50/50 plan. CP at 900. The GAL also states "[t]he teachers have all told me that they can't tell the difference between the children when they are with either parent." CP at 900. Noticeably absent from the report was any signs of emotional abuse or excessive, inappropriate questioning of the children by Mr. Clare. When the GAL spoke with the children's teachers and other objective third parties and there were no issues. CP 961-64.

Specifically, the GAL spoke with the children's counselor, Sara Reeve; again, there were no signs of emotional abuse or excessive,

inappropriate questioning. CP at 970–78 (“The child didn’t say anything concerning to her.”). Not getting the answer she wanted, the GAL improperly told Ms. Reeves that Mr. Clare was excessively questioning the Clare children. CP at 973. Despite the GAL’s attempts to “poison the well,” Ms. Reeve did not change her opinion in light of these new alleged facts:

Either the father’s questioning of the children for his journal isn’t a problem for Kennedy or it isn’t enough to cause mental health issues. Both the parents and Kennedy denied symptoms of concern and that’s why her sessions ended. She wasn’t hearing about Kennedy having issues at that point and time.

CP at 975. Ms. Reeve even wrote letters on Mr. Clare’s behalf explaining that the Clare children’s issues had begun before the alleged “excessive questioning” of the Clare children, CP at 1418, 1420.

Instead, Ms. Clare’s allegation of emotional abuse of the Clare children allegation relies on one thing—the opinion of the GAL. Ms. Clare had the GAL testify for roughly two and a half days to begin this trial; her testimony and reports were her main source of evidence in this case. The GAL testified at trial that a journal of happenings, voluntarily turned over by Mr. Clare at the direction of his previous attorney, is evidence of emotional abuse of the Clare children. Stunningly, and in a similar fashion to Ms. Clare, the GAL made this assertion without identifying any behavior by the children that would indicate they have actually suffered emotional abuse. Ms. Vaughn’s testimony did not even offer a pseudo-scientific or

psychological analysis as to why she believed the conduct described in the journal was emotional abuse, but just kept insisting that the amount of questioning was “just too much.” Mr. Clare’s counsel’s questioning revealed that the GAL did not in fact have a problem with any one question. (RP at 206-242: No problem with journal questions (Jan. 3- 11))

The GAL’s opinion should be considered as a lay witness. The GAL did not testify regarding any credentials or expert qualifications she possesses for this Court to consider her opinion on the issue of emotional abuse, whether potential or actual. The duty of a GAL is to report facts to this Court and ultimately make a recommendation for the best interest of the children. It is simply not her duty, nor is she qualified, to evaluate children or conduct by parents and diagnose emotional abuse. Allowing GAL’s to become pseudo-psychologists in the family law context with little or no training is antithetical to Washington Evidentiary Rules, specifically ER 702.

The only witness qualified to opine on such an allegation of emotional abuse was Dr. Marnee Milner, J.D., PhD. Upon careful evaluation of the journal, the short video of Cruz, the pleadings in this case, and the GAL Reports, Dr. Milner opined that the journal (and the video) did not rise to the level of emotional abuse of a child. RP at Jan. 3-11, at pg. 856. Dr. Milner testified that she found no basis to define Mr. Clare’s

conduct as emotional abuse. *Id.* This Court should be guided by the only expert opinion presented to this Court regarding emotional abuse of the Clare children.

In addition to the GAL's lack of qualifications, she conducted a biased investigation in this case. CP at 1704-28.

2. There was Not Substantial Evidence to Support a Finding of Stalking Conduct by Mr. Clare.

This Court reviews the trial court's decision to grant or deny a stalking protection order for an abuse of discretion. *In re Marriage of Freeman*, 169 Wn.2d 664, 670–71, 239 P.3d 557 (2010). A trial court may only “enter a stalking protection order if it finds by a preponderance of the evidence” that the petitioner is a victim of stalking conduct by the respondent. *Kencayd v. Preece*, 196 Wn. App. 1073, at *2 (2016) (unpublished).

