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COURT OF APPEALS
DIVISION III OF THE STATE OF WASHINGTON

ANDREA J. CLARE,
Respondent / Cross-Appellant,

v.

KEVIN P. CLARE,
Appellant / Cross-Respondent.

REPLY BRIEF OF APPELLANT / CROSS-RESPONDENT

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INTRODUCTION

The trial court erred when it made several findings of fact related to determinations that Kevin engaged in abusive use of conflict and/or excessively questioned the children, Kevin had stalked Andrea both during and after the marriage, and Kevin subjected Andrea to ‘coercive control’ and intimate partner violence. In making these erroneous determinations the court relied on the testimony of Chuck Derry, Dr. Mindy Mechanic, and GAL Laura Vaughan, which consisted of conclusory statements and were based upon out of court communications with Andrea. There was an absence of factual evidence offered at trial to justify the court’s findings and conclusions. Even Andrea’s own testimony was devoid of testimony of factual events. The court considered the unfounded testimony from Derry, Mechanic, and Vaughan, and the conclusory and conspiratorial allegations from Andrea, and therefrom made findings of stalking, coercive control, and emotional harm of the children. The result was a parenting plan and protection order which unreasonably limited Kevin’s time with the children.

STATEMENT OF THE CASE

A. Introduction to the Statement of the Case.

The court entered voluminous findings of fact, but did not enumerate its conclusions of law, instead referencing the letter opinion dated March 29, 2019. CP at 2438-53, 2487. In Section “1” of that letter

opinion, “Parenting Plan”, the court stated that it was basing its parenting plan upon the court’s findings of ‘coercive control during and after the marriage’, and ‘stalking’, allegedly committed by Kevin towards Andrea. CP at 2439-41. The court rather than find Kevin had committed domestic violence, as defined by statute, instead deemed him guilty of “coercive control” which the court found “abusive.” CP at 2439-41.

The court took an equivocating position regarding domestic violence, stating that although there was a “dearth of testimony regarding more recent or recurring acts of physical violence on the part of the Respondent. The Petitioner testified as to other occasions where there was no actual physical assault but where physical body language, body positioning, and menacing facial expressions added to her fear for her personal safety.” CP at 2440-41.

Regarding “stalking”, the court found that the conditions imposed by Kevin during the marriage, that Andrea not spend one-on-one social time with other men – following Andrea’s confession of infidelity, were unreasonable, and “mitigate towards a finding of coercive control which in turn could be defined as stalking under RCW 26.50.010(3)(c) and RCW 9A.46.110.” CP at 2441. The court appeared to treat “coercive control” and “stalking” as separate conclusions of law, but also conflated the two and

appeared at points to incorporate “stalking” as a contributing factor to “coercive control” rather than a standalone factor. CP at 2439-41.

However, the court did not, in its letter opinion, articulate any conclusions of law that the children had been emotionally harmed by the alleged ‘coercive control’ and ‘stalking.’ CP at 2439-41. In fact, the court declined to impose any RCW 26.09.191 (“191”) restrictions for child abuse or statutorily defined domestic violence. CP at 2492. In sum, the court awarded sole decision making and primary placement with Andrea and did so based on its findings of “coercive control” and “stalking”, for which there was no evidence to support. CP at 2439-44.

Regarding stalking, the court issued a protection order with no reasoning given other than “[b]ased upon the findings made herein.” CP at 2443. The court ultimately crafted its parenting plan, which involved awarding primary custody and sole decision making to Andrea, and mandating Kevin take domestic violence training classes, and the protection order, on the basis that Kevin’s actions amounted to coercive control and stalking, and resulted in emotional harm to the children. 2439-42. Yet this is contradicted by the absence of any findings the children had been harmed and the court’s statements to the contrary. CP at 2443 (“the children are resilient and doing well under the circumstances.”).

There was no evidence offered at trial to substantiate the court's findings of stalking. Testimony by Andrea and the witnesses she called on her behalf offered no actual evidence of stalking. Andrea's testimony concerned her accusation that she "felt" like she was being stalked, and her conspiracy theory that Kevin was secretly hacking into her email account. Andrea sued Kevin in federal court for the alleged email hacking. The federal district court dismissed Andrea's claim on the basis of a lack of evidence. Finally, there was no testimony or otherwise any basis for translating 'stalking' into 'emotional harm to the children' necessitating the court to severely limiting Kevin's parenting time, awarding sole decision making to Andrea, and mandating Kevin take domestic violence training classes. Andrea could not offer a single piece of evidence that Kevin had been stalking her post-separation. The court's findings of fact and letter opinion legal conclusions related to 'stalking' were in error and unsupported by evidence, admissible otherwise.

