No. 102169-1

THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 843435

Spokane Superior Court No. 17-2-0211716

In re:

PATRICK RYAN FLYNN,

Petitioner,

and

ALEXANDRA LEIGH CARTWRIGHT,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, PATRICK FLYNN, is the moving party.

II. DECISION BELOW

Petitioner seeks review of the *Opinion* (05/01/2023),[1] and the *Order on Reconsideration* (06/09/2023).[2]

III. CASE STATEMENT

Patrick Flynn and Alexandra Cartwright were married on September 18, 2010, and the marital community ended on April 30, 2017.[3] The parties had one daughter, who was five years old at the time of trial.[4]

February 10, 2020: At trial, Ms. Cartwright made allegations of domestic violence, stalking, and abusive use of conflict.[5] In support of her claims, Ms. Cartwright brought a domestic violence expert witness, Tracee Parker, who testified

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[1] Appendix 1.
[2] Appendix 2.
[3] CP 264-72.
[4] *Id.*
[5] *Id.*

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that Mr. Flynn had engaged in stalking behaviors, and while she admitted that "there was no physical violence against the Mother in this case," she nevertheless claimed that Mr. Flynn showed "dangerous lethality factors sufficient to constitute domestic violence."[6] The Superior Court had also appointed a parenting evaluator, Monique Brown, who produced a 49-page report that was admitted at trial.[7]

MARCH 26, 2020: After its consideration of the extensive testimony, the Superior Court entered specific findings indicating that Mr. Flynn had ***not*** engaged in domestic violence or stalking.[8] The Superior Court did find that Mr. Flynn's parental behavior rose to an abusive use of conflict, and entered limitations pursuant to RCW 26.09.191(3)(e), indicating:

> "... the Court orders the Father to undergo evaluation and ***any treatment*** **for** ***anger management*****.** As stated above, the Father must

[6] *Id.*
[7] *Id.*
[8] *Id.*

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> address his inner anger and feelings about the Mother as shown in his daily journal like entries.[9]

The Superior Court declined to enter RCW 26.09.191 findings related to domestic violence, explicitly indicating: **"Neither parent has any of these problems."[10]** Similarly, it made no findings in Section 3(b) that either parent had an alcohol or substance abuse problem.[11]

The Superior Court ordered Mr. Flynn "[b]e evaluated ***for anger management*** through ACT&T[12] within 60 days entry of the Final Parenting Plan," and indicated that "Father must comply with any treatment as recommended by the evaluation."[13]

JULY 7, 2020: Mr. Flynn complied, and a report was issued on July 7, 2020. ACT&T unilaterally evaluated Mr. Flynn not

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[9] *Id*; CP2.
[10] CP1.
[11] *Id.*
[12] "Anger Control Treatment & Therapies."
[13] CP2; emphasis added.

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only for anger management as directed, but also for substance abuse and domestic violence, which was not authorized.[14]

ACT&T did ***not*** find that Mr. Flynn had an anger management problem, instead indicating that his *Buss/Durkee Hostility Inventory* "did ***not*** reveal an overall propensity for hostility nor did it in any subcategories."[15]

ACT&T also did ***not*** find that Mr. Flynn had a substance abuse problem; his *Substance Abuse Subtle Screening* (SASSI-3) revealed a low probability of a substance abuse disorder.[16]

With respect to domestic violence, ACT&T's own testing specifically reported that Mr. Flynn's *Propensity for Abuse Scale* (PAS) score was 42%, which is ***normal***.[17] ACT&T noted that scores under 48% are considered normal, and "high scores correlated with relational abuse" are over 60%.[18]

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[14] CP619-625.
[15] *Id; emphasis added.*
[16] *Id.*
[17] *Id.*
[18] *Id.*

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ACT&T then completely disregarded its own test data as well as the information provided by Mr. Flynn and the specific legal findings and conclusions of the Superior Court and instead relied ***solely*** on the report of Monique Brown to support its conclusion that Mr. Flynn required the treatment provided by ACT&T itself (even though the Superior Court had already considered the report/testimony of Monique Brown at trial and made specific findings that no domestic violence, stalking, or substance abuse existed).[19]

Mr. Waterland, the social worker who conducted the evaluation (who is not licensed to practice law and was never elected to any judicial office for King County) unilaterally determined that Mr. Flynn "clearly meets" the definition of domestic violence based on (1) his personal interpretation of the significantly outdated[20] 2006 edition of the "DV Manual for

[19] *Id.*

[20] The most recent edition at time of trial was the 2016 edition, freely available on the internet via a Google search.

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Judges," (2) his informal evaluation of incomplete evidence without reference to jurisprudential standards of any kind, and (3) his clear misinterpretation of the legal terminology contained in the Superior Court's ruling, which reflects a mistaken belief that the term "abusive use of conflict" is equivalent to a finding of domestic violence, when, in fact, the Superior Court made *precisely the opposite finding*.[21]

In his evaluation, Mr. Waterland effectively *overruled* the Superior Court's orders and *modified* them to include alternative factual findings. He determined that Mr. Flynn *had* engaged in the behaviors alleged in Monique Brown's report (***even though the Superior Court explicitly found that he had not***) and arrived at the legal conclusion that Mr. Flynn's behaviors qualified as domestic violence as *a matter of law* despite the Superior Court's

[21] *Id;* "His accountability and readiness to change is low due to his belief that he has never engaged in acts of domestic violence and yet the court found in the Findings and Conclusions about a Marriage, "... The court finds that the Father's actions did constitute abusive use of conflict and orders 192 [sic] limitations as stated in the Parenting Plan."

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ruling to the contrary. Mr. Waterland then recommended that Mr. Flynn (1) complete a level 2 DSHS certified domestic violence intervention program that is a minimum of 39 weekly group sessions (purchased through AT&T, the entity conducting the evaluation), (2) comply with the "provider's contract," (3) abstain from all mood and mind-altering drugs without a doctor's prescription, including alcohol and marijuana, for the entire length of treatment, and (4) enroll in a course entitled "DV Dads," during which he would be monitored until completion.[22]

Mr. Flynn did not submit to domestic violence treatment because he believed the Superior Court's final orders only required him to submit to anger management treatment (*"Father to undergo evaluation and any treatment <u>for anger management</u>")*[23] and because the Superior Court had explicitly found that he had <u>*not*</u> engaged in domestic violence.[24]

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[22] *Id.*
[23] CP265.
[24] CP71-89.

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NOVEMBER 20, 2020: Ms. Cartwright made a motion to "enforce the parenting plan" arguing that Mr. Flynn had failed to comply.[25] Ms. Cartwright asserted that Mr. Flynn was required to comply with *any* recommendations made by ACT&T, based on any type of evaluation (authorized or unauthorized) for any type of treatment for any reason whatsoever.[26] Ms. Cartwright requested the suspension of *all* Mr. Flynn's residential time and the entry of new parenting restrictions against him.[27] Ms. Cartwright also sought attorney's fees for "having to bring this motion to enforce the court-ordered Amended Parenting Plan," and she provided no authority for her request.[28]

DECEMBER 4, 2020: At hearing, Mr. Flynn, who was unrepresented, argued that he had only been ordered to comply with anger management recommendations because the Superior Court had already ruled that no domestic violence had

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[25] CP310-13.
[26] *Id.*
[27] *Id.*
[28] *Id.*

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occurred.[29] He also noted that two of the six pages comprising ACT&T's report were allegations copied and pasted verbatim from Monique Brown's report, which the Superior Court had evaluated at trial and found unpersuasive after Monique Brown had admitted on the stand that she had been unable to corroborate Ms. Cartwright's allegations.[30] Mr. Flynn reported that when he spoke to ACT&T, he was told that they had based their recommendation *solely* on Monique Brown's report and that they would reevaluate their recommendation if he provided them with "all of the information from the trial"; he explained that, because of the pandemic closures, he had not been able to obtain any information about how to acquire that information,[31] and he

[29] CP80-83.

[30] *Id.*

[31] Mr. Flynn indicated that he had repeatedly contacted the judge's chambers to "get clarification as to your intent whether you meant any treatment recommended by ACT&T or specific to the evaluation that they were conducting," and explained that because all of the family law facilitators were no longer available as a result of the pandemic, he had no access to the resources that had previously permitted him to represent himself in this matter and did not know what else to do. (CP83-89.)

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asked for some direction.[32] The Superior Court declined to provide any.[33] The Superior Court subsequently entered an order on (hereinafter, the "*December Order")*:[34]

a. Patrick Flynn must comply with the recommended treatment of 39 weekly group sessions of a level 2 D.S.H.S. certified domestic violence intervention program before he can resume residential time with Winter Flynn. Patrick Flynn must enroll in the treatment program within 30 days of this order and provide proof to mother's counsel.

b. The treatment program entered into by Mr. Flynn should be with ACT&T as recommended by Dr. Monique Brown in her parenting evaluation report and he shall comply with the ACT&T provider contract.

c. Mr. Flynn must abstain from all mood and mind-altering drugs without a doctor's prescription including alcohol and marijuana for the entire length of treatment.

d. Mr. Flynn must enroll and successfully complete DV Dads with Mark Adams LMHC when he successfully completes the weekly group phase of the DSHS certified domestic violence program with ACT&T. Mr. Flynn will then move to monthly monitoring sessions in his DV program, where he shall remain

[32] CP86-87.
[33] *Id.*
[34] CP7-19.

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until he successfully completes DV Dads with Mark Adams, LMHC.

e. Patrick Flynn must pay $4,105.00 in attorney's fees incurred by Alexandra Cartwright for having to bring this motion to enforce a parenting plan. Fees shall be paid to Luminosity Law PLLC within 60 days of the entry of this order or work out a payment plan w/counsel.

DECEMBER 24, 2020: Mr. Flynn appealed.

He argued that the order was a violation of his due process rights related to his liberty interest in parenting and in his good name.[35] Mr. Flynn argued that he was given no opportunity to be heard with respect to the findings/recommendations made by ACT&T that directly contradicted the trial court's findings; instead, the trial court abandoned its own findings (which were the result of appropriate due process) and adopted ACT&T's findings/recommendations without notice or a hearing or any opportunity for review.[36]

[35] *Appendix 3,* pgs. 28-31; *Appendix 4*, pgs. 24-28
[36] *Id.*

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Further, Mr. Flynn argued that he was denied due process because he was given no meaningful opportunity to appeal because nothing in the final orders as written could have put him on notice that the trial court would subsequently subject him to parenting limitations in direct violation of Washington law and contrary to its own findings. *Id.*

MAY 31, 2022: Division I of the Court of Appeals reversed the *December Order,* holding that "[t]he terms of the order enforcing the parenting plan reduced Flynn's residential time in a manner not provided for in the dissolution of marriage act, thus we reverse and remand for compliance with property statutory procedure."[37] It did not reach Mr. Flynn's other arguments, including his constitutional arguments.

JUNE 10, 2022: Ms. Cartwright subsequently filed a motion for contempt with the Superior Court,[38] alleging that Mr. Flynn

[37] *Appendix 5,* pg. 2.
[38] CP20-24; 25-102.

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was in contempt of the *Parenting Plan* and the *December* Order, which had been reversed by this Court almost a month earlier.[39]

The motion then requested "terms" by which Mr. Flynn could "purge" the finding of contempt, which included total suspension of Mr. Flynn's residential time, required supervised visitation, and an extremely complex multi-phasal modification of the *Parenting Plan's* residential schedule that would take a minimum of seven months before Mr. Flynn could "purge" the contempt even if he immediately and perfectly complied.[40]

Ms. Cartwright asked for attorney's fees, and she also requested that the Superior Court "affirm" the attorney fees previously awarded to Petitioner in the *December Order*, which had subsequently been reversed; she provided no authority for this request.[41]

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[39] CP21-22.
[40] CP22-24
[41] *Id.*

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JULY 1, 2022: Mr. Flynn responded, asserting that he had fully complied with the *Parenting Plan*.[42] He argued that because this Court had reversed the *December Order,* the only order governing the question of contempt was the *Parenting Plan*.[43] Mr. Flynn argued that his due process rights were violated for various reasons, including that ACT&T exceeded the scope of its authorization by evaluating whether Mr. Flynn was a domestic violence perpetrator when the Superior Court had already made legal findings that he was not.[44]

JULY 15, 2022: At hearing, Ms. Cartwright's attorney re-argued the trial evidence and urged the Superior Court to revise the findings and conclusions *years* after the fact, based on new legal definitions that did not exist at trial:

> So, he's engaged, as this Court noted, in all kinds of surveilling, controlling behaviors that now meets the updated definitions of domestic violence and therefore he has committed domestic violence. It just wasn't in effect at the time and doesn't mean

[42] CP136-77.
[43] CP141-43.
[44] *Id.*

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> that ACT&T didn't properly find that after assessing him..."[45]

Astonishingly, she even made the following argument:

> Just because this Court held that at the time Mr. Flynn didn't meet the statutory definition of domestic violence doesn't mean he didn't engage in domestic violence.[46]

(Contrary to Ms. Baugher's comments, however, a review of the *FFCL* reviews that the Superior Court never even *mentioned* the words "coercion" or "control" in its findings *or* in the *Parenting Plan.* It never used words like "abusive" or "controlling" to describe Mr. Flynn's behavior. The Superior Court never made findings to suggest that Mr. Flynn engaged in assaultive or coercive behaviors for the purpose of gaining and maintaining power and control over Ms. Cartwright.)

Judge Chung, however, seemingly persuaded by Ms. Baugher's encouragement, relied on his memory of the evidence at trial two years prior and found Mr. Flynn in contempt without

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[45] Verbatim Report for 07/15/2022, pg.19.
[46] *Id.* at 18.

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conducting any meaningfully discussion regarding the explicit language of the final orders, the inconsistency of ACT&T's report, or Mr. Flynn's constitutional due process rights.[47]

The *Contempt Order* found Mr. Flynn in contempt of the *Parenting Plan* and in contempt of the *December Order,* which had already been reversed and no longer existed.[48] The Superior Court wholly suspended Mr. Flynn's residential time for at least a month, with no purge terms for that period of time.[49] The Superior Court extensively modified the *Parenting Plan* to add supervision requirements not included in the *Parenting Plan* and to set out a modified residential schedule for a minimum of seven months, regardless of compliance.[50]

The Court also awarded Ms. Cartwright fees. [51] Without any analysis/explanation specifically justifying the "affirmation" of

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[47] *Id.* at 19-20.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*

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a reversed fee award, the Superior Court indicated that it reviewed the "attorney's fee request" generally and "finds them reasonable and appropriate under the Lodestar method," and it "affirmed" the reversed award.[52]

AUGUST 2, 2022: Mr. Flynn appealed.[53]

Mr. Flynn argued that the Superior Court erred when it found him in contempt of an order that had previously been reversed by the Court of Appeals.[54]

He also argued that the Superior Court erred when it found him in violation of the parenting plan for multiple reasons, including but not limited to (1) Mr. Flynn was in compliance with the plain language of the order (which much be sufficiently clear to be understood and construed in his favor),[55] and (2) the Superior Court violated Washington law when it interpreted the parenting plan to enable an automatic modification to include

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[52] *Id.*
[53] CP240-246.
[54] *Appendix 6,* pgs. 22-24.
[55] *Appendix 6,* pgs. 25-43.