Upon review of the trial court's findings and written opinion, there is a lack of legal analysis as to under what avenue the trial court found “stalking” under RCW 7.92.020(3)(a–c). Because the trial court failed to enter a domestic violence protection order, and specifically denied any

finding of domestic violence, CP at 2441, this likely means the trial court found stalking was met only under RCW 7.92.020(3)(c)⁴ which states:

(c) Any course of conduct involving repeated or continuing contacts, attempts to contact, monitoring, tracking, keeping under observation, or following of another that:

(i) Would cause a reasonable person to feel intimidated, frightened, or threatened and that actually causes such a feeling;

(ii) Serves no lawful purpose; and

(iii) The stalker knows or reasonably should know threatens, frightens, or intimidates the person, even if the stalker did not intend to intimidate, frighten, or threaten the person.

RCW 7.92.020(3)(c).

Based on the record in this case, there is not substantial evidence to prove Mr. Clare had been “stalking” Ms. Clare. Not only is there a lack of evidence to prove stalking conduct occurred, but the record reflects that Ms. Clare was not “actually” frightened or threatened by the alleged conduct as she went most of the proceeding without any protection or no-contact order, after she had made her allegations. Therefore, the trial court erred in making all findings of fact which support that stalking occurred.

Below is a timeline of events related to Ms. Clare attempting to obtain any type of protection order:

⁴ Stalking was likely not found under RCW 7.92.020(3)(a) or (b) because if those definitions of “stalking” were satisfied, the trial court would have entered a DV protection order. *See* RCW 26.50.010(3).

- -March 2016: Ms. Clare files for divorce in Walla Walla County, but did not seek a protection order.
- -August 2016: Ms. Clare refiles divorce in Franklin County, seeks a protection order. Obtains an immediate temporary protection order ex-parte. CP at 4, 5, 32–43.
- -A few days/weeks later: both parties agree to dismiss the protection order and agree to a civil stay away order, though the civil stay away order was never even reduced to writing. CP at 544.
- **Roughly a year and a half go by with no issues**
- -March 2018: Ms. Clare “discovers” that Mr. Clare and his attorney are hacking into her emails.
- -March 2018: Ms. Clare attends a GAL conference and “realizes” she has been a victim of stalking and coercive control.
- -April 2018: Despite Ms. Clare’s allegations, trial court grant’s **Ms. Clare’s** summer parenting plan, 50/50 week on week off. CP at 477.
- -May 2018: Ms. Clare again renewed her request for a protection order. CP at 479.
- -June 2018: Ms. Clare claims in a Reply Declaration that Mr. Clare put a GPS tracking device on her car. CP at 590–91.

- -June 2018: Ms. Clare files for Domestic Violence Protection Order or in the alternative an Anti-Harassment Protection Order. CP at 670.
- -August 2018: Ms. Clare finally notes hearing for protection order same day as her motion to adopt her new parenting plan which significantly restricts Mr. Clare's parenting.
- -September 2018: Protection Order granted by trial court, but never reduced to written order or filed.
- **No valid protection order exists for next six months**
- -March 2019: Trial court enters Protection Order – Stalking as part of final orders.

Ms. Clare's actions do not reflect that of a stalking victim, who would seek out an order soon after realizing that she was being stalked. Instead, Ms. Clare uses the protection order, when convenient, as a weapon to influence the visitation schedule. Ms. Clare "realized" or "discovered" two new allegations in March of 2018 (the email hacking and coercive control/stalking) and she did not set the motion to be heard until August of 2018. Also, during this period, Ms. Clare, herself, had moved for and was granted a week on week off 50/50 custody in April of 2018. CP at 477.

