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STATE OF WASHINGTON
Division III

Division III No. 372308

Jeanette Poindexter (fka Sirianni), Appellant

v.

Warren Sirianni, Respondent

RESPONSE BRIEF OF RESPONDENT

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INTRODUCTION

Warren Sirianni, Respondent, is a retired veteran and is currently employed by the City of Spokane. On March 12, 2011 he and Appellant, Jeanette Sirianni, were married. They had two children together, Aimee and Jacob Sirianni, ages six and seven respectively.

Respondent has been the primary financial provider, as well as an equal coparent when providing care and other daily necessities for the children. Respondent testified that he previously had a more rigid schedule when the kids were younger, but in recent years his career advancement at work has given him a lot more flexibility in his schedule and he is able to provide care for the children before and after school.

Appellant declared that she was primarily a stay-at-home mother when the kids were younger. She testified that, in recent years, she began operating a farming business on the parties' joint property. She testified that she does farm work, such as shearing, clipping, and other farm work on the weekends. She testified that she works at Guardian Angel Home Care on the weekends if she is called in to do so. She further testified that, now that the kids were older, she had registered for online classes and was set to begin attending those classes in October of 2019.

Procedural History

This case was originally filed by Appellant on August 14, 2018. Appellant was then represented by her attorney, Gina Costello. In her initial Petition for Dissolution, Appellant indicated that she was not seeking a Protection Order or a Restraining Order. CP:1-6. In her initial Proposed Parenting Plan she indicated that she wanted Joint Decision-Making for School/Educational and non-emergent healthcare issues. In her Information for Temporary Parenting Plan, CP:16-18, Appellant indicated "Yes" to all of the following descriptions of Respondent 's involvement with the children's daily needs: "Has a loving and stable relationship with the children; yes; Takes care of the children's daily needs, such as feeding, clothing, physical

care and grooming, supervision, doctor/dentist visits, day care, and other activities for the children; yes; Attends to the children's education, including any necessary remedial or other education; yes; Helps the children to develop age-appropriate social relationships; yes; Uses good judgment to protect the children's well-being; yes; Provides financial support for the children, such as housing, food, clothes, child care, health insurance, and other basic needs; yes". Appellant further indicated "When their Dad is home, mostly weekends he is a good dad and participates in the care and education of our children." Lastly, Appellant stated "There are no abandonment, abuse, domestic violence, sex offense, or other serious problems that affect the children in this case". *Id.*

So, as of August 14, 2018, Appellant has declared that there are no domestic violence or other serious problems that affect the children in this case. On September 19, 2018, Mr. Craig Mason, Appellant's current attorney, substituted as counsel for Ms. Costello. On September 21, 2018, Appellant filed a motion for temporary orders. CP: 39-47. She requested a parenting plan, child support and "reserved" a request for restraints. On September 25, 2018 Appellant filed an Ex Parte motion for restraining order. CP: 55-62. In this request, Appellant stated in a text message exchange with Respondent "Your week starts next Friday so whatever days you can get off that week." Respondent was able to provide care for the children every day that week, and he let Appellant know that he intended to do so. Appellant did not believe that was the intent of her prior statement and brought her request for restraints to Ex Parte. CP: 55-76. Appellant's request for Ex Parte restraints was denied. CP: 63-65 Later that week, on September 28, 2018, Appellant filed a declaration outlining her "fears" of Respondent. A stark contrast from her previous declarations indicating that these issues do not exist. CP: 72-76.

A consistent theme of this case has been Appellant's questionable credibility and inconsistent actions. She filed this case and indicated that there were no Domestic Violence or

Abuse issues, and roughly one month later she's filed a Motion for Temporary Orders with restraints "reserved" and then shortly thereafter she is in Ex Parte requesting an immediate restraining order. During this same time period she sends a text message saying Respondent can have "whatever days you can get off that week" and when Respondent lets her know which days those are she sought restraints to restrict him from exercising those days.

In a motion for temporary orders, on revision in front of Judge Clark, Appellant indicated there are no issues with caring for the children on the weekends and a plan was ordered with that statement in mind. CP: 200-221; CP: 242-247. Respondent was given a right of first refusal in the event Appellant does have to work on the weekends. *Id.* In this Motion for Revision Judge Clark also alluded to credibility issues with Appellant's allegations of threats or abuse: "As to the farm, you know, the time that mom says she was getting those threats and she needed to move out, she had an attorney, she had a very good attorney who is not shy about coming in and asking for restraining orders when she needs them. So I don't understand why mom would have moved out without some kind of consultation with her attorney and having some kind of restraining order in place so that she could stay in the home...". CP: 242-247. Months later, in April 2019, Appellant was found in contempt for willfully failing to give Respondent his right of first refusal. CP: 618-624. Appellant had been working on the weekends (at both her Guardian Angel Care job and at the family farming business) and purposefully did not tell Respondent or offer him his right of first refusal. CP: 483-485. Respondent was awarded make up time with the children as a result of Appellant's contempt. CP: 618-624.

