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No. 66572-3

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

VIKAS LUTHRA,

Appellant,

vs.

ARADHNA LUTHRA,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE DEBORAH D. FLECK

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BRIEF OF APPELLANT

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## **I. ASSIGNMENT OF ERRORS**

1. The trial court erred in modifying the parties' parenting plan by restraining the father from volunteering at the child's school under the guise of "clarifying" the parenting plan. (CP 147)

2. The trial court erred in modifying the parties' parenting plan by restraining the father from contact with the child while he is at school. (CP 147)

3. The trial court erred in modifying the parties' parenting plan by restraining the father from "being in the presence of the child" outside of his court-ordered residential time. (CP 147)

4. The trial court erred in unilaterally modifying the July 8, 2010 restraining order by restraining the father from being "at least 500 feet from [the mother]" when such relief was not sought by either party. (CP 147)

5. The trial court erred in entering its December 1, 2010 Order on Motion to Enforce Compliance with Final Parenting Plan. (CP 146-47)

6. The trial court erred in entering its December 21, 2010 Order on Respondent's Motion Requesting Reconsideration. (CP 137-39)

## II. STATEMENT OF ISSUES

1. The only restriction on the father's contact with the child in the parties' original parenting plan was to suspend his mid-week evening residential time during the school year until the father engaged in "intensive therapy" for his diagnosed Obsessive Compulsive Disorder. The father was otherwise provided with liberal residential time during the child's school breaks and two weekends per month during the school year. Did the trial court err by modifying the parenting plan five months later by imposing new restrictions on the father, including restraining the father from volunteering at the child's school, which the trial court knew was the father's practice before it entered the original parenting plan, and restraining the father from being in the child's "presence" outside of his court-ordered residential time, when no petition for modification had been filed and the trial court did not consider any of the factors for modification under RCW 26.09.260?

2. If the newly imposed restrictions were not a modification of the parenting plan, did the trial court err in "clarifying" the parenting plan by restraining the father from volunteering at the child's school and restraining the father from

being in the child's "presence" outside of his court-ordered residential time, when such restrictions were not "reasonably calculated" to address the trial court's stated concerns that the child's exposure to the father's "cleansing rituals" in his home and the father's alleged fears of contamination, which were elements of the father's Obsessive Compulsive Disorder, were adverse to the child's best interests?

3. The "continuing restraining order" in the parties' decree of dissolution only restrained the father from coming within 500 feet of the mother's home or work. Did the trial court err by modifying the restraining order five months later by restraining the father from coming within 500 feet of the mother when no such relief was sought by the mother and the father had no notice that the trial court intended to unilaterally modify the restraining order?

### III. STATEMENT OF FACTS

**A. The Parties' Parenting Plan Provided The Father With Two Weekends Per Month With The Son, But Suspended His Mid-Week Evening Residential Time Until The Father Received Treatment For His Obsessive Compulsive Disorder. The Parenting Plan Contained No Other Restrictions On The Father's Contact With The Son.**

Appellant Vikas Luthra and respondent Aradhna Forrest (f/k/a Aradhna Luthra) were divorced on July 8, 2010 after a five-

day trial before King County Superior Court Judge Deborah Fleck. (CP 45; Sub no. 167, Supp. CP \_\_) Mr. Luthra and Ms. Forrest are the parents of Akshay, age 7, who was born in July 2003. (CP 48) The trial court entered a parenting plan that designated Ms. Forrest as the primary residential parent. (CP 10, 13) The parenting plan provided Mr. Luthra with residential time with Akshay during the first and third weekend of every month from after school on Friday until Sunday evening at 7 p.m. (CP 10) The trial court also gave each parent one-half of all school breaks, except for summer. (CP 11) During summer break, Akshay resided with Mr. Luthra four out of fourteen overnights, plus two weeks of vacation that can be taken as two one-week segments or one two-week segment. (CP 11)