Ms. Clare's allegations in support of her petition for a restraining order (and a basis for a limit on Mr. Clare's visitation) can be put into two categories 1) Mr. Clare has been stalking and coercively controlling Ms. Clare throughout their marriage, 2) Mr. Clare has been stalking coercively controlling Ms. Clare since separation. Accepting almost all of Ms. Clare's allegations as true, the trial court found:

The Respondent is indeed guilty of abusive conduct toward the Petitioner both during their marriage and afterwards. The rules of conduct that he imposed following her disclosure of her affair prior to their marriage, his need to know always where she was and what she was doing, his use of the "Find my iPhone" app, his unreasonable examination of her panties for evidence of an extramarital affair, his unauthorized reading of her text messages and/or emails, his questioning of the children and third parties regarding her activities and whereabouts. . . .

CP at 2441.

a. allegations of stalking and coercive control during marriage.

Mr. Clare categorically denied any stalking or coercive control occurred during the Clare marriage. Ms. Clare's two main pieces of evidence of coercive control and stalking during the marriage are 1) Mr. Clare tracking her whereabouts via the iPhone app and 2) the "rules" the couple had agreed to salvage their marriage given Ms. Clare's past acts of infidelity. The trial court relied heavily on marital conduct and marital

dynamics in finding that Mr. Clare stalked Ms. Clare during the marriage. CP at 2441.

i. iPhone app tracking allegation.

First, both parties disputed the nature and context of Mr. Clare's use of the iPhone app. Mr. Clare told the trial court that he used the app so that he could easily locate Ms. Clare and check when to see when she was leaving work or a bar to determine when to start dinner. CP at 125–26, RP at 510. He emphasizes that this was done with her knowledge and consent. *Id.* Ms. Clare's position is that she never allowed Mr. Clare to use the find friends application CP at 541.

Objective evidence, a text exchange between the parties, corroborates Mr. Clare's story and directly conflicts with the story told by Ms. Clare. CP at 1515–17 (Ms. Clare: "U and kids come find me [smiley face emoji] In golfcart. Track phone"). Ms. Clare has never addressed the text message exchange evidence and still argues, based on her self-serving testimony alone, that she never allowed Mr. Clare to use her location. Ms. Clare's only relies on her self-serving testimony to support her story.

ii. "Rules" During Marriage

Ms. Clare also argues that Mr. Clare had certain rules for her about seeing other men, given her past acts of infidelity. In reality, As discussed

these “rules” were an agreement between two consenting adults in attempts to rebuild trust that was lost after Ms. Clare disclosed her previous affair. RP at 468. The agreement was that Ms. Clare would let Mr. Clare know when she was socializing with other men alone, due to her prior infidelity. RP at 469. Ms. Clare was free to leave the relationship at any time and did so in February of 2016 without any objection from Mr. Clare. RP at 471. It is concerning that a dissolution court is keen on investigating into alleged marital misconduct, when Washington is a no-fault divorce state.

Not only are Ms. Clare’s allegations untrue, and not borne out by the evidence, but occurred so long ago even if they were true they cannot be a basis, as a matter of law, for granting a protection order several years later.

To grant a stalking protection order, a court must also find that there is a current fear of stalking conduct. *Freeman*, 169 Wn.2d at 674, 676 (“It is not enough that the facts may have justified the order in the past.”). Ms. Clare left the family home and never returned in February of 2016. The protection order entered by the trial court was granted in March of 2019, nearly three years later. To the extent the trial court relied on alleged stalking behavior that occurred several years ago during the marriage, it erred in finding that as of the date the protection order was signed that Ms.

Clare was reasonably “intimidated, frightened, or threatened and that actually causes such a feeling.” RCW 7.92.020(3)(c).

iii. other conduct during marriage.

Mr. Clare admitted he did check Ms. Clare’s underwear when she would return home from trips and he was often suspicious that she was seeing someone else. RP at 496. First off, though Mr. Clare isn’t proud of his conduct in hindsight, he did have reason to be suspicious given her prior infidelity, and Ms. Clare was having an affair, at least emotionally, with her law firm partner Mr. Telquist.