In December of 2018, Appellant sought another restraint against Respondent. CP: 313-327. In this request she alleged that Respondent had tailgated and followed her after an exchange. *Id.*; CP: 303-305; CP: 310-312. She claimed that this event, and other vague allegations of "threats"

made by Respondent (which were addressed in previously denied restraints) supported her request for RCW 26.50 and RCW 9A.46 restrictions. *Id.* She separately filed a Petition for an Order for Protection (Harassment and Stalking), detailing these allegations as well. *Id.* This Petition contained numerous incredible allegations, all of which were unsupported by any evidence and were clearly fabricated or exaggerated to bolster her claims. She alleges that Respondent previously threatened various family members of hers, to which Respondent provided a declaration with his own reasonable description of the event as they actually took place (it should be noted that these allegations were present and considered in prior requests for restraints and the December Petition for an Order for Protection was a compilation of these allegations which had already been individually considered and discredited previously). She includes child hearsay from the parties' son as to what Respondent allegedly told him about Appellant. She indicates that "Warren has head-butted me in the face, which broke my nose" without providing a date, time or any proof whatsoever as to this incredible allegation. CP: 313-327. She makes other claims as to his "glares" at her during exchanges and other previously discredited allegations of various threats. *Id.* Finally, she makes the incredible claim that "Warren loses his temper at the children all the time, and hits them too hard, or grabs them too hard. The children are very fearful of Warren." *Id.* Again, this is a stark contrast from the initial declarations and statements provided by Appellant as to Respondent's behavior with the children.

This request for restraints was denied by Commissioner Pelc on January 11, 2019. CP: 379-380; CP: 387-413. Appellant sought revision of this denial and Judge Fennessy provided his ruling on April 11, 2019. CP: 441-446. That order stated "The allegations raised have, as Commissioner Pelc observed, been restated with differing foci such that the Court cannot decipher whether Petitioner is adding factors piecemeal to cause Respondent additional fees/costs/consternation OR

if Respondent's behavior is escalating." CP: 441-446. The court further stated "there are not sufficient facts currently before the court to grant this relief [RCW 26.50 or RCW 10.14]". CP: 451-452. Judge Fennessy affirmed the denial of Appellant's requested restraints, but also reserved the issues for trial without prejudice. *Id.* Upon hearing the trial testimony of Appellant, Respondent, and all of the witnesses relevant to her allegations, Judge Fennessy denied Appellant's request for restraints under RCW 26.50 and RCW 10.14. CP: 787-814 Appellant now appeals this denial. It should again be noted that none of these incredible claims were present in Petitioner's initial filings, as outlined above.

In *another* request for restraint (by way of a Motion to Re-open trial, Motion for New Testimony, and Motion for Reconsideration of the denied restraints) in September of 2019, Appellant indicated that there was a heated dispute at the YMCA. CP: 744-759. The court again found credibility concerns with this allegation due to a multitude of questionable factors. The allegation occurred after the Trial Judge issued his oral ruling, but before presentment of the final orders; Appellant did not request or provide a police report, and when Respondent obtained and presented it to the court there were many inconsistencies with Appellant's statements and actions; and the YMCA had video surveillance of the area where the incident allegedly occurred, but Appellant did not request any of the surveillance footage and it was no longer obtainable by the time the matter was heard. This request for restraints was denied. An interesting note, Appellant provided declarations of "witnesses" to Respondent's allegedly threatening behavior prior to the trial. These alleged witnesses did not testify at trial. After trial, Appellant provided updated/amended declarations from these witnesses to bolster her motions for reconsideration of the denied restraints. CP: 782-784; CP: 785. Again, this calls into question Appellant's credibility and affirms Commissioner Pelc and Judge Fennessy's previous concerns that "the Court cannot

decipher whether Petitioner is adding factors piecemeal to cause Respondent additional fees/costs/consternation". With these late additions and the plethora of other questionable or outright false allegations, it is clear that Appellant "is adding factors piecemeal" to her claims.

To briefly summarize the procedural history until the current action: Appellant filed a Petition and Declaration indicating that there were no Domestic Violence, abuse, or other concerns that would affect Respondent's parenting of the children. She sought new counsel and did a 180 on her previous statements, immediately seeking restraints against Respondent. She sends him a text message saying he can have the kids during "his week" when he is off, and she rushed to Ex Parte for a restraining order when she learned that Respondent was able to care for the children every day that week. Commissioner Pelc ordered a shared parenting plan, and Judge Clark revised that shared parenting plan. One basis for that revision was Appellant's representation that she does not work weekends (and thus, it would be unfair to give Respondent every weekend). Judge Clark gave Appellant parenting time every other weekend, and she gave Respondent a right of first refusal if Appellant is working. Months later, Appellant is found in contempt of court for intentionally refusing to give Respondent that right of first refusal. She was found to be working on six different weekends in which she did not give Respondent notice that she was doing so, and in some instances went through great lengths to deceive Respondent about her working on the weekend. She filed a motion for restraints, Petitions for Order for Protection (under RCW 26.50 and RCW 10.14), and multiple Ex Parte requests for immediate restraints. All of these were denied. She sought revision of many of these denials, all of which were denied. Her credibility has always been at issue in these various requests, and the court considered those credibility concerns when weighing her trial testimony. After trial, she made various other request for restraints, new testimony, new trial, reconsideration, etc., and again these requests were all denied.

