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Court of Appeals, Division III No. 368149-III

Franklin County Superior Court No. 16-3-50269-11

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

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ANDREA J. CLARE,

Respondent / Cross-Appellant.

v.

KEVIN P. CLARE,

Appellant / Cross-Respondent,

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**BRIEF OF RESPONDENT / CROSS-APPELLANT**

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## I. INTRODUCTION

Andrea Clare (“Andrea”), hereby presents this Response and Cross-Appeal Brief in accordance with RAP 10.2-10.4.

## II. STATEMENT OF THE CASE

### A. Kevin’s Statement of the Case and the Argument rely upon Facts Outside the Evidence presented at Trial.

Kevin Clare’s (“Kevin”) Brief relies largely on facts that were not presented during the 11-day trial. In lieu of a motion to strike, Andrea will point out when Kevin is using evidence that was not heard at trial. See Fillmore, LLLP v. Unit Owner’s Association of Centre Point Condominium, 183 Wn. App. 328, 346-47, n 13, 333 P.3d 498 (2014).

### B. Background Facts – Pre-June 25, 2005.

Until the date of separation, February 6, 2016, Kevin was Andrea’s only significant and long-term relationship. RP, Vol. 3, pg. 733. She met Kevin in high school. RP, Vol.2, pg. 462. Kevin went to Washington State University. RP, Vol 2, pg. 463-464. Andrea attended Columbia Basin Community College. RP, Vol.2, pg. 463-464. They began dating in November of their freshman year in college. RP, Vol. 2, pg. 463-464.

After a year at Washington State University, Kevin matriculated at Spokane Falls Community College. RP, Vol. 2, pg. 463. Andrea completed her course study at CBC and matriculated at Eastern

Washington University. RP, Vol. 2, pg. 463. Kevin transferred to the University of North Dakota. RP, Vol. 2, pg. 463. Upon completion at Eastern, Andrea attended Gonzaga University School of Law. RP, Vol. 2, pg. 463-464. Until Andrea graduated from Gonzaga their relationship was that of long distance. RP, Vol 2. pg. 463-464. Prior to marriage, Andrea dated a man other than Kevin. RP, Vol. 2, pg. 466. Kevin never got over that relationship. RP, Vol. 2. pg. 413-414; 468.

C. Background Facts – 2005 Marriage until 2016 Petition for Dissolution.<sup>1</sup>

In Kevin's Statement of the Case, Section A, he makes reference to CP 125-59, 288 (pretrial Declaration by Kevin), CP 132-36 (pretrial Declaration of Marshall Smith), CP 140-41 (pretrial Declaration of Dan Farrell), CP 153-56 (pretrial Declaration of Lynn Goulet), and CP 181-189 (pretrial Declaration of Andrea). None were admitted at trial. Neither Marshall Smith, Dan Farrell, nor Lynn Goulet were called to testify. Testimonial statements, like declarations, are inadmissible unless the declarant is unavailable and the opposing party had previous opportunity to cross-examine the declarant. See State v. Cronich, 131 Wn. App. 537, 546, 128 P.3d 119 (2006).

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<sup>1</sup> For ease of review of this matter, Andrea adopts the headings under Kevin's Statement of the Case and will address improperly-relied upon clerk's papers and will also supplement the facts based upon the trial testimony and admitted exhibits.

*1. June 25, 2005 to March 25, 2007*

Shackled with guilt, Andrea wanted to tell Kevin of her pre-marriage relationship. RP, Vol. 2, pg. 466, RP, Vol. 3, pg. 732-733, 750; RP, Vol. 4, pg. 753.

Andrea decided to tell Kevin. RP, Vol. 3, pg. 722. She was concerned he would lash out, so she chose to tell him in a public location. RP, Vol. 3, pg. 722, 724. In response, Kevin became angry and demanded to go home. RP, Vol. 3, pg. 723. He sequestered Andrea to the couch, but within moments, demanded intimacy. RP, Vol. 3, pg. 723, 725. Kevin at trial, 12 years later, could remember the date that he was told – March 25, 2008. RP, Vol. 2, pg. 465.

*ii. March 25, 2007, to August 2015*

Immediately, Kevin instituted the “Rules”. RP, Vol. 2, pg. 729-739, 746, 754-755, 758-759. No lunch, no coffee, no meetings, no interaction with any other men unless pre-approved by Kevin. RP, Vol. 2, pg. 469, 471, 474. Kevin would yell at Andrea and call her stupid if she violated the rules. RP, Vol. 2, pg. 732-733. He had a look. RP, Vol. 2, pg. 740. Kevin demanded a process and justifies his long-term behavior on the theory that he was entitled to his emotions and feelings. RP, Vol. 2, pg. 729-731. At trial, he claimed that his process lasted approximately a

year, however, the rules and the behavior only worsened. RP, Vol. 2, pg. 729-733. Kevin was the “Captain”. Ex. 14.

Kevin wasn’t above being physical with Andrea. RP, Vol. 3, pg. 92-94; 97-99. Kevin was observed and admits to pushing Andrea against a car after an argument. RP, Vol. 1, pg. 92-94. During this time frame, he would tell her that he hoped she got raped when they were arguing. RP, Vol.3, pg. 506.

By the time Andrea and Kevin were having children, she was an attorney at Leavy, Schultz, Davis & Fearing. RP, Vol. 3, pg. 725. Andrea was limited with male social contact to members of that firm. RP, Vol. 2, pg. 735-737. During this timeframe, Kevin accused her of having intimate relationships with clients, friends, and other attorneys in the community. RP, Vol. 2, Pg. 730, 740, 744.

In July 2014, Andrea decided to leave Leavy, Schultz, Davis & Fearing for her current position as an attorney. With that, the rules changed. Now, Andrea was permitted to have social relationships with the males at the new law firm, but was no longer allowed to have a relationship with members of Leavy, Schultz, Davis & Fearing. Kevin continued to allege she was having relationships with other men. RP, Vol. 2, pg. 741. He would drive by her office. RP, Vol. 2, pg. 741-743. With the new job Kevin began following Andrea’s location on her Find My

iPhone App. RP, Vol,3, pg. 510. He followed her whereabouts approximately a dozen times without her knowledge. RP, Vol. 3, pg. 510-511; 741-743.

*iii. August 2015*

The deteriorating marriage had its last straw in August, 2015. RP, Vol.2, pg. 489. Andrea was assisting her grandmother in a dissolution matter in the state of Idaho. RP, Vol.2, pg. 489-493. As she is not admitted in Idaho, she sought the assistance of a former business associate and an Idaho lawyer. RP, Vol. 2, pg. 489-493, 746-750, 753; RP. Vol. 3, pg. 754. Chip, a friend of Andrea, traveled from Boise to Pasco and stayed at Andrea and Kevin's home. RP, Vol. 2, pg. 489-493, 746-750, 753; RP. Vol. 3, pg. 754. Andrea and Chip then traveled to Sandpoint to assist in her grandmother's case. RP, Vol. 2, pg. 489-493, 746-750, 753; RP. Vol. 3, pg. 754. Andrea stayed at a hotel with her grandmother. RP, Vol. 2, pg. 489-493, 746-750, 753; RP. Vol. 3, pg. 754. At the end of the day, Andrea, Chip and friends of Chip's went out for cocktails. RP, Vol. 2, pg. 489-493, 746-750, 753; RP. Vol. 3, pg. 754. Andrea's phone died. RP, Vol. 2, pg. 489-493, 746-750, 753; RP. Vol. 3, pg. 754. Upon charging it, Kevin immediately called and demanded to know where she was and who she was with. RP, Vol. 2, pg. 489-493, 746-750, 753; RP. Vol. 3, pg. 754. He required her to wake up her grandmother so that he

could speak with her to determine where she had been and whether she was staying at the hotel with Grandma. RP, Vol. 2, pg. 489-493, 746-750, 753; RP. Vol. 3, pg. 754. Kevin admits that when returning from the work trip he checked Andrea's underwear. RP, Vol. 2, pg. 496. After the Chip incident, Andrea demanded counseling. RP, Vol. 2, pg. 746. Kevin conditioned it upon discussing her "history". RP, Vol. 2, pg. 746.