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previously undisclosed limitations on parenting conduct absent the explicit, specific findings required by RCW 26.09.191.[56]

Mr. Flynn also re-asserted all the same constitutional objections he had previously raised (none of which had ever been addressed by any court), as well as additional objections to the entry of punitive sanctions without due process.[57]

Finally, he objected to the Superior Court's order "affirming" an award of fees that had already been reversed by the Court of Appeals on the basis that Superior Court's cannot overrule Courts of Appeal.[58]

MAY 1, 2023: Division I of the Court of Appeals entered its decision, reversing the Superior Court with respect to two of the sanctions entered; it affirmed the remainder of the decision as to the sanctions.[59]

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[56] *Appendix 6,* pgs. 36-40, 52-59.
[57] *Appendix 6,* pgs. 43-48, 59-68.
[58] *Appendix 6,* pgs. 68-74.
[59] *Appendix 1.*

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Mr. Flynn's constitutional arguments, which have **never** been substantively addressed by any court at any point in this proceeding, were again dismissed by Division I:

> Fatal to Flynn's due process arguments is the fact that each argument is, at bottom, a challenge to the parenting plan's directive that Flynn comply with "any" treatment recommended by the anger management assessment. Flynn claims that the parenting plan deprived him of an opportunity for judicial review of ACT&T's recommendations, but he is incorrect. The parenting plan includes a dispute resolution provision that provides for mediation – then court review – of "disagreements about the parenting plan." Also, as Cartwright points out, Flynn cannot challenge the merits of the underlying order in an appeal from a contempt order.[60]

MAY 22, 2023: Mr. Flynn moved for reconsideration. He objected to Division I's attempt to circumvent punitive sanctions by requiring "completion" of requirements rather than "compliance" with the order.[61] He objected to Division I's failure to meaningfully address any of his constitutional

[60] *Appendix 1,* pgs. 10-11.
[61] *Appendix 8,* pgs. 2-7.

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arguments.[62] He objected to Division I's decision to uphold the fees awarded to Ms. Cartwright pursuant to the order that had previously been reversed.[63]

DISRUPTION OF RELATIONSHIP: Mr. Flynn has now unlawfully been denied residential time for years.

V. ARGUMENT

1. The *Opinion* interprets the final orders in a manner that (1) ignores the plain language used by the Superior Court and violates numerous canons of construction and rules of grammar, and (2) construes the Parenting Plan in a manner that violates Washington law and due process.

The *Opinion* conflicts with decisions of this Court and published decisions of the Court of Appeals pursuant to RAP 13.4(b)(1) and (2), and it involves a significant question of law under the Constitution or of the United States per RAP 13.4(b)(3).

In interpreting a court's orders, a reviewing court applies the general rules of construction that apply to statutes, contracts, and

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[62] *Appendix 8,* 7-10.
[63] *Appendix 8,* 10-12.

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other writings. *In re Smith*, 158 Wn.App 248, 256, 241 P.3d 449 (2010). The meaning of language in orders is construed by reading orders in their entirety and considering all language relating to the same subject matter. *State v. Veliz*, 176 Wn.2d 849, 298 P.3d 75, 77 (2013). Whenever possible, orders are to be construed so that no clause, sentence, or word shall be superfluous, void, or insignificant. *Ruff v. Worthley*, 198 Wn.App. 419, 425, 393 P.3d 859 (2017).

In this instance, there are three related orders, entered simultaneously, that determine Mr. Flynn's obligations; they are the *FFCL,* the *Decree*, and the *Parenting Plan.* Because all three orders are interdependent, entered simultaneously, and effective collectively, it is important to consider "the entirety of all language relating to the same subject matter." *Veliz*, 298 P.3d at 75, quoting *State v. Morales*, 173 Wn.2d 560, 567 n. 3, 269 P.3d 263 (2012). A court discerns plain meaning from the context where a provision is found, related provisions, and the orders as

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a whole. See, e.g., *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

The Opinion suggests that the language in the *FFCL* is irrelevant because the contempt alleged is confined to the *Parenting Plan,* but the same obligation is described in the *FFCL,* which provides the findings that justify the limitations in the *Parenting Plan*, without which the Superior Court's limitations would be unlawful; therefore, the basis/context for interpreting the *Parenting Plan* necessarily requires reference to the *FFCL.* The Superior Court entered *extensive* findings regarding limitations in this case and concluded: "the Court orders the Father to undergo ***evaluation and any treatment for anger management***."[64] The Superior Court further confirmed that the purpose of treatment for anger management was for Mr. Flynn to "address his inner anger."[65]

[64] CP264-72.
[65] *Id.*

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The *FFCL* and the *Parenting Plan* also explicitly state that neither parent has problems regarding domestic violence nor any issue with substance abuse. As a result, the obligations laid out in Section 4(b) of the *Parenting Plan* must be interpreted in light of the language contained in the *FFCL* and the findings/restrictions of the *Parenting Plan.*

Further, when enforcing orders, courts must construe language so as to render it in compliance with the constitution and governing law. See, e.g., *In re MB*, 101 Wn.App. 425, 3 P.3d 780, 792 (2000).[66] In this instance, Division I interpreted the final orders to violate Washington law and the constitutional liberty rights of parents that statutes are designed to protect.

A parent has a fundamental civil right as to custody and control of their children, which cannot be infringed upon without complete due process safeguards. *Halsted v. Sallee*, 31 Wn.App. 193, 639 P.2d 877 (1982).[67]

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[66] RAP 13.4(b)(2).
[67] *Id.*

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This Court has ruled that a trial court is barred from limiting any provision of a parenting plan unless the evidence shows that a parent's conduct may otherwise have an adverse affect on the child's best interests. *In re Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014).[68] Limitations include requiring a parent to obtain an evaluation, get treatment, take a parenting class, or refrain from certain behaviors (such as ingesting legal substances, such as alcohol). *Chandola*, 180 Wn.2d at 642, 646.

If a court intends to enter limitations/restrictions based on Subsection 3, they must be reasonable calculated to address the identified harm in the findings:

> "[T]he court may not impose limitations or restrictions in a parenting plan in the absence of ***express findings*** under RCW 26.09.191. We also conclude that any limitations or restrictions imposed ***must be reasonably calculated to address the identified harm***."

In re Marriage of Katare [I], 125 Wn.App. 813, 826, 105 P.3d 44 (2004).[69]

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[68] RAP 13.4(b)(1).
[69] RAP 13.4(b)(2).

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Here, the trial court expressly and affirmatively found that no domestic violence occurred; therefore, absent an identified harm related to domestic violence, the trial court cannot impose the limitation of requiring domestic violence perpetrator's treatment.

Similarly, the trial court made no finding that Mr. Flynn had any issue with substance abuse; therefore, absent an identified harm related to substance abuse, the trial court cannot impose a limitation that limits Mr. Flynn's ability to engage in any lawful behavior related to legal substances.

This Court should accept review and address the important legal issues raised under RAP 13.4(b)(1), (2), and (3).

2. The *Opinion* violated Mr. Flynn's constitutional rights when it refused to even consider Mr. Flynn's procedural due process objections.

"Parental rights have been categorized as a 'liberty' protected by the due process clause of the Fourteenth Amendment." *In re Ebbighausen*, 42 Wn.App. 99, 102-03, 708 P.2d 1220 (1985).[70]

[70] RAP 13.4(b)(1) and (3).

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"Procedural elements of this constitutional guarantee are notice and the opportunity to be heard and defend before a competent tribunal in an orderly proceeding adapted to the nature of the case." *Id.*

"The Due Process Clause also forbids arbitrary deprivations of liberty." Goss v. Lopez, 419 U.S. 565, 574 (1975).[71] "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," liberty interests are implicated. Board of Regents v. Roth, 408 U.S. 564, 573 (1972). Mr. Flynn's liberty interest is implicated by the trial court's characterization of him as a domestic violence perpetrator despite its explicit findings to the contrary.[72]

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[71] RAP 13.4(b)(3).

[72] The paperwork that is required for Mr. Flynn to enroll in the programs "recommended" by ACT&T requires him to admit to engaging in acts of violence, which is inappropriate given that there are *no* findings of domestic violence by Mr. Flynn. For the trial court to require him to admit to behavior that it explicitly found he did not commit or face never seeing his child again is both cruel and unconstitutional.

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"Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).[73]

a. Mr. Flynn was entitled to notice before he was deprived of his liberty interests.

The Due Process Clause requires "at a minimum," "that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Goss,* 419 U.S. at 579. Mr. Flynn's due process right to receive notice was violated in two ways.

First, Mr. Flynn was not given notice in the Superior Court's final orders that he would subsequently be subject to a re-adjudication of the Superior Court's findings without any procedural protections at the hands of ACT&T or that ACT&T would be empowered to determine that he *had* engaged in domestic violence and enter limitations despite the Superior Court's explicit findings to the contrary. Had the final orders

[73] RAP 13.4(b)(3).

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indicated that information, Mr. Flynn would have undoubtedly exercised his right to appeal.

Second, Mr. Flynn was not given any notice or opportunity for hearing regarding the Superior Court's seemingly automatic adoption of ACT&T's findings. There was no judicial review. There was no hearing. There was no opportunity for Mr. Flynn to object or otherwise be heard regarding the serious flaws and internal inconsistencies of ACT&T's evaluation. Ms. Flynn has been desperately trying to make objections and address the substantive problems associated with violation of his due process rights in multiple hearings, but every time, the Superior Court simply ignores the constitutional issues at hand.

b. <u>Mr. Flynn was entitled to confront and cross-examine witnesses.</u>

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* This is especially important in circumstances where the evidence consists of "the

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testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).[74] These protections are formalized in the requirements of confrontation and cross-examination. *Id.*

Mr. Flynn was given no opportunity to confront or cross-examine ACT&T's evaluator as to how he arrived at his conclusions or to confront or cross-examine the information provided by witnesses to ACT&T; in fact, he was not even permitted to have complete knowledge of the information provided to ACT&T. Given that one of the witnesses is his ex-wife in a deeply acrimonious dissolution proceeding, it is not unlikely that some of what might have been said in secret was motivated by malice or vindictiveness.

c. Mr. Flynn was entitled to a meaningful opportunity to be heard before a proper authority.

[74] RAP 13.4(b)(3).

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"Procedural elements of this constitutional guarantee are notice and the opportunity to be heard and defend before a competent tribunal in an orderly proceeding adapted to the nature of the case." *Id.* ***"[A]ny modification, no matter how slight, requires an independent inquiry by the court and cannot be delegated****."* In re Smith-Bartlett, 95 Wn.App. 633, 640, 976 P.2d 173 (1999); emphasis added.[75] Judges *may* delegate the interpretation of their orders to third parties as long as the parties retain the "right of review" (i.e., a meaningful opportunity to be heard) with respect to any third-party decision to which they object. *Id;* see also, Kirschenbaum v. Kirschenbaum, 84 Wn.App. 798, 929 P.2d 1204 (1997).[76] Elected judges are not permitted to delegate their adjudicative powers. See, e.g., In re Lilly, 75 Wn.App. 715, 716, 880 P.2d 40 (1994)(mentioned without questioning superior court's ruling that a parenting plan term that permitted changes to visitation only with concurrence

[75] RAP 13.4(b)(2).
[76] *Id.*

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of therapists was usurping the power of the court to determine the parenting plan and concluding that therapist could recommend changes but the ultimate decision-making power rested with the court). The right of review is especially important here because ACT&T's "recommendations" directly contradict the findings of the Superior Court. [77]

Despite his repeated attempts, Mr. Flynn receives no meaningful consideration from Division I, either. Alarmingly, Division I sidesteps the issue by saying:

> Flynn claims that the parenting plan deprived him of an opportunity for judicial review of ACT&T's recommendations, but he is incorrect: The parenting plan includes a dispute resolution provision that provides for mediation – then court review – of "disagreements about the parenting plan."[78]

[77] The idea that the "expert" social worker is entitled to assert complete decision-making power over the parties is particularly troubling, given that in a trial context, expert witnesses are not permitted to even *opine* with respect to determinations of ultimate fact and credibility, because these subjects are the province of the judge/jury pursuant to ER 704.
[78] *Appendix 1,* pg. 10.

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This is a *startling* misinterpretation of what the dispute resolution provision provides. This language provides a venue for resolving parental decision-making disputes *between the parties*; it absolutely does not provide any form of due process-related judicial review related to the substantive plan requirements.

The Opinion also avoids conducting any analysis by claiming that "Flynn cannot challenge the merits of the underlying order in an appeal from a contempt order,"[79] but of course, as Mr. Flynn has repeatedly explained, he makes no attempt to challenge the merits of the underlying order (as his assignments of error confirm); rather, he challenged the Superior Court's unlawful interpretation of the underlying order, which was not made until long after the underlying order was entered and the appeal period passed.

[79] *Appendix 1, pg. 11.*

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The *Opinion* also violated Mr. Flynn's constitutional rights when it upheld punitive sanctions without due process, which it did by conflating "completion" and "compliance" of ACT&T's recommendations – this argument is described in great detail in Appendix 8.

FEES: The baseless fee award to Ms. Cartwright based on a non-existent order should be reversed, Mr. Flynn should be awarded fees pursuant to RAP 18.1(b) and based on Ms. Cartwright's bad faith litigation and constant violation of procedural rules/intransigence.

CONCLUSION: The implications of this case are tragic and terrifying for parents and children as well as for anyone who relies on due process protection for matters most precious. This Court should accept review and address the important legal issues raised under RAP 13.4(b)(1), (2), and (3).

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The undersigned certifies that the foregoing brief contains 5,000 words not including the appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and this certification of compliance.

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Appendix 1
Opinion; Filed May 1, 2023

FILED
5/1/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the marriage of: ALEXANDRA LEIGH CARTWRIGHT, Respondent, And PATRICK RYAN FLYNN, Appellant.	No. 84343-5-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — Patrick Flynn appeals from an order holding him in contempt of a parenting plan. He argues that the trial court erred by finding him in contempt, impermissibly modifying the parenting plan in the absence of a modification petition, and awarding his former spouse, Alexandra Cartwright, fees incurred in obtaining an enforcement order that this court had reversed.

