

NO. 72209-3-I

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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ERIN A. CULLEN,

APPELLANT

v.

DAVID A. CULLEN,

RESPONDENT

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

This appeal arises out of a dissolution of marriage involving a fifteen year history of domestic violence by the Respondent/Father against the Appellant/Mother. Despite undisputed findings of a history of domestic violence on the part of the Father, along with GAL recommendations that the children live primarily with the Mother and that the Father have residential time every other weekend, after a full trial in April, 2014, the final parenting plan entered by the court failed to include mandatory restrictions against the Father's residential time. Rather, the court ordered a two-week on, two-week off alternating residential schedule between the parents.

The parenting plan was reviewed by the trial court in November, 2014, for purposes of determining whether the residential schedule adopted by the court in April was an "unmitigated disaster." After engaging in an updated, supplemental investigation, the GAL issued a report in October, 2014, determining that immediate intervention was necessary to protect the well-being of the children, and recommended that the Father's residential time be reduced to professionally supervised visitation twice per week. Despite findings that the Father's ongoing domestic violence behavior was "terribly damaging to the children," that

the Father had failed to benefit from his domestic violence treatment, that the behavioral issues of the parties' oldest child resulting from influence by the Father had escalated since trial to the point of needing immediate intervention, and that the Father continued to demonstrate an unwillingness disengage from the Mother, engaging in the kind of controlling and stalking behavior that prompted the judge to say that the Father's behavior "creeps him out," no change to the residential schedule was ordered.

Since these orders were entered in December, the children's circumstances have continued to deteriorate. Exchanges have become increasingly hostile, the parties' oldest son has begun steal personal items from Mother's home to stockpile at his Father's, including cash, and has even stashed such items in his locker at school. Of primary concern is that in response to being confronted by the Mother and his treatment providers in the Step-Up program regarding this behavior, the child falsely alleged that the Mother had subjected him to an invasive "strip search," prompting an investigation by CPS. As a result, the child and the Mother were asked to leave the Step-Up program until the investigation has been completed and the relationship between the Mother and the child has suffered a devastating blow. The children's continued exposure to the Father's

abusive behavior has created a state of crisis for this family, and the Mother respectfully requests this Court's assistance in helping her to get these children on a path toward recovery and healing.

## **II. ASSIGNMENTS OF ERROR**

1. It was an error of law for the trial court to fail to impose mandatory restrictions against the Father's residential time pursuant to RCW 26.09.191(2)(a)(iii), when the court found that the Father continued to engage in domestic violence behavior, and such conduct was "terribly damaging to the children."
2. It was an error of law for the court to fail to enter a restraining order against the Father pursuant to RCW 26.50.060, when the court found that the Father had not benefited from domestic violence treatment, and that he continued to engage in domestic violence behavior toward the Mother, including controlling and stalking behaviors, that placed the Mother in fear of imminent harm.

## **III. STATEMENT OF THE CASE**

The parties separated in March, 2013, after a twelve-year marriage. CP 486. They have three children of their marriage: Aiden (age 12), Nathan (age 10), and Clare (age 7). CP 485. The parties' relationship included a substantial history of domestic violence by the Respondent/Father against the Appellant/Mother, going back fifteen years. CP 454. Though the Father's domestic violence was primarily targeted at the Mother, the Father also has a history of being emotionally abusive

with the children, which, at times, also included physical abuse. CP 213. The children witnessed the Father's sustained acts of domestic violence against the Mother, as well as an incident of physical abuse against their Maternal Grandfather. CP 454. The Mother petitioned for dissolution on April 3, 2013, and obtained an ex parte domestic violence restraining order against the Father. CP 436-439. The court found cause to enter a temporary restraining order against the Father at the return hearing on April 23, 2013. CP 337-341.

Although the Father had participated in domestic violence treatment prior to the dissolution, he again commenced domestic violence intervention treatment with Sno-King in April, 2013. Within a month, the Father was terminated for cause. CP 312. The court thus entered another restraining order against the Father on May 21, 2013, ordering that the Father have only supervised visitation with the children until he successfully re-enrolled and complied with treatment. CP 312-14. The Father started a second domestic violence perpetrator treatment program with Assessment & Treatment Associates (ATA) in May, 2013. Though it was modified from the previous order to reflect the Father's compliance with treatment, the court found cause to issue another twelve-month restraining order against the Father in September, 2013. CP 305-308.