*iv. August 2015 to May 20, 2016*

Kevin continued to surveil her location and, without her consent or knowledge, began looking at her phone, to include her work email. RP, Vol. 2, pg. 499. On December 23, 2015, while Andrea slept, Kevin obtained access to her phone and work email. RP, Vol. 2, pg. 499. Kevin did not have Andrea's passcode, so he rolled her thumb across the phone while she slept. RP, Vol. 3, pg. 771. Kevin reviewed her emails, sending approximately 15 to himself that were personal in nature about her developing feelings for a new man and leaving her marriage. RP, Vol. 2, pg. 499. Kevin admits he did not have Andrea's permission to view her email. RP, Vol. 2, pg. 503. Kevin promptly reported the pre-marriage relationship and the emails to her family. RP, Vol. 3, pg. 764-767.

With knowledge of the emails Kevin contacted and befriended Amy, George's then spouse. RP, Vol. 3, pg. 518-520. He began asking Amy for information about George and Andrea. RP, Vol. 3, pg. 518-520.

These inquiries continued into 2018 and included their whereabouts. RP, Vol. 3, pg. 518-520. Amy denies providing Kevin information about George and Andrea. Ex. 22.

At the time of separation, the two agreed that the kids would be shared equally during the evenings. Kevin demanded that he be able to take care of the kids during the day. This required Andrea to actively engage or see Kevin every weekday which she was the custodian of the children.

Andrea rented a town home without Kevin on the lease. RP, Vol. 3, pg. 514. Kevin entered Andrea's town home on several occasions by climbing on top of his vehicle and entering the second floor balcony. RP, Vol.3, pg. 514. It would scare Andrea, as he would just show up standing in her town home. RP, Vol. 2, pg. 427-428. Her family and friends were concerned for her. Andrea was also concerned for her safety. RP, Vol. 2, pg. 429. During these times, Kevin would demand intimacy. Post separation Kevin sought reconciliation. Ex 1, attachment K. He apologized for his years of treating her poorly and for the Rules. Ex 1, attachment K; Ex. 21. Kevin admits that he misbehaved in his treatment of Andrea. RP, Vol.2, pg. 505. Kevin testified that he had a "problem in [his] heart". RP, Vol.3 pg. 507.

By April 2016, Kevin hired John Maxwell, a Yakima area divorce lawyer. RP, Vol.3, pg. 527-528. At the time, Andrea and Kevin were sharing the kids equally. RP, Vol.3 pg. 526. Andrea had prepared documents for him to review. RP, Vol.3, pg. 516-517. She opened the documents on her cell phone in Word format and began sharing them. RP, Vol. 3, pg. 784-786. At that time, one of the kids needed parental assistance. RP, Vol. 3, pg. 784-786. Andrea went to care for the child. RP, Vol. 3, pg. 784-786. Kevin took this opportunity to close from the document that he was reading and to begin reviewing and scanning her text messages. RP, Vol. 3, pg. 784-786. Kevin testified that he knew he did not have permission to review her private text messages. RP, Vol. 3, pg. 784-786. When observing a text message with George, he became enraged. RP, Vol. 3, pg. 786-786. He began yelling and screaming at her. RP, Vol. 3, pg. 784-786. Kevin threatened to “pop” both her and George. RP, Vol. 3, pg. 785-786. He threw the children in the car and told her to “get the fuck out of here”. RP, Vol. 4, pg. 784. Andrea was afraid for herself and the safety of her children. RP, Vol. 3, pg. 784-786. Kevin then terminated his relationship with John Maxwell and hired the one lawyer in town that he knew hated Andrea – Ben Dow. RP, Vol. 3, pg. 530-531. Andrea filed her Petition in Walla Walla County. Despite their agreement, Kevin immediately objected to venue. RP, Vol. 3, pg. 784-786.

*v. May, 2016 to August 6, 2016*

Andrea advised Kevin that she wanted to reduce contact and not be around him. RP, Vol. 3, pg. 798-799. She asked that he not attend swim lessons or activities of the children during her time. RP, Vol. 3, pg. 798-799. He refused. RP, Vol. 3, pg. 798-799. Kevin demanded constant access to the kids. RP, Vol. 3, pg. 798-799.

Kevin began questioning the children, ages 7, 5 and 3. Kevin would ask who Andrea had at her home. He would demand of Andrea that the kids be made available to talk on the phone nightly. RP, Vol. 1, pg. 556. He would demand to be able to Facetime. RP, Vol. 1, pg. 556. He offered to give the 7-year old a phone and a secret password so that Andrea could not turn it off. RP, Vol. 2, pg. 798.

*vi. August 2016 to April 2017*

a) Statement of the case at Section B.1.

Kevin, in support of his position relies upon CP 130-159, the Declaration of Carrie Smiley, Jonathan David Allen, Brian Roberts, Lynn Goulet, Dan Farrell, Marshall Smith, Peggy Farrell, Richard Leumont, Ryan Morales, and his own declaration. Jonathan David Allen, Kevin's nephew, testified on his behalf at trial. Otherwise, none of the people identified testified at trial. The declaration of Kevin was not admitted.

b) Facts from the record.

On August 11, 2016, Andrea filed for dissolution in Franklin County. CP 1-7. In her proposed Parenting Plan, filed with the Petition, Andrea asserted that Kevin engages in coercive control and abusive use of conflict. CP 17-30. She sought and obtained a Temporary Restraining Order. CP 7-14. She hired Mason Pickett.

An initial hearing was conducted in August 2016. The Temporary Restraining Order was not addressed with the court. Rather, Mason, who admittedly regrets the advice, advised Andrea to agree to a civil no-contact order. RP, Vol. 2, pg. 794. It was not reduced to writing. RP, Vol. 2, pg. 794. The court at that time entered a Temporary Parenting Plan. Kevin took the position that his work schedule is more favorable to Andrea's, and thus, he should be the primary custodian.<sup>2</sup> Kevin portrayed himself as the stay-at-home dad. The court entered a Temporary Parenting Plan giving Kevin four week-day nights, as the kids were scheduled to attend school in Pasco at the time, and Andrea Friday through Sunday.

While Kevin was portraying that the work schedule was the key factor, in fact, it wasn't. Unbeknownst to Andrea, in August 2016, Kevin circulated a letter written by Attorney Dow that portrayed Andrea in a negative light for leaving the marriage. RP, Vol. 3 pg. 534-537; Exhibit 12. He circulated it to her friends, people that she attended church with,

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<sup>2</sup> The Court, after investigating work schedules, were not an impediment to either parent. CP 2834.

neighbors, former teachers of the children, and anybody he thought he could influence against her and to his side. RP Vol. 3, pg. 534-537. In addition, he began keeping a journal. RP Vol.3, pg. 540; Ex1, attachment E. The journal, which continued until April 2018, contained entries of things that he would ask the children about what they did, where they were, who they were with, and other details about their time with Andrea. RP Vol.3, pg. 540-642, Exh 1; specifically attachment E. Kevin would admit at trial that if the allegations of Andrea were believed that Andrea would suffer fear and harm. RP Vol.3, pg 546.

In addition to maintaining Andrea's whereabouts, Kevin has always historically liked to make subtle comments so she knows that he is watching. RP Vol. 1, pg. 630. During exchange of the children, he would begin making comments about her whereabouts. RP Vol. 2, pg. 795-796. If he didn't agree with something Andrea said or did, he would mention that it was gonna make the "list". RP Vol. 2, pg. 795-796. He began subtly impacting her during the exchanges. RP Vol. 2, pg. 800. He would make subtle comments and gestures, like the "hang ten" after she went to Hawaii. RP Vol. 3, pg. 811.

By April 2017, Kevin took a second mosquito control job. This job was in Grant County. Andrea brought a motion to equalize time with the children. A new Temporary Parenting Plan was entered, whereby the

children were split 50/50. Kevin sought and obtained a strike list for a Guardian-ad-Litem.

*vii. April 2017 to January 2018*

a) Facts from the record.

In Kevin's statement of the case, Section B.3., Kevin relies upon declarations of Andrea that were not admitted at trial.

b) Facts from the record.