The litigation in this case did not end with Appellant's post-trial motions for new testimony, new trial, reconsideration, etc. Shortly after the Trial Court denied Appellant's post-trial motions, on December 20, 2019, Appellant again filed another Petition for a Protection Order against Respondent. CP: 999-1007 She brought this Petition to Ex Parte to request immediate restraints. CP: 1008-1013. This Petition was denied in Ex Parte and proceeded to a full hearing on the merits on February 06, 2020. Petitioner's request for restraints was denied again due to issues with Appellant's credibility. *Id.*

ASSIGNMENTS OF ERROR

Respondent does not assign any errors to the trial court's rulings. The matter was fully and fairly litigated. Each party had ample opportunity to provide testimony and cross-examination, introduce appropriate evidence, and try their case.

ARGUMENT

The trial court properly weighed and considered all relevant testimony. The trial court did not abuse its discretion in any instance, nor did it make any errors of law. All of Appellant's requests should be denied and fees should be awarded to Respondent.

50/50 Parenting Plan

Appellant first requests that this court reverse the trial court's decision to enter a 50/50 parenting plan and to adopt Appellant's proposed parenting plan instead. This court should not entertain such request.

"Trial courts are given broad discretion in matters dealing with the welfare of children." *In re Marriage of McDole*, 122 Wn.2d 604, 859 P.2d 1239, (Wash. 1993). A trial court has broad discretion when crafting a parenting plan, and we review its decision for an abuse of discretion. *In re Marriage of Caven*, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998). Parenting Plans are reviewed

under an abuse of discretion standard. *In re Marriage of McDole*, 122 Wash. 2d 604, 610, 859 P.2d 1239, 1242 (1993). “A trial court's decision will not be reversed on appeal unless the court exercised its discretion in an untenable or manifestly unreasonable way” *Id.*

Appellant argues Judge Clark’s initial ruling found “‘no evidence’ for a 50/50 plan” *Opening Brief of Appellant*, pg. 30 (*see also Id. At pg. 17*). Importantly, the record does not reflect Appellant’s quoted statement from Judge Clark. Further, Appellant omits the very important qualifying portion of what the court *actually* stated. The full quote from Judge Clark is “based on those declarations I don’t think there’s a basis for a 50/50 plan”. CP: 242-247. Judge Clark made that statement and issued her ruling based on the limited declarations and information that were available at that time. “A temporary order. . . does not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding” RCW 26.09.060(10)(a). This is precisely why we have trial; so that the parties have adequate time to flesh out the relevant facts and information and so that witnesses providing testimony can have their credibility weighed and considered with all of the other relevant facts of the case. Appellant is asking the court to disregard the findings of the trial judge, after a three day trial (in which all of the witnesses that provided declarations in the initial motion for temporary orders provided trial testimony), and to follow the opinion of Judge Clark on Revision rendered just a month and a half after this case was filed. It should be noted this was prior to Appellant being found in contempt and having numerous requests for restraints denied as having no legal basis. The Temporary Order is not prejudicial to the final determination by law. The trial judge was aware of Judge Clark’s ruling on revision, both parties and counsel were aware, and Appellant has frequently referred to Judge Clark’s ruling on Revision. The Trial Judge used his discretion and, with all of the facts available, determined that a shared parenting plan was appropriate. Relying on Judge Clark’s initial impression on Revision

from the first Motion for Temporary Orders is not appropriate in this instance. Further, it is noteworthy that some of the information that Judge Clark referred to in her ruling was later found to be false or misrepresented. Specifically, Appellant's representations that she did not work on the weekends or seldomly worked on the weekends, which was later the subject of the finding of contempt against her. It should also be noted that Judge Clark denied Petitioner's requests for restraint. Judge Clark also made a specific finding as follows "I don't think there's any doubt that Mr. Sirianni is a good dad. There's no reason for any limitation or obstruction on his time. That isn't even suggested anywhere." CP: 242-247. In short, Judge Clark's findings in the record support Mr. Sirianni.

This matter was then fully and fairly litigated during a three-day trial. The Trial Judge heard the testimony of a multitude of friends and family members prior to making a decision. "[The Appellate Court] defers to the trier of fact on issues of conflicting testimony, credibility of the witnesses, and the weight or persuasiveness of the evidence." *State v. Killingsworth*, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012). "Such deference is particularly important in proceedings affecting the parent and child relationship because of 'the trial judge's advantage in having the witnesses before him or her.'" *In re Welfare of A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015).