Despite the provision to Mr. Luthra of weekend overnights and liberal visitation during school breaks, the trial court restricted Mr. Luthra's mid-week evening residential time with Akshay during the school year based on restrictions it found under RCW 26.09.191(3)(b),(e),(g). (CP 10, 48-51) Mr. Luthra has suffered from Obsessive/Compulsive Disorder (OCD) for over thirty years – since he was approximately 7 years old. (CP 48) The trial court opined that this was a “lifelong condition that cannot be cured.” (CP

48) The trial court found that as a result of this disorder, Mr. Luthra purportedly engaged in “cleansing rituals” within the home, and that this is “abnormal behavior, and it is not in Akshay’s best interests to be raised in an environment that is so severely impacted.” (CP 48-49) The trial court also found that Mr. Luthra had engaged in the abusive use of conflict, “particularly at the outset of this case,” (in early 2009), and that he had “disparaged Ms. [Forrest] and her family and friends to Akshay.” (CP 49)

Prior to the parties’ dissolution trial, Mr. Luthra had mid-week residential time with Akshay on Wednesdays from 3 p.m. to 9 p.m., which was later modified to Wednesdays from 3 p.m. to 8 p.m. (Sub no. 46, Supp. CP \_\_\_) The temporary parenting plan provided that Mr. Luthra pick up Akshay from school at 3 p.m. at the beginning of his residential time. (Sub no. 46, Supp. CP \_\_\_) Ms. Forrest would pick up the child from Mr. Luthra’s home at the conclusion of his residential time. (Sub no. 46, Supp. CP \_\_\_) The trial court ordered that the mid-week residential time would “stop until the father’s therapist provides a status report to counsel and to [the trial court] that affirmatively reports on the father’s commitment to and progress in treatment.” (CP 10) The trial court ordered that

once Mr. Luthra “is engaged in and making progress in intensive therapy” for his OCD, his Wednesday mid-week residential time with Akshay can resume. (CP 10) The trial court’s findings did not explain why the suspension of mid-week residential time was necessary to address the court’s concerns regarding Mr. Luthra’s OCD and its effect on Akshay. (See CP 48-51) However, the trial court did state that once the Wednesday evening residential time resumed, it would conclude at 7 p.m., instead of 8 p.m., and these visits would take place in West Seattle, where Ms. Forrest and Akshay reside, to “reduce the level of exhaustion for the child, while giving him an opportunity to spend time with his father.” (CP 10)

The trial court granted joint decision-making to the parents on all “major” decisions for Akshay, except for education. (CP 15) The trial court granted sole-decision making on education to the mother because it found Mr. Luthra engaged in the abusive use of conflict during the dissolution proceedings, and because it found that Mr. Luthra’s OCD was an “emotional impairment” under RCW 26.09.191(3)(b). (CP 15, 49-50) Although the mother was provided sole decision-making on education (CP 15), the father was also given “equal and independent authority, as provided by

the statute, to confer with the school regarding the child's educational progress." (CP 16)

Finally, the parenting plan provided "any disputes between the parties regarding carrying out this plan [ ] shall be submitted to the co-parenting therapist in therapeutic mediation." (CP 15)

**B. Five Months After The Parenting Plan Was Entered, The Trial Court Inserted New Restrictions Into The Parenting Plan. The Trial Court Restrained The Father From Volunteering At The Child's School, And Restrained The Father From Being In The Child's "Presence" Outside Of Court-Ordered Residential Time.**

Other than the provision regarding Mr. Luthra's mid-week evening residential time, there was no other restriction on Mr. Luthra's contact with Akshay. (CP 10-13) For example, while there was evidence presented at trial that the father participated in volunteer activities at the child's school, the trial court entered no restriction preventing Mr. Luthra from continuing his volunteer activities. (See CP 64, 121, 148-49) Accordingly, after the parenting plan was entered, Mr. Luthra continued to volunteer at Akshay's school. (CP 149)

Akshay's teacher stated, "as a budget conscious school district, and due to the young age of the children we teach, Lafayette Elementary encourages all able parents and guardians to

get involved in volunteering and helping with the children.” (CP 76)