In April 2017, Kevin publicly was saying that work schedules should be the controlling factor in residential placement of the children. Andrea was unaware of the letters that had been disseminated in August 2016. She was unaware of the journal. She was unaware that Kevin was having people report her whereabouts. At the time, she was desirous of having an amicable co-parenting relationship with Kevin. At the time she was desirous of a 50/50 plan. She was not concerned about work schedule, changing the plan as both of their work schedules had times that were more stressful than at other times. Kevin insisted upon the appointment of a guardian-ad-litem. Andrea did not believe that a guardian-ad-litem was necessary for the court to determine a Parenting Plan based upon the parties' work schedules. Faced with that, the court had ruled to a 50/50 plan. In June 2017, Andrea attended mediation with

Kevin. She proposed a 50/50 shared arrangement of the children. He rejected.

In July 2017, Andrea traveled to Hawaii. The travel was done during Kevin's residential time with the children. RP, Vol. 2, p. 443-445. She did not disclose to Kevin or anybody else that she was going to Hawaii. However, it was on her Outlook Explorer calendar at work. RP, Vol. 5, pg. 1035, 1055, 1105; RP, Vol. 1, pg. 587-88. Upon return, there was an exchange of the children. Kevin, through his sources, learned that Andrea was in Hawaii. RP, Vol. 2, pg. 453-54. He had to make sure that Andrea knew of his knowledge. Thus, at the exchange, he gave her the 'hang loose' sign (Mahalo). RP Vol. 3, pg. 811. Andrea found that worrisome, peculiar, and scary. While Kevin asserts that his mother learned from church friends that Andrea was in Hawaii, the reality is, Kevin knew not only that she was in Hawaii, but that she was in Maui. RP, Vol. 5, pg. 1035, 1055, 1105; RP, Vol. 1, pg. 587-88. He also, thinking Andrea purchased their daughter a dress, elicited the assistance of Mary Lynn, his current spouse, to determine which stores in Hawaii may have the dress in stock. Kevin added this to the journal. RP, Vol. 5, pg. 1035, 1055, 1105; RP, Vol. 1, pg. 587-88.

By December 2017, the case was stale. There was no pending trial date. Although the court had ordered a guardian-ad-litem to be appointed,

Kevin had done nothing to have an actual appointment of a guardian-ad-litem, other than filling out a strike sheet. She reached out to him, again, to resolve the dissolution. He rejected her approach. Ex. 27.

*viii. January, 2018 to January, 2019*

In Kevin's Statement of the Case, Section B.3., he relies upon CP 279, 323-24, 327-38, 335, 354, 328, 359-60, 384-87, 388-89, 392-404, 423-424, 435, 1312-23, 961-64, 970-978, 1318, 1129-32. These are the declarations of Andrea and Kevin and a declaration of Chuck Derry. Both the parties and Chuck Derry testified at trial. These declarations were not submitted into evidence.

In January 2018, the parties sought a trial date. Kevin sought an Order appointing Laura Vaughn as the guardian-ad-litem. Andrea, believing that Kevin's position was solely based on work schedule, resisted appointment of the GAL. RP, Vol. 1, pg. 50-51. Given that the parties were then sharing the children 50/50, she saw no reason why the need for an expense of the GAL when the court could evaluate the work schedules of both she and Kevin. RP, Vol. 1, pg. 50-51.

The court set a trial date of July 2018. At hearing, the court was prepared to enter an order appointing the GAL to examine the work schedules of the parties. At this point, Kevin insisted in an investigation

beyond work schedules and wanted that a full and complete investigation.

The court acquiesced. The GAL order was entered.

Kevin presented the GAL his journal. Ex. 1, attachment E.

Nothing in the journal relates to work schedule.

In March 2018, Kevin's mother, Cynthia Schatz was deposed. RP, Vol. 3, pg. 537. In response to the subpoena and the subpoena duces tecum, she presented with the August 2016 letter prepared by Ben Dow. RP, Vol. 3, pg. 537. It was the first time that Andrea was made aware of the letter. RP, Vol. 3, pg. 537. Andrea also began to notice that Kevin was making comments about her spending habits, who she was spending time with, and where she was traveling. Ex 14. She had information and belief that Kevin was accessing her work email, to include being able to view her calendar remotely from the community iPad that was left behind when she moved out. In March 2018, she learned that Kevin was systematically attempting to alienate her from friends, social groups, professionally. He was attempting to interfere in her relationship with her children. He was tracking her whereabouts. She became frightened and alarmed.

In response, she sought a restraining order. Given that the local judiciary had recused itself, she was deprived the benefit of the temporary restraining order process and the legislative mandate for quick relief.

Kevin thwarted every opportunity that she took to set a hearing and to

argue in favor of a restraining order. Ultimately, the Court indicated that the restraining order issue would be addressed at trial (at that time set for July 2018).

Andrea was required to bring a motion to compel to learn the identity of the persons that Kevin had disseminated the letter to, and for a copy of the journal. The Court ordered that the letter, the identity of each recipient, and the journal be turned over at once.

Andrea amended her Proposed Parenting Plan to the original plan that she proposed in August 2016. Andrea, at the outset of this case, knew that Kevin was capable of the very conduct that this court ultimately found. Given the benefit of the doubt and the benefit of time, Kevin chose to persist.

The GAL heard the complaints and concerns of Andrea. She heard the concerns and complaints of Kevin. She discounted the comments of Mindy Mechanic, Ph.D. and Chuck Derry. She gave them no weight. Her ultimate goal was to determine if the parties could continue in a 50/50 parenting plan. She noted that during her meetings with Kevin, that he was charming, engaging, and responsive. She further notice that he seemed obsessed with Andrea and her relationship with George. She discounted that as part of her investigation. She further discounted the complaints of Andrea that included stalking behavior, rummaging through

her undergarments, surveilling her, and otherwise harassing her. On July 23, 2018, the guardian-ad-litem filed her report. Ex. 1; RP, Vol. 1, pg 71-72. It was the largest Report she had ever completed. RP, Vol 1, pg. 70-72. In advance, she called Kevin to advise him that while her investigation was not complete, that she was leaning towards a 50/50 parenting arrangement. This caused Kevin to immediately complain that the kids would be around George, to cry, and to seek grace. Kevin made the GAL feel bad for recommending equal placement of the children with both Andrea and Kevin. After the Interim Report Kevin changed in his willingness to cooperate with the GAL in a “significant way”. RP, Vol 1, pg 79-80. The Interim Report revealed that Kevin was aware of Andrea’s movement and activities, RP, Vol 1, pg. 84-85, 86-87, 89, 95, 123-124,

The trial court moved the trial to October 2018. The court also allowed Laura Vaughn, Kevin and Andrea to be deposed on August 2, 2018. It is her observations and Kevin’s testimony that caused the GAL significant and great concern. The nice, thoughtful and responsive Kevin that she had observed was no longer present. Instead, he was smug and arrogant. He was staring Andrea down. When questioned about the complaints that Andrea made and the conduct that she complained of, he admitted, despite denying the behavior to the GAL previously. Ex. 21 attachment I. The GAL became concerned. In response to this concern,

the GAL recommended placement of the children with Andrea and for Kevin to submit to a psychological evaluation. Ex. 3, attachment I; Ex. 2 & 3. The Gal was hopeful that with an evaluation, that Kevin could receive services that would assist him and allow him to be a 50/50 co-parent with Andrea. He was required to identify three potential evaluators, to allow the GAL to provide information to the evaluator, and to sign a release in favor of Mason, Andrea's attorney. Kevin did none of that. CP 28, 42.

Instead, Kevin secretly obtained the services of Stephen Page, Ph.D. Dr. Page is not an expert in IVB. Kevin received a report from Dr. Page on September 28, 2018. He did not provide a copy of the report to Andrea's attorneys or the GAL. He did not disclose that he had the evaluation. Dr. Page, in his psychological report dated September 28, 2018, found Kevin to lack and avoid negative introspection. He found that it was easy to gain the impression that Kevin has been pathologically controlling, rigid, possibly guilty of stalking, overbearing, and has a difficult time extricating himself from Andrea. RP Vol. 1, pg. 80-82 He reasoned that Kevin continued to lack insight as to his role in conflict with Andrea, and Dr. Page would not be surprised to learn that Kevin was more insecure and hyper-vigilant about the relationship with Andrea than he admits. In follow up interview with the GAL, Dr. Page identified Kevin as

“passive-aggressive”. Ex. 3, attachment I. He discouraged the GAL from seeking or finding a diagnosis, as there simply may not be one available. He advised the GAL that Kevin would need sledge-type hammer consequences in order to co-parent with Andrea. RP Vol. 1 pg. 82.