Second, Washington is a no-fault divorce state which does not task its dissolution courts with examining and attributing fault to the marital conduct and marital dynamics once the parties go their separate ways. *See Little v. Little*, 96 Wn.2d 183, 188, 634 P.2d 498 (1981) (“Obviously the element of fault is removed from the action. This evidences a legislative recognition of the strife, vindictiveness, and bitterness which proof of that element engendered, to no useful or desirable purpose.”).

b. allegations of stalking and coercive control since separation (Email Hacking and Tracking)

The thrust of Ms. Clare’s allegations, since separation, are that Mr. Clare and his attorney Mr. Dow accessed her work email in order to “stalk” Ms. Clare. Ms. Clare’s self-serving declarations provide absolutely no

independent evidence to support any of these claims. CP at 474–76. And, of course, Mr. Clare and Mr. Dow denied all of Ms. Clare’s allegations. CP at 510, 514.

Mr. Clare’s Response⁵ accurately narrowed Ms. Clare’s “evidence” of her cyber stalking conspiracy theory:

Ms. Clare's Petition is based on two events which she apparently feels were kept secret from the world and knowable only by access to her email/calendar account.

CP at 489; *see also* CP at 572. The two events Mr. Clare “should not have been aware of” were (later fleshed out at trial) 1) that Ms. Clare had gone to Olympia for a GAL CLE, and 2) that Ms. Clare and Mr. Telquist had taken a trip to Hawaii. However, the record clearly reflects that Mr. Clare had a reasonable explanation of how he came to know this information, which was corroborated by third parties.

First, Ms. Brantley, the children’s kindergarten teacher, testified that she had been told by Ms. Clare that she was in Olympia one time and Hawaii another, and at the time did not believe it was confidential information. CP at 518–20. In a casual conversation with Mr. Clare, the topic of Ms. Clare’s trips came up, and Ms. Brantley mentioned the locations of the trips. *Id.* Ms. Brantley’s testimony was unchallenged by Ms. Clare. RP at 812-813.

⁵ A full review of Mr. Clare’s Response, at CP 488–493, will give this Court a concise summary of Mr. Clare’s response to Ms. Clare’s unsupported allegations.

Second, Cynthia Schatz, Mr. Clare's mother, testified that she had a conversation with a friend at church, Mr. Telquist's ex-mother-in-law, who had told her that Mr. Telquist and his kids were in Hawaii. CP 522; RP at 453-54. Ms. Schatz was, at the time, already aware that Mr. Clare had told her that Ms. Clare asked him to watch the Clare children because she was "out of town." *Id.*; *see also* CP at 572 (Ms. Clare confirms this: "I attended a wedding in Hawaii and asked him to keep the children for two of my regular visitation days as I would be 'out of town.'"). Ms. Schatz deduced that Ms. Clare was likely in Hawaii as well. *Id.* Ms. Schatz communicated what she had heard to Mr. Clare. *Id.* Likewise, Ms. Schatz testimony remained the same at trial and unchallenged by Ms. Clare. RP at Jan. 3-11, pg. 453-55.

Regarding any actual, technical evidence that Mr. Clare or Mr. Dow had actually accessed Ms. Clare's work email, or evidence that would even show how such information could have been gleaned from Ms. Clare's email, there was none. Instead, Ms. Clare submitted the conclusory declaration of Dan Morgan, an employee of "Teknologize," who was already hired by Ms. Clare's law firm to "maintain the law firm's computer

systems and IT needs.” CP 548.⁶ His only conclusion was, without providing any explanation or analysis:

Based upon my review of the TMC.law systems, I have confirmed that a residence in Pasco had been accessing the TMC.law Microsoft Exchange using Andrea Clare's credentials. Such access would provide any and all knowledge and/or review of her calendar, contacts, and emails through the TMC.law server. Such unauthorized access has been seen in both 2017 and 2018.