Police reports within this case document two instances of the Father violating restraining orders, with one violation resulting in an arrest. CP 213.

A Guardian ad Litem was appointed in this case in December, 2013. CP 283-86. Her first report was issued in March, 2014. CP 212-247. In her analysis, the GAL noted that the Father's behavior toward the children may have "devastating effects" on the children's developing self-concept. CP 234. She noted that while the children may not be outwardly struggling in areas such as social interactions and academics, they "may be well-conditioned to hide any indicators of turmoil in their lives." *Id.* The GAL also explained that she was concerned that the children, particularly the parties' oldest child, Aiden, may have "learned behavior from the Father that is aggressive and hostile in nature from witnessing the Father's behavior at times toward the Mother." CP 235. She reported that the child's therapist, Dr. DuHamel, even expressed concerns that the child, "after witnessing the Father's verbal, psychological, and occasional abuse of the Mother, may have adopted some of these behaviors in his concept of male/female relationships in general and in his interactions with the Mother." CP 240. Furthermore, she described how the Father had shared inappropriate information with the children throughout the dissolution

process, including legal information. *Id.* She explained that the Father had engaged in efforts to triangulate the children, causing Aiden in particular to build “a notion of the Mother as someone not to be trusted which can be damaging to the Mother/child relationship and can negatively impact the child’s sense of trust regarding other relationships which may induce anxiety. *Id.* Moreover, while the GAL noted that concerns over the Father engaging in physical abuse were mitigated by the Father’s enrollment in treatment, what was of deeper concern was the “more subtle forms of emotional abuse that can occur in private and are less detectable from outside sources.” CP 236-37. The GAL thus recommended that a case manager be appointed to assist in confirming the Father’s compliance with treatment and monitor the Father to make sure that he is not engaging in ongoing emotional abuse or share inappropriate information with the children that “serves to belittle the Mother and the children’s relationship with her.” CP 237.

The GAL concluded that restrictions should be imposed against the Father pursuant to RCW 26.09.191 based upon a history of domestic violence, and that the children should reside primarily with the Mother, with the Father having residential time with the children every other weekend and one evening visit each Wednesday. CP 243. The GAL also

recommended that the Father's residential time be contingent on the completion of his domestic violence treatment through ATA, and that he be additionally required to complete the DV Dads program through Wellspring Family Services, as well as a chemical dependency evaluation. *Id.* The GAL further recommended that Aiden enroll in Kid's Club, a program for children who have lived in high conflict or domestic violence homes. CP 244.

The parties' dissolution was finalized on June 13, 2014, after a full trial before Judge Bowden in Snohomish County Superior Court. The two-day trial took place on April 14-15, 2014, and Judge Bowden issued his oral ruling on April 16, 2014. Court's Ruling RP 1, lines 10-18. The judge determined that there was no dispute that the Father had engaged in a history of acts of domestic violence, which triggers a prohibition on mutual decision-making under RCW 26.09.191(1). Court's Ruling RP 13, lines 14-17. The judge thus ordered that the Mother have sole-decision-making for all major decisions. CP 90. However, though the judge determined that RCW 26.09.191(2) also triggers a limitation on the Father's residential time, finding that there was both a history of acts of domestic violence and that there were episodes of abuse of the children in terms of demeaning comments and a few occasions of physical

maltreatment, he did not find that the conduct toward the children “amounted to a pattern of abuse,” though the domestic violence toward the Mother did present such a history. Court’s Ruling RP 15, lines 6-14. The judge further found that given the Father’s enrollment in treatment, there was little likelihood that his contact with the children or his residential time with them would lead to any physical, sexual or emotional abuse or harm, and that it was not in the children’s best interests to impose restrictions on the Father’s residential time. Court’s Ruling RP 16, lines 21-25, and 17, lines 1-9. The judge therefore dispensed with the restrictions pursuant to RCW 26.09.191(2)(n). Court’s Ruling RP 17, lines 15-18. Despite the GAL’s recommendations regarding the residential schedule, the judge implemented a school schedule in which the children alternate between parents, residing with each parent for two consecutive weeks at a time. CP 85. The Father’s residential time with the children was contingent on the Father continuing in and successfully completing the ATA domestic violence program and enrolling in and completing the DV Dads program at Wellspring Family Services. CP 87. Additionally, the judge ordered that the court could revisit the parenting plan without a substantial change of circumstances at the end of the summer, 2014, if either party believed that the plan was not working in the best interests of

the children (CP 89); should the parenting plan “prove to be a disaster.” Court’s Ruling RP 33, line 16. Judge Bowden retained jurisdiction over this case and ordered that all future matters be set in front of him. CP 53. The Mother filed a Notice of Appeal on July 9, 2014.