Also armed with the report, Andrea objected to the failure to engage the procedure ordered by the court. The court, wanting to get this case done, ordered Kevin again to have a psychological evaluation. Again, Kevin went silent on the issue initially, but ultimately was evaluated by Ken Cole, Ph.D. Dr. Cole advised the GAL that he would not consider her report, and that his position was based upon an interview with Kevin.

In November 2018, Andrea learned that Kevin was not forthright to the GAL about his medical history. He had omitted treatment at Three Rivers Family Medicine. She found it significant, as she was concerned that Kevin was flying with her minor children. Kevin, a licensed pilot with the FAA, is required to have a flight physical annually. She was concerned that he was lying on the annual form. She asked the GAL to investigate whether or not he was flying with the children. She did not contact the FAA. RP, Vol. 1, pg. 182, 195, 224, 276. Andrea never made a threat of contacting the FAA. RP, Vol. 1, pg. 182, 195, 224, 276. It was never disclosed to the FAA of this concern. In response, Kevin sued

Andrea and George “in case he lost his job”. On the eve of trial, he claimed damages of \$6 million. He further disclosed portions of the GAL report that are confidential in his claim under ER 904.<sup>3</sup>

D. Background Facts – Ms. Clare’s Allegations of Stalking and Domestic Violence. March 21, 2018 – August 22, 2018.

In Kevin’s Statement of the Case, Section C, he relies on documents and declarations that were not admitted at trial. They are located at CP 390-404, 470, 474, 516, 540-545, 578-579, 590-591, 670, 679. It is not permissible to consider these facts in the record on review.

Now with knowledge of Kevin’s conduct, Andrea, again, petitioned for a restraining order pursuant to 26.50 RCW. CP 570-589. The court initially reserved the matter to trial that was currently set in July 2018. After more was learned in Kevin’s August 2, 2018 deposition, the Court entered a restraining order to the date of trial. CP 2641- 2643.

E. Background Facts – August 22, 2018 – January 2, 2019.

In Kevin’s Statement of the Case, Section D, he relies on declarations that were not admitted at trial. They are located at CP 698,

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<sup>3</sup> Kevin dismissed the claim two days before hearing on a motion for summary judgment and a motion for sanctions under the Anti-Slapp Statute, 4.24.500. At the time of filing this appeal brief, two motions for sanctions are pending in Spokane County Superior Court. The motions are based upon the frivolous filing, the Anti-Slapp Statute, and for filing a witness disclosure statement indicating that Kevin intended to talk about the sex life of George and Andrea in his malpractice claim against them.

1707, 1704-28, 1713-16, 1719. It is not permissible to consider these facts in the record on review.

F. Trial – January 2, 2019.

a) In his statement of the case, Section E., Kevin dedicates four paragraphs and two pages to the testimony of Chuck Derry and Kenneth Cole. It is the only part of the Brief where Kevin utilizes the verbatim report of proceedings. This trial lasted eleven days. The first eight were related to the residential placement of the children. The last three were dedicated to the division of assets and liabilities. Neither party has appealed the latter portion of the trial. The trial record for the first eight days is approximately 1172 pages.

b) Trial – January 2, 2019, summary of testimony.

Laura Vaughn (GAL), testified about her role as guardian-ad-litem. By the time of trial, the GAL had filed her initial report and six supplements. Ex. 1-7. Exhibits 1-7 were identified and admitted by the court without objection by Kevin. The initial GAL report has interviews with not only the parties, but also persons identified by the parties for purposes of being interviewed, Chuck Derry, Mindy Mechanic, Ph.D., Steven Page, Ph.D., Kenneth Cole, Ph.D. It includes pleadings, medical records, the journal. It was supplemented six times as more information was learned and the trial continued multiple times. Ex. 2-7.

The GAL made no recommendation for residential placement of the children. RP Vol. 1, pg. 266. She completely deferred to the court. She was asked by counsel for Andrea and counsel for Kevin and her answer was the same. She did not know what to do, given Kevin's behavior and conduct, coupled with the lack of an actual diagnosis. She did not want to use the kids as a carrot for behavior. She had been hopeful that there would be some type of service provided to Kevin that would be of assistance. She just didn't see that happen. Given the lack of direction from both evaluators of Kevin, she gave the file to the court for the court to evaluate and make the judge's own decision.

After the initial report, Kevin refused to communicate with the GAL. RP Vol. 1, pg. 79. Kevin made issues that Andrea was taking the children to Ice Harbor Restaurant and Brewery. RP, Vol. 1, pg. 84. Kevin offered the GAL the name and number of people that could verify where Andrea was hanging out. RP, Vol. 1, pg. 86. Kevin refused to take the kids to activities on their designated time. RP, Vol. 1, pg. 92. Kevin acknowledged to the GAL that he was aware that Andrea did not want to be around him. RP, Vol. 1, pg. 62, 93. Kevin knew when George was going to Andrea's house. RP, Vol. 1, pg. 95. Kevin was critical of Andrea's morals. RP, Vol. 1, pg. 95-96. Kevin asked the GAL not to disclose his relationship with Mary Lynn. RP, Vol. 1, pg. 96. The GAL

noted that Kevin seemed to be disproportionately concerned about George. RP, Vol. 1. Pg. 118-119. Kevin complained that Andrea would not share her address and wanted it confidential. RP, Vol. 1, pg. 123. Kevin told the GAL that he was going to get Andrea's address from George's ex-wife. RP, Vol. 1, pg. 124. The GAL observed that Kevin would interfere with Andrea's attempt to educate and obtain services for the children. RP, Vol. 1, pg. 141-145. In contrast, the GAL noticed that Andrea would still reach out to Kevin for input even after granted sole decision making. RP, Vol. 1, pg. 145-147.

Kevin showed no remorse for checking Andrea's email, text messaging or questioning the children. RP, Vol. 1, pg. 149; Ex. 21. He admitted he would do it all over again. RP, Vol. 1, pg. 149; Ex. 21. The GAL observed Kevin as smug and arrogant in his August 2018 deposition. RP, Vol. 1, pg. 184; Vol. 2, pg. 10. In his deposition, he acted as if he was made to do it, didn't feel bad, admitted he questioned the children, and didn't have any problems with his behavior. RP, Vol. 2, pg. 10.

The GAL spoke with Dr. Page. Dr. Page advised her that Kevin was not interested in treatment. RP, Vol. 2, pg. 80. Dr. Page was concerned about Kevin thinking that parenting was a competition. RP, Vol. 2, pg. 81. Dr. Page found that Kevin cannot negotiate and he would not be able to work with Andrea in the future. RP, Vol. 2, pg. 81-82. The

evaluation of Dr. Page was disappointing to the GAL. RP, Vol. 2, pg. 82-86. The GAL deferred to the court to make a decision on residential placement. RP, Vol. 2, pg. 188; pg. 266.

Gary Register (“Gary”) has known Andrea since she was a child. RP, Vol. 1, pg. 91-92. He observed Kevin yelling and screaming at Andrea in a vehicle, getting in her face, and ultimately pushing her in the parking lot. RP, Vol. 1, pg. 92-93. Gary indicated that Andrea was visibly upset. RP, Vol. 1, pg. 94. He was concerned enough that he reported the incident to Andrea’s mother. RP, Vol. 1, pg. 97.

Charles Derry (“Derry”) testified. Derry works with batterers and has done so since 1983. RP, Vol. 1, pg. 104-105. Started a program for treatment of batterers. RP, Vol. 1, pg. 107-108. He has trained family court Judges. RP, Vol. 1, pg. 118. The court, after hearing his credentials, identified him as an expert witness. RP, Vol. 1, pg. 125. Derry testified that domestic abusers tend to perform well on psychological examinations. RP, Vol. 1, pg. 113.