We hold that by adding a supervision requirement to Flynn's time with the parties' child and conditioning increases in his time on the supervisor's approval, the trial court exceeded its contempt authority and impermissibly modified the parenting plan. Therefore, we reverse these aspects of the contempt hearing order and remand to the trial court to strike them. Otherwise, we affirm.

FACTS

The underlying facts about the parties' dispute are set forth in our opinion in In re Marriage of Cartwright, No. 82231-4-I, slip op. at 2-6 (Wash. Ct. App. May

31, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/822314.pdf. We briefly summarize them again here.

In 2020, the trial court dissolved Flynn and Cartwright's marriage and entered findings and conclusions after a dissolution trial. In its findings, the court described the trial evidence of what it characterized as "troubling" actions by Flynn. But because the evidence "d[id] not show that [Cartwright] was fearful of imminent physical harm," the court could not find that Flynn's actions "rose to the level of domestic violence as define[d] by statute and caselaw." The court did find, however, that Flynn engaged in an abusive use of conflict, citing Flynn's "constant efforts to undermine [Cartwright] as an unfit parent, calling CPS[1] without justification, efforts to groom and enlist [the parties' child, W.F.,] in [Flynn's] favor over [Cartwright]," and Flynn's "overall behavior." The court thus entered a parenting plan that directed Flynn to (1) be evaluated for anger management through Anger Control Treatment & Therapies (ACT&T), and (2) "comply with any treatment as recommended by the evaluation." Under the parenting plan, W.F. would reside with Flynn every other weekend and have a weekly Wednesday evening visit with him; otherwise W.F. would reside with Cartwright.

Flynn underwent an anger management assessment with ACT&T, which issued a report in July 2020. According to the report, "Flynn's abusive use of conflict is indicative of a pattern of coercive control that goes beyond what an anger management intervention would be effective [sic]." The report stated that

[1] Child Protective Services.

Flynn "clearly meets the Behavioral Definition of domestic violence used in this assessment." ACT&T recommended that Flynn:

> (1) "complete a level 2 D.S.H.S.[2] certified domestic violence intervention program that is a minimum of 39 weekly group sessions";
>
> (2) "enroll and successfully complete DV Dads with Mark Adams LMHC when he successfully completes the weekly group phase of a DSHS certified domestic violence program," then "move to monthly monitoring sessions in his DV program where he shall remain until he successfully completes DV Dads";
>
> (3) "comply with provider's contract"; and
>
> (4) "abstain from all mood and mind-altering drugs without a doctor's prescription including alcohol and marijuana for the entire length of treatment."

(Boldface omitted.)

Flynn did not follow through with ACT&T's treatment recommendations, and Cartwright moved to enforce the parenting plan. The trial court granted Cartwright's motion and, in December 2020, entered an order (December 2020 Order) that directed Flynn to comply therewith. The court suspended Flynn's residential time with W.F. until he "compl[ied] with the recommended treatment of 39 weekly group sessions of a level 2 D.S.H.S. certified domestic violence intervention program." The court also awarded Cartwright $4,105.00 in fees incurred to bring her enforcement motion.

Flynn appealed, and we reversed the December 2020 Order. See Cartwright, slip op. at 2. In doing so, we addressed Flynn's argument that the trial court erred in "finding that he failed to comply with the evaluation and treatment

[2] Department of Social and Health Services.

requirement as set out in the parenting plan because the recommendation from ACT&T includes domestic violence and other forms of treatment." Id., at 11 n.6. Specifically, Flynn had "aver[red that] this exceeds the scope of the court's original requirement" because the parenting plan did not contemplate domestic violence treatment. Id. We disagreed, explaining that the parenting plan's language requiring compliance with " 'any treatment as recommended by the evaluation' is clear." Id.

Nevertheless, we held that the trial court erred in suspending Flynn's residential time, explaining that there are three ways that a court can change the residential provisions in a parenting plan. Id. at 7-9. First, "a court may change an existing residential schedule contained in a parenting plan . . . by including self-executing language in th[e] original [parenting plan]." Id. at 7. Second, a court may change a parent's residential time pursuant to a petition to modify under RCW 26.09.260 and .270, if there is adequate cause to alter the existing plan. Id. at 8-9. And finally, "a court may adjust a parent's residential time in a parenting plan based on contempt proceedings." Id. at 9. We held that because the parenting plan did not contain a self-executing provision reducing Flynn's residential time in the event of noncompliance, "[t]he trial court should have upheld the procedural requirements for either contempt proceedings or a modification of the parenting plan" before suspending Flynn's time. Id. at 14. And because Cartwright did not petition for modification and the trial court did not follow the statutory procedure for contempt proceedings, the trial court erred by suspending Flynn's residential time. Id.

After we reversed the December 2020 Order, Cartwright sought an order holding Flynn in contempt of the parenting plan and requested that Flynn's time with W.F. remain suspended until he complied with ACT&T's treatment recommendations. Cartwright did not petition to modify the parenting plan.

In her contempt motion, Cartwright pointed out that Flynn had not seen W.F. since January 2021. She asserted that a resumption of residential time would thus "be a major adjustment" for W.F., and that it was "important to facilitate their reunification in a way that feels safe and secure" for W.F. Cartwright stated, "I believe professionally-supervised visitation and gradually increased visitation, in conjunction with [Flynn's] compliance with the treatment recommendations, will assist in ensuring [W.F.] is emotionally and practically supported through this transition." Cartwright asked the court to order a phased-in residential schedule under which Flynn's time with W.F. would remain suspended until he completed four weekly group treatment sessions, and would thereafter be limited to professionally supervised visitation, which would increase incrementally and become unsupervised only if Flynn remained in compliance with treatment recommendations and "provided the professional supervisor deems it appropriate." Finally, Cartwright requested that the trial court "affirm" the attorney fee award in the December 2020 Order and asked for an additional award of fees for bringing her contempt motion.

Flynn opposed Cartwright's motion, focusing his arguments on the propriety of the treatment ACT&T recommended. He confirmed he did not complete the treatment.

On July 15, 2022, the trial court held a hearing on Cartwright's motion. The court found Flynn "in contempt under RCW 26.09.160 as well as RCW 7.21.010, the civil contempt statute," stating, "I want everyone to be perfectly clear that I am indeed finding Mr. Flynn in contempt for failing to comply with this Court's orders which was very clear that he must comply with any treatment as recommended by the evaluation." It determined that the remedies requested by Cartwright were reasonable "remedial measures," and it entered a contempt hearing order adopting the phased-in residential schedule Cartwright had proposed. The trial court also "affirm[ed] the attorney fee award of $4,105.00 . . . included in the [December 2020 Order]" in addition to awarding Cartwright fees for bringing her contempt motion.

Flynn appeals.

ANALYSIS

I. Contempt Finding

Flynn argues that the trial court erred by finding him in contempt. We disagree.

We review a trial court's decision in a contempt proceeding for an abuse of discretion. In re Marriage of DeVogel, 22 Wn. App. 2d 39, 53, 509 P.3d 832 (2022). We review a trial court's factual findings for substantial evidence. Id.; In re Marriage of Lesinski, 21 Wn. App. 2d 501, 514-15, 506 P.3d 1277 (2022). " 'Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.' " Lesinski, 21 Wn. App. 2d at 514 (internal quotation marks omitted)

(quoting In re Marriage of Fahey, 164 Wn. App. 42, 55, 262 P.3d 128 (2011)). We strictly construe the parenting plan to determine whether the alleged conduct constitutes " 'a plain violation' " of the plan. In re Marriage of Eklund, 143 Wn. App. 207, 213, 177 P.3d 189 (2008) (quoting In re Marriage of Humphreys, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995)).

Here, the trial court found Flynn in contempt under both RCW 26.09.160 and RCW 7.21.010. Under the former statute, "[a]n attempt by a parent . . . to refuse to perform the duties provided in the parenting plan . . . shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court." RCW 26.09.160(1); see also In re Marriage of Myers, 123 Wn. App. 889, 893, 99 P.3d 398 (2004) ("A parent who refuses to perform the duties imposed by a parenting plan is per se acting in bad faith."). Under the general contempt statute, contempt includes, as relevant here, "intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b).

Substantial evidence supports the trial court's finding that Flynn was in contempt under both statutes. The parenting plan—an order of the court—directed Flynn to comply with "any treatment" recommended by the anger management evaluation. On appeal, Flynn persists in arguing that because the trial court did not find that he engaged in domestic violence when it entered the parenting plan, the parenting plan "must be interpreted to mean that Mr. Flynn is obligated to undergo an *anger management* evaluation (and no other kind), and that he is obligated to comply with treatment for *anger management* (and nothing

else).” But as we explained in the previous appeal, the parenting plan’s language is clear: Flynn was required to undergo an anger management evaluation and comply with “*any* treatment” recommended thereby. See Cartwright, slip op. at 11 n.6 (emphasis added). We adhere to our prior interpretation of the parenting plan as the law of the case and need not revisit the issue. See Cronin v. Cent. Valley Sch. Dist., 12 Wn. App. 2d 99, 111, 456 P.3d 843 (2020) (under law of the case doctrine, questions determined on appeal generally will not again be considered in a subsequent appeal absent a substantial change in the evidence); cf. RAP 2.5(c)(2) (giving this court discretion to “review the propriety of an earlier decision . . . in the same case”).

Flynn also reasserts on appeal that he “complied with his obligations under the Parenting Plan because he underwent the anger management evaluation, and ACT&T concluded that he did not have an anger management issue [and] made no recommendations for anger management treatment.” (Emphasis omitted.) But in his declaration submitted in response to the contempt motion, Flynn himself confirmed that ACT&T’s “treatment plan included entering and . . . complet[ing] a Level 2 D.S.H.S. Certified Domestic Violence intervention program that included a minimum of 39 weekly group sessions” and that he did not complete that treatment. Flynn’s own declaration constitutes substantial evidence supporting the trial court’s contempt finding.

In support of reversal, Flynn argues that the trial court’s contempt finding either failed to explicitly identify the part of the parenting plan that was violated or relied on a violation of the December 2020 Order. He points out that the

contempt hearing order states that he failed to comply not only with the parenting plan, but also with the December 2020 Order, which had since been reversed. But it is plain from the record that the trial court's contempt finding was based on Flynn's failure to comply with the parenting plan's directive that he complete any treatment recommended by the ACT&T evaluation. This directive was clearly spelled out in the parenting plan, and the December 2020 Order merely reiterated it. Therefore, while the references to the December 2020 Order were erroneous, substantial evidence supports the trial court's contempt finding.

Flynn next argues that the trial court erred by disregarding evidence that to enroll for the recommended treatment, he was required to "confess in writing to having engaged in domestic violence," which justified his refusal to participate in treatment. In support of this assertion, he cites to a declaration filed in support of a March 2021 motion to vacate the December 2020 Order, to which he attached the enrollment paperwork.

But not only is it unclear where in the paperwork Flynn was required to "confess in writing" to engaging in domestic violence, Flynn's March 2021 declaration and the paperwork attached thereto were not before the trial court in connection with Cartwright's contempt motion. And even if they were, this court will not, on a substantial evidence review, second guess the trial court's decision as to what weight to give that evidence. See Burnside v. Simpson Paper Co., 66 Wn. App. 510, 526, 832 P.2d 537 (1992) ("Where there is conflicting evidence, it is not the role of the appellate court to weigh and evaluate the evidence.").

Finally, Flynn asserts that to the extent the parenting plan requires him to

participate in domestic violence-related treatment based on ACT&T's evaluation, it violates Washington law and deprives him of due process for various reasons. He argues that the parenting plan could not direct him to undergo domestic violence treatment absent a finding of domestic violence and that it improperly authorized ACT&T to make recommendations related to substance use absent a finding that Flynn had a substance abuse problem. Further, he claims this requirement deprived him of notice, an opportunity to be heard, and an ability to confront or cross-examine with regard to ACT&T's recommendations and that it improperly delegated the court's adjudicative powers to ACT&T.

Fatal to Flynn's due process arguments is the fact that each argument is, at bottom, a challenge to the parenting plan's directive that Flynn comply with "any" treatment recommended by the anger management assessment. Flynn claims that the parenting plan deprived him of an opportunity for judicial review of ACT&T's recommendations, but he is incorrect: The parenting plan includes a dispute resolution provision that provides for mediation—then court review—of "disagreements about this parenting plan." Also, as Cartwright points out,[3] Flynn cannot challenge the merits of the underlying order in an appeal from a contempt

[3] Cartwright asserts that "[a]ll of [Flynn]'s substantive arguments were either waived, presented and rejected, or could have been presented, before." But she provides no further specificity or analysis except with regard to Flynn's argument that domestic violence treatment was beyond the scope of the parenting plan. Accordingly, we decline to deem "all" of Flynn's arguments waived or previously rejected.

Cartwright also states that she has decided "not to fully brief the multitude of issues raised" in Flynn's opening brief, and she directs this court to her briefing in Flynn's prior appeal. But under RAP 10.3(b), a respondent's brief should conform to the requirements for an appellant's brief "and answer the brief of appellant." We do not consider Cartwright's brief from the prior appeal. Cf. Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (deeming abandoned the issues a party attempted "to incorporate . . . by reference to trial briefs or otherwise").

order. Griffin v. Draper, 32 Wn. App. 611, 614, 649 P.2d 123 (1982); see also City of Seattle v. May, 171 Wn.2d 847, 852, 256 P.3d 1161 (2011) ("The collateral bar rule prohibits a party from challenging the validity of a court order in a proceeding for violation of that order.").[4]

Substantial evidence supports the trial court's finding that Flynn failed to obey the parenting plan. Thus, we conclude the trial court did not err in ruling that Flynn was in contempt.

II. Contempt Sanctions

Next, Flynn argues that the trial court erred by imposing sanctions that exceeded its authority in this contempt proceeding and constituted impermissible modifications to the parenting plan. Specifically, Flynn takes issue with three aspects of the trial court's order: (1) the initial suspension and subsequent phasing-in of Flynn's time with W.F., (2) the addition of a supervision requirement, and (3) the directive that Flynn comply with ACT&T's treatment recommendations. We hold that the suspension and phasing-in of Flynn's time were appropriate remedial sanctions under the circumstances and that the trial court did not err to the extent it directed Flynn to comply with ACT&T's recommendations. However, we agree with Flynn that it was error to add supervisory limitations on his time with W.F. that were absent from the original parenting plan.

[4] Although an exception to this rule exists for orders that are void, May, 171 Wn.2d at 852, an order is void only if the court that entered it lacked personal jurisdiction or jurisdiction to adjudicate the type of controversy at issue. Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 541-42, 886 P.2d 189 (1994). And Flynn does not argue—much less establish—that the trial court was without jurisdiction when it entered the parenting plan.