Regarding coercive control, Andrea proffered her own testimony, the opinion testimony of two "experts" Dr. Mindy Mechanic and Chuck Derry, and the testimony of GAL Laura Vaughan. Andrea's testimony was fundamentally flawed as she alleged that she was subjected to non-violent 'domestic violence' and 'coercive control' throughout her marriage and post-separation, while simultaneously admitting that she never "realized"

she was the victim of non-violent ‘domestic violence’ and ‘coercive control’ until after separation, when she attended a CLE in which Chuck Derry was a guest speaker. RP at 976. Conveniently, Andrea after meeting Mr. Derry at the CLE, retained him as an expert witness and developed a new case theory during the middle of her dissolution proceeding. Simultaneously she leveled a slurry of accusations against Kevin and changed her position from equal parenting time to primary placement. ‘Coercive control’, is a nebulous ad-hoc legal theory Andrea offered and totally irrelevant to the best interests of the children.

Moreover, the purported “expert” opinions offered by Derry and Mechanic failed to meet standard of reliability for expert testimony. There was no objective methodology used. RP at 103-69. Both “experts” conceded that they did not perform an evaluation of Kevin or even speak with him but relied exclusively on Andrea’s allegations she relayed to them. RP at 126-56. Dr. Cole and Dr. Milner both testified that this breached the standard of care because no psychological opinions may be offered without evaluating the subject. RP at 310. RP at 855-56. Moreover, Dr. Mechanic did not testify at trial. CP at 2462-63. As Derry was the only “expert” testifying to coercive control, Andrea lacked sufficient expert opinion to offer an opinion or diagnosis on coercive control/intimate partner violence.

The court erred in finding coercive control based on Derry's testimony, who has no psychological training, when two licensed clinical psychologists, one who evaluated Kevin—Dr. Cole, testified that Kevin did not meet the diagnostic criteria for intimate partner violence or coercive control. RP at 322-23. The only allegations supported by any evidence that Andrea testified to, was that Kevin insisted that Andrea not see other men socially, but only after Andrea revealed her affair with another man. Finally, there was no testimony or otherwise any basis for translating 'coercive control' into 'emotional harm to the children', necessitating the court to severely limiting Kevin's parenting time, award sole decision making to Andrea, and mandate that Kevin take domestic violence training classes. The court's findings of fact and letter opinion legal conclusions related to 'coercive control' were in error and unsupported by evidence, admissible or otherwise.

The court made reference to the various positions that Kevin and Andrea took pretrial regarding requested parenting plans and Andrea's allegations of stalking. CP at 2439-2445. Andrea testified at length of the positions Kevin took pretrial. She likewise testified that the 'coercive control' and 'stalking' she accused Kevin of continued post-separation and during the pretrial process. See trial testimony *infra*. As such, a detailed account in Kevin's opening brief of the pretrial process and the various

contradictory positions Andrea took was necessary as the trial court referenced the pretrial process in its findings and conclusions and letter opinion legal conclusions. CP at 2439-2445, 2466-87.

Finally, as shown in the findings of fact and letter opinion legal conclusions, the court relied heavily on the GAL's pretrial report. CP at 2439-2445, 2466-87. As demonstrated in Kevin's opening brief, the GAL's process was flawed, violated the standard of care, incorporated the inadmissible opinions and conclusions of Chuck Derry and Dr. Mechanic, and was fundamentally biased in its methodology and conclusion.

Below, Kevin demonstrates that the evidence presented at trial does not support the court's various findings related to 'coercive control', 'stalking', and resulting 'emotional harm to the children', which were the bases of the court's decision to severely limit Kevin's parenting time to a few days a month. CP at 2439-2445. Additionally, the majority of the Andrea's factual recitations in her responsive brief, either lack citation or misrepresent the cited portion of the record. Indicative of this, is her reliance on purported paraphrasing rather than quotes. Provided below is a detailing of the trial testimony concerning 'coercive control', 'stalking', and 'emotional harm to the children', which demonstrates the absence of evidence in support of the trial court's legal conclusions.

B. Trial testimony concerning stalking.

Andrea's trial testimony concerning stalking was limited to speculation and conjecture. As testified to by Dr. Cole, Ph.D., Kevin's conditions imposed during the marriage regarding Andrea spending time alone with other men, which Andrea concedes came about only after she revealed to him her infidelity, did not amount to stalking but were normal actions of a betrayed spouse ensuring responsibility following a confession of infidelity. RP at 320-21. Importantly, Andrea did not testify that during the marriage Kevin had access to her phone without her permission. When asked whether Kevin had her permission, Andrea answered in neither the negative or the affirmative but acknowledged it was practice that occurred normally during their marriage, which amounts to a tacit admission of consent. RP at 757. This is in line with Andrea's testimony that during the marriage, prior to the revealing of her second affair, Andrea and Kevin were "best friends." RP at 775. Andrea offered no proof whatsoever of any pattern of stalking, or tracking post separation, other than baseless conclusory conspiracy theories.