Derry explained that domestic abusers are about intimidation and not always physical. RP, Vol. 1, pg. 129-131. They typically portray themselves as nice, kind, caring and loving individuals. RP, Vol. 1, pg. 134. He typically likes them while in group meetings as they can be funny and smart. RP, Vol. 1, pg. 140. Male domestic abusers tend to use the

children to harm the mother. RP, Vol. 1, pg. 138-139. They isolate women from family and friends. RP, Vol. 1, pg. 147. In her investigation the GAL did not give Derry's opinions much thought or weight. RP, Vol.2 pg. 11-13.

Larry Schatz ("Larry"), Kevin's stepfather testified. RP, Vol. 2, pg. 296. By the time of trial Larry had not spoken to Andrea in several years. RP Vol. 2, pg. 296. He had no criticism of Andrea's parenting and described her as loving. RP Vol. 2, pg. 300, 358. Larry was unaware of Kevin's journal. RP Vol. 2, pg. 353. He did not have a reason to believe that Andrea should have the children less than 50% of the time. RP Vol. 2, pg. 300.

Cynthia Schatz ("Cynthia") is Kevin's mother. RP, Vol. 2, pg. 443. She reported to Kevin that George and Andrea were in Hawaii, post-separation. RP, Vol. 2, pg. 453.

Andrea Sell ("Sell") testified that she had known Andrea for 30 years and during her relationship with Kevin. RP, Vol. 2, pg. 406. She testified that Kevin was "passive aggressive". RP, Vol. 2, pg. 410-411. She had observed him interfering with her role with the kids during the marriage. RP, Vol. 2, pg. 409. At the conclusion of her testimony the Court had questions for Sell. The Court asked for descriptions of passive aggressive behavior. RP, Vol. 2, pg. 413-415. She replied by explaining

that Kevin would never let things go with Andrea and things would just keep coming back up. RP, Vol. 2, pg. 412-413. That he would make “sly remarks”. RP, Vol. 2, pg. 412-413. The Court specifically inquired if Kevin appeared to hold a grudge. RP, Vol. 2, pg. 414. Sell responded “yes”. RP, Vol. 2, pg. 414. The Court asked if Kevin “show[ed] it [the grudge]. RP, Vol. 2, pg. 414-415. Sell answered, “yes”. RP, Vol. 2, pg. 414-415.

Kim Snowden (“Kim”), Andrea’s stepsister of 32 years testified at trial. RP Vol. 2 pg. 417. She testified that Kevin isolated Andrea from her family. RP Vol. 2. pg. 418-419. During the marriage Kim observed Kevin give Andrea dirty looks if he did not agree with him. RP Vol. 2, pg. 421.

Kim was worried that Kevin would let himself into Andrea’s townhome through the second floor balcony. RP Vol. 2, pg. 427-428. Andrea expressed that she was fearful of Kevin and worried he would hurt her. RP Vol. 2. pg. 428-429.

John Allen (“John”), Kevin’s nephew testified. RP, February 4, 2019 (no volume indicated), pg. 43. He had not seen Andrea around the kids in “years” - since she moved out of the family residence in February 2016. RP, February 4, 2019 (no volume indicated), pg. 47. He was aware

the kids were performing better in school now that they were placed with Andrea. RP, February 4, 2019 (no volume indicated), pg. 46.

Ryan Trulson (“Ryan”), Kevin’s best friend from childhood testified. RP Vol. 2, pg. 389. Andrea had asked him in 2016 to contact Kevin about trying to reach a settlement. RP Vol. 2, pg. 392. Ryan, who has a child he shares equally with the mother believes in cooperation between parents. RP Vol.2, pg. 391. Kevin showed no interest in being willing to come to an agreement. RP Vol.2, pg, 393.

Ryan has not had frequent contact with Andrea after separation. RP Vol.2, pg. 392. Ryan has not seen her with the kids since February 2016. RP Vol.2, pg 396. Twice since separation he has reported to Kevin the whereabouts of Andrea and who she was with. RP Vol.2, pg. 399-400.

Ryan was not given the August 2016 Dow letter. RP Vol.2, pg. 394. Kevin did not tell Ryan why there had been a change in residential placement while the dissolution was pending. RP Vol.2, pg. 395. Ryan thought the dispute was over the most favorable work schedule. RP Vol.2, pg. 396.

Robin Dear (“Robin”) has known Andrea and Kevin since high school. RP Vol.2, pg. 381. She would socialize with them a couple times a month as she too had young kids. RP Vol.2, pg. 382-383. Kevin

interfered with Andrea's attempt to parent the kids while they were married dispute Andrea being a involved parent. RP Vol.2, pg. 384-387.

Mary Lynn Smiley ("Mary Lynn") began a relationship with Kevin in August 2016. RP Vol.2 pg. 361-362. They concealed the relationship. RP Vol.2, pg. 368. She testified that she felt bad for Andrea and that things "hadn't worked out well" for the kids. RP Vol.2, pg 370. She testified that Kevin believed Andrea had relationships with men who she worked with between 2005 and separating from Kevin. RP Vol.2, pg. 377.

Mary Lynn had no criticism of Kevin. RP Vol.2, og. 371-374. She testified that Kevin would now agree to equal residential placement as Andrea met his conditions for being "available" and that Andrea had not proven herself to him over the past "three year". Rp Vol.2, pg. 371-374. Mary Lynn was aware that Andrea had tried to have peaceful resolution since 2016 and Kevin would not agree to anything he saw as "disfavorable". RP Vol.2 pg 378-379. She testified that Andrea should not have placement of the children because she uses daycare to provide for the children when she works. RP Vol.2, pg. 378-379.

Kenneth Cole, Ph.D ("Dr. Cole") performed the second psychological evaluation of Kevin. RP Vol. 2 pg. 304. He did not receive or review the GAL's materials. RP Vol. 2, pg. 304. He did not know

Kevin was to provide the GAL materials. RP Vol. 2, pg. 315. Dr. Cole interviewed Kevin. RP Vol.2, pg. 312.

On direct, Dr. Cole testified that he found Kevin to be passive aggressive and to engage in “difficult uncooperative sort of behavior.” RP Vol.2, pg. 307. Kevin demonstrated lack of interest in his children’s activities or their daily lives. RP Vol.2, pg. 307. He found suggestions of Intimate Partner Violence and coercive control. RP Vol.2, pg. 308. Dr. Cole had reviewed the Report of Dr. Page and was in agreement. RP Vol.2, pg. 310. Ex 3, attachment I.

On cross-exam Dr. Cole testified that he was unaware that Kevin was court ordered to engage in a psychological examination and had been ordered several months prior. RP Vol.2, pg. 311. He testified it is consistent with IPV abusers to engage in stalking. RP Vol.2, pg. 320. He explained that the behavior could last for a long period of time. RP Vol.2, pg. 321.

Dr. Cole was unaware if Gary’s testimony about witnessing Kevin push Andrea against the car in 2013. RP Vol.2, pg. 321. The past history of Kevin being willing to be physical is clinically significant. RP Vol.2, pg. 321. It was further clinically significant to Dr. Cole that Kevin monitored Andrea’s whereabouts and continued to do so after separation, RP Vol.2, pg. 323-324. Kevin’s journal was not provided to him,

however, he testified that using the kids to gain information about the other parent is “inappropriate and damaging” to the kids. RP Vol2, pg. 324. This type of information is expressed at the court-ordered parenting class that Dr. Cole teaches. RP Vol.2, pg. 325. Dr. Cole expressed significant concern about Kevin’s passive aggressive behavior and it’s likelihood to cause other behaviors. RP Vol.2, pg. 327-335. He testified that Kevin would be uncompromising when co-parenting with Andrea absent the Court doing something that had “teeth”. RP, Vol.2, pg. 332.