The Father’s treatment program through ATA was closed in compliance after eighteen months of treatment. Ex 32. The Father commenced DV Dads intervention treatment with Wellspring Family Services in the summer of 2014, but was involuntarily removed from the program based on conduct that is inconsistent with treatment requirements. Ex 12.

The Mother filed a request for the end-of-summer review on August 21, 2014. Ex 2, page 2. Due to the continued negative effects of the Father’s behavior on the children, she asked that the Parenting Plan be changed such that the children reside primarily with her. *Id.* The new evidence relied upon in the Mother’s request for review included the Father’s neglect of the children’s health and medical needs, the Father’s use of profanity and derogatory statements toward the Mother in the children’s presence, the Father’s failure to use car seats for the children, problems related to the children’s schooling while in the Father’s care, and new concerns that the Father is manipulating the children. *Id.* At the

hearing before Judge Bowden on September 4, 2014, he directed the Mother to seek permission from this Court to allow him to proceed with the anticipated review, since the relief sought in the review is similar to the relief sought on appeal. He did not address the merits, but indicated that he would conduct the review as an evidentiary hearing and would seek GAL investigation and input prior to that hearing.

In compliance with that order, the Mother filed a motion with this Court for leave to allow the Superior Court to review the decision on September 5, 2014. On September 29, 2014, this Court granted her motion. The GAL was reappointed on September 15, 2014. Ex 2, page 1. Her report was issued on October 29, 2014. Ex 2, page 27.

The GAL was assigned the task of investigating very specific topics for purposes of the review hearing, given the short timeline provided for gathering information and writing a report. Ex 2, page 16. Her investigation revealed overall that “the Father’s behavior continues to jeopardize the over-all health of the children and their relationship with their Mother, calling into question his rehabilitation.” Ex 2, page 17. Her analysis regarding the specific issues assigned by the judge include the following conclusions: First, the information gathered by the GAL support the Mother’s allegations regarding the Father’s neglect of the children’s

health and medical needs. Ex 2, page 17. Second, the GAL determined that the Father is influencing the children's perceptions/relationship with the Mother in a negative fashion. *Id.* She notes that the Father "is either not understanding, in denial, or worse intentionally trying to sabotage the fact that the well-being of the children is inextricably linked with the health of their relationship with the Mother." Ex 2, page 18. The GAL noted how, in particular, Aiden's relationship with his Mother continued to deteriorate, explaining that his "negative behavior toward the Mother appears to be a byproduct of the Father's lack of control around his own emotions and behavior toward the Mother...Aiden's emotional growth and psychological health continues to be negatively influenced by the Father's continued domestic violence..." Ex 2, page 19. The GAL specifically noted that the Father's behavior shows that he has not been successfully rehabilitated, that he needs to begin domestic violence treatment again, have professionally supervised time with the children, and that protective orders need to be put in place "restraining the Father from the Mother as a buffer to the Father's continued domestic violence tendencies." *Id.*

Third, the GAL determined that it appeared the children had been coached to lie for the Father and cover for him when he attempted to control the Mother through fear by flaunting his court-sanctioned presence

at an event in light of the termination of protective orders restraining him from the Mother. Ex 2, page 20. Fourth, the GAL concluded that the Father's use of profanity and derogatory comments toward the Mother in the presence of the children are a perpetuation of domestic violence, thus calling for the reinstatement of protective orders restraining the Father from the Mother and limitations in the parenting plan. Ex 2, page 21.

The GAL also conducted an analysis of the overall parenting skills of both parents. Her report concluded that while both parents undoubtedly possess strengths within their parenting (such as the Father's motivation for fun and active endeavors with the children and the Mother's nurturing qualities toward the children), the positive effects of both parents' skill-sets appear to be negatively impacted by the Father's continued behaviors that undermine the Mother and her ability to parent. Ex 2, page 22. She concluded that while the children are deeply bonded with both parents and reduced time will have a negative impact on the children, the negative impact of the Father's perpetuation of domestic violence outweighs the benefit of the children maintaining their current levels of exposure to the Father. Ex. 2, pages 22-23. She further determined that the Father's actions toward and around the children, resulting in the children copying his destructive behavior, constitute an abusive use of conflict by the

Father. Ex 2, page 23.