A. Standard of Review and Legal Standards

"Punishment for contempt of court is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion." In re Marriage of Mathews, 70 Wn. App. 116, 126, 853 P.2d 462 (1993). "Discretion is abused where it is exercised on untenable grounds or for untenable reasons." Newlon v. Alexander, 167 Wn. App. 195, 199, 272 P.3d 903 (2012). "A court necessarily abuses its discretion if its decision is based on an erroneous view of the law." In re Marriage of Scanlon, 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001). "A court's authority to impose sanctions for contempt is a question of law, which we review de novo." In re Dependency of A.K., 162 Wn.2d 632, 644, 174 P.3d 11 (2007).

Here, as discussed, the trial court found Flynn in contempt under both RCW 26.09.160, the contempt statute for parenting plan violations, as well as RCW 7.21.010, the general contempt statute. While RCW 26.09.160(2)(b) identifies specific sanctions for bad faith lack of compliance with "an order establishing residential provisions for a child," the sanctions Flynn challenges are not among those specified therein. Accordingly, we turn to the general contempt statute for the relevant standard for sanctions. Under that statute,

> If the court finds that [a] person has failed or refused to perform an act that is yet within the person's power to perform, the court may . . . impose one or more of the following remedial sanctions:
> (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1)(b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.
> (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
> (c) An order designed to ensure compliance with a prior order of the court.

> (d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection *if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.*

RCW 7.21.030(2) (emphasis added).[5]

For a sanction to be remedial rather than punitive, it must contain a purge clause that is "designed to serve remedial aims"—i.e., "it must be directed at obtaining future compliance." In re Interests of M.B., 101 Wn. App. 425, 450, 3 P.3d 780 (2000). The purge condition must also "be within the power of the [contemnor] to fulfill" and "reasonably related to the cause or nature of the . . . contempt." Id.

Here, as the trial court did not make a finding under RCW 7.21.030(2)(d) that the sanctions described in RCW 7.21.030(2)(a) through (c) "would be ineffectual to terminate a continuing contempt of court," RCW 7.21.030(2)(c) provides the authority for the sanction. Thus, the court's authority was limited to "[a]n order designed to ensure compliance with a prior order of the court." RCW 7.21.030(2)(c). Imposing a sanction beyond this authorization would be an abuse of discretion.

It is also an abuse of discretion, in the context of a family law proceeding, if the trial court imposes a contempt sanction that rises to the level of a parenting plan modification without following the statutory procedures for modification. See In re Custody of Halls, 126 Wn. App. 599, 608, 109 P.3d 15 (2005) (trial court

[5] The court may also impose punitive sanctions under the general contempt statute, but only pursuant to the procedures set forth in RCW 7.21.040, which requires commencement of an action "by a complaint or information filed by the prosecuting attorney . . . charging a person with contempt of court and reciting the punitive sanction sought to be imposed." RCW 7.21.040(2)(a). No such action was commenced here, so this section is inapplicable.

lacked authority to modify parenting plan where the only motion before it was a contempt motion that gave no notice that a modification was sought, and court had not made findings to support modification). A modification "occurs when a party's rights are either extended beyond or reduced from those originally intended in the decree." In re Marriage of Christel, 101 Wn. App. 13, 22, 1 P.3d 600 (2000). As we explained in Flynn's prior appeal, the " '[t]he procedure for modification is very specific and requires consideration of certain criteria such that the court's discretion is limited.' " Cartwright, slip op. at 9 (citing RCW 26.09.260-.270). Among other things, a court generally cannot modify a parenting plan

> unless it finds, upon the basis of facts that have arisen since the prior . . . plan or that were unknown to the court at the time of the prior . . . plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

RCW 26.09.260(1). Compliance with the statutory procedures for modification is mandatory. In re Marriage of Shryock, 76 Wn. App. 848, 852, 888 P.2d 750 (1995). That said, a temporary suspension of a parent's residential time, lasting only so long as the parent does not follow a parenting plan's conditions, is not a modification. See Kirshenbaum v. Kirshenbaum, 84 Wn. App. 798, 807, 929 P.2d 1204 (1997) (parenting plan authorized arbitrator to suspend visitation rights without court order).

We address Flynn's challenges to the contempt hearing order with the foregoing principles in mind.

B. Changes to Residential Time

Flynn points out that under the trial court's order, his time with W.F. will remain suspended until he has completed a minimum of four weekly group treatment sessions, and then will gradually increase over time. He argues that because these changes to his residential time will remain in effect even after he begins complying with the recommended treatment, they go beyond what the trial court was authorized to impose as a remedial sanction. We disagree.

The changes to Flynn's time were designed to be temporary and were expressly intended as remedial measures to coerce Flynn's full compliance with the parenting plan. ACT&T recommended—and thus the parenting plan required—that Flynn complete a DSHS-certified domestic violence intervention program that was "a minimum of 39 weekly group sessions," followed by the "DV Dads" program. Given that Flynn's full compliance with the parenting plan's treatment requirement will take time—the better part of a year, at a minimum—suspending Flynn's time with W.F. until he has completed four sessions and conditioning additional increases in his time on continued compliance with the months-long treatment are sanctions designed to coerce compliance. Cf. M.B., 101 Wn. App. at 440 (coercive sanction is justified "on the theory that it will induce a specific act that the court has the right to coerce"). Furthermore, the contempt order provides that Flynn's contempt "will be purged" upon "successful completion of all treatment recommended by ACT&T, and compliance with the program requirements." That is, Flynn has the power to purge his contempt by

fully complying with treatment.[6]

The suspension of his residential time also did not constitute an impermissible modification to the parenting plan, as Flynn claims. Flynn relies on Wulfsberg v. MacDonald, 42 Wn. App. 627, 713 P.2d 132 (1986), for the proposition that "withholding of visitation because a parent is in contempt for failure to obey provisions of the dissolution decree is an abuse of discretion." But in Wulfsberg, the court suspended the contemnor parent's visitation rights indefinitely. Id. at 631. Here, by contrast, the suspension was temporary. Furthermore, even the Wulfsberg court recognized that withholding visitation as a contempt sanction could be a proper exercise of discretion based on the welfare of the child, but there, the trial court "gave no reasons" for indefinitely suspending the contemnor's visitation rights. Id. at 632; cf. Lunsford v. Waldrip, 6 Wn. App. 426, 429, 493 P.2d 789 (1972) (declining to decide that contemnor parent "has such an inherent right to visitation that the trial court cannot consider his conduct in defining or withholding visitation privileges" in sanctioning for contempt and observing that "[t]he paramount concern in such matters is the welfare of the child, and the conduct of the father as it affects the child's welfare is a proper consideration for the trial court"). Here, by contrast, the trial court expressly indicated it was concerned that Flynn's "obstinance and refusal to confront reality

[6] Flynn's reliance on In re Marriage of Didier, 134 Wn. App. 490, 140 P.3d 607 (2006), and In re Marriage of Farr, 87 Wn. App. 177, 940 P.2d 679 (1997), is also misplaced. Didier and Farr each concerned the adequacy of a purge condition for a parent who was sanctioned with incarceration. See Didier, 134 Wn. App. at 505 (incarceration was punitive and not coercive where parent could not immediately obtain release "solely by paying the money owed"); Farr, 87 Wn. App. at 187 (incarceration was punitive and not coercive where parent could not avoid jailtime "by agreeing to comply with the parenting plan"). Here, no jailtime was ordered, and for the reasons already discussed, the sanction is coercive, not punitive.

[was] not really in [W.F.]'s best interest." The contempt sanctions of suspending and phasing-in Flynn's time were not impermissible modifications to the parenting plan. Cf. Christel, 101 Wn. App. at 23 (change to dispute resolution provisions of a parenting plan amounted to a modification where "the language is clearly intended to apply into the future" and had "all of the characteristics of a permanent change rather than a temporary order").

C. Supervision Requirement

Flynn next argues that the trial court exceeded its contempt authority and impermissibly modified the parenting plan by adding a supervision requirement to his time with W.F. and conditioning increases in that time on the supervisor's approval. We agree.

Although the trial court apparently believed that the supervision requirement was an appropriate condition for Flynn to purge his contempt, it was not. As discussed, a purge condition must, among other things, "be directed at obtaining future compliance" and "within the power of the [contemnor] to fulfill." M.B., 101 Wn. App. at 450. But the trial court agreed to impose the supervision requirement not to coerce compliance, but because Cartwright proposed it to protect W.F. Furthermore, the supervision requirement is unaffected by Flynn's future compliance with treatment because Flynn's time will become unsupervised only if the supervisor "deems it appropriate." Even more problematically, the supervisor must also "deem[ ] it appropriate" for Flynn's time with W.F. to increase, and the supervisor's determination in this regard is not subject to judicial review. That is, the supervision requirement could render permanent the

otherwise temporary phasing-in of Flynn's time, thus converting a permissible remedial sanction into an impermissible modification to the parenting plan. Cf. Kirshenbaum, 84 Wn. App. at 807 (court may delegate authority to suspend visitation if delegee's decision is subject to court review).

Also, when it entered the parenting plan in 2020, the trial court did not require that Flynn's time with W.F. be supervised despite finding that Flynn engaged in an abusive use of conflict. In other words, the court made no determination at that time that the best interests of the child necessitated supervision of Flynn's time with W.F. Cf. RCW 26.09.191(2)(m)(i) (limitations, such as supervision, are intended to protect the child from abuse that could result if the child has contact with the parent requesting residential time). Later, in her contempt motion, Cartwright argued that supervision was in W.F.'s best interests because of the time that had passed since W.F. had seen Flynn.[7] But unlike the temporary suspension and phasing in of Flynn's time with W.F. to coerce his compliance with treatment, adding a *new limitation* on Flynn's time constituted a permanent alteration to the parenting plan. Making such an alteration based on changed circumstances allegedly affecting the best interests of the child was the proper subject of a modification proceeding, not a mere contempt proceeding. See In re Marriage of Coy, 160 Wn. App. 797, 804, 248 P.3d 1101 (2011) ("Any modification, no matter how slight, requires an independent inquiry by the trial court."); see also RCW 26.09.260(1); Halls, 126 Wn. App. at 607 ("[A]bsent a

[7] Flynn acknowledged at the contempt hearing that given the long period of no visitation with W.F., "it would be in the best interest of the child to have it be in a safe, controlled manner," but suggested reunification therapy rather than professionally supervised visits.

finding that modification is in the best interests of a child, the court may not modify for mere violations of the parenting plan."). Yet there was no modification petition before the trial court, and the court did not make any findings to justify a modification.

For the foregoing reasons, we hold that the trial court erred in sanctioning Flynn by adding a supervision requirement to his time with W.F. and conditioning increases in his time on the supervisor's approval.

D. Treatment Requirements

Finally, Flynn argues that the trial court erred when it entered "limitations" related to domestic violence and substance abuse. This appears to be a challenge to the trial court's contempt hearing order to the extent that it directs Flynn to comply with ACT&T's treatment recommendations, including its recommendation that Flynn refrain from using certain substances during the course of that treatment. Flynn argues that these directives, too, constituted impermissible modifications of the parenting plan.

Flynn's argument is without merit. As discussed above, as well as in the prior appeal, the parenting plan itself is the source of this requirement, and the plan is clear: Flynn must comply with *any* treatment recommended by the anger management evaluation. The domestic violence treatment and Flynn's refraining from using certain substances during the course of that treatment are both part of ACT&T's treatment recommendations. Accordingly, they were required under the parenting plan and do not, as Flynn contends, constitute modifications thereto.

III. Re-award of Attorney Fees

Flynn argues that the trial court erred by re-awarding the fees it awarded to Cartwright under the December 2020 Order. He argues that although Cartwright asserted that fees were warranted based on Flynn's intransigence, "Cartwright never alleged intransigence related to the [December 2020 Order], no evidence was ever submitted, [and] no authority was ever provided." He also argues that there was no basis under Washington law to grant Cartwright's request for fees " 'for having to bring this motion' " and that Cartwright should not have been awarded fees for bringing a motion that, according to Flynn, "made no effort to comply with the law."

But these arguments are being raised for the first time on appeal. Cartwright plainly requested in her contempt motion that the fees awarded under the December 2020 Order be re-awarded based on Flynn's intransigence. Flynn did not oppose that request in his response, and while Flynn's attorney acknowledged the request at the contempt hearing, he provided no argument with regard to why it should not be granted. Flynn points to nothing in the record to show that his opposition to Cartwright's request was raised with enough specificity to alert the trial court to the errors Flynn now asserts on appeal. We therefore decline to review the trial court's decision to re-award the fees awarded in the December 2020 Order. See RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); see also Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (reason for requiring issue preservation is "to afford the trial court an opportunity to correct any error,

thereby avoiding unnecessary appeals and retrials").

IV. Fees on Appeal

Both Flynn and Cartwright request an award of fees on appeal. Flynn argues that a fee award is warranted based on Cartwright's intransigence. Cartwright relies on RCW 26.09.160(1), which directs the court to punish a bad faith contemnor "by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court." She also relies on RCW 26.09.140, which gives this court the discretion to award fees on appeal in dissolution proceedings.

Even though the trial court committed error in fashioning a remedy for Flynn's contempt, we are not persuaded that Cartwright was intransigent by bringing her contempt motion or by raising the arguments she raised to support her motion. Cf. Schumacher v. Watson, 100 Wn. App. 208, 216, 997 P.2d 399 (2000) ("Intransigence is the quality or state of being uncompromising." (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1186 (3d ed. 1993))). Meanwhile, although Cartwright asserts that "[b]oth RCW 26.09.160(1) and RCW 26.09.140 provide a basis for fees," she provides no further analysis as to why an award of fees on appeal is warranted under either statute. Cf. Brownfield v. City of Yakima, 178 Wn. App. 850, 876, 316 P.3d 520 (2014) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."). Accordingly, we deny each party's request for an award of fees on appeal.

We reverse the trial court's contempt hearing order to the extent that it

adds a supervision requirement to Flynn's time with W.F. and makes increases in Flynn's time subject to the supervisor's approval. We remand to the trial court to strike these provisions from the order. Otherwise, we affirm.

Chung, J.

WE CONCUR:

Coburn, J.

Hazelrigg, ACJ

Appendix 2

Order on Reconsideration; Filed June 9, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the marriage of: ALEXANDRA LEIGH CARTWRIGHT, Respondent, And PATRICK RYAN FLYNN, Appellant.	No. 84343-5-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTION TO PUBLISH

Appellant Patrick Flynn filed a motion for reconsideration and a motion to publish the opinion filed on May 1, 2023, in the above case. A majority of the panel has determined that the motions should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied and

ORDERED that the motion to publish is denied.