Andrea testified that:

- Kevin was upset when Andrea first admitted to cheating on him up until the day of their wedding ceremony. RP at 722-23

- Kevin instituted “rule” that Andrea was not allowed to go on platonic lunch dates with other men after she admitted to cheating on him, and Kevin would be upset when he learned she was breaking this rule. RP at 730.
- Andrea consented to allowing Kevin to see her phone, after her cheating was exposed, so she could earn Kevin’s trust and repair her marriage, and did so on her counselor’s advice. RP at 731.
- Andrea testifies that Kevin tracked her whereabouts during marriage on her phone, but doesn’t say Kevin did not have permission to do so despite Kevin already testifying that Andrea gave him permission to do so. RP at 742.
- Admits to learning about Kevin’s travels with his new wife, post-separation, through outside sources. RP at 745.
- Testifies that Kevin told her during marriage that knowing where she was using apple software was convenient because it was easier than asking where she was during work hours, and he did not have to bother her. RP at 757.
- When asked to confirm Kevin’s testimony that that she agreed to allow him access to her phone, she does not directly answer the question, and her response implies a tacit admission. RP at 757

- Andrea alleges that Kevin knowing she took a trip to Hawaii with George is evidence of stalking, but admits that Kevin found out through other people. Andrea does not offer evidence of how this amounts to stalking, just the bare conclusory allegation. RP at 810.
- George and Andrea cheat on their respective spouses with each other. George's ex-wife Amy Britt tells Kevin that George and Andrea took a trip to Ireland. Andrea has an issue with Amy telling Kevin this. Andrea does not understand how Amy could have found out and makes a conspiracy implication that Kevin is stalking Andrea through Amy. RP at 815.
- Andrea is upset that the children told Kevin that Andrea had taken them to Hawaii with George. RP at 816-17. Her allegations of stalking are a weapon against Kevin's involvement in his children's lives.
- Andrea takes issue with the fact the children told Kevin that Andrea took them to Hawaii, a perfectly expected thing for children to talk about without being 'questioned'. RP at 817.
- Andrea claims Kevin listing Eric Moore as a witness was proof Kevin was accessing her email account. Andrea offers no proof other than a conspiratorial conclusory statement. RP at 948.

- Kevin goes outside, during a counselling meeting with the children attended by both Kevin and Andrea, to pick up a toy that one of the children dropped. Andrea's conclusion was that Kevin, or his family, put a tracking device on her car. RP at 957.
- Andrea admits that post-separation, and post-affair, she attempted to be Facebook friends with Kevin, stating "lets just get along and agree." RP at 972. This contradicts her stalking and coercive control allegations, as she was reaching out to Kevin who was the one who wanted a divorce from her.

Dr. Kenneth Cole, Ph.D. testified that:

- There is a difference between checking up on someone during marriage and cohabitation because of marital commitment, and stalking. RP at 320-21

Kevin testified that:

- Began using "find my phone" app during marriage a "couple dozen times" beginning with an instance in which the children needed joint parent signatures and Andrea was not responding. RP at 510-11.
- Kevin never once used the "find my phone" app after separation. RP at 512.
- Andrea twice entered his house without permission post-separation. RP at 515.

- Kevin was told Andrea went to Hawaii with George by a woman at church named “Carrie”, and not because as she conspiratorially accused, because he was having her followed. RP at 587.
- Andrea, objecting to Kevin’s presence during medical appointments, once showed up unannounced to a medical appointment during Kevin’s parenting time. RP at 595.
- The first time Kevin used “find my phone” app because he could not get a hold of Andrea, not because she was unfaithful. Andrea worked long hours as a litigation attorney during the marriage and was difficult to get a hold of. RP at 655.

C. Trial testimony concerning coercive control / intimate partner violence

Andrea’s trial testimony concerning ‘coercive control’ was limited to speculation and conjecture. As testified to by Dr. Cole, Ph.D. Kevin’s conditions imposed during the marriage regarding Andrea spending time alone with other men, which Andrea concedes came about only after she revealed to him her infidelity, did not amount to ‘coercive control’ but were normal actions of a betrayed spouse ensuring responsibility following confessions of infidelity.

Both Dr. Cole, Ph.D. and Dr. Milner, Ph.D. testified that there was no evidence of coercive control or intimate partner violence. They further

testified there was insufficient data in the record to even render an opinion in the affirmative or the negative whether either had occurred. Additionally, they established that the standard of care to come to such a conclusion is to perform an evaluation of the subject and Dr. mechanic and Derry breached the standard of care by failing to even speak to Kevin much less evaluate him. Finally, there is no evidence in the record that Andrea's allegations, even if they were supported by evidence, had any effect on the children.