The teacher further stated, “[r]esearch has shown that parents volunteering at school helps children build self confidence, boosts their social interaction skills, offers them the comfort of seeing familiar and loving faces around in a sea of 100’s of students, and above all emphasize to them the importance of a good education.” (CP 76)

As is required of all parents who volunteer, Mr. Luthra, cleared the School District mandated background check. (CP 75, 152) Mr. Luthra is supervised by the teachers while he volunteers at the school. (CP 77, 152) Akshay’s teacher stated she has “never observed anything that would cause me to be concern[ed] about the appropriateness of him being around Akshay or any of the other kids in the school.” (CP 76) The teacher stated “I have not seen anything in Mr. Luthra’s behavior, demeanor, or communication with Akshay or the other kids that warrants any concern.” (CP 77) The principal of Akshay’s school stated that she was aware of Mr. Luthra’s OCD diagnosis, saw “absolutely no reason to limit his ability to volunteer” at the school, and that she

“observed no manifestation of his OCD condition in his volunteer work.” (CP 73)

Mr. Luthra’s therapist agreed that Mr. Luthra’s OCD would not have a negative impact on his volunteering at the school. (CP 82) The therapist stated that “unnecessarily restrict[ing]” contact between Akshay and Mr. Luthra “is not serving any purpose.” (CP 82) The therapist stated that the nature of “[Mr. Luthra]’s OCD (cleanliness) does not diminish his ability to offer this support to Akshay.” (CP 82) Finally, the therapist stated that “there is no clinically justifiable reason that [she] is aware of” for restraining Mr. Luthra from volunteering at Akshay’s school. (CP 83)

The frequency of Mr. Luthra’s volunteering is dictated by the needs and requests of the school. (CP 152) The majority of the time that Mr. Luthra spends volunteering at the school is not spent with Akshay directly. (CP 151) Instead, Mr. Luthra is involved with all of the children in the classroom, assisting them in their reading, writing, and math. (CP 76, 151)

Ms. Forrest objected to Mr. Luthra’s volunteer work at Akshay’s school. Ms. Forrest did not, as required by the parenting plan, submit her dispute “regarding carrying out [the parenting]

plan” to a co-parenting therapist as required by the parenting plan. (CP 15) Instead, on October 22, 2010, Ms. Forrest filed a motion to “enforce” the parenting plan, asking the court to order the father to “immediately cease his visits” at Akshay’s school. (CP 1, 4) The mother argued that by volunteering at the school, the father was “circumventing the requirements of [the parenting plan] for him to enjoy mid-week visits with Akshay.” (CP 4) Ms. Forrest complained that Mr. Luthra had not engaged in the “intensive therapy” for his OCD as required by the parenting plan. (CP 4)

Mr. Luthra explained that because of the divorce five months earlier, he lost his health insurance through Ms. Forrest’s employer. (CP 151) Mr. Luthra asserted that he had had difficulty locating affordable private insurance that will provide any coverage for the intensive therapy purportedly required by the parenting plan. (CP 151) Nevertheless, Mr. Luthra’s regular therapist, whose treatment he has been under since 2003, acknowledged that even without insurance coverage, she continued to accommodate Mr. Luthra by providing “proper and consistent therapeutic care.” (CP 82)

The mother’s motion was heard without oral argument by Judge Deborah Fleck, who had presided over the parties’ trial. On

the “court’s own motion,” it purported to “clarify” the parenting plan. (CP 147) The trial court ordered Mr. Luthra to “immediately cease” his volunteer work at Akshay’s school, and ordered that he “immediately cease being in the presence of the child at any other times and places not specifically awarded to the respondent under the final parenting plan.” (CP 147)

The trial court also, on its own motion (as it was not requested by the mother in her motion), modified the restraining order from the Decree of Dissolution, which had restrained Mr. Luthra “from knowingly coming within or knowingly remaining within 500 feet of the home or the workplace of [Ms. Forrest].” (Sub no. 167, Supp. CP \_\_) The trial court modified the restraining order by ordering the father to “remain at least 500 feet from [Ms. Forrest] with the exception of residential transfers.” (CP 147)