The report included the following recommendations: RCW 26.09.191 restrictions against the Father's residential time based on "continued domestic violence, emotional abuse of a child, abusive use of conflict and failure to perform parenting functions," restricting the Father's residential time to professionally supervised time for four hours, twice per week. Ex 2, page 25. The GAL recommended that the Father be required to re-enter a one-year state-certified domestic violence program, and upon completion of its weekly phase, apply to be re-screened for re-entry into the DV Dads program. Ex 2, page 25-26. She recommended further that the court issue a restraining order against the Father, restricting him from coming within 500 feet of the Mother without the presence of a professional supervisor. *Id.*

The evidentiary review hearing before Judge Bowden took place from November 12, 2014, through November 17, 2014. Substantial testimony was presented at trial to support the adoption of the GAL's recommendations, particularly testimony presented by the Mother's treatment provider, Seth Ellner, and the GAL herself. In his testimony, Seth Ellner explained that "the number one measure of success and resiliency for kids to get through anything, no matter how tough it is, is the

health and wellbeing of their relationship with the non-abusive parent.” 1 RP 137, lines 20-23. He noted that the behaviors exhibited by Aiden are “highly suggestive of coaching and interference from another parent” (1 RP 138, lines 21-22), that Aiden has taken on a “proxy role” for the Father, and the fact that he has assumed this “abusive role” is “extremely disturbing.” 1 RP 143, lines 16-21. Mr. Ellner testified further that Aiden is at a point where “he, actually, himself, needs intervention now...he has taken on the traits of an abusive person that he actually is going to need intervention to help him turn around, hopefully.” 1 RP 143-44. Mr. Ellner suggested that Aiden immediately enroll in the Step-Up Program in order to help him examine the power and control issues that people who become abusive take on. 1 RP 145, lines 3, 20-21. Finally, Mr. Ellner explained that given the Father’s coaching and abusive behavior, it is extremely important for the Father’s contact with the children to be professionally supervised. 1 RP 146, lines 12-22.

Similarly, the GAL, Jessica Arango, explained that her concern for the children since her last report has definitely increased, particularly considering the Father’s continued DV behavior toward the Mother despite his completion of a year-long domestic violence treatment program and participation in DV Dads. 2 RP 97 line 1; 98, lines 1-4. The

GAL discussed at length her concerns with the Father's failure to engage in active reporting to his treatment providers and how he has only engaged in treatment to the point of "compliance," but that even his ATA treatment provider refused to use the word "successful" to describe his completion of the program. 2 RP 181, lines 11-22. In addition to the concerns addressed in her report, the GAL noted that there was substantial evidence that the Father continues to engage in obsessive monitoring of the Mother and stalking behavior, and it disturbing that the Father is unable to disengage from the Mother in this fashion. 2 RP 190, lines 14-23.

On cross examination, when asked how the children are functioning in school, the GAL tellingly responded, "just because a child's doing well at school, to me, doesn't mean they're doing well emotionally or in general (2 RP 153 12-14)...it appears that Aiden is holding it together enough to function in school. But I think at some point, that's going to burst...I feel like the emotional abuse and extended issues going on right now, I don't see that's he's going to continue to function at that academic level." 2 RP 179, lines 3-10. Notably, on the last day of trial, the Mother testified that Aiden had targeted another student at the school, intentionally deleting all of the student's work files, refusing to accept accountability for his actions and had been suspended from school. 4 RP

2, lines 15-20. The Mother explained that it was becoming abundantly clear that the need for intervention for Aiden was urgent, and that Aiden's abusive behavior was continuing to evolve, now spilling over into school. 4 RP 2, lines 22-25.

Judge Bowden issued his oral ruling on November 21, 2014. Court's Ruling RP 1, line 13. Notably, Judge Bowden included in his opening remarks, "The history of domestic violence by the Father is real" and that it "calls for restrictions." Court's Ruling RP 2, lines 6-7. He went on to find that "Aiden's behavioral issues have escalated since trial to the point of needing intervention. The Father completed domestic violence treatment, but his abusive behavior persists...It's abusive, and it's terribly damaging to the children. It is the example that he is setting for his children and which is being emulated by Aiden." Court's Ruling RP 6, line 25; 7, lines 1-8. He found that the Father's "abusive language toward the Mother in the presence of the children...is inexplicable other than being symptomatic of his history of domestic violence. More importantly, the Father has failed to timely disclose this abusive behavior to his domestic violence therapist in accordance with their contract and, in fact, denies any inappropriate behavior on those occasions or minimizes his own misconduct." Court's Ruling RP 7, lines 21-25; 8, lines 1-6. Judge