Andrea testified that:

- Admits that she informed Kevin about unwanted sexual advances from a co-worker, and Kevin did not respond badly or intrusively. RP at 739.
- Kevin becomes upset when he learns that Andrea, while on a business trip with another man, has drinks with that man and his friend until midnight without telling Kevin. Andrea testifies that Kevin told her that she "should not have been out with dudes he doesn't know out of town." RP at 748.
- Admits that Kevin wanted a divorce immediately upon seeing adulterous texts between her and George after Andrea admitted to having an "emotional affair" with George. RP at 769. Kevin's behavior of wanting to end the marriage after the second affair, whereas he had continued the marriage after the first affair is

inconsistent with a coercively controlling spouse. Having forgiven Andrea for prior infidelity is inconsistent with her portrayal of Kevin as an abusive husband.

- Andrea admits that previous to the “emotional affair”, her and Kevin had been “best friends.” RP at 775.
- Andrea admits that she had invited Kevin over during the “suburban incident.” RP at 780
- When Kevin saw evidence on Andrea’s phone of her affair, he said “I’m so angry I could pop you”, I’m so angry I could pop George.” Andrea left and Kevin called and apologized before she even reached home. RP at 785.
- Andrea didn’t think she needed a restraining order when she originally filed her petition. RP at 794.
- When Andrea and Kevin had an agreed civil no contact order, which was Andrea did not reduce to writing, Kevin honored that agreement. RP at 795.
- Andrea, looking back, bases her theory of coercive control, on the fact that Kevin kept a private journal chronicling his divorce experience, despite Andrea having no idea the journal existed. RP at 795.

- Andrea admits that Kevin kept his private divorce journal as a way of proving he was the better parent in order win primary placement of the children, and not as Andrea otherwise claimed, to ‘coercively control’ her. RP at 971
- Andrea admits that prior to attending a CLE where the “wheel” was discussed, she didn’t know “this type of situation or this kind of domestic violence even existed.” In sum, Andrea never considered herself to be a victim of “coercive control” or “intimate partner violence” until during her contested divorce she learned about the “wheel.” RP at 976.
- Andrea testified regarding her allegations of domestic violence in general conclusory terms but could not offer any concrete examples of domestic violence when prompted. RP at 977.
- Andre admits that she ‘discovered’ that she had been a victim of domestic violence during her marriage, for the first time, in February 2018, which was two years after separation. RP at 979. This speaks to Andrea’s domestic violence theory as a strategic tactic to gain an advantage in the divorce.

Andrea’s Sister Kimberly Snowden testified that:

- Andrea and Kevin had a wonderful marriage. RP at 423.

- She never witnessed a dispute between Kevin and Andrea. RP at 424-25.
- Andrea had told her early in the divorce that a 50/50 was best. RP at 428
- Andrea no longer wants 50/50, but instead wants primary custody because she adores the children, not because she thinks Kevin is a negative influence. RP at 435.

Chuck Derry testified that:

- He has no college degree, no formal training, has never served as an expert witness, and his job consists of “monitoring” criminal domestic violence offenders, and not, providing expert opinions on coercive control. RP at 119-25
- Derry never spoke to Kevin and only two conversations with Andrea, yet is convinced that Andrea was the victim of ‘coercive control’ non-violent domestic violence. RP at 126, 156.
- The only specific incidents Chuck Derry references are the parking lot incident where Kevin allegedly pushed Andrea during a fight, and when Kevin once slammed the door on Andrea. Otherwise Chuck Derry speaks about his experience with other ‘abusers’ and his intuitive conclusion that Kevin fits the profile. RP at 103-37.

- Derry offers his conclusion that Kevin has “intimate partner abuse issues” without stating the specific factual basis for his conclusions, and despite not being a psychologist and never even speaking with Kevin. RP at 154.
- Derry never spoke with Kevin, only spoke to Andrea and Andrea’s lawyers. RP at 158.
- When asked: “Do you know whether Mr. Clare has actually engaged in all the behaviors that Mrs. Clare has alleged?”, Derry replies “I believe Miss Clare.” RP at 164.

Dr. Kenneth Cole, Ph.D. testified that:

- Preliminarily, Andrea grossly misrepresents Dr. Cole’s testimony, her misrepresentations are addressed below.
- The first attorney to contact him regarding Kevin’s evaluation was Andrea’s attorney. RP at 302
- Kevin was negative for every indicator on Danger Assessment Scale and was given a “1” rating. RP at 306
- Kevin is a non-confrontational person who does not get in people’s faces, just at times, passive aggressive, which is normal. RP at 306.
- Based on the evidence presented by both sides, including the evidence presented by Andrea, there was no evidence whatsoever of intimate partner violence or coercive control. RP at 308.