Mr. Luthra moved for reconsideration, which the trial court denied. (CP 63, 137-39) The trial court reasoned that its suspension of Mr. Luthra’s mid-week evening residential time included all mid-week contact with Akshay. (CP 137)

Mr. Luthra appeals. (CP 140)

#### IV. ARGUMENT

##### A. A Trial Court Cannot Modify A Parenting Plan Unless It Complies With The Requirements Of RCW 26.09.260.

“After a trial court enters a final parenting plan, and neither party appeals it, the plan can be modified only under RCW 26.09.260.” *Marriage of Coy*, \_\_ Wn. App. \_\_, ¶ 13, 248 P.3d 1101 (March 22, 2011). This statute “sets forth the criteria and procedures for modifying a parenting plan and contains varying standards depending on the parties' circumstances and the kind of modification requested. These criteria and procedures limit a court's range of discretion. Thus, a court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria.” *Marriage of Watson*, 132 Wn. App. 222, 230, ¶ 21, 130 P.3d 915 (2006) (citations omitted); see also *Marriage of Tomsovic*, 118 Wn. App. 96, 103, 74 P.3d 692 (2003) (“Compliance with the statute is mandatory”).

“Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification. With this policy in mind, RCW 26.09.260 was designed to favor continuity and disfavor modification.” *Marriage of Taddeo-Smith and Smith*, 127 Wn.

App. 400, 404, ¶ 6, 110 P.3d 1192 (2005). Even in situations such as here, where the nonresidential parent has RCW 26.09.191 restrictions, the trial court may only modify the parenting plan to further reduce contact between the child and the parent if it specifically “finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.” RCW 26.09.260(4). “Failure by the trial court to make findings that reflect the application of each relevant factor [of RCW 26.09.260] is error.” **Marriage of Stern**, 57 Wn. App. 707, 711, 789 P.2d 807, *rev. denied*, 115 Wn.2d 1013 (1990).

Procedurally, a modification action is generally commenced by the filing of a summons and petition. See 20 Kenneth W. Weber, *Washington Practice, Family and Community Property Law*, § 33.38 n.1 (noting the mandatory petition form; WPF DRPSCU 07.0100). A modification action is a new proceeding, which is generally assigned a new judge. See **State ex rel. Mauerman v. Superior Court for Thurston County**, 44 Wn.2d 828, 830, 271 P.2d 435 (1954). To be entitled to a full hearing on a petition to modify, the party seeking modification must first demonstrate that adequate cause for a modification exists. **Tomsovic**, 118 Wn. App.

at 104; RCW 26.09.270. Thus, before a parenting plan can be modified, a threshold hearing must be held and adequate cause established. RCW 26.09.270.

**B. The Trial Court Erred By Modifying The Parenting Plan By Imposing A Restriction Restraining The Father From Volunteering At The Child's School, And Restraining The Father From Being In The Child's Presence Outside Of Court-Ordered Residential Time, Including At The Child's School.**

The trial court erred by modifying the parties' parenting plan without following the requirements of RCW 26.09.260. The trial court improperly modified the final parenting plan without a pending petition for modification, an adequate cause hearing, or consideration of the statutory criteria under RCW 26.09.260.

At the conclusion of the dissolution trial, the trial court found that the father has been "actively involved" in the son's life. (CP 48) It is undisputed that both the mother and the trial court were aware that the father volunteered at the son's school prior to entry of the final parenting plan. (See CP 64, 121) Nevertheless, the mother did not seek, nor did the trial court order, any restriction on the father's ability to continue to volunteer at the son's school. By entering an order, five months after it entered the final parenting plan, restraining the father from volunteering at the son's school

and in prohibiting the father from contact with the son at his school, the trial court improperly modified the parenting plan without following the requirements of RCW 26.09.260.