Bowden determined that the Father also failed to address Aiden's behavioral issues toward the Mother, and that it is "a significant parental failing for the Father to let that go." Court's Ruling RP 9, lines 8-9. He found that the Father engaged in "controlling behavior" toward the Mother, and even specifically commented regarding the Father's stalking behavior, "It creeps me out." Court's Ruling RP 10, lines 14-15. Judge Bowden noted the Father's need to restart domestic violence treatment, "because it's evident to me he hasn't gained any benefit from that program." Court's Ruling RP 12, lines 1-3.

Despite these findings, Judge Bowden ordered that he would not be fundamentally changing the two-weeks on, two-weeks off residential schedule. Court's Ruling RP 15, lines 22-23. Even after Judge Bowden made this ruling, he went on to say, "The behavior that I am most critical of is the behavior that the Father has demonstrated. That certainly warrants the recommendations by the guardian ad litem." Court's Ruling RP 16, lines 14-17. Furthermore, Judge Bowden determined that there was not a sufficient basis for a domestic violence protection order, and that the Father's behavior "doesn't amount to the sort of domestic violence that would warrant a protection order." Court's Ruling RP 6, lines 11-15.

Final orders in the matter were entered on December 15, 2014. The

Mother filed an amended notice of appeal on January 12, 2015, and an amended statement of arrangements on February 13, 2015.

#### IV. ARGUMENT

##### A. Standard of Review.

A trial court's parenting plan is reviewed for an abuse of discretion, which occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). The trial court's findings of fact are treated as verities on appeal, so long as they are supported by substantial evidence. *Id.* "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. *Id.* The Court of Appeals also reviews a trial court's decision to grant or deny a protection order for an abuse of discretion. *In re Marriage of Stewart*, 133 Wn. App. 545, 550, 137 P.3d 25 (2006). Because the trial court's failure to impose mandatory restrictions against the Father's residential time and its failure to enter a domestic violence restraining order against the Father was manifestly unreasonable, these decisions constitute an abuse of discretion. The Mother thus respectfully requests that this Court overturn the decision of the trial court and remand this case to a new judge to establish a

parenting plan and restraining order in conformity with this Court's decision.

**B. The Court is Mandated to Implement Restrictions to Protect the Children Where there are Findings under RCW 26.09.191 that a Party has a History of Domestic Violence.**

RCW 26.09.191(2)(a)(iii) provides that a parent's residential time with a child *shall* be limited if it is found that the parent has engaged in a history of acts of domestic violence as defined in RCW 26.50.010(1) (emphasis supplied). Though the court may dispense with such limitations pursuant to RCW 26.09.191(2)(n), this may only be done upon express evidence that contact between the parent and the child will not cause physical, sexual or emotional abuse or harm to the child and that the probability that the parent's harmful or abusive contact will recur is so remote that it would not be in the child's best interest to apply the limitations. Though the trial court made such express findings under subsection (n) in its ruling of April 16, 2014 (Court's Ruling RP 16, line 25; 17, lines 1-18), the trial court made no such findings in its ruling of November 21, 2014. Rather, the trial court expressly stated that based on the evidence presented during the November trial, the Father's abusive behavior persists and it is "terribly damaging to the children." Court's Ruling RP 7, lines 2-6. Moreover, no substantial evidence to the contrary

was presented that would be sufficient to persuade a fair-minded person that no such harm exists. Thus, it was an abuse of discretion for the trial court to fail to impose mandatory restrictions to against the Father's residential time pursuant to RCW 26.09.191.

Furthermore, deciding whether to impose restrictions based on a threat of future harm necessarily involves consideration of the parties' past actions. *In re Marriage of Katare*, 175 Wn.2d 23, 39, 283 P.3d 546 (2012). By its terms, RCW 26.09.191(3) obligates a trial court to consider whether "[a] parent's involvement or conduct *may* have an adverse effect on the child[ren]'s best interests." *Id.* To make this determination, the court must engage in a form of risk assessment. *Id.* Testimony from multiple witnesses at the November trial addressed the mental, emotional and physical harm caused to the children from the Father's conduct. Witnesses Jessica Arango, GAL, Mark Adams and Seth Ellner all addressed the issue of how children are negatively affected by domestic violence. Testimony specifically identified emotional, mental and physical detriment to children from exposure to domestic violence.