- Dr. Mechanic and Chuck Derry breached the standard of care by coming to “onerous conclusions about [Kevin’s] behavior and character” without talking to him. RP at 310.
- There was nothing in Andrea’s testimony that suggested Kevin had committed intimate partner violence. RP at 322-23.

Kevin testified that:

- He accused Andrea of having a second affair in August 2015, which of course turned out to be true. RP at 489
- Kevin checked Andrea’s phone while she slept, in December 2015, while the couple was still married, because he did not believe her denials of infidelity. RP at 499-00
- Began using “find my phone” app during marriage a “couple dozen times” beginning with an instance in which the children needed joint parent signatures and Andrea was not responding. In total Kevin used “find my phone” app a couple of dozen times to locate Andrea when he could not get a hold of her. RP at 510-11.
- Kevin never once used the “find my phone” app after separation. RP at 512.
- Andrea twice entered his house without permission post-separation. RP at 515.

Dr. Marnee Milner, Ph.D., J.D., testified that:

- Establishing coercive control requires an expert psychologist performing an evaluation on a potential subject. RP at 832.
- Scope of assignment in this case was to review the GAL's methodology and findings. RP at 834-35.
- There was no non-physical "intimate partner violence", and notwithstanding there was not sufficient data available for any qualified expert to conclude that there was. RP at 855.
- There was no coercive control by Kevin, and notwithstanding, there was not sufficient data available for any qualified expert to conclude that there was. RP at 856.
- There is no data to conclude that Mr. Clare is a batterer. RP at 895.

D. Trial testimony concerning the wellbeing and emotional abuse of the children, and the need for the children's time with Kevin to be limited.

Andrea's trial testimony concerning any negative emotional impact or negative impact Kevin had on the children was absent. Andrea offered her own testimony and called witnesses to testify concerning her ad hoc allegation of 'coercive control' and conspiracy theory of stalking. There was no evidence of emotional abuse of the children or negative impacts on the children whatsoever.

Andrea testified that:

- As late as 2018, Andrea continued to believe 50/50 time was best for the children. RP at 937.
- Admits she told the children that Kevin kept a private divorce journal. RP at 948.
- Andrea admits to taking Kennedy's phone away so that she could not communicate with Kevin. RP at 798.
- Andrea blames Kevin for the children, all nine years old or younger, calling him while Andrea left them alone in the car by themselves. RP at 961-62.
- Andrea admits that eventually she removed Kevin's phone number from the children's watch phones so that they could not call him. RP at 963.
- Andrea, objecting to Kevin's presence during medical appointments, once showed up unannounced during a child's medical appointment during Kevin's time. RP at 595.
- Andrea admits that when residential time switched from Kevin as primary to 50/50 time, that the children developed dental problems. RP at 964.
- Andrea claims that the youngest child, the four-year-old, told her, "Andrea broke their home", implying that Kevin was stating this to

the children, and the four-year-old repeated Kevin's words. RP at 971.

Kevin testified that:

- Kevin doesn't question the children, they naturally say things to him, their former primary caretaker, such as having to duck when riding in the front seat "with mom" when they see police. RP at 591.
- One of the children, who are all very young, spontaneously tells Kevin that Andrea once left him alone at a bus stop and another time left him alone in the car. This was not a product of questioning but a spontaneous comment from a young son to his father. RP at 609.
- Since primary custody has changed from Kevin to Andrea, and the children now only see Kevin a few days a month, the children voice that they miss Kevin badly. RP at 675.

Guardian Ad Litem Laura Vaughan testified that:

- She changed her recommendation from 50/50 to primary placement with Andrea eight days before trial, because at Kevin's August 2, 2018 deposition, wasn't "crying", as he had been during a July 19, 2018 phone call. RP at 8-9.
- She further based her changed recommendation on Kevin admitting he checked Andrea's underwear for evidence of an affair and was not "apologetic." RP at 10. Here, the GAL shows her bias and

concedes that she changed her recommendation not based on the children, but based on her opinion of Andrea and Kevin's relationship dynamics.

- Vaughan claims that Kevin admitted to “question[ing] the kids.” RP at 10. Yet she offers no examples or factual basis, just hearsay. RP at 10. This stands in contrast to Kevin's testimony that the children would spontaneously mention things, such as Andrea taking them to Hawaii.
- She admits that she recommended a “psych eval” for “intimate violence and course of control” following discussions with “Mindy Mechanic” and “Chuck Derry.” RP at 11
- “I changed the IPV and the coercive control based on Mr. Clare's deposition and the admissions in his deposition.” RP at 12. Kevin made no admissions of ‘domestic violence’, ‘coercive control’, ‘stalking’, or ‘intimate partner violence’ at his deposition.