Appellant further states that there was no evidence between that ruling and trial to support a 50/50 plan. The record does not support that assertion. Respondent testified that he spent equal time with the children and that Appellant occasionally worked on the weekends and left the children with him. RP "Trial": 58-59, 62-63; CP: 787-814. One of Appellant's witnesses, Ms. Carpenter, testified that "she felt Mr. Sirianni was a good parent." RP "Trial": 140; CP: 787-814. One of Appellant's witnesses, Ms. Fees, "admitted to not being very familiar with Warren's

parenting.” RP “Trial”: 224; CP: 787-814. Another, Ms. Ford, indicated “she had never met Mr. Sirianni.” RP “Trial”: 216; CP: 787-814.

An important consideration is the testimony from the Appellant/Petitioner herself. Appellant testified that “[Respondent] has always loved his children...” that “[Respondent] was not a bad dad” and “He participated in childcare.” RP “Trial”: 250; CP: 787-814. Appellant testified that “she was gone about 50% of the weekends” working at her farm business. RP “Trial”: 252; CP: 787-814. Appellant also testified that she had returned to school to pursue her teaching certification.” RP “Trial”: 355; CP: 787-814. Respondent had two supporting witnesses, Mr. and Ms. Babinsky, who testified that “he is a good dad and the kids love him” and “[Respondent] has been a good parent.” RP “Trial”: 397, 407; CP: 787-814.

The testimony from the Appellant is notable because it confirms her earliest statements to the court in this case in her petition and statement in support of parenting plan. These statements directly conflict with her request for restraint/limitations. She contradicts her own claims and portions of her other testimony. She has, in essence, impeached her own credibility in the case with many of her own statements. In contrast, Mr. Sirianni’s claims were consistent throughout the course of the case and trial, from initial statements through his ultimate testimony. It is well within the court’s discretion to find his testimony and veracity more credible.

Appellant cites to RCW 26.09.002, stating “The best interests of the child are served by a parenting arrangement that best maintains a child’s emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.” Appellant states that “a dogmatic imposition of a 50/50 parenting plan violates the

Washington statutes. The ‘existing pattern’ for the Sirianni children is one of Jeanette as their primary parent. There is no evidence to the contrary. None.” *Opening Brief of Appellant*, pg. 31. It should be noted that there is conflicting testimony from witnesses on both sides as to the existing pattern of interaction over the years. The Trial Judge heard these conflicting statements and weighed them appropriately as to what the existing pattern of interaction between the parents and the children looked like. Further, of particular importance in the above statute is the clause “The best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents. . .” RCW 26.09.002 (emphasis added).

The statute presumes that the pattern will be changed by the dissolution. The parties have both experienced a shift in work and lifestyle shifts necessitating schedule changes as their children grew older and more opportunities presented themselves. In this case, both parties provided testimony that their work schedules were changing and evolving. Appellant has a farming business that operates primarily on weekends, she works at Guardian Angel Home Care as a nurse on the weekends, and she testified that she was returning to school for her teaching credentials. Appellant testified that “I have applied to WGU, an online school . . . I am scheduled to start September [2019].” RP “Trial”: 315. On the other hand, Respondent testified that his work schedule is more predictable, and that he has considerable leeway due to his managerial status. He further testified that he is available for “daily pick-ups” if the parenting plan allots time for him after school during the weekdays. RP “Trial”: 79. The Trial Judge heard these parties testify as to these changes, and ordered a 50/50 parenting plan. Even if the court believed that “the existing pattern of interaction between the parents and children” was not a 50/50 shared schedule (and there is no indication that

that was the case), the ordered 50/50 residential schedule was necessitated by the changed relationship of the parents.

To claim that there is “no new evidence between the initial motion for temporary orders and trial that would support a 50/50 plan” is disingenuous. Appellant was found in contempt while this matter was pending. Specifically, Appellant was found in contempt because she “intentionally did not give [Respondent] his right of first refusal while working”. CP: 618-624. Appellant was found to have withheld Respondent’s residential time on seven different occasions. *Id.* at 4a. RCW 26.09.002 requires the court to consider each parent’s ability to foster a relationship with the other parent/significant adults. *See also RCW 26.09.187(3)(a)(v).*

The legislature takes contempt of residential time in a parenting plan so seriously that two instances in three years is an explicit basis for a modification of a parenting plan. *See 26.09.260(2)(d)* (“The court shall retain the residential schedule established by the decree or parenting plan unless: The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions”). To say that there is no new evidence between the temporary orders’ ruling and the trial is factually incorrect. There is evidence of numerous changes between the initial motion for temporary orders and the trial, including but not limited to: changes in the parties’ demeanor and behavior towards each other, changes in the ability to effectively communicate and coparent, and changes in the parties’ work and school schedules. Along with that there have been several false domestic violence allegations levied against Respondent, to which Appellant’s credibility was heavily scrutinized and no restraints were ordered.