The literature describing the long-term effects of childhood physical and emotional abuse is robust. Posttraumatic reactions to aversive childhood experiences typically involve the interplay of

dysregulation in emotional, cognitive, behavioral and psychobiological domains, with symptoms in each domain potentially triggering symptoms in other domains. These symptoms can disrupt typical maturation and derail the child from normal developmental tasks and activities. For example, child victims of physical abuse are more apt to view others as hostile and harmful which causes them to strike out first.<sup>1</sup> They misperceive many interpersonal interactions, especially if the interactions are ambiguous in nature.

A number of studies have recently focused on the neuroanatomy of children exposed to family violence and childhood maltreatment. One study found that children exposed to physical abuse and domestic violence showed the same pattern of activity in their brains as soldiers exposed to combat.<sup>2</sup> There is an increase in brain activity in two specific brain areas, the anterior insula and the amygdala, which is associated with threat detection and often leads to hypervigilance and anxiety disorders. A second study found that childhood maltreatment is associated with decreased size of the prefrontal cortex, insula and cerebellum.<sup>3</sup> These

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<sup>1</sup> McCoy, M, Keen, S. (2014): *Child Abuse and Neglect, Second Edition*, page 141.

<sup>2</sup> <http://www.ucl.ac.uk/news/news-articles/1112/111205-maltreated-children-fMRI-study>

<sup>3</sup> Edmison, E., Wang, F., Mazure, C.M., Guiney, J., Sinha, R., Mayes, L.C., & Blumberg, H.P. (2011). *Corticostriatal--Limbic Gray Matter Morphology in Adolescents With Self-*

areas of the brain are necessary for emotional regulation, judgment and decision-making abilities. Thus victims of childhood adverse events sometimes have difficulty with regulating emotion and choosing healthy friendships and partners.

In addition, a 1997 study showed that that 85% of children ages 6-12 who witnessed domestic violence had moderate to severe PTSD symptoms compared to 0% of the control group who had witnessed no violence.<sup>4</sup>

**C. The Trial Court’s Decision is Not Supported by Washington Policy and Legislative Intent.**

RCW 26.09.002 provides that parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. Under this statute, the court’s duty is to allocate parental responsibilities based on the children’s best interest. Though the statute recognizes the fundamental importance of the parent-child relationship, the statute provides that this relationship should be fostered *unless inconsistent with the child's best interests* (emphasis supplied). The statute further clarifies that the best interests of the child

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*-reported Exposure to Childhood Maltreatment*. Archives of Pediatric and Adolescent Medicine, 165(12):1069 – 1077.

<sup>4</sup> Kilpatrick, K, Litt, M. and Williams, L. (1997) *Post-traumatic Stress Disorder in Child Witnesses to Domestic Violence*. Am.. J. Orthopsychiatry, 67:639-644.

are served by a parenting arrangement that *best maintains a child's emotional growth*, health and stability, and physical care, and contemplates alterations to the child's existing pattern of interaction to the extent required to protect the child from physical, mental, or emotional harm. *See* RCW 26.09.002 (emphasis supplied). In this case, though the court recognized that the children are extremely bonded to the Father, substantial evidence was presented at trial that supported the conclusion that the negative impact of the Father' perpetuation of domestic violence outweighs the benefit of the children maintaining their current levels of exposure to the Father.

Furthermore, RCW 26.09.003 reaffirms the intent of the law as expressed in RCW 26.09.002, but further clarified that to better implement the existing legislative intent, the legislature finds that the identification of domestic violence as defined in RCW 26.50.010 and the treatment needs of the parties to dissolutions are necessary to improve outcomes for children. Though the trial court found that the Father had failed to benefit from his domestic violence treatment and that his ongoing domestic violence behavior was damaging to the children, the parenting plan entered by the court fails to provide adequate safeguards for the children by failing to require the Father to fully engage and comply with treatment

*before* being granted unsupervised residential time. So long as the children maintain prolonged exposure to the Father while his treatment is incomplete, the children continue to be exposed to harm. Therefore, the trial court's decision failed to comply with legislative intent and should thus be overturned.