Furthermore, the trial court's order requiring the father to "immediately cease being in the presence of the child at any other times and places not specifically awarded to the [father] under the Final Parenting Plan" (CP 147) is tantamount to imposing a restraining order against the father when one did not previously exist. As written, the father would have to immediately vacate a location if the child also happened to be there and it was not during the father's residential time. The father also would be absolutely prohibited from attending any sporting or school events in which the child is participating. Such a restriction was not part of the original parenting plan, and its imposition now is an improper modification of the parenting plan. ***Custody of Halls***, 126 Wn. App. 599, 609-10, ¶ 29, 109 P.3d 15 (2005) (vacating an order restraining contact between mother and child as an impermissible modification of the parenting plan); See also ***Marriage of Barone***, 100 Wn. App. 241, 247, 996 P.2d 654 (2000) (holding that it would be contrary to

public policy to allow a protection order to function as a *de facto* modification of the parenting plan).

The trial court purported to “clarify” the parenting plan by imposing these new restrictions. But as this court has stated, a clarification is “merely a definition of the rights which have *already* been given and those rights may be completely spelled out if necessary.” ***Marriage of Christel/Blanchard***, 101 Wn. App. 13, 22, 1 P.3d 600 (2000) (emphasis added), *citing* ***Marriage of Rivard***, 75 Wn.2d 415, 418, 451 P.2d 677 (1969). “A court may clarify a decree by defining the parties’ respective rights and obligations, if the parties cannot agree on the meaning of a particular provision.” ***Christel/Blanchard***, 101 Wn. App. at 22. Thus, the parenting plan must be ambiguous in order for the court to clarify it. ***Marriage of Thompson***, 97 Wn. App. 873, 878, 988 P.2d 499 (1999) (“An ambiguous decree may be clarified, not modified”). “‘Ambiguous’ has been defined as ‘[c]apable of being understood in either of two or more possible senses.’” ***Logan v. Logan***, 36 Wn. App. 411, 420, 675 P.2d 1242 (1984).

Here, there is nothing ambiguous about the parenting plan that requires “clarification.” (See CP 10-11) Nothing in the

parenting plan suggests that the father should be restrained from contact with the child outside of his court-ordered residential time, or that he should be restrained from volunteering at the child's school. The only restriction on the father was that his mid-week Wednesday evening residential time would be suspended until he is "engaged in and making progress in intensive therapy." (CP 10) The trial court's order imposing new restrictions was a modification of the parenting plan.

A "modification" occurs when a party's rights are either extended beyond or reduced from those originally intended in the parenting plan. *Christel/Blanchard*, 101 Wn. App. at 22. In *Christel/Blanchard*, the trial court, just as here, issued an order purporting to "clarify" a parenting plan. This order specified a new process for determining changes to school enrollment, and warned that missed deadlines would be deemed a waiver of the parental right to seek a change in school enrollment for the following year. This court reversed, holding that the order went beyond "clarifying" the parenting plan. *Christel/Blanchard*, 101 Wn. App. at 23. This court held that the order "goes beyond explaining the provisions of the existing parenting plan. The language goes beyond filling in

procedural details. The order on its faces imposes new limits on the rights of the parents. It is not a clarification of the parenting plan.” ***Christel/Blanchard***, 101 Wn. App. at 23.

Likewise here, the trial court’s order did not “clarify” the parenting plan. Instead, it “imposes new limits on the rights of the parents.” ***Christel/Blanchard***, 101 Wn. App. at 23. The parenting plan in this case was in fact modified by the trial court because it imposed new limitations on the father’s contact with the child that did not exist in the original parenting plan. The trial court prohibited the father from visiting the child’s school, effectively restraining him from volunteering at the school, and it imposed a restraining order on the father with the child except during his court-ordered residential time. Thus, the father’s rights are “reduced from those originally intended in the parenting plan.” ***Christel/Blanchard***, 101 Wn. App. at 22.

The trial court erred by modifying the parenting plan when there was no pending petition for modification, no threshold hearing establishing adequate cause, and no consideration of the statutory criteria under RCW 26.09.260.

**C. Even If The Trial Court Only “Clarified” The Parenting Plan By Imposing New Restrictions On The Father, The Trial Court Erred As There Is No Nexus Between These New Restrictions And The Father’s Obsessive Compulsive Disorder.**

Even if the trial court’s order was not a modification of the parenting plan, the trial court nonetheless erred in clarifying the parenting plan and imposing new limits on the father’s conduct. A clarification of a dissolution decree is reviewed de novo. ***Marriage of Michael***, 145 Wn. App. 854, 859 ¶ 9, 188 P.3d 529 (2008).