Marnee Milner, Ph.D (“Dr. Milner”) was called by Kevin to challenge the GAL’s findings and methodology. RP, Vol.4, pg. 835. She limited and based her testimony on the documents she had been provided and reviewed. RP, Vol.4, pg. 835 and 880. Dr. Milner was not aware that Kevin was keeping track of Andrea’s whereabouts even after separation and was using the kids to gather information about Andrea. RP, Vol.4, pg. 880. She agreed that the data supports that keeping track of Andrea and her partner monitoring the phone and text messages are all consistent with IPV. RP, Vol.4, pg. 913.

Dr. Milner deferred Derry on the issue of treatment of IPV abusers. RP, Vol.4, pg. 896. She believed that the Duluth Wheel accurately describes conduct by batterers. RP, Vol. 4, pg. 914-915. Ex 8. She found

it concerning that behavior of Kevin had persisted for most the term of the marriage and post-separation. RP, Vol.4, pg. 917.

Kevin's deposition was admitted into evidence. Kevin admits to the allegations and behavior complained of by Andrea. He admits to tracking her location without permission. RP, Vol.3, pg. 655. He agreed with the assessment of Dr. Page to be accurate. RP, Vol.2, pg. 674. Ex 3, attachment I. Kevin admitted that Andrea had communicated that he was to not be around her and that he would ignore the request. RP, Vol.3, pg. 637-638. Kevin admitted at trial that he listed numerous witnesses that he had no knowledge of or whether they had information to assist with the case. RP, Vol.3, pg. 650-653. He admitted that he publicly called Andrea paranoid and accused her of substance abuse. RP, Vol.3, pg. 670. Kevin further admitted at trial that he had no concerns about Andrea as a parent but is just hypercritical. RP, Vol.3, pg. 658-659. He further admits that he was "unwilling to negotiate" with Andrea. RP, Vol.3, pg. 672.

### **III. ARGUMENT AND RESPONSE**

#### **A. Kevin's Standard of Review.**

The standard of review of a trial court's ruling regarding Parenting Plans and Restraining Orders is abusive discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or based on

untenable grounds. In re Marriage of Stenshoel, 72 Wn. App. 800, 803, 866 P.2d 635 (1993). Appellate courts are generally reluctant to disturb a child custody disposition because of the trial court’s unique opportunity to personally observe the parties. In re Custody of Stell, 56 Wn. App. 356, 366, 783 P.2d 615 (1989). Further, a trial court’s finding of fact will be upheld if supported by substantial evidence. Substantial evidence is evidence of sufficient quantity to persuade a reasonable fact finder of the truth of the declared premise. Holland v. Boeing Company, 90 Wn.2d 384, 390-91, 853 P.2d 621 (1978). This Division III has “emphasized” that dissolution decisions will be affirmed unless no reasonable judge could have reached the same decision. In re Marriage of Kim, 179 Wn.App. 232, 240, 317 P.3d 555 (2014). Emotional and financial finality is favored. Id. Kevin bears a heavy burden on appeal. Id.

B. Unchallenged Findings of Fact Become Verities on Appeal and Unchallenged Conclusions of Law Become the Law of the Case.

The court invited the parties to propose findings and conclusions. The court then either adopted or [deleted] findings and conclusions in the court’s discretion. In paragraph 22 of the findings and conclusions, the court had Section A as those offered by Andrea, and Section B as offered by Kevin. Kevin has simply listed 17 findings of fact as offered by Andrea for which he assigns error. The assignment of error requires a

concise statement, together with the issues pertaining to the assignment of error. RAP 10.3(a)(4). Findings of Fact not properly assigned error are now verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

Kevin then lists additional findings of fact as associated with his Table of Contents in the Argument section of his brief, Section C, page 28 and Section E, page 47. Kevin has failed to comply with RAP 10.3(g). The findings listed in Section C, page 28 and Section E, page 47 are now verities.

Further, Kevin assigns error to only two conclusions of law. He states:

“Errors assigned to the trial court’s conclusion of law pertaining to the findings supporting the anti-stalking order, and the findings supporting parental alienation.”

Unchallenged conclusions of law become the law of the case. King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 716, 846 P.2d 550 (1993). The court entered a letter ruling as its conclusions of law. CP 2828-2843. The court then entered a Final Parenting Plan. The court specifically struck “alienation of the mother from the children” from the court ordered Parenting Plan. (CP 2848, Section 3, page 2 of 12.) Thus, the only remaining conclusion of law that Kevin complains is related to the “anti-stalking order”. CP 2844-2846. All other conclusions as

outlined in the court's letter ruling related to the Parenting Plan, RCW 26.09.191 restrictions and decision making are now law of the case.<sup>4</sup>

C. There was no Evidence at Trial of a GAL Bias.

Kevin once said, “[t]he GALs purpose is to look into the lives of people responsible for these [the Clare] children and how they conduct themselves in furtherance for the children.” Ex 14. “Andrea is only concerned about the GAL because the truth is I am the more favorable parent in relation to what is best for the children.” Id. In February 2018, he labelled her as “not nurturing” and a liar. Id. In February 2018 he first admitted that he had “10 months of journaling to prove why it is in the best interest of the children to be I my primary care” Id.

The court may appoint a GAL to protect the best interests of the child in any proceeding under Title 26, RCW. RCW 26.12.175(1)(a). The GAL is an officer of the court. GALR 2(f). The role of the GAL is to investigate and report factual information regarding the issues ordered to be reported or investigated to the court. RCW 26.12.175(1)(b). The GAL must always represent the best interests of the child. Id. The GAL may make recommendations based upon her investigation, “which the court may consider and weigh in conjunction with the recommendations of all

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<sup>4</sup> The court, in its findings and conclusions and letter ruling made decisions about decision-making, division of the assets and debts and child support. Those issues are not raised on appeal and therefore, waived by Kevin.

of the parties”. Id. Kevin was entitled to file with the court written responses to any report filed by the guardian-ad-litem. RCW 26.12.175(c). The court “shall” consider any written responses that Kevin may file. Id.

The GAL made no recommendation. The Trial Court fashioned the Parenting Plan, with restrictions, based upon the evidence at trial. Dugger v. Lopez, 142 Wn. App. 110, 120, 173 P.3d 967 (2007)(The GAL does not make Parenting Plan decisions; that obligation rests solely with the trial court). Kevin now claims “bias”. Kevin made no pre-trial attempt to remove the guardian-ad-litem for which he now asserts bias. See In re Marriage of Bobbit, 135 Wn. App. 8, 23, 144 P.3d 306 (2006) (removal of a guardian-ad-litem in 26 RCW cases is a discretionary function of the court). He did not object to the submission of the Gal Report and Supplementals. See Ex. 1-7. He did not object to the testimony of the GAL.

A litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the court’s qualifications on appeal. Tatham v. Rogers, 170 Wn. App. 76, 96, 283 P.3d 583 (2012). “A party may not speculate upon what rulings the court will make on propositions involved in the case and, if the rulings do not happen to be in the party’s favor, then for the first time raise the issue on

appeal. In re Welfare of Carpenter, 21 Wn. App. 814, 820, 587 P.2d 588 (1978); Club Envy of Spokane, LLC v. Ridpath Tower Condominium Association, 184 Wn. App. 593, 605, 337 P.3d 1131 (2014)(bias cannot be raised for the first time on appeal).

Rather than attempt to disqualify or remove the GAL Kevin went to trial. He filed nothing to respond to any of the concerns of the GAL. But the GAL made no recommendation. While he claims bias when in reality the GAL was attempting to get him services so she could recommend an equal parenting arrangement. The Court made the decision after hearing 11 days of testimony.

In support of his position, Kevin relies upon In re Bobbit, 135 Wn. App. 8, 144 P.3d 306 (2006). In Bobbit, the GAL “steadfastly refused” to interview Bobbit and his identified witnesses. She did conduct an interview with the mother, Esther, and her 18 witnesses. See In re Bobbit at 22. Bobbit brought a motion to remove the GAL asserting that the GAL refused to investigate his side of the case, and thus was in violation of the local guardian-ad-litem rules. Id. The court denied the motion. The appellate court reversed for failing to interview Bobbit and his witnesses. In fact, he did not remove the GAL. The court reasoned:

“Here, despite the deficient GAL performance, the totality of the records supports the conclusion that the trial judge independently evaluated the evidence...”