Appellate Courts “do not decide the credibility of witnesses or weigh the evidence” on appeal. *In re Welfare of A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015). Here, the trial judge

considered the testimony of the parties and their witnesses and analyzed this testimony pursuant to the objectives for a permanent parenting plan as outlined in RCW 26.09.184. CP: 787-814. The Trial Judge found “the testimony is that each parent has a strong relationship with each child”. CP: 787-814. With regard to “each parent’s past and potential for future performance of parenting functions” the Trial Judge found that “that factor I don’t think weighs necessarily in favor or against either party . . . there’s not one that’s better or worse than the other.” CP: 787-814. With regard to the “emotional needs and developmental level of the child or the children”, “the Court recognize[d] at trial both [the children] seem to be doing well” and ordered joint-decision making pursuant to that recognition. CP: 787-814. With respect to the factors of “the child’s relationship with siblings and other significant adults” and “the wishes of the parents” the court recognized that during trial “families lined up behind their family members very clearly and very distinctly” and that the “wishes of the parents are in opposite, and the children are not sufficiently of age to be asked their preferences.” CP: 787-814. The court also noted the difficulty in crafting a plan pursuant to the parties’ employment schedules. CP: 787-814. The Trial Judge took all of these factors into consideration and ordered an “equal” parenting plan, to rotate on a 2/5-5/2 schedule or 3/4 schedule in order to accommodate the parties’ weekend work and school rotations. CP: 787-814.

This court should deny Appellant’s request to “reverse the trial court on the parenting plan and adopt Jeanette’s parenting plan as the only reasonable plan”. There was no abuse of discretion, nor was there any error of law in this decision. The Trial Judge carefully and thoughtfully weighed the testimony and credibility of the witnesses and ordered a parenting plan pursuant to the framework and guidelines of the various provisions in RCW 26.09.

Domestic Violence Protection Order (DVPO)

Appellant next makes a sweeping request “to reverse the trial court’s ruling on waiver of attorney-client privilege, to reverse the trial court on ER 1101(C)(4) and allow hearsay testimony, and remand the DVP and RCW 10.14 Petition for a new trial with a new judge”. This request, too, should be denied. As noted above, Appellant’s many and ongoing requests for these orders have all been denied as having no factual or legal basis.

Remand the DVPO and RCW 10.14 Petition

Appellant first requests that the denial of the DVPO and RCW 10.14 petition be remanded for a new trial with a new judge. “An appellate review of a DVP order is also under an abuse of discretion standard.” *See Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003).

Appellant claims she faced “an appalling insensitivity to her situation from the court commissioner and the trial judge.” *Opening Brief of Appellant*, pg. 37. She then cites to a plethora of court policies and domestic violence resources. When analyzing Appellant’s claims, it is important to look at the procedural history of this case and the nature and frequency of the allegations Appellant levied against Respondent.

In her Petition, Appellant did not request a restraining order or a protection order. In fact, she stated that there were no abandonment issues, sexual abuse, domestic violence, or other serious problems in the case. CP: 1-6. She then sought new counsel and drastically changed the tone of her litigation moving forward. Appellant brought three separate Motions for Restraints or requests for similar relief. CP:55-62; CP: 313-327; CP: 744-759. All were denied. She sought an Ex Parte restraining order on September 25, 2018 and was denied. CP: 63. She did not seek revision of the denial of this request, but she did seek revision of other portions of the order. CP: 222. Again, on December 04, 2018 and December 05, 2018 she filed a Petition for Order for Protection under

RCW 10.14. CP 313-327. On January 11, 2019 this too was denied. CP: 379-380; CP 387-413. She sought revision of this denial, and the denial was affirmed in part and reserved for trial. CP: 451-452. Finally, shortly after the trial was conducted, Appellant filed a Motion for Reconsideration, Motion for Stay, Motion for Retaking Testimony, and Motion for New Trial based on new allegations of Domestic Violence. CP: 744-759

In one early denial for restraints, Commissioner Pelc alluded to some credibility issues with the facts as presented by Appellant, stating: “I don’t think it’s reasonable at this point, and I’ve said this at the beginning. . . This case started, and when Appellant filed, and I’ll go back together August 14, 2018, document, paragraph 6, ‘Yes, Mr. Sirianni has a long stable relationship with these children. Yes, he provides for their daily needs. Yes, he uses good judgment to protect these children.’ Paragraph 9, ‘There are no abandonment issues. There are no domestic violence, sexual abuse, or other serious problems in this case...’ I don’t see how sending that text listed a litany of abusive – she straight up said he is abusive for sending these texts. And I don’t see it. . . I’m not seeing this frenzy that Ms. Sirianni is presenting to the court.” CP: 387-413.