**D. Father's History of Abuse and Mother's Present Fear Was Sufficient to Support the Entry of a Restraining Order against the Father.**

A protection order is a civil remedy. *City of Tacoma v. State*, 117 Wn.2d 348, 351-52, 86 P.2d 7 (1991). Civil cases require proof of the statutory elements by a preponderance of the evidence. *Reese v. Stroh*, 128 Wn.2d 300, 312, 907 P.2d 282 (1995). After notice and a hearing, RCW 26.50.060 authorizes the court to issue an Order for Protection. The Petitioner must meet this burden with specific facts and circumstances. RCW 26.50.030.

RCW 26.50.010 defines domestic violence:

(1) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

“As the title of the Act indicates--Domestic Violence Prevention, the Legislature has made it clear that the intent of chapter 26.50 RCW is to prevent acts of domestic violence.” *Muma v. Muma*, 115 Wn. App. 1, 7, 60 P.3d 592 (2003). In *Muma*, the court refused “to construe the law so as to require that Ms. Muma wait until Mr. Muma commits further acts of violence against her or their children in order to seek an order for protection.” *Id.* A past history of abuse or threatened abuse plus present fear is sufficient to meet the standard. *Spence v. Kaminski*, 103 Wn. App. 325, 332-33, 12 P.3d 1030 (2000); *Muma*, 115 Wn. App. at 6-7. In interpreting the statutory command of RCW 26.50.060(3), given the Father’s history of domestic violence, the question before the trial court was thus whether or not given the Father’s ongoing behavior, the Mother had a reasonable present fear of the Father. *See Muma*, 115 Wn.App. at 6-7.

Ample evidence was presented at trial which support the conclusion that the Father has taken extreme measures to inflict himself on the Mother. The Mother testified that the Father engaged in substantial, frightening conduct such as following the Mother and children inside of stores, showing up during the Mother’s residential time, interfering with her ability to come and go freely on her residential time, refusing to return

the children's personal items, removing the children from the Mother's care, and repeatedly using extreme profanity toward the mother in the presence of the children. 1 RP 18-24.

Furthermore, the GAL's report included analysis that the Father "attempted to control the Mother through fear by flaunting his court-sanctioned presence at an event in light of the termination of protective orders restraining him from the Mother." Ex 2, page 20. The GAL and the Mother also provided substantial testimony regarding the Father engaging in obsessive stalking behavior, which the court even recognized as "creepy." The Mother further explained that her car had been repeatedly vandalized, and that these events increased her fear, as the fourth incident was clearly set up to look intentional, as if it were a threat. 4 RP 6-7. There was clearly sufficient evidence to support the entry of a restraining order. The trial court's blanket statement that the behavior exhibited by the Father was insufficient to support the entry of a restraining order was unsupported by tenable grounds or reasons, and thus the court's failure to enter an order protecting the Mother constituted an abuse of discretion.

**E. Order For Protection Is Mandated If There Is A History Of Domestic Violence; There Is No Conflict With Parenting Act.**

The purpose of the domestic violence statute is to provide a “swift response to prevent further domestic abuse.” *See Stewart*, 133 Wn. App. at 551. Courts have held that a domestic violence order for protection is appropriate, even if it suspends a father’s court-ordered visitation, in order to prevent further domestic violence.<sup>5</sup> In *Stewart*, the court affirmed an order for protection which suspended the residential time granted to the Father’s in an agreed parenting plan after specific incidents of domestic violence occurred, including the Father reaching into the Mother’s car and berating her, and the Father approaching the Mother’s car during an exchange and trying to reach through her window. *Id.* at 548. Given the Father’s similar abusive conduct toward the Mother in this case in the children’s presence, the entry of a restraining order would be supported even if it suspends the Father’s current visitation, in order to prevent further domestic violence on the part of both the Father and the parties’ son, Aiden.

**F. Father’s Stalking Evidences an Ongoing Pattern Which Causes the Mother to be Fearful.**

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<sup>5</sup> *Id.* at 553. “...court is expressly authorized to make a temporary order affecting the residential arrangements of the children and/or restricting parental contact without entering a parenting plan. Any such order is limited to one year. RCW 26.50.060(2).”