Dr. Kenneth Cole, Ph.D. testified that:

- All Kevin's aspects of the Parent/Child Relationship Inventory were within normal range. RP at 307.
- Kevin is emotionally adequate to parent his children. RP at 308

Dr. Marnee Milner, Ph.D., J.D., GAL, testified that:

- Dr. Milner is a Registered Guardian Ad Litem, a licensed clinical Psychologist who did her phd dissertation on the neuropsychological characteristics of domestic violence offenders and indications for treatment, and a former San Francisco Bay Area family law attorney. RP at 828.
- There was no emotional abuse of the children inferable from the materials provided to or by the guardian ad litem, or provided to Mechanic and Derry. RP at 856.
- Intensive analysis as to why there was no abusive use of conflict in this case. 856-62.
- There is no data to conclude that Mr. Clare is a batterer. RP at 895.

E. Misrepresentations of the record by Andrea

Andrea states: “Kevin admits to the allegations and behavior complained of by Andrea.” Brief of Respondent / Cross-Appellant at 31. Kevin vehemently denied the allegations by Andrea. See generally RP at 462-713.

Andrea states: Kevin “admits to tracking her location without permission.” Brief of Respondent / Cross-Appellant at 31. Kevin’s testimony was that he used the “find my phone” app when he couldn’t get a hold of Andrea during their marriage, that his doing so was consensual,

and never used the app after separation. RP at 510-512. It was Andrea who offered equivocating testimony when asked whether use of the “find my phone” app during the marriage was consensual. RP at 757.

Andrea states “Dr. Milner deferred Derry on the issue of IPV abusers.” Brief of Respondent / Cross-Appellant at 30. Dr. Milner stated unequivocally that Derry breached the standard of care, and that there was insufficient data to conclude IPV abuse. RP at 855-56.

Andrea misrepresents the entirety of the Dr. Cole testimony. Andrea states that Dr. Cole “found suggestions of Intimate Partner Violence and coercive control.” Brief of Respondent / Cross-Appellant at 29. Dr. Cole testified that he “didn’t see any evidence” of “intimate partner violence or coercive control” and “certainly it did not meet the diagnostic criteria.” RP at 308.

Andrea states “It was further clinically significant to Dr. Cole that Kevin monitored Andrea’s whereabouts and continued to do so after separation.” Brief of Respondent / Cross-Appellant at 29. Dr. Cole testified, in response to a ‘if true’ hypothetical, that it would be clinically significant. RP at 323. There is no evidence in the record of any proof that Kevin monitored Andrea’s whereabouts post-separation. See generally Brief of Respondent / Cross-Appellant.

Andrea cites the GAL's hearsay testimony at length without citing any factual testimony by the GAL that would justify or contribute to findings of stalking, coercive control, or emotional harm to the children. Brief of Respondent / Cross-Appellant at 21-24.

In addition to voluminous misrepresentations, Andre makes numerous factual assertions unsupported by any citation to the record throughout her brief. See generally Brief of Respondent / Cross-Appellant.

ARGUMENT

A. The Trial Court, in Error, Entered Findings of Fact and Legal Conclusions Which Were Not Supported by Any Evidence.

A trial court's decision in a dissolution is overturned for abuse of discretion. *In re Marriage of Stenshoel*, 72 Wn. App. 800, 803, 866 P.2d 635 (1993). "A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). A decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

Here, the trial court entered conclusions of law and related findings of fact that Kevin engaged in coercive control, stalking, and caused emotional harm to the children. There was no evidence in the record to find that Kevin engaged in coercive control, stalking, and had emotionally harmed the children. In fact, Andrea's own testimony contradicts the trial court's conclusions.

1. Coercive Control

The Trial Court entered Conclusions of Law in its letter opinion that Kevin engaged in "coercive control." CP at 2439-44. Kevin and Andrea offered differing testimony concerning Andrea's allegations of coercive control. Kevin presented the expert opinion testimony of two psychologists, Dr. Cole and Dr. Milner, who both opined that Kevin did not meet the criteria for coercive control or intimate partner violence. RP at 306, 308, 322-23, 855-56, 895. Dr. Cole and Dr. Milner both likewise testified that there was not enough evidence in the record to possibly conclude that coercive control had occurred. RP at 306, 308, 322-23, 855-56, 895.