Appellant sought revision of Commissioner Pelc’s denial, and Judge Fennessy (the Trial Judge in this instance) denied revision as well. He stated: “The allegations raised have been restated with differing foci such that the Court cannot decipher whether Petitioner is adding factors piecemeal to cause Respondent additional fees/costs/consternation OR if Respondent’s behavior is escalation. . .”. CP: 441-446. The indication here being that the trial court will determine if a DVPO or Anti-Harassment order is necessary after trial testimony, but there was not enough evidence at that time to order restraints. The Court did receive testimony about these allegations at trial. Any and all requests for restraints or .191 restrictions were denied.

Finally, Appellant made additional allegations of domestic violence against Respondent and filed additional requests for restraints based on an incident that allegedly occurred on August 12, 2019 (roughly three weeks after trial). Based on these allegations Appellant requested a Stay of Judgment, Reconsideration of the denial of a DVPO or RCW 10.14 protection order, Retaking of Testimony, and a New Trial. CP: 744-759. These motions were all denied by Judge Fennessy. In his oral ruling, Judge Fennessy again noted the credibility considerations in this case. “The whole issue for me revolves around credibility and revolves around the parties[’] acceptance of the Court’s decision. And I specifically point to the declaration of Jeanette Sirianni filed October the 11th, sub number 212, in this matter. Wherein, she takes the position that is difficult for the court to understand, but it’s part of the process here. She says that she didn’t report because the kids were upset, and she was trying to deal with that. The Court reflects that the upset in this circumstance has been going on for these children for a long time. . . That her second reason [for delayed reporting of the alleged DV] was that she knew Warren would deny, just as he had, in November of 2018, and with every other threat wherein the police do nothing. . . But the Court’s counterpoint is if she has learned nothing from this process, it’s that finding support for her position and providing information and documentation is very important.” RP Volume II of II: 41-42.

Appellate Courts “do not decide the credibility of witnesses or weigh the evidence’ on appeal.” *In re Welfare of A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015); *see also Chatwood v. Chatwood*, 44 Wn.2d 233, 240, 266 P.2d 782 (Wash. 1954). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the asserted premise. *Snyder v. Haynes*, 152 Wn. App. 774, 779, 217 P.3d 787 (2009). “[T]he fact that the evidence may be subject to different interpretations does not authorize this court to substitute its findings for those of the trial court.” *Peter L. Redburn, Inc. v. Alaska Airlines, Inc.*, 20 Wn. App. 315, 318, 579 P.2d 1354

(1978). “[M]ere accusations, without proof, are not sufficient to invoke the restrictions under the statute.” *In re Marriage of Caven*, 136 Wn.2d 800, 809, 966 P.2d 1247 (Wash. 1998).

The Court Commissioner and Trial Judge both made it clear that there were concerns with Appellant’s credibility and the evidence provided relative to the allegations she levied on Respondent. There were instances of inconsistent or factually impossible statements made by Appellant and her supporting witnesses, inconsistent actions taken by Appellant relative to the nature and exigency of her allegations, and many of her allegations were unsupported by even a modicum of evidence. All of these factors played a part in the weighing of Appellant’s credibility and ultimately the decision to deny her request for a DVPO or RCW 10.14 anti-harassment order or similar restraints.

The Trial Judge properly weighed the evidence, testimony, and credibility of the information provided in support of Appellant’s request for a DVPO and RCW 10.14 anti-harassment order. This court should affirm that denial. If there was any error in this instance it was harmless, as Appellant has time and again made incredible allegations unsupported by the evidence.

ER 1101(c)(4)

Appellant next alleges that “it was error and an abuse of discretion not to admit [Appellant’s] hearsay. This was a material, harmful error, that precluded [Appellant] from presenting substantial evidence that would have affected the outcome of her Petition for a Domestic Violence Protection Order, as the facts in those petitions could not be presented, among others.” Appellant requests that this Court articulate additional guidelines on the application of ER 1101(c)(4), and to remand for re-trial on the DVPO with a new judge.

Appellant claims “hearsay may be admitted in DV cases under ER 1101(c)(4)” *Opening Brief of Appellant*, pg. 40 (emphasis added) and cites “*Gourley v. Gourley*, 124 Wn. App. 52, 57, 98 P.3d 816 (2004)(rules of evidence need not be applied in protection order proceedings; hearsay may be considered); *In re Marriage of Stewart*, 133 Wash. App. 545, 552, 137 P.3d 25, 29 (2006) (quoting footnote 15)”. *Id.* As Appellant, and supporting case law, states: “hearsay MAY be admitted”. The use of “may” is important, as it indicates that the admittance of hearsay in this instance is discretionary, not a requirement. In similar situations, the courts have found the use of the word “may” to imply judicial discretion. “By use of the word ‘may’ the legislature has clearly placed considerable discretion in the trial court in its determination . . .” *City of Seattle v. Gardner*, 54 Wash.2d 112, 338 P.2d 125 (1959); *State v. Mason*, 41 Wash.2d 746, 252 P.2d 298 (1953).