FOR THE COURT:

Chung, J.

Judge

Appendix 3
Opening Brief (2020 Appeal)

COURT OF APPEALS OF THE STATE OF WASHINGTON
Division I

Court of Appeals No. 822314

In re:

PATRICK RYAN FLYNN,

Appellant,

and

ALEXANDRA LEIGH CARTWRIGHT,

Respondent.

APPELLANT'S AMENDED OPENING BRIEF

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I. SUMMARY OF ARGUMENT

After a five-day trial, the superior court entered findings explicitly stating that Mr. Flynn had not engaged in domestic violence or substance abuse as alleged by his former spouse. Later that year, the trial court subsequently adopted a private social worker's findings and recommendations, which determined that Mr. Flynn had engaged in domestic violence and substance abuse. The trial court then entered limitations against Mr. Flynn based on domestic violence and substance abuse and found Mr. Flynn to be in contempt of the parenting plan for failing to comply with the social worker's recommendations (which did not agree with the trial court's prior ruling).

As remedial sanctions for contempt, the trial court totally suspended Mr. Flynn's residential time with his daughter, entered restrictions on his parenting conduct, and awarded thousands of dollars to Ms. Cartwright in attorney's fees.

Mr. Flynn made a motion to vacate the order adopting the social worker's findings and recommendations, and the trial court denied the motion. Mr. Flynn, who has not seen his daughter since December of 2020, appeals the matter to this Court for review.

II. ASSIGNMENTS OF ERROR

Error #1: The trial court erred when it entered the *Order*.

Error #2: The trial court erred when it entered remedial sanctions against Mr. Flynn for failing to comply with the terms of the parenting plan.

Error #3: The trial court erred when it determined that Mr. Flynn had failed to comply with the requirements of the final parenting plan.

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Error #4: The trial court erred when it entered sanctions without having made a specific finding on the record that Mr. Flynn had, by a preponderance of the evidence, acted in bad faith when he failed to comply with the parenting plan.

Error #5: The trial court abused its discretion when it suspended visitation as a remedial sanction for failure to comply with the parenting plan in violation of the public policy contained in RCW 26.09.160.

Error #6: The trial court erred when it entered an order modifying the final parenting plan in violation of Washington law.

Error #7: The trial court erred when it entered an order modifying the final parenting plan without personal jurisdiction over Mr. Flynn for a proceeding to modify the parenting plan.

Error #8: The trial court erred when it entered an order modifying the parenting plan in violation of procedural statutory requirements.

Error #9: The trial court erred when it entered the order modifying the parenting plan in violation of substantive statutory requirements.

Error #10: The trial court erred when it entered the order modifying the parenting plan in violation of Mr. Flynn's right to constitutional due process.

Error #11 The trial court erred when it denied Mr. Flynn's motion to vacate.

Error #12: The Order should have been vacated because it was obtained as the result of an irregularity pursuant to CR 60(b)(1).

Error #13: The Order should have been vacated because it was void for lack of jurisdiction pursuant to CR 60(b)(5).

Error #14: The Order should have been vacated for "other reasons justifying relief" pursuant to CR 60(b)(11).

Error #15: The trial court erred when it denied Mr. Flynn's request for attorney's fees.

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III. ISSUES PRESENTED

1. Whether the trial court erred when it entered the *Order*.
2. Whether the trial court erred when it denied Mr. Flynn's motion to vacate.
3. Whether the trial court erred when it denied Mr. Flynn's request for attorney's fees.

IV. STATEMENT OF THE CASE

Patrick Ryan Flynn and Alexandra Leigh Cartwright were married on September 18, 2010, and the marital community ended seven years later, on April 30, 2017. (CP 10-11.) The parties had one child together, a daughter, who was five (5) years old at the time of trial. (CP 13.)

February 10, 2020: The parties went to trial on the dissolution of their marriage. (CP 10.) At trial, Ms. Cartwright made allegations of domestic violence, stalking, and abusive use of conflict. (CP 14-16.) In support of her claims, Ms. Cartwright brought a domestic violence expert witness, Tracee Parker, who testified that Mr. Flynn had engaged in stalking behaviors, and while she admitted that "there was no physical violence against the Mother in this case," she nevertheless claimed that Mr. Flynn showed "dangerous lethality factors sufficient to constitute domestic violence." *Id.* The trial court had also appointed a parenting evaluator, Monique Brown, who produced a 49-page report, which was admitted at trial. *Id.*

MARCH 26, 2020: The trial court entered findings of fact and conclusions of law, which included the definition of domestic violence

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pursuant to RCW 26.50.10(3) and the definition of stalking pursuant to RCW 9A.46.110. *Id.* After its consideration of Ms. Cartwright's testimony/allegations, the testimony of Tracee Parker, and Monique Brown's report, the trial court entered specific findings that Mr. Flynn had not engaged in domestic violence or in stalking. *Id.*

The trial court also entered a final parenting plan, which included limitations on Mr. Flynn based on a finding of abusive use of conflict. (CP 19-20.) The trial court declined to enter RCW 26.09.191(3) findings related to domestic violence, choosing instead to indicate: "Neither parent has any of these problems." *Id.* Similarly, the trial court made no findings in Section 3(b) that either parent had an alcohol or substance abuse problem that interfered with the ability to parent. *Id.*

Based on its finding that Mr. Flynn had engaged in the abusive use of conflict, the trial court ordered that he "[b]e evaluated for anger management through ACT&T[1] within 60 days entry of the Final Parenting Plan," and indicating that "Father must comply with any treatment as recommended by the evaluation." *Id.* The trial court further stated that "[i]f Father does not complete evaluation and/or treatment recommended, Mother may directly petition the Court, i.e., without mediation, to reduce Father's visitation with the Child." *Id.*

[1] Anger Control Treatment & Therapies.

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JULY 7, 2020: Mr. Flynn complied with obtaining an anger management evaluation, which was conducted by ACT&T as directed, and a report was issued on July 7, 2020. (CP 91-97.) Contrary to the trial court's instructions, ACT&T evaluated Mr. Flynn not only for anger management, but also for substance abuse and domestic violence. *Id.*

ACT&T did not find that Mr. Flynn had an anger management problem, indicating that his *Buss/Durkee Hostility Inventory* "did not reveal an overall propensity for hostility nor did it in any subcategories." *Id.* The report noted that anger management addresses impulse control and affect regulation disorders, and Mr. Flynn "did not reveal any impulse control disorder or any affect management dysregulation." (CP 95.)

ACT&T also did not find that Mr. Flynn had a substance abuse problem; his *Substance Abuse Subtle Screening* (SASSI-3) revealed a low probability of a substance abuse disorder. *Id.*

With respect to domestic violence, ACT&T specifically reported that Mr. Flynn's *Propensity for Abuse Scale* (PAS) score was 42%, which is considered well within the normal range. *Id.* ACT&T reported that scores under 48% are considered normal, and "high scores correlated with relational abuse" are over 60%. *Id.* ACT&T also reported that Mr. Flynn had denied ever engaging in violent, threatening, abusive, or surveillance behaviors. *Id.*

In arriving at its recommendations, however, ACT&T completely disregarded its own test data, the information provided by Mr. Flynn, and the

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specific findings and conclusions of the trial court. Mr. Waterland, the social worker who conducted the evaluation, chose instead to rely *solely* on the report of Monique Brown even though the trial court had already considered that report and made specific findings that no domestic violence, stalking, or substance abuse existed.

Mr. Waterland, who appears to have no legal education, is not licensed to practice law, and was never elected to the office of superior court judge for King County, determined that Mr. Flynn "clearly meets" the definition of domestic violence based on (1) his interpretation of the significantly outdated[2] 2006 edition of the "DV Manual for Judges," (2) his informal evaluation of incomplete evidence without any reference to jurisprudential standards of any kind, and (3) his clear misinterpretation of the legal terminology contained in the trial court's ruling, which reflects a mistaken belief that the term "abusive use of conflict" is equivalent to a finding of domestic violence, when, in fact, the trial court made *precisely the opposite finding*.[3]

In his evaluation, ACT&T's social worker purports to *overrule* the King County Superior Court's final orders and *revises* them to make the factual

---

[2] The most recent edition at the time of trial was the 2016 edition, which is freely available on the internet and easily located via a Google search at: https://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index

[3] "His accountability and readiness to change is low due to his belief that he has never engaged in acts of domestic violence and yet the court found in the Findings and Conclusions about a Marriage, "... The court finds that the Father's actions did constitute abusive use of conflict and orders 192 [sic] limitations as stated in the Parenting Plan. ..." (CP 93.)

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finding that, in fact, Mr. Flynn *had* engaged in the behaviors alleged in Monique Brown's report, and he arrives at the legal conclusion that those behaviors qualified as domestic violence as *a matter of law* (as defined by a non-authoritative legal "manual" that had been outdated for well over a decade). Mr. Waterland then subsequently recommends that Mr. Flynn (1) complete a level 2 DSHS certified domestic violence intervention program that is a minimum of 39 weekly group sessions, (2) comply with the "provider's contract," (3) abstain from all mood and mind-altering drugs without a doctor's prescription, including alcohol and marijuana, for the entire length of treatment, and (4) enroll in a course entitled "DV Dads," during which he would be monitored monthly until completion. *Id.*

The paperwork that is required for Mr. Flynn to enroll in the programs "recommended" by ACT&T requires him to agree to "end all violence and abuse," and to "change my behavior," which is identified as "a pattern of abusive and controlling behaviors." (CP 134-142.) Mr. Flynn would also be required to sign paperwork acknowledging his obligation to provide individual and specific examples of his abusive behaviors. *Id.*

Mr. Flynn did not take any action to comply with ACT&T's domestic violence recommendations.

NOVEMBER 20, 2020: Ms. Cartwright made a motion to "enforce the parenting plan" arguing that Mr. Flynn had failed to comply with the requirements of the parenting plan. (CP 72-75.) Ms. Cartwright asserted that

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Mr. Flynn was required to comply with *any* recommendations made by ACT&T, for any reason. *Id.* Because Mr. Flynn had not "complied" with ACT&T's unlawful domestic violence recommendations, Ms. Cartwright requested the suspension of *all* Mr. Flynn's residential time, the entry of parenting restrictions against him, and an award of attorney's fees. *Id.*

Ms. Cartwright argued that she was entitled to such relief based on the terms of the parenting plan that she characterized as authorizing her to "move the Court to reduce Mr. Flynn's residential time if he failed to comply with the evaluation and/or recommended treatment." *Id.* (As indicated above, however; this is not what the parenting plan said; it stated that "[i]f Father does not complete evaluation and/or treatment recommended, *Mother may directly petition the Court, i.e. without mediation*, to reduce Father's visitation with the Child.")(Emphasis added.) Ms. Cartwright made the following request to modify the parenting plan:

> Ms. Cartwright requests that the court enter an order restricting Mr. Flynn's residential time all together until he has complied with the Amended Parenting Plan by undergoing the treatment recommended by ACT&T, and that his residential time be automatically suspended during any period thereafter that he becomes non-compliant with the treatment program."

Ms. Cartwright sought attorney's fees in the amount of $4,742.50 for "having to bring this motion to enforce the court-ordered Amended Parenting Plan." (CP 72-75.) She provided no reference to any Washington law that authorized her fee request.

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DECEMBER 4, 2020: The trial court held a hearing on Ms. Cartwright's motion. (1 RP 3.) At hearing, counsel for Ms. Cartwright argued that "Ms. Cartwright actually remains terrified that without the treatment intervention that's been recommended that Mr. Flynn will never come to the understanding that it's not appropriate for him to stalk her[4] and drive by her house, to keep notes on her, to use [the child] as a go-between for conflict and so forth." (1 RP 3-4.) Counsel confirmed Ms. Cartwright's request for remedial sanctions, saying: "we're concerned that unless the Court eliminates his visitation altogether until such time that he's provided proof that he's enrolled in and complying with a DV perpetrator treatment program as recommended by ACT&T – I'm paraphrasing what their actual recommendation was – however, we just don't think he's going to have any incentive to do it." (1 RP 5.)

Mr. Flynn, who was unrepresented by counsel, informed the trial court that it was his understanding that he had only been ordered to comply with any recommendations made by ACT&T based on his anger management assessment because the trial court had already clearly ruled that no domestic violence had occurred. (1 RP 9-12.) He noted that two of the six pages comprising ACT&T's report were simply allegations copied and pasted from Monique Brown's report, which the court had evaluated at trial when Monique

[4] Importantly, at trial, the trial court specifically found that Mr. Flynn had *not* engaged in stalking in this case. (CP 14-16.). Not only does Ms. Cartwright's attorney appear to misrepresent that stalking had occurred, but the trial court itself adopts that characterization in its comment that "[t]here was an issue of stalking," which directly contradicts its own findings that no stalking had occurred. (1 RP 3-4, 14.)

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Brown had admitted on the stand that she had been unable to corroborate Ms. Cartwright's allegations. *Id.* Mr. Flynn reported that when he spoke to ACT&T, he was told that they had based their recommendation solely on Monique Brown's report and that they would reevaluate their recommendation if he provided them with "all of the information from the trial," but he explained that, because of the pandemic closures, he had not been able to obtain any information about how to obtain that information,[5] and he asked for some direction. (1 RP 15-16.) The trial court indicated that "it's up to you to take whatever action that you need to take and deal with ACT&T." (1 RP 16.)

The trial court concluded: "Well, it says here, quote, Father must comply with any treatment as recommended by the evaluation, so you know, if they recommend domestic treatment, domestic violence treatment, I think, you know, I don't see a question as to why that's not clear." (1 RP 12.) "So, the evaluation I ordered was very specific and that the order was very specific that any treatment that is recommended by the evaluator must be followed, so that I think, you know, there shouldn't be any question about that." (1 RP 15.)

Interestingly, the trial court noted that its decision was "not perfect, I will grant you that," and it confirmed that "I'm not in the business of just

[5] Mr. Flynn indicated that he had repeatedly contacted the judge's chambers to "get clarification as to your intent whether you meant any treatment recommended by ACT&T or specific to the evaluation that they were conducting," and explained that because all of the family law facilitators were no longer available as a result of the pandemic, he had no access to the resources that had previously permitted him to represent himself in this matter and did not know what else to do. (1 RP 12-18.)

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sanctioning people for not complying with my orders," but it asserted that it wanted to see "a father who's willing to, you know, learn from the lessons that he learned." (1 RP 17.)