Andrea proffered Chuck Derry as a coercive control expert. RP at 119. Chuck Derry is not a psychologist, has no formal training, does not have a bachelor's degree, and had never testified as an expert before. RP at 119-25. Chuck Derry opined that Kevin had engaged in coercive control based solely on allegations Andrea had relayed to Chuck Derry. RP at 126,

156. When asked “[d]o you know whether Mr. Clare has actually engaged in all the behaviors that Mrs. Clare has alleged?”, Derry testified: “I believe Miss Clare.” RP at 164. Derry, as a purported expert, impermissibly weighed disputed evidence. RP at 164. Derry came to conclusions about Kevin without ever evaluating Kevin or even speaking to him; notwithstanding that Derry is unqualified to perform a psychological evaluation. RP at 126, 156. Dr. Cole and Dr. Milner both testified that Derry breached the standard of care by making “onerous conclusions about [Kevin’s] behavior and character” without talking to Kevin. RP at 310, 832, 856.

Andrea could not rely on actual factual events to forward her theory of coercive control because none occurred, she instead offered the baseless conclusions of an unqualified expert who did not employ any recognized methodology. Finally, ‘coercive control’ is a psychological concept. RP at 832. The only testifying expert who evaluated Kevin, Dr. Cole, unequivocally stated that no coercive control occurred in the marriage. RP at 322-23. The court erred in concluding that coercive control occurred during the marriage. The court further erred because it could not tie any of the alleged coercive control to harm to the children. CP at 2439-44.

In making its final decision of residential placement, the court stated that “the exhibited abusive behavior should be taken into consideration

together with the factors described in RCW 26.09.187(3)". CP at 2441. However in analyzing those factors the court did not find any harm to the children stating only, in analyzing factor "i", that "Respondent's past desire to monitor and follow the conduct and activities of the Petitioner and enlist the children in this process is abusive and puts at risk the children's good relationship with the mother." CP at 2442. In analyzing factors "ii" – "vii" the court makes no criticisms of Kevin, instead commenting that "the children are resilient and doing well under the circumstances." CP at 2443. Then in summation, the court states: "[c]onsidering all the above factors and giving factor (i) the greatest weight as required, the Court finds that the mother should be designated the as the primary residential parent."

It is clear that the court based its residential schedule solely on conduct that occurred between Andrea and Kevin during the marriage. This independently is error, as the residential schedule should be based on the best interests of the children, and not retribution for accusations of a bad marriage. RCW 26.09.002. Moreover, Andrea's own testimony contradicts her position that she was abused during the marriage. Andrea testified that prior to her disclosure of the second affair in 2015, she and Kevin's marriage was one of "best friends." Andrea, a sophisticated family law attorney, testified that she didn't consider herself to have been abused during the marriage until mid-2018, which was two years post separation,

and only when she attended a presentation by Chuck Derry at a CLE. RP at 979.

An abusive relationship, as a matter of precedential policy, must be more apparent than a retroactive epiphany by a spouse, who is a seasoned family law attorney, two years into a divorce process. Especially when that theory produces an instantaneous strategic advantage during the dissolution. CP at 1526, August 22, 2018 RP at 8-9. Andrea's own sister Kimberly Snowden testified that Andrea and Kevin had a "wonderful marriage." RP at 423. Ms. Snowden further testified that Andrea wanted primary placement not because Andrea felt Kevin was a danger to the children or her relationship with the children, but because Andrea adored the children. RP at 435. The court's conclusion that coercive control occurred is unsupported by the record, untenable, and unreasonable. The court's reliance on coercive control in crafting the parenting plan was in error.

2. Stalking

The Trial Court entered Conclusions of Law in its letter opinion that Kevin engaged in "stalking" CP at 2439-44. Kevin testified on the record that he did not engage in any stalking behaviors. RP at 512. There was no specific testimony for Kevin to rebut, as Andrea did not testify to any occurrences that could fall under the category of stalking. See generally testimony of Andrea. The only testimony Andrea offered was that Kevin

was hacking into her email account post-separation. She offered no proof this occurred, no recounting of specific events, only conclusory statements which amounted to a conspiracy theory. RP at 948. Moreover, Andrea brought suit in federal court alleging Kevin hacked into her email. That suit was dismissed on summary judgment on the grounds that Andrea had no admissible evidence to support her allegations of email hacking. *Telquist McMillen Clare PLLC v. Clare*, No. 4:18-CV-05045-SAB, 2019 WL 7819648, at *1 (E.D. Wash. Dec. 2, 2019). Here, there was no evidence in the record to find Kevin engaged in Stalking.

The court's conclusion that stalking occurred is unsupported by the record, untenable and unreasonable. The court's reliance on stalking in crafting the parenting plan was in error.