Id. at 28. Here, the GAL interviewed the parties, two experts provided by Kevin, two experts provided by Andrea, and both their friends and family. Further, the GAL made no recommendation. The Parenting Plan was established by the trial judge's independent evaluation of the evidence and the totality of the record. While citing Bobbit for his theory, Kevin looks to Bobbit for assistance, but in fact, if read in its entirety, demonstrates the woeful position on bias that Kevin now asserts.

D. The Court did not Err in Relying on Expert Opinions.

The trial court has broad discretion in allowing and weighing expert opinions. In re Marriage of Gillespie, 89 Wn. App. 390, 403, 948 P.2d 1138 (1997). Kevin alleges that the court relied upon inadmissible expert testimony in coming to the court's decision. The report of the GAL contained materials by Mr. Derry and Dr. Mechanic. Dr. Mechanic did not testify at the trial. The GAL testified that she gave little or no weight to Mr. Derry or Dr. Mechanic. Rather, the GAL relied upon the person that had actually evaluated Kevin, Dr. Page. In support of his position, Kevin relies on State v. King County District Court West Division, 175 Wn. App. 630, 307 P.3d 765 (2013). The issue in that case was not the admissibility of expert testimony, but rather the necessity of a statement of uncertainty associated with breath tests and whether or not the process

conformed to Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Kevin also relies on Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 333 P.3d 388 (2014). In that, the state supreme court affirmed the trial court's decision on limiting but allowing expert testimony. Finally, Kevin relied on Douglas v. Freeman, 117 Wn.2d 242, 814 P.2d 1116 (1991), a medical negligence case where causation was disputed.

E. The Trial Court was not misled by the GAL.

1. There was substantial evidence of questioning the children and thus restricting Kevin.

The statute which authorizes the appointment of the guardian-ad-litem authorizes the family court to hear the opinions of a witness who would not be a traditional expert under ER 702. Fernando v. Nieswandt, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997). A guardian-ad-litem is not appointed as a "expert". Id. Rather, she is appointed to investigate the child and family situation for the court and make recommendations. Id. In effect, she acts as a neutral adviser to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a commonsense impression to the court. Id. But the court is also free to ignore the guardian-ad-litem's recommendations if they are not supported by other evidence, or it finds other testimony more convincing. Id. The guardian-ad-litem is free to develop her opinion about residential

placement by conducting interviews with parties, witnesses, therapists, and experts. Id. The statute anticipates that the guardian-ad-litem will testify about her recommendations, and therefore, the court does not abuse its discretion when it considers the guardian-ad-litem's testimony. Id. at 107-108.

The trial contained volumes of evidence of Kevin's abusive conduct. Kevin ignores the trial when asserting that there was not substantial evidence to support the Court's findings of fact. In Kevin's brief, he lists several findings of fact as not supported by substantial evidence. Kevin is obligated to demonstrate why specific findings of the trial court are not supported by the evidence and to cite to the record in support of that argument. In re Estate of Palmer, 145 Wn.App. 249, 265, 187 P.3d 758 (2008). Strict adherence to this rule is required. See In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

Kevin admits he kept a journal. Ex. 14. While he complains of the criticism of excessive questioning it was not that fact alone that caused the GAL concern. The GAL became concerned after preparing her initial Report when observing Kevin's subsequent behavior and hearing him admit the behavior that he had previously denied. Kevin hired Marnee Milner, Ph.D not for a clinical evaluation to rebuke Dr. Page or Dr. Cole but to criticize the GAL. Dr, Milner testified that Kevin only made

negative comments about Andrea in his journal; that she would have expected him to be over the divorce by the time of trial. She learned at trial that Kevin gave the journal to the GAL. She was unaware that Kevin's friends and family were letting Kevin know when and where they see her and with whom. She was not aware that Kevin continued this behavior after separation. She was not aware Kevin was asking the kids of Andrea's whereabouts.

Dr. Milner agreed with Chuck Derry that if a person is unwilling to change that it is unlikely to occur. She admitted that Mr. Derry has more experience in treatment of Intimate Partner Violence perpetrators.

2. There was substantial evidence at trial to support a finding of stalking by Kevin.

Andrea filed a Petition under 26.50, RCW on two occasions. After trial the Court entered a two year Restraining Order. The decision to grant a domestic violence protection order is reviewed for abuse of discretion. Maldonado v. Maldonado, 197 Wn.App 779, 789 , 391 P.2d 546 (2017).

Kevin, strangely, argues 7.92 RCW. The Act does not apply to those who qualify for protection under 26.50, RCW. RCW 7.92.040. Restraining Orders are based on several different statutes and rules. State v. Turner, 118 Wn.App. 135, 138, 74 P.3d 1215 (2003). This cases was and is about domestic abuse and RCW 26.09 and 26.50. Both allow

Andrea to petition for and receive the relief the Court granted. Heckler v. Cortinas, 110 Wn.App. 865, 866-870, 43 P.3d 50 (2002). Any perceived error by Kevin in the form of the Order is not a basis for his challenge of the entry of a protective order. See Turner, 118 Wn.App. at 140-143.

Stalking imports the definition of “harassment” from RCW 10.14.020. See RCW 26.50; RCW 9A.46.110(6)(c). Under the civil unlawful harassment when the Court considered Kevin’s course of conduct the decision was made to enter a protective order – for Stalking. See CP 2844-2846; State v Askham, 120 Wn.App. 872, 881-883, 86 P.3d 1224 (2004); RCW 10.14.020(1) and (2). Stalking can be accomplished by the manipulation of third parties to engages in stalking and harassing behavior. State v Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008).

F. The Court did not Abuse its Discretion in Crafting a Parenting Plan with Restrictions.

Review concerning provisions of parenting plans if abuse of discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). Again, Kevin asserts a lack of substantial evidence yet ignores his obligation to cite the record. The Court had overwhelming evidence to consider when making findings to support two permissive restrictions. RCW 26.09.191(3). The Court shall protect the best interests of the children. RCW 26.09.002. This Court, as argued in her cross-appeal,

should remand with instructions to enter a mandatory restriction as Kevin is a domestic abuser. RCW 26.09.191(1).

G. The Findings of Fact Articulated in Kevin's Argument Section E. are Supported by Substantial Evidence.

Kevin argues that certain findings were inappropriate as they were based upon child hearsay. The findings were based upon his journal entries and thus a statement of a party. Leaving only a few findings allegedly based upon child hearsay amounts, at most, harmless error. Brown v Spokane County Fire Prot. Dist. No 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The improper admission of evidence constitutes harmless error if the evidence is minor in comparison to the overwhelming evidence as a whole. State v Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). See In re Marriage of Thompson v Holt, unpublished (2016). Further, to the extent that the Court relied on the findings of fact for purposes of ruling on the Protective Order then hearsay statements are admissible. ER 1101(c)(4); See Gourley v Gourley, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006). The evidence may be wholly documentary. Ex. 8; See Blackmon v Blackmon, 155 WnApp. 715, 722, 230 P.3d 233 (2010).

H. Kevin is Not Entitled to Attorney's Fees.

Kevin makes a request for attorney's fees pursuant to RAP 18.1, but provides no analysis. He then seems to believe that he reserves the

right to prepare an Affidavit of Need “prior to consideration of the case”.

He cites no authority.

#### **IV. CROSS APPEAL**

Social change is upon us. With women’s suffrage did not come equal rights. There are still men, like Kevin, who believe that they are the “Captain of the ship”. Ex. 14. Their female partner may only be the “First Mate”. Ex. 14. There is a segment of society that engages in domestic violence that does not always result in leaving bruises. It’s systematic and it’s damaging. As early as 1992, our legislature identified domestic violence as “a problem of immense proportions”. As recent as 1992, the legislature wanted to make it easier for victims to be protected from domestic violence. The legislature found that the domestic violence crisis is growing. 1992 Wash. Legislative Service, Chapter 111 (SSB 6347) (1992). The legislature has found that treatment of domestic abusers is not a one size fit all proposition. 2019 Wash. Leg. Service, Ch. 263 (SSHB 1517) (2019). The legislature intended to provide greater education to those who work around domestic violence. Id. This education should include the judiciary. It is time for this court to identify that pervasive intimate partner abuse, whether physical, emotional or mental, is not tolerated in our society. This court should reject Kevin’s appeal and remand this matter with instructions to find that he has engaged in

domestic violence to enter a lifetime restraining against Kevin in favor of Andrea, and to find that Kevin's conduct is intransigent in nature, and award attorney fees to Andrea.