CP at 548. He also opined that “the device used to gain access to Andrea Clare’s Exchange server was an Apple device.” His basis for that opinion: there was none. Mr. Morgan’s declaration does not meet the standards for evidence required as expert testimony and are inadmissible under ER 702 and 703. Therefore, it likewise cannot be a basis for the trial court to find substantial evidence of stalking. In fact, a federal court ruled it inadmissible and thus collateral estoppel bars its admissibility or relevance. *Telquist McMillen Clare*, 2019 WL 7819648, at *3.

Instead, there was objective, forensic evidence to the contrary. Mr. Clare had hired Roloff Digital Forensics to conduct a forensic investigation into a family iPad that had remained at the family home, but had broken

⁶ “Plaintiffs’ statement of facts and Mr. Morgan’s declaration only show that Mr. Morgan is an employee with an IT management company retained by Plaintiff’s law firm, and that he reached conclusions regarding who accessed Plaintiff’s email. ECF No. 53 at ¶ 1; ECF No. 56 ¶ 4. Furthermore, neither the statement of facts nor Mr. Morgan’s declaration contain information about how Mr. Morgan reached his conclusions. The Court concludes that Mr. Morgan’s declaration is inadmissible under Federal Rules of Evidence 702 and 703.”

from one of the children dropping it.⁷ Senior Forensic Examiner Joshua

Michel was able to opine that, using data extraction software:

E-mail activity related to the following user accounts, which appeared to be associated with Ms. Clare, were identified: andrea@tzmlaw.com and clare@tricitylaw.com. Further review revealed that the activity associated with those accounts appeared to end in 2015. This was to be expected from the broken iPad, which was last synchronized in November 2015, and therefore did not contain any information beyond that date.

...

Mr. Morgan does not identify what he means by “TMC.law[”] systems, or how he identified that a “residence in Pasco” had been accessing the TMC.law Microsoft Exchange or how he determined Andre[a] Clare’s credentials. Presumably he has looked as a “server log” of contacts, which identified an IP address that has had access. If that is the case, it is a relatively simple process to obtain the registration information associated with that IP address, which information includes the person with whom it is associated. That information is available through subpoena.

Further, Ms. Clare has stated that, upon her departure, she deleted her Exchange account from the iPad in question (community iPad). If so, that information would no longer be available to a non-technical person using the iPad. Although it is true that a forensic evaluation might detect that the credentials had once been on that iPad, such access is beyond the capability of the average consumer user of those devices.

CP at 528, 564–65. As a result of Mr. Michael’s response, Ms. Clare’s

“expert” Dan Morgan did not testify at trial regarding his theory.

D. The Trial Court Abused Its Discretion in Crafting a Parenting Plan for the Clare Children that Significantly Limited Mr. Clare’s Visitation.

⁷ “If [child] could tell his parents anything at all and not get in trouble it would be that he broke the iPad.” CP at 929.

“[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). “[T]he state may interfere only ‘if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.’” *In re Custody of Smith*, 137 Wn.2d 1, 17, 969 P.2d 21 (1998) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972)).

“Trial courts have broad discretion to create parenting plans tailored to the needs of the individuals involved in a particular dissolution.” *In re Marriage of Chandola*, 180 Wn.2d 632, 658, 327 P.3d 644 (2014). However, “while trial courts have broad discretion in the context of a parenting plan, that discretion must be exercised within the bounds of the applicable statutes.” *Id.* Minor squabbles between parents who are going through a dissolution are not to be considered in restricting a parent’s visitation or decision-making. *See Katare v. Katare*, 175 Wn.2d 23, 36, 283

P.3d 546 (2012) (“[M]ore than the normal. . . hardships which predictably result from a dissolution of marriage.”)