The trial court erred by imposing new limitations on the father’s rights by restraining the father from volunteering at the school and from being in the child’s presence outside of his court-ordered residential time. Presumably, the basis for the trial court’s decision to impose these new limits was its prior imposition of RCW 26.09.191(3) limitations on the father’s mid-week residential time in the original parenting plan, which was based on the father’s Obsessive/Compulsive disorder diagnosis. (CP 48-51, 137) But even there, the trial court provided no link between the father’s Obsessive/Compulsive disorder and the suspension of the mid-week residential time. Instead, it appears that the only basis for any restriction of the father’s mid-week residential time was the trial

court's concern over the child's "exhaustion" from this residential time when they occurred at or near the father's home. (See CP 10) To address this concern, the trial court limited this residential time to West Seattle, where the child and mother live, and ordered that the residential time conclude at 7 p.m. instead of 8 p.m. as previously allowed. (See CP 10)

The reasons for the restrictions on the father's mid-week residential time with the child simply do not carry over as a basis to impose a restriction on the father's right to volunteer at the child's school or be in the child's presence outside of the court-ordered residential time. The trial court's findings after the dissolution trial in support of its RCW 26.09.191 limitations on the father's residential time largely addressed the trial court's concerns with the father's alleged "cleansing rituals" inside his home due to his OCD. (CP 48-49) The trial court found that the exposure "to these fears and rituals is conduct that has an adverse effect on Akshay's best interests." (CP 49) Without conceding it as true, these findings might have been a basis to limit the child's residential time in the father's home during the school week. However, they are not a basis for the trial court to restrain the father from volunteering at the

child's school, or to restrain the father from being in the child's presence outside of court-ordered residential time. This is especially true when it is evident that the father is no real risk to the child as he is allowed liberal overnight residential time during school breaks, two weeks of vacation during the summer, and two full weekends per month during the school year.

“Under the domestic relations law of this State, the best interests of the child must be the paramount concern of the court. As important as this consideration is, however, it must nevertheless be balanced against a parent's fundamental right to be a parent. This right is of constitutional magnitude and cannot be restricted without a rational reason for doing so.” ***Marriage of Cabalquinto***, 100 Wn.2d 325, 330-31, 669 P.2d 886 (1983). Accordingly, “any limitations or restrictions imposed [under RCW 26.09.191] must be reasonably calculated to address the identified harm.” ***Katare v. Katare***, 125 Wn. App. 813, 826, 105 P.3d 44 (2004), *rev. denied*, 155 Wn.2d 1005 (2005). Any limitation or restriction placed on a parent's conduct or contact with their child must be “specifically tailored to the presenting problem.” 20 Kenneth W. Weber, *Washington Practice: Family and Community Property Law* §

33.25, at 100 (Pocket Part, 2010); see e.g., ***Marriage of Jensen-Branch***, 78 Wn. App. 482, 491, 899 P.2d 803 (1995) (to satisfy the constitution, the trial court must “find a substantial probability of actual or potential harm to the children” before it may restrict a parent’s role in the child’s religious upbringing).

Here, there was no basis to impose a restraint on the father’s volunteer work at the child’s school or from simply being in the child’s presence because of the father’s OCD. The “identified harm” found by the trial court was the child’s exposure to cleansing rituals at the father’s home, the child’s exposure to the father’s “fears” related to his OCD, the child’s “exhaustion” from the mid-week evening residential time, and the father’s alleged disparaging statements about the mother to the child. (CP 48-49) But preventing the father from volunteering at school and being in the child’s presence is not “reasonably calculated” to address these alleged harms.