The trial court entered the Order Enforcing Parenting Plan ("Order") containing the following ruling:

> a. Patrick Flynn must comply with the recommended treatment of 39 weekly group sessions of a level 2 D.S.H.S. certified domestic violence intervention program before he can resume residential time with Winter Flynn. Patrick Flynn must enroll in the treatment program within 30 days of this order and provide proof to mother's counsel.
>
> b. The treatment program entered into by Mr. Flynn should be with ACT&T as recommended by Dr. Monique Brown in her parenting evaluation report and he shall comply with the ACT&T provider contract.
>
> c. Mr. Flynn must abstain from all mood and mind-altering drugs without a doctor's prescription including alcohol and marijuana for the entire length of treatment.
>
> d. Mr. Flynn must enroll and successfully complete DV Dads with Mark Adams LMHC when he successfully completes the weekly group phase of the DSHS certified domestic violence program with ACT&T. Mr. Flynn will then move to monthly monitoring sessions in his DV program, where he shall remain until he successfully completes DV Dads with Mark Adams, LMHC.
>
> e. Patrick Flynn must pay $4,105.00 in attorney's fees incurred by Alexandra Cartwright for having to bring this motion to enforce a parenting plan. Fees shall be paid to Luminosity Law PLLC within 60 days of the entry of this order or work out a payment plan w/counsel.

(CP 84-86.)

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DECEMBER 24, 2020: Mr. Flynn filed a *Notice of Appeal* requesting review of the trial court's *Order*.[6]

MARCH 4, 2021: Mr. Flynn filed a motion to vacate the *Order*. (CP 111-33.) He argued that the order should be vacated because it had been entered as a result of an irregularity pursuant to CR 60(b)(1), because it was void for lack of jurisdiction pursuant to CR 60(b)(5), and because of other reasons justifying relief pursuant to CR 60(b)(11). *Id.* Mr. Flynn also asserted that the trial court's decision to defer its judgment to the discretion of ACT&T's social worker was a violation of his constitutional due process rights. *Id.*

MARCH 26, 2021: The trial court heard the motion to vacate. (2 RP 24.)

MARCH 31, 2021: The trial court entered an order denying Mr. Flynn's motion to vacate. (CP 405-06.) The order stated:

> The court finds good cause to DENY Respondent's motion to vacate the Order Enforcing Parenting Plan dated December 4, 2020.
>
> Specifically, in this Court's March 26, 2020 Final Orders, including a Parenting Plan, and Final Findings and Conclusions the Court found 26.09.191 limitations based on abusive use of conflict against the Respondent/Father. This Court ordered the Father to be evaluated for anger management and that he must comply with any treatment as recommended by the evaluation. The Court did not find that the Father had engaged in domestic violence, however. The parenting plan provided that if the Father does not complete evaluation and/or treatment recommended, the Mother may directly petition the Court to reduce the Father's visitation with the child.
>
> Following this Court's order, ACT&T completed anger management assessment and concluded that the Father had committed DV and recommended that he must undergo DV treatment programs. The

[6] Designated in the *Second Supplemental Designation of Clerk's Papers,* filed simultaneously with this document.

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> assessment identified the behavioral definition of DV that differs from RCW 26.50.010(3) and based its findings on (1) finding that the abusive use of conflict identified by the court was a pattern of coercive control over the mother; (2) anger management is not effective for controlling behaviors and as such, anger management would not be an effective treatment.
>
> Although ACT&T's definition is different than the legal definition used by this Court, the Court finds that the treatments ordered by ACT&T are appropriate, the Court dismisses the Father's Motion to vacate this Court's December 4, 2020 Order Enforcing Parenting Plan.
>
> (CP 405-06.)

APRIL 7, 2021: Mr. Flynn filed a *Notice of Appeal* seeking this Court's review of the trial court's decision denying his motion to vacate.[7]

RESIDENTIAL TIME: Mr. Flynn has not had residential time with his daughter since December 30, 2020, and the trial court made specific inquiry at the March 26 hearing to confirm "that the father is not trying to see the child in the meantime." (CP 134-142; 2 RP 45.)

V. ARGUMENT

A. The trial court erred when it entered the Order.

The first issue that must be addressed is to accurately characterize the Order so that the appropriate standards may be applied. Here, this Court has several characterizations to consider.

[7] Designated in the *Second Supplemental Designation of Clerk's Papers,* filed simultaneously with this document.

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The first option would be to accept the title of the motion, which characterizes it as a decision generally "enforcing" the parenting plan.

The second option is to define the Order more precisely by the specific type of problem it seeks to address and the nature of the requested relief. In her motion, Ms. Cartwright sought to address Mr. Flynn's alleged failure to comply with the parenting plan, and she sought the entry of remedial sanctions against him. Decisions that enter sanctions against a party for failure to comply with a court order are characterized as orders on contempt, and they are governed by specific rules in both statute and case law.

The third option would be to characterize the decision by the action taken by the trial court, which in this case was the modification of the parenting plan, and the entry of an award of attorney's fees to Ms. Cartwright.

The Order is not appropriately characterized as a general order to enforce. The term "order to enforce" is generally used when a court provides relief that directly effectuates an intended outcome, often by bypassing the involvement of a non-compliant party altogether. While an order on contempt is arguably a *type* of enforcement order, contempt decisions are uniquely governed by precise procedural and substantive rules, so it is not helpful to reference an order on contempt as an "order to enforce." To illustrate the distinction, if one spouse fails to comply with a court's order to sign a real estate deed transferring marital property to the other spouse, the aggrieved spouse has two potential avenues of obtaining relief. She could file a general 'motion to enforce,' which

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might request the appointment of a special master who would be empowered to sign the real estate deed directly or she might ask the trial court to transfer title by court order, thereby bypassing the obstruction of the recalcitrant spouse and directly effectuating the outcome ordered by the court. Alternatively, the aggrieved spouse could also file a specific motion for contempt and request the entry of sanctions against the recalcitrant spouse. Remedial contempt sanctions are designed to compel a party to comply with an order rather than directly effectuating the outcome ordered by the court.

While Ms. Cartwright styled her request as a general request for "enforcement," her motion did not actually seek general enforcement remedies (i.e., direct effectuation of an order); rather it sought specific contempt remedies. It is not appropriate to characterize an order issuing contempt sanctions as a general order of 'enforcement,' because the term is so imprecise as to be misrepresentative; by failing to acknowledge the applicable substantive and procedural rules that govern contempt sanctions, a court is easily invited into reversible error.

The Order is a decision entering sanctions for contempt of court. Contempt includes the "disobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b). A punitive sanction is imposed to punish a past contempt of court for the purpose of upholding the authority of the court. *In re M.B.*, 101 Wn.App. 425, 438, 3 P.3d (2000); RCW 7.21.010(2). A remedial sanction is imposed for the purpose of coercing performance when

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the contempt consists of failure to perform an act that is yet in the person's power to perform. *M.B.*, 101 Wn.App. at 438; RCW 7.21.010(3).

Here, Ms. Cartwright alleged that Mr. Flynn had failed to comply with the trial court's order, and *based on Mr. Flynn's failure to comply,* she sought remedial sanctions in the form of a total suspension of residential time, the entry of parenting restrictions, and an award of attorney's fees, and the trial court granted her motion. Because the Order provided relief in the form of remedial sanctions on the basis that Mr. Flynn had failed to comply with the trial court's order, the Order was an order on contempt.

The Order is a decision modifying the final parenting plan. When the trial court granted Ms. Cartwright's motion, it entered an order that *significantly* modified the final parenting plan (completely suspending Mr. Flynn's residential time with the child and entering parenting restrictions); therefore, the Order was also a decision modifying the final parenting plan.

1. The trial court erred when it entered remedial sanctions against Mr. Flynn for failing to comply with the terms of the final parenting plan.

STANDARD OF REVIEW: The question of whether a court has authority to impose sanctions for contempt is a question of law, which is reviewed de novo. *In re Dependency of A.K.*, 162 Wn.2d 632, 644, 174 P.3d 11 (2007).

Where a court has authority to impose sanctions, contempt rulings are reviewed for an abuse of discretion. *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn.App. 720, 768, 271 P.3d 331 (2012). A trial court abuses its discretion if

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its contempt decision was manifestly unreasonable or based on untenable grounds. *Holiday v. City of Moses Lake*, 157 Wn.App. 347, 355, 236 P.3d 981 (2010). A contempt ruling based on an erroneous view of the law or an incorrect legal analysis constitutes an abuse of discretion. *In re Estates of Smaldino*, 151 Wn.App. 356, 364, 212 P.3d 579 (2009). Findings of fact in a contempt order are reviewed for substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003). Substantial evidence exists so long as a rational trier of fact could find the necessary facts were shown by a preponderance of the evidence. *In re Welfare of A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015). In determining whether the findings of fact support a conclusion of contempt, this Court strictly construes the order alleged to have been violated, and the facts must constitute a plain violation of the order. *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995).

Contempt includes intentional "[d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b). If a court finds that a person has failed or refused to perform an act that is within her power to perform, it may find that person in contempt. RCW 7.21.030(2). To avoid being held in contempt for a violation of a parenting plan, a noncomplying parent must establish by a preponderance of the evidence that he lacked the ability to comply or had a reasonable excuse for noncompliance. *Rideout*, 150 Wn.2d at 352-53. A court's order must be clear enough that the contemnor understands what is necessary for compliance. *Tiger Oil*, 166 Wn.App. at 768.

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"The interpretation of a parenting plan is a question of law." *Kirschenbaum v. Kirshenbaum*, 84 Wn.App. 798, 803, 929 P.2d 1204 (1997). When determining an order's intended effect, the appellate court's inquiry is normally limited to the order's provisions. *Id.*

i. The trial court erred when it determined that Mr. Flynn had failed to comply with the requirements of the final parenting plan.

In this case, the plain language of the court's order confirms that Mr. Flynn had no obligation to comply with any recommendations other than those based on the anger management evaluation; this conclusion is confirmed by Washington law, which does not support an alternative interpretation.

Domestic Violence. The trial court made explicit findings that no domestic violence occurred pursuant to RCW 26.09.191(3), and, consistent with those findings, it did not order Mr. Flynn to be evaluated or treated for domestic violence. There is no language in the parenting plan that addresses or requires an evaluation or recommendations for domestic violence; therefore, Mr. Flynn could not have violated a term that does not exist.

This interpretation complies with Washington law. A court is not authorized to limit parenting conduct without findings that indicate a restriction is appropriate pursuant to RCW 26.09.191(3). Limitations include requiring a parent to obtain an evaluation, get treatment, take a parenting class, or refrain from certain behaviors. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 646, 327 P.3d 644 (2014). The Washington Supreme Court has ruled

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that RCW 26.09.09.191(3) bars a trial court from limiting any provisions of the parenting plan unless the evidence shows that a parent's conduct may otherwise have an adverse effect on the child's best interests. *Chandola*, 180 Wn.2d at 642. The Washington Court of Appeals has similarly ruled that a finding under RCW 26.09.191(3) *must* be supported by substantial evidence that the parent's involvement or conduct caused the restricting factor. *In re Marriage of Watson*, 132 Wn.App. 222, 233, 130 P.3d 915 (2006). Restrictions of a parent's conduct can only be imposed pursuant to RCW 26.09.191(3), and cannot be entered as features of the parenting plan under RCW 26.09.187. *Chandola*, 180 Wn.2d at 645. By requiring trial courts to identify specific harms to the *child* before ordering parenting plan restrictions, RCW 26.09.191(3) prevents arbitrary imposition of the court's preferences. *Chandola*, 180 Wn.2d at 655.

Absent a finding of domestic violence, RCW 26.09.191(3) does not authorize a court to preclude or limit any provisions of the parenting plan based on domestic violence concerns, nor may a court require a parent to be evaluated or treated for domestic violence.

Because the trial court had no authority to require Mr. Flynn to be evaluated or treated for domestic violence, and because it did not order Mr. Flynn to be evaluated/treated for domestic violence; Mr. Flynn did not violate the plan when he declined to be treated for domestic violence.

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Substance Abuse. The trial court made no findings that Mr. Flynn had problems with substance abuse pursuant to RCW 26.09.191(3), and, consistent with those findings, it did not order Mr. Flynn to be evaluated or treated for substance abuse. There is no language in the parenting plan that addresses or requires an evaluation or recommendations for substance abuse; therefore, Mr. Flynn could not have violated a term that does not exist.

Based on its findings, the trial court had no authority to require Mr. Flynn to be evaluated or treated for substance abuse, and, appropriately, it did not order that Mr. Flynn be evaluated or treated for substance abuse; therefore, Mr. Flynn did not violate the trial court's orders when he declined to follow ACT&T's inappropriate recommendations restricting his use of any substance.

Abusive Use of Conflict. The trial court *did* make findings pursuant to RCW 26.09.191(3) with respect to Mr. Flynn's abusive use of conflict, and it *did* order that Mr. Flynn be evaluated by ACT&T for anger management problems and that he comply with any recommendations based on *that assessment*. Specifically, the trial court ordered that:

> "Father Patrick Flynn must: Be evaluated for anger management through ACT&T within 60 days entry of the Final Parenting Plan"; and
>
> "Father must comply with any treatment as recommended by the evaluation."

Mr. Flynn complied with the trial court's order and submitted to ACT&T's anger management evaluation. ACT&T found that Mr. Flynn did not have anger management issues, and it made no recommendations based on its anger

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management evaluation; therefore, Mr. Flynn was and continues to be in full compliance with the trial court's orders.

Contrary to Ms. Cartwright's assertions, the parenting plan does not require that Mr. Flynn submit to *any* recommendations arbitrarily made by ACT&T – such an outcome would violate Washington law – rather, the parenting plan ordered Mr. Flynn to submit to the recommendations made pursuant to "the evaluation" authorized by the trial court, which was specifically an anger management evaluation. Ms. Cartwright was able to cultivate much confusion based on the parenting plan's failure to anticipate that ACT&T would 'go rogue' and conduct all manner of unauthorized evaluations in violation of Washington law and Mr. Flynn's privacy rights. It is deeply troubling that ACT&T considered itself at liberty to disregard the trial court's instructions, but ACT&T's inappropriate behavior did not obligate Mr. Flynn to comply with recommendations based on unauthorized evaluations.

There is no evidence in the record to support a finding that Mr. Flynn failed to comply with any recommendation made by ACT&T pursuant to his anger management evaluation; therefore, Mr. Flynn did not fail to comply with the plain language of the parenting plan. The trial court erred when it sanctioned Mr. Flynn without finding a plain violation of the order, and this Court should reverse the trial court's decision.

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ii. The trial court erred when it entered sanctions without having made a specific finding on the record that Mr. Flynn had, by a preponderance of the evidence, acted in bad faith when he failed to comply with the parenting plan.