A. Assignments of Error.

Andrea hereby assigns error pursuant to RAP 10.3(a)(4) as follows:

1. *The court committed error and abused its discretion in failing to find that substantial evidence existed to declare Kevin a perpetrator of domestic violence under 26.50 RCW as stated in the court's letter ruling.*
2. *The court committed error of law in its letter ruling whereby the court makes Findings of Fact and Conclusions of Law that Andrea engaged in intransigent behavior, and thus, making the Finding and Conclusion that Andrea was not entitled to attorney's fees for Kevin's intransigent behavior.*

B. Statement of Case.

See above.

C. Argument.

1. There was substantial evidence to find Kevin to be a perpetrator of domestic violence under 26.50 RCW.

The general standard of review of trial court’s decisions in Parenting Plans is an abuse of discretion. Matter of LH, 198 Wn.App. at 190, 194, 391 P.3d 490 (2016). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Id. A trial court’s decision is manifestly unreasonably if it is outside the range of acceptable choices considering the facts and applicable legal standard, it is based on untenable grounds if the factual findings are not supported by the record and it is based on untenable reasons if it applies an incorrect standard or the facts do not meet the requirements of the correct standard. Id. The overwhelming record in this case demonstrates that Kevin is a perpetrator of domestic violence.

The trial court had “serious concerns” about ‘respondent’s stalking behavior”. CP 2831. The Court found that Kevin had a desire to monitor and follow the conduct and activities of Andrea. CP 2832. The Court went on to state:

“While this court has not made an affirmative finding of domestic violence, ... the court remains concerned about the respondent’s controlling behavior and is satisfied that joint decision-making is not in the best interests of the children.”

CP 2834. The Court then went on to order a DV-MRT education program for Kevin. CP 2834. If there is a history of domestic violence, there are mandatory restrictions in Parenting Plan. RCW 26.09.191(1)(c);

see Matter of LH, 198 Wn. App. 190, 194, 391 P.3d 490 (2016).

Domestic violence not only includes assault, but also course of conduct.

RCW 10.14.020(1). The court cannot give Kevin grace and avoid the domestic violence finding to avoid the mandatory restriction. Id. at 194-195. See Cole v. Cole, (unpublished, see Appendix D.) Proof of a recent act of domestic violence is not required. Spence v Kaminski, 103 Wn.App. 325, 333-34, 12 P.3d 1030 (2000). The purpose of the Domestic Violence Protection Act is to prevent domestic violence based upon the history of events. Id.

Upon entering the Restraining Order – Stalking, the Court was mandated to find a restriction under RC 26.09.191(1). The Trial Court restricted Kevin in the parenting plan permissively and avoided the mandatory restriction stating: “The Court does not find it necessary to its final decision on residential time and decision-making to find that intimate partner violence (referenced as ‘IPV’ by witnesses at trial) or domestic violence as defined in RCW 26.50.010 occurred during the marriage” CP 2831. RCW 26.50.010 mandates a finding of domestic violence is the court finds stalking. Which this court did.

A person commits stalking if he intentionally and repeatedly harasses or repeatedly follows another person; and the person being harassed or followed is placed in fear that the stalker intends to injure the

person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience; and the stalker either: intends to frighten, intimidate or harass the person; or knows or reasonably should know that the person is afraid, intimidated or harassed even if the stalker did not intend to intimidate or harass. RCW 9A.46.110(1)(a)-(c)(ii); RCW 10.14.020.

The term “harasses” means unlawful harassment as defined in RCW 10.14.020. RCW 9A.46.110. It includes a course of conduct. RCW 10.14.020(1).

The harassment can include the direction or manipulation of third parties. See State v. Beckland, 163 Wn.2d 519, 529, 182 P.3d 944 (2008).

*i. Request for Attorney’s Fees on Appeal.*

Andrea requests attorney’s fees. RAP 18.1. This appeal is now the third attempt by Kevin to eliminate the domestic protective order. Andrea is entitled to attorney’s fees. See RCW 26.50.060(g); see Gorurley v. Gorurley, 158 Wn.2d 460, 470, 145 P.3d 1185 (2006).

A court may consider an award of attorney fees which were caused by one party’s intransigence and award attorney’s fees on that basis. Matter of Marriage of Greenlee, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). When intransigence is established, the financial resources of the

spouse seeking the award are irrelevant. In re Marriage of Morrow, 53 Wn. App. 579, 590, 77 P.2d 197 (1989). Awards of attorney's fees based upon the intransigence of one party has been granted when the party made a trial unduly difficult and increased legal costs for his actions. Id.

The court noticed that Kevin changed his position at the commencement of trial on his "insistence on a primary custody" as it would not put him in the "best light". CP 2829. Andrea, till nearly the end attempted to resolve the dispute with Kevin. Ex. 15. It was only after Kevin could not advance his ambush tactics that he then agreed to an equal residential time. By then, his egregious conduct was known by Andrea.

The Court then concluded that there were two events that were the reasons for intransigence, neither of which are supported by substantial evidence, or both of which bases are error of law. First, there was no evidence that Andrea ever contacted the FAA. The evidence demonstrated that Andrea was concerned about Kevin flying with the children if he did not have a valid license. The GAL did not disclose Kevin's identity when learning about licensing requirements from the FAA. Andrea is immune from any civil liability, had she contacted the FAA. See RCW 4.24.500-550. The trial court cannot infringe upon Andrea's First Amendment Rights in finding intransigence. See Leishman v. Ogden Murphy Wallace, PLLC, 10

Wn. App. 2d 826, 834-35, 451 P.3d 1101 (2019). There is no evidence of Andrea's intransigence in this case.

The Court was critical of Andrea asserting her legal rights and seeking her remedies. Andrea's access to Courts cannot be a permissible basis for intransigence. Musso-Escude v. Edwards, 101 Wn. App. 560, 566, 4 P.3d 151 (2000). Our United States Supreme Court has found that in the First Amendment a constitutional basis for the right of access to the courts as a well established facilitative right to present and have claims determined. Id. The right of access is implicated if the court impacts the ability of claimants to bring suit. Id. The court committed error of law, and at the very least, abuse of discretion in finding that Andrea engaged in intransigent behavior based upon her asserting her legal rights.

In contrast, the trial court found Kevin acted specifically in this dissolution proceeding to cause delay and expense to Andrea. This includes opposition to venue in Walla Walla County, sending the August 2016 letter to approximately 30 mutual friends, inconsistent positions with respect to the sale of the family home, twice disregarding the Court's explicit instruction to engage with a psychologist for examination purposes; wanting a full guardian-ad-litem investigation and then not engaging the guardian-ad-litem in a timely manner and refusing to pay her for her time; potentially spewing the results of the GAL investigation by

lack of cooperation and adversarial attitude; and routinely disagreeing with the petitioner regarding the children's schooling, extra-curricular activities, their son's growth condition and decisions about medical treatment. CP 2842 at pg. 15. The Court should remand with an Order striking the Finding and Conclusion at CP 2841-2842, pg. 14 and 15 that Andrea engaged in intransigence. This Court should remand for attorney's fees to be awarded to Andrea by Kevin for Kevin's intransigence.

## V. CONCLUSION

The trial court should be affirmed in part and reversed and remanded to enter findings and conclusions that Kevin commits domestic violence and award attorney's fees.

RESPECTFULLY SUBMITTED, this 17<sup>th</sup> day of July, 2020.

TELARE LAW, PLLC

/s/ GEORGE E. TELQUIST

By: \_\_\_\_\_

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**Comments:**

On pages 11 and 15 of the Brief, the Journal is referenced as Ex. 1, Attachment K. It has been corrected to Ex. 1, Attachment E. On page 45 of the Brief, CP 28-31, 28-32, 28-34 has been corrected to: CP 2831, 2832, 2834.

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