The father’s contact with the child at school is supervised by school personnel. The school principal stated that she was aware of the father’s OCD and did not believe that it affected his ability to volunteer at the school. (CP 73-74) The principal stated that she

has not “seen, nor heard feedback from my staff of any inappropriate behavior from Mr. Luthra which would cause me concern or hesitation in his working with my school children.” (CP 73) The son’s teacher who supervised the father’s volunteer work stated that she saw nothing in the father’s “behavior, demeanor, or communication” with the son or the other children “that warrants any concern.” (CP 77) The father’s therapist also stated that there was “no clinically justifiable reason” to restrict the father’s ability to volunteer at the school due to his OCD. (CP 83)

The mother claimed no specific negative impact from the father volunteering at the school because of his OCD. The only allegations by the mother were her vague claim that the father’s volunteering somehow “deprive[s] our 7-year old child of valuable opportunities to interact with his peers,” and that the father’s volunteering would somehow affect *her* relationship with the teachers. (CP 40, 121) The trial court made no finding after trial, or in its most recent order, explaining how limiting the father’s volunteer work at the child’s school was “reasonably calculated to address the identified harm.” **Katara**, 125 Wn. App. at 826.

It appears that the trial court imposed these new restrictions on the father's residential time as a means to "punish" the father for allegedly not yet making "progress in the intensive therapy" that the trial court believed he needs. (See CP 144) But "custody and visitation privileges are not to be used to penalize or reward parents for their conduct." **Cabalquinto**, 100 Wn.2d at 329. It is the best interests of the child, not the conduct of the parents, which is the "paramount" consideration in making decisions relating to parenting. **Calbaquinto**, 100 Wn.2d at 329; see also **Malfait v. Malfait**, 54 Wn.2d 413, 416, 418, 341 P.2d 154 (1959) (reversing trial court decision limiting father's visitation rights as a punishment based on the trial court's determination that the father was "arrogant and selfish"). When, as here, there is no evidence that the father's volunteer work was adverse to the child, and in fact there was substantial evidence that it was beneficial to the child, the trial court abused its discretion by imposing restrictions on the father's ability to continue to volunteer at the child's school.

Further, the trial court's imposition of what amounts to a restraining order between the father and child is especially egregious as there was no basis for such a restraint at the end of

the parties' dissolution trial – which is why one was not entered – and there is no basis for such a restraint now. RCW 26.09.002 provides that “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.” There were no findings in the original parenting plan, or in the present order challenged on appeal, that the father's mere presence would be harmful to the child. Instead, when it entered the original parenting plan, the trial court found that “both parents have provided care for Akshay and have been actively involved in his life. Both love Akshay, and he loves each of his parents.” (CP 48) This finding undermines the trial court's newly imposed restriction that would prevent the father from attending any events for the child, including birthday parties, sporting events, or school productions. Such a restriction is not in the child's best interests, nor did the trial court find it so.

The trial court erred in clarifying the parenting plan and imposing new limitations on the father's rights by restraining the

father from volunteering at the school and from being in the child's presence outside of his court-ordered residential time.

**D. The Trial Court Abused Its Discretion By Unilaterally Modifying The Restraining Order.**

“A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment.” *Marriage of Thompson*, 97 Wn. App. 873, 878, 988 P.2d 499 (1999). Here, the trial court improperly modified its decree of dissolution by ordering the father to “remain at least 500 feet from [the mother] with the exception of residential transfers” (CP 147), when the decree of dissolution only restrained the father “from knowingly coming within or knowingly remaining within 500 feet of the *home* or the *workplace* of [the mother].” (Sub no. 167, Supp. CP \_\_\_, emphasis added)

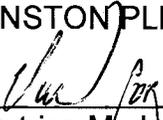
The mother did not seek this relief in her motion to “enforce” the parenting plan, and the father was given no notice that the trial court intended to make any ruling on the provisions of the restraining order. The trial court erred in unilaterally modifying the restraining order. See RCW 26.50.130 (a court may only modify the terms of a protection order “upon application with notice to all parties and after a hearing”).

**V. CONCLUSION**

This court should reverse the trial court's order as it imposes new restrictions on the father.

Dated this 25th day of April, 2011.

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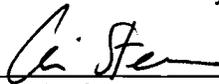
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 25, 2011, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 25th day of April, 2011.

  
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