A parent seeking an order of contempt for the other parent's failure to comply with a parenting plan must establish the contemnor's bad faith or intentional misconduct by a preponderance of the evidence, and the court must enter a specific finding. *In re Marriage of James*, 79 Wn.App. 436, 440–42, 903 P.2d 470 (1995); *In re Marriage of Williams*, 156 Wn.App. 22, 28, 232 P.3d 573 (2010); *In re Marriage of Davisson*, 131 Wn.App. 220, 224, 126 P.3d 76 (2006). RCW 26.09.160(2)(b) provides that a party cannot be found in contempt without a written finding that the party acted in bad faith. *James*, 79 Wn.App. at 440.

Here, the trial court made no specific finding that Mr. Flynn had engaged in bad faith by a preponderance of the evidence; therefore, the trial court abused its discretion by entering sanctions against Mr. Flynn.

iii. The trial court abused its discretion when it suspended visitation as a remedial sanction for failure to comply with the parenting plan in violation of the public policy contained in RCW 26.09.160.

"The withholding of visitation because a parent is in contempt for failure to obey provisions of the dissolution decree is an abuse of discretion." *Wulfsberg v. MacDonald*, 42 Wn.App. 627, 632, 713 P.2d 132 (1986). "The paramount concern in deciding whether to withhold visitation rights of a parent is the welfare of the child."

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The Washington Legislature foresaw the likelihood that parents would seek sanctions that would not serve the best interests of children, and it took great care to prevent that outcome. The statute specifically states that "[i]f a party fails to comply with a provision of a decree ... the obligation of the other party ... to permit contact with children is not suspended." RCW 26.09.160(1). Not only did the Legislature explicitly state that a non-compliant parent's contempt could *not* be used as a basis to prevent contact with the children, but it adopted language that *punishes* a parent who attempts to effectuate that outcome:

> **An attempt by a parent**, in either the negotiation or the performance of a parenting plan **to condition one aspect of the parenting plan upon another ... or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court** by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court.

RCW 26.09.160(1)(emphasis added). While Ms. Cartwright did not *directly* engage in the behavior forbidden by the legislature, she did effectuate the proscribed outcome by persuading the trial court to violate public policy. The statute clearly states that no party (and, by implication, no *court*) is permitted to suspend a parent's contact with the children based *solely* on that parent's failure to comply with some other obligation contained in the parenting plan, child support order, or decree. This is because residential schedules are intended to serve the best interests of *the child*. Residential schedules are not to be used as tools to punish a parent or as leverage to manipulate parents' behavior, and these principles apply just as readily to an

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errant court as they do to the bad faith actions of a parent. Suspending a parent's residential time as a remedial sanction traumatizes *the child*, which directly violates the public policy governing parenting plans.

The Legislature clearly articulated its intent regarding parenting plans in RCW 26.09.002: "The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests." 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."*** *Id.* These policy statements confirm that parenting plans should not be modified absent a threshold finding of adequate cause, which a court is required by statute to find before it may modify a residential schedule. Modification of a plan is not available solely on a finding of contempt.

The trial court's total suspension of Mr. Flynn's residential time as a sanction for contempt was reversible error as well as a *startling* violation of Washington law. This Court should reverse the trial court's decision and enter an opinion strongly condemning the trial court's inappropriate action which has profoundly disrupted the relationship between Mr. Flynn and the parties' child in direct opposition to Legislative intent.

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2. The trial court erred when it entered an order modifying the final parenting plan in violation of Washington law.

i. The trial court erred when it entered an order modifying the final parenting plan without personal jurisdiction over Mr. Flynn for a proceeding to modify the parenting plan.

STANDARD OF REVIEW: A judgment is void if it is entered without personal jurisdiction. Castellon v. Rodriguez, 9 Wn.App.2d 303, 418 P.3d 804 (2018). Whether a judgment is void is reviewed de novo. *Id.*

ANALYSIS: A request to modify a parenting plan requires the initiation of a new proceeding:

> A proceeding to modify the child custody provisions of a divorce decree, upon changed conditions since entry of that decree, is a new proceeding. It presents new issues arising out of new facts occurring since the entry of the decree. It is not ancillary to or in aid of the enforcement of the divorce decree.

State ex rel. Mauerman v. Superior Court, 44 Wn.2d 828, 830, 271 P.2d 435 (1954). Pursuant to RCW 26.09.260, a party seeking to modify a parenting plan is required to file a petition. Proper service of a summons/petition is essential to invoke personal jurisdiction over a party in a proceeding. Allstate Ins. Co. v. Khani, 75 Wn.App. 317, 324, 877 P.2d 724 (1994). Pursuant to CR 4.1(a), "actions authorized by RCW 26.09[8] shall be commenced by filing a petition or by service of a copy of a summons together with a copy of the petition on respondent as provided in Rule 4."

[8] Actions authorized by RCW 26.09 include dissolutions and modification proceedings.

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Ms. Cartwright failed to serve a summons or a petition when she made a request to modify the final parenting plan; as a result, the trial court did not have personal jurisdiction over Mr. Flynn for a modification proceeding; therefore, the order modifying the parenting plan is void.

ii. The trial court erred when it entered an order modifying the parenting plan in violation of procedural statutory requirements.

Modifications of parenting plans are governed by RCW 26.09.260. "Procedures relating to the modification of a prior custody decree or parenting plan are statutorily prescribed and compliance with the criteria set forth in RCW 26.09.260 **is mandatory**." *In re Marriage of Shyrock*, 76 Wn.App. 848, 852, 888 P.2d 750 (1995)(emphasis added). Pursuant to Washington State statute, a court "shall not modify" a parenting plan unless it adheres to the procedures of RCW 26.09.260. The record confirms that the trial court did not adhere to *any* of the procedures in RCW 26.09.260, which include, but are not limited to the requirement that a petitioner file and personally serve a petition for modification and a summons, the requirement that a petitioner file/serve a motion requesting a finding of adequate cause, and the requirement that the court make a finding of adequate cause.

The trial court erred when it modified the final parenting plan without adhering to the procedures required by RCW 26.09.260; therefore, this Court should reverse the trial court's decision.

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iii. The trial court erred when it entered the order modifying the parenting plan in violation of substantive statutory requirements.

The trial court modified the parenting plan without consideration of *any* of the relevant substantive requirements, including, but not limited to:

NO FINDINGS TO SUPPORT LIMITATIONS: The trial court erred when it entered limitations without findings to confirm a restriction was appropriate pursuant to RCW 26.09.191(3), which bars a trial court from limiting any provisions of the parenting plan unless the evidence shows that a parent's conduct may have an adverse effect on the child's best interests. *Chandola*, 180 Wn.2d at 642. The trial court further erred when it entered limitations based on the findings of a private social worker, which did not comply with RCW 26.09.191(6)(requiring that decisions to impose limitations must be made by a court, and requiring that the court shall apply the civil rules of evidence, proof, and procedure in determining whether any of the conduct described by RCW 26.09.191(3) occurred).

BEST INTERESTS OF THE CHILD: The trial court erred when it modified the parenting plan as a sanction without considering the best interests of the child pursuant to RCW 26.09.002.

ADEQUATE CAUSE: The trial court erred when it modified the parenting plan without first conducting the substantive analysis related to adequate cause pursuant to RCW 26.09.260(1).

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iv. The trial court erred when it entered the order modifying the parenting plan in violation of Mr. Flynn's right to constitutional due process.

STANDARD OF REVIEW: Claims of constitutional error are reviewed de novo. *State v. Curtis*, 110 Wn.App. 6, 11, 37 P.3d 1274 (2002).

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). "'Liberty' and 'property' are broad and majestic terms," that require some definition. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). "Judgments entered in a proceeding failing to comply with the procedural due process requirements are void." *In re Ebbighausen*, 42 Wn.App. 99, 102, 708 P.2d 1220 (1985).

LIBERTY INTEREST IN PARENTAL RIGHTS: "It has long been recognized that the family entity is the fundamental element upon which the modern civilization is founded." *Id.* "A parent's interest in the custody and control of minor children was a 'sacred' right recognized at common law." *Id.* A parent's right to his child has been characterized as "more precious to many people than the right of life itself." *In re Gibson*, 4 Wn.App 372, 379, 482 P.2d 131 (1971). "Given a parent's significant interest in his children, there can be no doubt the Fourteenth Amendment establishes a parental constitutional right

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to the care, custody, and companionship of the child." *Ebbighausen*, 42 Wn.App. at 102.

"Parental rights have been categorized as a 'liberty' protected by the due process clause of the Fourteenth Amendment." *Ebbighausen*, 42 Wn.App. at 102-03. "Procedural elements of this constitutional guarantee are notice and the opportunity to be heard and defend before a competent tribunal in an orderly proceeding adapted to the nature of the case." *Id.*

LIBERTY INTEREST IN GOOD NAME: "The Due Process Clause also forbids arbitrary deprivations of liberty." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," liberty interests are implicated. *Roth*, 408 U.S. at 573. Mr. Flynn's liberty interest is implicated by the trial court's characterization of him as a domestic violence perpetrator despite its explicit findings to the contrary.

The paperwork that is required for Mr. Flynn to enroll in the programs "recommended" by ACT&T requires him to admit to engaging in acts of violence, which is inappropriate given that there are *no* findings of domestic violence by Mr. Flynn. For the trial court to require him to admit to behavior that it explicitly found he did not commit or face never seeing his child again is both cruel and unconstitutional.

DUE PROCESS: "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471,

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481 (1972). The Due Process Clause requires "at a minimum," "that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Goss*, 419 U.S. at 579. These rights are important in cases where the challenge rests on assertions that the State relied on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).

"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg*, 397 U.S. at 268-269. "[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important." *Id.* "Particularly where credibility and veracity are at issue," the U.S. Supreme Court found that "written submissions are a wholly unsatisfactory basis for decision." *Id.*

Further, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* This is especially important in circumstances where the evidence consists of "the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Goldberg*, 397 U.S. at 270. These protections are formalized in the requirements of confrontation and cross-examination. *Id.*

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In this case, the trial court provided appropriate due process in the form of trial, but it then deferred its previous judgment – which complied with the civil rules of evidence, proof, and procedure and the Washington statutes governing parenting plans –to the opinion of a private social worker.

The trial court repeatedly made the *alarming* suggestion that a private social worker's lay interpretation of an outdated deskbook "definition" of domestic violence could be informally applied to an incomplete collection of hearsay evidence and evaluated by some undisclosed standard without any reference to the governing statute to reach a "finding" that somehow legitimately *supersedes* an elected judge's formal findings and conclusions based on a five-day in-person trial. Such a startling assertion can be characterized as nothing less than astonishing.

Washington law does not permit judicial decisions by duly elected officials to be overruled by private therapists in the absence of due process.[9] The trial court erred by modifying the parenting plan to suspend residential time and enter restrictions in the absence of the required due process.

[9] Additionally, it is worth noting that children also have independent constitutional interests with respect to the resolution of parenting issues. See, e.g., *In re Marriage of Furrow*, 115 Wn.App. 661, 63 P.3d 821 (2003). Ensuring the regularity of parenting proceedings also protects children from outcomes that violate their constitutional rights. Children are rarely treated independently inside of a dissolution proceeding because the assumption is that the due process provided to the parents will ensure the appropriate protection to the children; however, when due process does not occur, the rights of children may also be implicated.

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B. The trial court erred when it denied Mr. Flynn's motion to vacate.

STANDARD OF REVIEW: The decision to grant or deny a motion to vacate is within the trial court's discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013).

ANALYSIS: A proceeding to vacate or set aside a judgment is equitable in character, and "the relief sought or afforded is to be administered in accordance with equitable principles and terms." *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). When dealing with a motion to set aside an order, a court "should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done." *White*, 73 Wn.2d at 351. The overriding reason when determining whether vacation of an order is appropriate should be "whether or not justice is being done," and "[w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome." *Calhoun v. Merritt*, 46 Wn.App. 616, 619, 731 P.2d 1094 (1986).

1. The Order should have been vacated because it was obtained as the result of an irregularity pursuant to CR 60(b)(1).

An irregularity in obtaining an order exists, "when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unreasonable time or in an improper manner." *Lane v. Brown &*

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Haley, 81 Wn.App. 102, 106, 912 P.2d 1040 (1996). "An 'irregularity' within the meaning of [CR 60(b)(1)], has been defined as the want of adherence to some prescribed rule or mode of proceeding; and it consists either in the omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner." *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). Irregularities are usually procedural mistakes that call into question the validity of the judgment, e.g., insufficient notice, problems with service of process, and errors that go to the trial court's authority to enter the judgment. *See* Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash.L.Rev. at 513-14, 522; *see, e.g.*, *In re Wise's Estate*, 71 Wn.2d 734, 737, 430 P.2d 969 (1967).

Multiple irregularities contributed to the entry of the Order in this case. A court is not permitted to modify a parenting plan via a motion for contempt. Courts are not authorized to enter limitations on parenting conduct without findings in the parenting plan to support limitations. Courts are not authorized to restrict parenting time as a sanction; all parenting plans much be entered in the best interests of the child. Courts are not permitted to defer their authority to third parties; doing so deprives the parties of constitutional due process.

The trial court erred when it denied the motion to vacate, and this Court should reverse its ruling.

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2. **The Order should have been vacated because it was void for lack of jurisdiction pursuant to CR 60(b)(5).**

Pursuant to CR 60(b)(5), the court may vacate when an order is void.

> "There are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment. For the absence of any one of these elements, when properly apparent, the judgment may be vacated at any time...."

John Hancock Mut. Life Ins. Co. v. Gooley, 196 Wn. 357, 369-70, 83 P.2d 221, 226-27 (1938). The trial court had no personal jurisdiction over Mr. Flynn for a proceeding to modify the parenting plan; therefore, the order modifying the plan was void and should have been vacated.

3. **The Order should have been vacated for "other reasons justifying relief" pursuant to CR 60(b)(11).**

CR 60(b)(11) allows vacation for "[a]ny other reason justifying relief from the operation of the judgment." CR 60(b)(11) is confined to extraordinary circumstances when no other section of the rule applies. *Furrow*, 115 Wn.App. at 673. The circumstances must relate to irregularities that are "extraneous to the action of the court." *In re Marriage of Yearout*, 41 Wn.App. 897, 902, 707 P.2d 1367 (1985). Irregularities that are extraneous to the court's action or involve substantial deviations from a prescribed rule or means of proceeding justify vacating an order under CR 60(b)(11); errors of law cannot be addressed in a CR 60(b)(11) motion. *Furrow*, 115 Wn.App. at 674 (quoting Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35

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WASH. L. REV. 505, 515(1960)). "'Viewing the problem more generally, it appears that an irregularity is regarded as a more fundamental wrong, a more substantial deviation from procedure than an error of law.'" *Id.* That provision is "intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b) applies." *Shandola v. Henry*, 198 Wn.App. 889, 895, 396 P.3d 395 (2017).