In evaluating a residential schedule, a court “shall make residential provisions for each child which encourage **each parent** to maintain a loving, stable, and nurturing relationship with the child, consistent with the child’s developmental level and the family’s social and economic circumstances.” RCW 26.09.187 (emphasis added). Absent RCW 26.09.191 (“191”) restrictions, a court shall consider the following factors:

- i) The relative strength, nature, and stability of the child’s relationship with each parent;
 - (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
 - (iii) Each parent’s past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
 - (iv) The emotional needs and developmental level of the child;
 - (v) The child’s relationship with siblings and with other significant adults, as well as the child’s involvement with his or her physical surroundings, school, or other significant activities;
 - (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
 - (vii) Each parent’s employment schedule, and shall make accommodations consistent with those schedules.
- Factor (i) shall be given the greatest weight.

RCW 26.09.187 (emphasis added). The trial court found that all factors were neutral in determining a parenting plan, except factor “i.” CP at 2441–44. The trial court found that factor “i” required limitation’s on Mr. Clare’s

visitation and decision making authority. CP at 2439–44. The trial court stated:

The Court has a continuing concern that Respondent's past desire to monitor and follow the conduct and activities of the Petitioner and to enlist the children in this process is abusive and puts at risk the children's good relationship with her mother.

CP at 2442. (emphasis added). As mentioned above, not only is there an insufficiency of the evidence to prove Mr. Clare's desire to monitor and follow Ms. Clare, but such desire even if true, was in the past and occurred years ago during the Clare marriage. Further, there is again no evidence in the record to show that the children's relationship was at all harmed by Mr. Clare's alleged conduct. In fact, the trial court specifically struck from the final parenting plan Ms. Clare's proposed language which stated "alienation of the mother from the children." CP at 2492.

It is also interesting to note that after Mr. Clare has finished his DV-MRT courses, the trial court felt comfortable awarding Mr. Clare a limited visitation schedule during the school year, but allowed 50/50 visitation during the children's summer. CP at 2492, 2494. Surely if the trial court felt that it was in the best interest for the Clare children to have 50/50 visitation with their father during the summer, there is no basis to restrict his time during the school year, without cause.

Finally, the trial court also refused to make a finding that Mr. Clare had a history of domestic violence or other “191” restrictions. The trial court abused its discretion in crafting a parenting plan that, even with findings supported by substantial evidence, improperly restricted Mr. Clare’s visitation during the school year and entirely removed his decision-making authority.

E. Findings of Fact Based on Those Offered by the Petitioner 73, 74, 107, 118, 119, and 142 are not Supported by Substantial Evidence as they Rely Entirely on Child Hearsay.

The findings of fact, listed above, all rely entirely on 1) Ms. Clare’s self-serving testimony which itself is 2) completely derived from alleged child hearsay. There is no other evidence to prove that these events occurred as Ms. Clare suggests. Washington ER 802 prohibits the admissibility of hearsay in this case.

Ms. Clare’s bare allegations that these events occurred cannot serve as a basis to persuade a fair-minded person that they actually occurred. To do so would be to alter the definition of substantial evidence to mean “any evidence.” If bare allegations can be considered “substantial evidence” trial courts’ findings of fact would be unappealable.

F. Mr. Clare Requests Attorneys' Fees On Appeal.

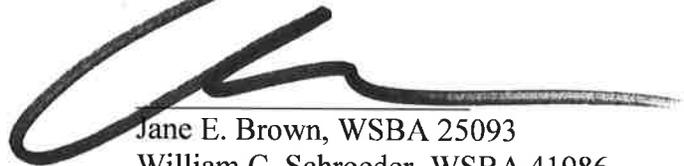
RAP 18.1 authorizes attorney's fees, subject to a showing of need by one party, and ability to pay by the other. Pursuant to the Rule, an affidavit of need will be filed prior to consideration of the case.

CONCLUSION

Given the lack of substantial evidence to support the trial court's findings of stalking, email hacking, emotional abuse of the children, and coercive control, Mr. Clare requests that this Court reverse those determinations of the trial court.

Submitted this 8th day of May, 2022, by:

8th Day of May
KSB LITIGATION, P.S.



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