The Father's inability to disengage from the Mother, through his continued closely held belief that the Mother is "having an affair" despite the fact that the parties are divorced is additional concerning behavior. There was clear testimony at trial that the Father has taken specific steps to target and intimidate the man with whom he believes the Mother is having an affair. 1 RP 181-187. There was additional testimony that the Father took specific steps to stalk the Mother in the presence of the children. 1 RP 21, lines 12-25; 22, lines 1-25. The domestic violence statute protects mother from father's stalking and other abusive conduct. RCW 26.50.010(1) protects the Mother from being harassed by the Father. Sub-paragraph (c) specifically incorporates the definition of "stalking" as set forth in RCW 9A.46.110. Said statute defines "stalking" as a person who harasses another person resulting in fear on the part of the harassed person<sup>6</sup> *and* the harasser knows that the person is "afraid, intimidated, or

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<sup>6</sup> RCW 9A.46.110(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

harassed.”<sup>7</sup> It is not a defense that the Father did not intend to place the Mother in fear.<sup>8</sup> Further, where there is evidence that the harasser has “actual notice that the person does not want to be contacted,” it is “prima facie evidence that the stalker intends to intimidate or harass the person.”<sup>9</sup> Thus, because in addition to the standard provided above regarding past violence and present fear, there was ample evidence to support the entry of a restraining order against the Father based on his stalking behavior, it was an abuse of discretion for the court to fail to enter one in order to protect the Mother.

**G. Affidavit of Prejudice.**

Though Judge Bowden retained jurisdiction over this matter, the Mother respectfully requests that if this Court does see fit to remand this case to the trial court for further proceedings, that the Court’s order

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harass the person.

<sup>7</sup> *See Id.* at sub-part (c) above.

<sup>8</sup> RCW 9A46.110(2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

<sup>9</sup> RCW 9A.46.110(4) provides that attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes, in addition to any other form of contact or communication, the sending of an electronic communication to the person.

explicitly provide that the case be brought before a new judge on remand. RCW 26.12.010(1) confers jurisdiction over any proceeding under Title 26 RCW to the superior court. Judges sitting on the superior court in the same county have identical authority and identical jurisdiction. *State ex rel. Campbell v. Superior Court*, 34 Wn.2d 771, 775, 210 P.2d 123 (1949); *State v. Caughlan*, 40 Wn.2d 729, 732, 246 P.2d 485 (1952).

Though, especially in family law cases, judges routinely retain responsibility for subsequent matters that arise between the parties in order to promote judicial economy for the court and continuity for the parties, a judge who “retains jurisdiction” over post-decree proceedings does not thereby deprive the other members of the court of their statutory jurisdiction over those same proceedings.

Moreover, given the extent of Judge Bowden’s involvement in this matter at the November, 2014 evidentiary hearing, it is no longer possible to have a fair and impartial trial before him. RCW 4.12.050(1) provides, in pertinent part:

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge.

Parties are entitled to one change of judge as a matter of right. *State v. Detrick*, 90 Wn. App. 939, 942, 954 P.2d 949 (1998). Upon such a filing in Washington, the party has a peremptory right to a change of judge; there is no question of fact or discretion. *Id.*

## V. ATTORNEY'S FEES

The Mother requests that her fees and costs on appeal be paid by the Father pursuant to RAP 18.1 and RCW 26.09.140 on the basis of need and ability to pay. An affidavit of financial need shall be filed pursuant to RAP 18.1(c). and based on the Father's intransigence. A party's intransigence can substantiate an award of attorney fees, regardless of the factors enunciated in RCW 26.09.140; attorney fees based on intransigence are an equitable remedy. *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). In deciding whether to award fees, the trial court may consider the extent to which one party's intransigence caused the other party who is seeking an award of fees to undertake additional legal services. *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). The Father has engaged in conduct that resulted in a substantial and unnecessary increase in the cost and difficulty of the underlying matter by... The Court should find that intransigence has permeated the case and as a result, the Mother is not required to segregate

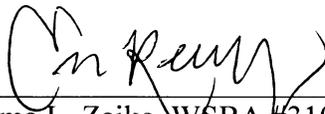
attorney's fees. *See In re Marriage of Sievers*, 78 Wn. App. 287, 312, 897 P.2d 388 (1995).

## VI. CONCLUSION

Based on the argument and authority provided above, the Mother respectfully requests that this Court overturn the decision of the trial court, finding that the trial court erred in failing to impose mandatory restrictions in the final parenting plan pursuant to RCW 26.09.191 and in failing to enter a restraining order against the Father, and remand this case to a new judge in Snohomish County Superior Court to enter a parenting plan and restraining order pursuant to this Court's decision.

Respectfully submitted this 13<sup>th</sup> day of March, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 13<sup>th</sup> day of March, 2015 the original of the Brief of Appellant was transmitted for filing to the Court of Appeals, Division I, by legal messenger, and that copies were sent via email and U.S. Mail as follows:

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