B. Kevin Properly Identified the Findings of Fact and Conclusions of Law Challenged on Appeal

Andrea states that "Kevin assigns error to only two conclusions of law." This misrepresents Kevin's opening brief and the court's conclusions of law. The court expressly stated that it was providing its March 29, 2019 opinion letter in lieu of its conclusions of law: "[t]he Court incorporates herin and makes part hereof by this reference its Decision Letter filed contemporaneously herewith." CP at 2487.

C. The Court Relied on the GAL Report in Error.

Andrea claims that any bias or errors in the GAL report or the GAL's testimony is irrelevant because "[t]he GAL made no recommendations." Brief of Respondent / Cross- Appellant at 35. However, the court's findings of fact and conclusions of law state issues related to the emotional well-being of the children and excessive questioning of the children. CP at 2442. The GAL herself testified that there wasn't a single question that Kevin allegedly asked the children which was problematic. RP at 206-42.

Moreover, any claims the GAL made about Kevin harmfully impacting the children are contradicted by her own report, where she cites the children's counselor who did not identify any signs of emotional abuse or excessive, inappropriate questioning. CP at 970-78.

RESPONSE TO CROSS APPEAL

A. The Trial Court did not Err in Refusing to Find Kevin Committed Domestic Violence Under RCW 26.50.

Andrea asserts that "there was substantial evidence to find Kevin to be a perpetrator of Domestic violence under RCW 26.50." Brief of Respondent / Cross- Appellant at 44. Andrea bases her theory upon RCW 26.50.010(3)(a), which defines "Domestic violence" as, *inter alia*, "stalking as defined in RCW 9A.46.110." Brief of Respondent / Cross- Appellant at

46-47. Andrea further states that “[u]pon entering the Restraining – Order Stalking, the Court was mandated to find a restriction under RCW 26.09.191(1).” Brief of Respondent / Cross- Appellant at 46. Andrea cites no authority for her final contention which is the crux of her argument. Brief of Respondent / Cross- Appellant at 46.

The stalking statute provides in relevant part:

(1) A person commits the crime of stalking if, **without lawful authority** and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and **repeatedly harasses or repeatedly follows** another person; and

(b) 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 under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110. (emphasis added).

“Follows” is defined as “deliberately maintaining visual or physical proximity to a specific person over a period of time.” RCW 9A.46.110(6)(b). “Harasses,” according to RCW 9A.46.110(6)(c), means “unlawful harassment as defined in RCW 10.14.020,” which in turn states:

(1) “Unlawful harassment” means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

(2) “Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. “Course of conduct” includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of “course of conduct.”

Andrea provides no factual basis for her argument. See Brief of Respondent / Cross-Appellant at 44-47. She provides no facts or citation to the record for how Kevin’s behavior met the elements of stalking as defined by the statute. Brief of Respondent / Cross-Appellant at 44-47. In fact,

Andrea's testimony focused on acts that occurred during the marriage. See generally testimony of Andrea.

Her accusations post-separation concerned Andrea being upset when Kevin learned through third parties that Andrea was going on vacations with George. RP at 810, 815-17. This does not involve any following or harassment. Kevin was not seeking this information; the information was simply offered to him. RP at 810, 815-17. Andrea also alleged that Kevin was hacking her email. She provided no proof that Kevin ever accessed her email post separation and provides no citation to the record in her briefing. Brief of Respondent / Cross-Appellant at 44-47. Andrea provided no allegations of Kevin following her, or incidences of harassment. Brief of Respondent / Cross-Appellant at 44-47. Andrea provided no evidence of a reasonable fear or reasonable emotional distress. Brief of Respondent / Cross-Appellant at 44-47.

The court did not err in declining to impose “.191” restrictions. *Matter of L.H.*, 198 Wn. App. 190, 194, 391 P.3d 490 (2016). (“The trial court has discretion to determine whether the evidence presented meets the requirements of RCW 26.09.191”). “[A] stalking conviction requires evidence of two or more distinct, individual, noncontinuous occurrences of following or harassment, and no minimum amount of time must elapse between the occurrences, provided they are somehow separable. *State v.*

Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). There was no evidence of stalking, much less statutory criminal stalking.

The court's error was in granting a Protection order for stalking without any factual basis to support such a protection order.

B. Andrea Committed Intransigence During the Dissolution Proceeding.

Andrea asserts that she had a constitutionally protected first amendment right to report Kevin to the FAA. Brief of Respondent /Cross-Appellant at 49. What Andrea neglects to mention, is that the finding of intransigence was based upon Andrea divulging Kevin's attorney-client protected information in an attempt to cause him to lose his FAA license. CP at 2451. The effect would destroy Kevin's career. Andrea divulged this information over two years after filing the dissolution and on the eve of trial, despite possessing the information for years. CP a 2451. The court did not err.

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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 15th day of September, 2020, by:

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