Appellant’s own allegation even frames the issue in the context of an abuse of discretion. Appellant and her counsel are well aware of the amount of discretion the trial court has in this instance. Appellant’s counsel conceded at trial that the admittance of hearsay under ER 1101 is discretionary. “The rule is typically read that ER 1101(c) when rules need not be applied. The rules other than the list that you read, need not be applied in the following situation sub-4 applications for protection orders. But it is discretionary which is why it says need not.” RP “Trial”: 266

Similar to many of the above issues, “A trial court’s decision will not be reversed on appeal unless the court exercised its discretion in an untenable or manifestly unreasonable way.” *Id.* Here, the court properly and reasonably exercised its discretion and that decision should not be reversed or remanded.

If this court does find that there was an error in this instance, it was not a harmful error. There have been consistent issues with Appellant’s credibility. The court was aware of the nature of the testimony Appellant sought to elicit and it would not have changed the verdict.

Attorney Client-Privilege

Appellant next alleges error as to the Trial Court's ruling regarding the scope of waiving privileged attorney-client communications. Appellant's claim that the Trial Court's ruling that the attorney-client privilege "deprived her of presenting testimony of her fear of Warren Sirianni in August of 2018" is simply untrue.

Appellant testified extensively about her "fear" which was not found credible. Appellant described her claims, her fears, and had her witnesses describe some of the same. The court found this to not be credible or based in facts. *RP Volume II of II*: 41-42; CP: 387-413.

The only portion of testimony that was not even offered, ultimately, were the limited statements by Appellant to her attorney Gina Costello and Mr. Mason. The court indicated that if Appellant testified to these, that this would open the door to potential impeachment by Respondent by calling Appellant's attorneys to determine the veracity of these statements. RP "Trial": 259-261. This would be a highly imprudent decision on the part of Appellant by opening up all of her private attorney/client communication to cross exam and testimony. There was ample good reason to deny this testimony as being cumulative of Appellant's many false claims of fear and abuse, from herself and other witnesses. In essence, the court was protecting Appellant from the poor tactical trial decisions of her counsel.

The issue is also moot because Appellant ultimately did not offer this evidence and subject herself to these potentially disastrous consequences. It may have presented further issues with her credibility if her testimony was inconsistent with statements and declarations she made at that time, but nothing in this ruling prevented her from testifying as to her feelings or perceptions of Respondent from the August 2018 time frame.

If the court does find error, it should be construed as harmless error. Appellant's credibility has been heavily scrutinized and questioned throughout the entirety of these proceedings. Additional testimony from Appellant would have been duplicative of her prior testimony and would not have changed the court's ruling in this instance. This court should not remand or reverse any of the Trial Court's rulings based on Appellant's allegations regarding the attorney/client privilege.

Child Support Deviation

Appellant next alleges that "the court made no findings (only a conclusory statement at presentment... cited above) that it was ordering a deviation of child support." *Opening Brief of Appellant*, pg 42. Appellant cites "... a trial court is required to enter written findings of fact supported by the evidence when it enters an amount for support which deviates from the standard calculation." RCW 26.19.035(2); *In re Marriage of Sacco*, 114 Wash.2d 1, 4, 784, P.2d 1266 (1990). Appellant then states "It was legal error that there were simply no findings of any kind to support a child support deviation, and the deviation lacked substantial evidence to support it. The court abused its discretion." *Opening Brief of Appellant*, pg 43.

In this instance, Appellant's claim is an intentional misrepresentation of the facts. In the Court's Oral Ruling, the Trial Judge stated: "Because of the shared parenting, I'm going to make the equalization payment, or the child support transfer payment – pardon me, to be \$275 from Mr. Sirianni to Ms. Sirianni monthly." CP: 787-814. Pursuant to RCW 26.19.075(d) "The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment." It was not error to order a deviation of the child support transfer payment, nor was it an abuse of discretion. Counsel for Appellant attempted to address this issue at the Presentment hearing as well. RP Volume II of II: 494.

Appellant's counsel objected to the inclusion of the language "this deviation does not result in a lack of resources in the mother's household or the children" and indicated "I did not want to concede that you had made that finding when it was not in your transcript". *Id.* The Trial Judge responded "When I made that part of my oral ruling, I intended to indicate that that would not result in a lack of resources in the mother's household or to the children. I apologize for not having stated it more clearly on the record, but that is, in fact, my intension [sic]." *Id.* After the Presentment Hearing, the court signed final orders. The signed Final Child Support Order states "The monthly child support amount is different from the standard calculation because the children reside equally with both parties and this deviation does not result in lack of resources to the mother's household or the children." CP: 896-900

The intent of the Trial Judge was clear, and any ambiguity was clarified when Appellant's Counsel requested specific clarification at the presentment. To the extent Appellant alleges a defect in the proceeding due to the need for clarification of the express findings from the oral ruling, this court values the proposition of "substance over form." *See China Products North America, Inc. v. Manewal*, 69 Wn. App. 76, fn #8, 850 P.2d 565 (Wash. App. 1993) (citing *Gordon v. Cummings*, 78 Wash. 515, 521, 139 P. 489 (1914) (courts must look to substance over form because to do otherwise 'would meet the letter of the law but blast its spirit'). This concept is so foundational to our justice system, that it has been codified in Washington for well over 150 years. *See Statutes of the Territory of Washington, 1st Legislative Assembly, 1, section 164 (1854)*. It remains codified to this day. *See RCW 4.36.240* (The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect).

If there was judicial error in this instance, it was harmless error and should not form the basis for reversing or remanding this decision. The court should deny Appellant's request to reverse or remand the Trial Court's decision regarding the deviation of child support.

Warren Sirianni's Income

Appellant briefly alludes to an allegation that the court abused its discretion when it "minimized Warren's income." Respondent would dispute that Appellant properly preserved this issue for appeal as it is unbriefed and does not contain a substantive argument. However, should this Court address this issue, the court did not abuse its discretion in this instance. The Trial Judge was thorough in his reasoning for imputing income to Appellant, and for accepting the proposed income of Respondent. CP: 787-814. The Court heard testimony on all of the issues over three days and rendered its decision based on the evidence presented and testimony of relevant parties. The determination of Respondent's income should not be reversed or remanded, and Appellant's request should be denied.

Requirement of Paid Daycare

Lastly, Appellant requests that this court "reverse the requirement of paid daycare, *precluding Jeanette's parents from caring for the children.*" *Opening Brief of Appellant*, pg. 43. The last part is particularly important given the history of this case. As evinced by the procedural history, declarations submitted throughout this case, and the testimony at trial, Appellant's parent's do not like Respondent. In fact, they actively facilitated Appellant's withholding of the children when Respondent was entitled to care for them while Appellant was at work (Appellant was found in contempt for not complying with Respondent's 'Right of First Refusal' to care for the children while she worked. Instead, she was secretly working and dropping the children off at her parent's house). Nonetheless, there was no actual oral ruling that indicated that anyone providing daycare

for the children be licensed. The clause to which Appellant is presumably referring to is in the “Other” section of the final parenting plan. It reads “Third party childcare shall be with a licensed provider as a joint decision.” CP: 882-890. Notably, that is not a restriction against Appellant’s parents from providing daycare for the children, but a restriction against all unlicensed parties from providing daycare for the children. Further, the indication from that section is that the clause regarding licensed daycare is preserving the status quo and that the joint decision would be the removal of the children from licensed daycare. That would put this issue in the “dispute resolution” category and is an issue that needs to be mediated rather than appealed.

Fees

Pursuant to RAP 18.1 and RCW 26.09.140 Respondent requests that this court award him fees and costs for his having to respond to the voluminous requests and allegations in this appeal. The Court Commissioner and Trial Judge both indicated that it was “hard to discern whether Appellant was litigating in a manner to create additional fees/costs/consternation OR if Respondent’s behavior was escalating”. Appellant has brought a multitude of motions and petitions for restraints, and not a single one was granted. There are no credible allegations that Respondent’s behavior was or did escalate during the history of this case. However, there has been substantial issues with Appellant’s credibility throughout this case. It is now clear that Appellant “is adding factors piecemeal to cause Respondent additional fees/costs/consternation.” Appellant continuously exhausts almost every remedy she can to overturn or undue every decision at every step. She has filed multiple requests for restraints, protection orders, anti-harassment orders, all of which have been denied. She has filed multiple Motions for Revision, Requests for New Trial, Motion for Reconsideration, and she now is appealing almost the entirety of the Trial Court’s ruling. Respondent has spent considerable funds defending baseless allegations and frivolous

motions and should be awarded fees and costs for having to expend more funds to respond to this appeal.

CONCLUSION

Appellant has time and time again shown that there are serious concerns with her credibility and the credibility of her supporting statements when requesting restraints. At the beginning of this case, after the first request for restraints, Commissioner Pelc indicated that it was difficult to “decipher whether Petitioner is adding factors piecemeal to cause Respondent additional fees/costs/consternation OR if Respondent’s behavior is escalating” and Judge Fennessy echoed those concerns. Looking at the procedural history it is clear that Appellant is still “adding factors piecemeal to cause Respondent addition fees/costs/consternation” and will make any allegation and exhaust every remedy she can to achieve her litigation goals. In its ruling, the trial court noted “The whole issue for me revolves around credibility and revolves around the parties[‘s] acceptance of the Court’s decision....”. RP Volume II of II: 41. That sentiment is again relevant to this proceeding. Appellant has had consistent issues with her credibility, and has consistently refused to accept the Court’s decision at every stage of the case. All of Appellant’s requests should be denied. Fees and costs should be awarded to Respondent for having to reply to these baseless claims.

Respectfully Submitted on this 16th day of June, 2020,



Handwritten signature of Douglas R. Hughes, with the text "WSBA #30354" and "Feb" written next to it.

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Handwritten signature of Zachary Leighton.

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