To vacate an order under CR 60(b)(11), any extraordinary circumstances must either be an irregularity extraneous to the court's action or go to the question of the regularity of the proceedings. *Tatham v. Rogers*, 170 Wn.App. 76, 100, 283 P.3d 583 (2012). The extraordinary circumstance must demonstrate a "fundamental wrong" or a "substantial deviation from procedure." *Furrow*, 115 Wn.App. at 674 (quoting Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash.L.Rev. 505, 515 (1960)). Courts that have considered motions to vacate orders in a dissolution have found circumstances to be sufficiently extraordinary when they materially frustrate the purpose of the relevant order. *See, e.g.*, *In re Marriage of Hammack*, 114 Wn.App. 805, 810-11, 60 P.3d 663 (2003); *In re Marriage of Thurston*, 92 Wn.App. 494, 503-04, 963 P.2d 947 (1998).

The Order frustrates the parenting plan when it requires Mr. Flynn to be *extensively* treated for domestic violence when the plan does not include any such requirement. The Order also frustrates the purpose of the plan

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when it suspends all of Mr. Flynn's residential time when the plan awards time in the best interest of the child.

Additionally, the *Order* allowed Ms. Cartwright to revive claims that had already been adjudicated and denied at trial. It facilitated a second bite at the apple so that Ms. Cartwright could obtain an outcome that the trial court explicitly declined to award at trial; this is the fundamental definition of a prejudicial outcome and an extraordinary circumstance. The *Order* should have been vacated in its entirety.

C. The trial court erred when it denied Mr. Flynn's request for attorney's fees.

STANDARD OF REVIEW: A trial court's decision regarding attorney's fees is reviewed for abuse of discretion. *In re Marriage of Mattson*, 95 Wn.App. 592, 604, 976 P.2d 157 (1999).

ANALYSIS: When entertaining a request for attorney's fees, a court may consider "the extent to which one spouse's intransigence caused the spouse seeking a fee award to require additional legal services." *In re Marriage of Wallace*, 111 Wn.App. 697, 708, 45 P.3d 1131 (2002). See also, *Schumacher v. Watson*, 100 Wn. App.208, 212, 997 P.2d 399 (2000); *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). Intransigence includes litigious behavior and bringing excessive or unnecessary motions. *Wallace*, 111 Wn. App at 710; see also, *Gamache v. Gamache*, 66 Wn.2d 822, 829-30,

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409 P.2d 859 (1965). It also encompasses behavior that makes litigation unduly difficult and unnecessarily increases legal costs. *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989). "If intransigence is established, the financial resources of the spouse seeking the award are irrelevant." *Crosetto*, 82 Wn.App. at 564.

Additionally, CR 11 requires that "[t]he signature of a party or of an attorney constitutes a certificate by the party or the attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." CR 11(a).

"If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of

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the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee." CR 11(a)(4).

In making her motion, Ms. Cartwright repeatedly invited this Court to make reversible error by misrepresenting the previous ruling of the Court and by attempting to mask the true nature of her requests. Additionally, it is apparent from the efforts of Ms. Cartwright that the purpose of her motion was to mislead the Court into changing its previous ruling regarding domestic violence, which was *explicitly* that domestic violence had not occurred. Making efforts to bamboozle a pro se litigant and wrangle an outcome that was *explicitly* not awarded at trial by misrepresenting the record to the Court is inappropriate and sanctionable. Parties and attorneys are required to act with candor to the tribunal, and Ms. Cartwright's representation that she was entitled, pursuant to the parenting plan, to drastically modify the parenting plan by motion was simply false. Further, because she had the benefit of counsel (who is familiar with appropriate process/procedures, Washington law, and the statutory requirements to modify a parenting plan), Ms. Cartwright had a good faith obligation to argue for relief in compliance with the laws of Washington; an obligation which she did not fulfill.

The fact that Ms. Cartwright was willing to seek total suspension of Mr. Flynn's residential time is deeply troubling and undertaken in bad faith pursuant to RCW 26.09.160(1). Such actions are likely to traumatize a child and are explicitly contrary to the definition of what is in the best interests of a

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child pursuant to RCW 26.09.002 ("t]he 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"). It is irresponsible that Ms. Cartwright would seek the total suspension of *any* residential time (even supervised) in circumstances where there is no evidence or findings in the record to demonstrate any physical, mental, or emotional harm to the child caused by Mr. Flynn. The trial court explicitly found that it "does not doubt the Father's detailed and thorough ability to parent the Child," and noted that "[s]everal witnesses testified to the Father's intelligence, hard-work and devotion to the child." (CP 14-16.) Ms. Cartwright's actions in attempting to completely alienate the child from her father demonstrates her inability to do what is in the best interests of the child (as defined by RCW 26.09.002) when faced with the opportunity to "win" by obtaining the outcome she was not awarded at trial through opportunistic gamesmanship. This kind of behavior cannot be rewarded because it negatively impacts the parties' child. Ms. Cartwright should be required to pay Mr. Flynn's attorney's fees for having to bring a lengthy motion to vacate in an effort to undo the effects of her inappropriate actions.

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D. Mr. Flynn should be awarded attorney's fees on appeal.

Mr. Flynn seeks attorney's fees on appeal pursuant to intransigence and CR 11 for the same reasons described in Section C, above, and based on Ms. Cartwright's bad faith behavior pursuant to RCW 26.09.160(1).

VI. CONCLUSION

Mr. Flynn did not violate the parenting plan, and the trial court's erroneous decision and subsequent entry of remedial sanctions represent a multitude of errors that have profoundly prejudiced Mr. Flynn and damaged his relationship with his daughter.

Mr. Flynn respectfully requests that this Court reverse the trial court's decision, immediately reinstate Mr. Flynn's residential time, award make-up time, require Ms. Cartwright to pay any therapeutic costs addressing the disruption of his relationship with the parties' daughter, and entering an award of attorney's fees to Mr. Flynn. Mr. Flynn also respectfully requests that this Court provide clear direction to trial courts with respect to their authority to suspend parenting time as a remedial sanction and the degree to which judicial authority may be delegated to private third parties so that no other parent will be subject to the same devastatingly arbitrary treatment that Mr. Flynn received.

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Respectfully submitted this 29th day of June, 2021,

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CERTIFICATE OF ATTORNEY

I certify that on June 29, 2021, I arranged for delivery of a copy of the foregoing *APPELLANT'S AMENDED OPENING BRIEF* to the following:

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Appendix 4
Reply Brief (2020 Appeal)

COURT OF APPEALS OF THE STATE OF WASHINGTON
Division I

Court of Appeals No. 822314

In re:

PATRICK RYAN FLYNN,

Appellant,

and

ALEXANDRA LEIGH CARTWRIGHT,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Ms. Cartwright's brief substantially alters the organization of the *Opening Brief,* which makes strict reply profoundly difficult. Mr. Flynn has responded first to the arguments implied by Ms. Cartwright's statement of facts and then addresses her responses in the context of the original argument structure.

II. RESPONSE TO "RESTATMENT OF FACTS"

Court Findings vs. Trial Testimony: Ms. Cartwright repeatedly admits that the trial court explicitly determined that Mr. Flynn had *not* engaged in domestic violence or stalking, yet she spends a great deal of time rehashing trial testimony that makes those allegations even though the trial court did not find that information persuasive in its findings (which are not before this Court on appeal). This information should be disregarded.

Plain Language of Limitation/Restriction: Ms. Cartwright fails to address the facts regarding the plain language of the trial court's limitations/restrictions. She repeatedly asserts that Mr. Flynn was ordered to participate in an anger management

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evaluation and comply with "any treatment" recommended[1] based on the following language:

> "Father Patrick Flynn must: **Be evaluated for anger management** through ACT&T within 60 days entry of the Final Parenting Plan"; and
>
> "Father must comply with any treatment as recommended by the evaluation."[2]

But she fails to mention the trial court's findings:

> "[T]he Court orders the Father to undergo evaluation and any treatment ***for anger management***."[3]

Taken together, the language in the trial court's findings and the parenting plan confirm that Mr. Flynn was obligated to undergo an *anger management evaluation* and any recommended treatment *for anger management.* There is no language anywhere in the findings or the parenting plan to suggest that Mr. Flynn would be required to undergo a domestic violence evaluation or engage in domestic violence perpetrator

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[1] *Response,* pgs. 1, 7, 16, 20, and 41.
[2] CP 19-20; emphasis added.
[3] CP 16; emphasis added.

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treatment, and there are positive findings that Mr. Flynn did *not* engage in domestic violence or stalking.

Validity of Evaluation: Ms. Cartwright entirely fails to address Mr. Flynn's challenge to the validity of the ACT&T evaluation. She does not address the fact that ACT&T exceeded the scope of the trial court's authorization when it evaluated Mr. Flynn for domestic violence and substance abuse in addition to anger management. She does not address the assertion that ACT&T's social worker appeared to rely solely on the report of Monique Brown for its findings even though the trial court had not found the report persuasive at trial. She does not address the fact that ACT&T's social worker seems to have misunderstood the trial court's ruling or that it disregarded its own testing data/tools as well as all statements made by Mr. Flynn himself.

Finally, Ms. Cartwright does not address the problem that the social worker's evaluation of information occurred off the record without the benefit of cross-examination or the rules of evidence.

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Domestic Violence vs. Abusive Use of Conflict: Throughout her response, Ms. Cartwright implies that 'domestic violence' and 'abusive use of conflict' are interrelated in a way that they are not. They are not equivalent or interchangeable, and one is not a subset of the other; they are distinct under the statute.

'Domestic violence' is governed by RCW 26.09.191(2) and is defined *specifically* and *exclusively* by RCW 26.50.010(3). A finding of domestic violence requires that parenting time be limited, among other outcomes, and a finding made under RCW 26.09.191(2) has *significant* consequences to a trial court's analysis and to all aspects of a plan. Importantly, the question of domestic violence is interested in *abusive behaviors* that are directed toward *intimate partners or household members*. In this instance, the inquiry related to domestic violence only referenced Ms. Cartwright, and there were no allegations of domestic violence against the child. This is an important distinction compared with "abusive use of conflict," discussed below. Ultimately, the trial court not only declined to make an express

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finding of domestic violence, but it specifically found that domestic violence did *not* occur.

In contrast, 'abusive use of conflict' addresses *parental behaviors* that affect *the psychological development of the child*. Subsection 3 addresses conduct that "may" have an adverse effect on the child's best interests, and it indicates that the court "may" preclude or limit provisions of the parenting plan; Subsection 3 does not have required restrictions/outcomes, and it is designed to address a wide variety of problematic parental behaviors. If a trial court intends to enter limitations/restrictions based on Subsection 3, they must be reasonably calculated to address the *identified harm* in the findings:

> "[T]he court may not impose limitations or restrictions in a parenting plan in the absence of ***express findings*** under RCW 26.09.191. We also conclude that any limitations or restrictions imposed ***must be reasonably calculated to address the identified harm.***"[4]

[4] *In re Marriage of Katare [I]*, 125 Wn.App. 813, 826, 105 P.3d 44 (2004).

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Ms. Cartwright acknowledges the trial court's finding that there was no domestic violence, but she argues that this is only a problem of semantics. She asserts that the 'harm' that the trial court intended to address when it entered an 'abusive use of conflict' finding was identified as Mr. Flynn's "pattern of coercive control over the mother" and that domestic violence perpetrator treatment is therefore 'reasonably calculated' to address the identified harm and is therefore an appropriate limitation/restriction under Subsection 3. The success of Ms. Cartwright's argument turns, then, on a question of fact, governed by what the trial court actually identified as the harm to be addressed.

The court's trial findings do not support Ms. Cartwright's assertion. The trial court never even *mentions* the words "coercion" or "control" in its findings or in the parenting plan. Ms. Cartwright claims that the trial court was concerned about a

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"pattern of abusive and controlling behaviors,"[5] but the trial court never used words like "abusive" or "controlling" to describe Mr. Flynn's behavior.[6] Ms. Cartwright alleges that Mr. Flynn's actions meet the "behavioral" definition of domestic violence towards her, which includes "a pattern of assaultive and coercive behaviors that an adult or adolescent uses to gain and maintain power and control over an intimate partner," but the trial court never made findings to suggest that Mr. Flynn engaged in 'assaultive or coercive behaviors for the purpose of gaining and maintaining power and control' over Ms. Cartwright.

Contrary to Ms. Cartwright's assertions, the trial court solely identified *parenting behaviors* that reflected hostility and high conflict, with emphasis on concern about how the absence of *coparenting* would affect *the child.*

> While this Court does not doubt the Father's detailed and thorough ability to parent the Child, the Court finds that the Father's faulting the Mother and **disagreements over child rearing** must not override

[5] *Response,* pg. 11.
[6] *Id.*

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> what is in the best interest of the child and **coparent** the child with the Mother...[7]
>
> [H]e must accept the realities of **co-parenting"**[8]
>
> Father's constant efforts to undermine the Mother as an unfit **parent**, calling CPS without justification, efforts to **groom and enlist the child in his favor** over the Mother, and his overall behavior as detailed above supporting a finding of abusive use of conflict under 3(b) of the Parenting Plan."[9]
>
> Consequently, the Court orders the Father to undergo evaluation and **any treatment for anger management.**[10]

Factually, the identified "harm" that threatened the well-being of the parties' child was Mr. Flynn's inability to *coparent* with Ms. Cartwright. This is confirmed by the fact that not only did the trial court explicitly find that Mr. Flynn had *not* engaged in domestic violence, but fostering a coparenting relationship is generally contraindicated in situations with a likelihood of domestic violence, coercion, and control, as is mediation (which

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[7] CP 16; emphasis added.
[8] *Id.*
[9] *Response,* pg. 6; CP 16.
[10] CP 16; emphasis added.

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is required by this parenting plan and is forbidden in the presence of domestic violence). The court's language reflects no concern about protecting Ms. Cartwright from abuse or control or coercion; rather, it focuses on fostering a more positive *coparenting* relationship. The trial court clearly identifies the *absence of a functional coparenting relationship* between the parties as the potential harm to the child's psychological development that it is attempting to address.

It is important to note that Ms. Cartwright is clearly aware of this problem because she is forced to rely extensively on post-trial comments made by the court in two later hearings, which she artfully declines to distinguish from the trial findings; however, Mr. Flynn assigned error to both decisions on appeal.[11]

The trial court's later comments indicate that while ACT&T's domestic violence findings were different, the treatments

[11] There is no substantial evidence in the record to support the court's later characterization of its previous concerns, and only the trial findings are relevant to the analysis as a matter of law.

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recommended were "appropriate." Not only did the trial court fail to articulate how the proposed treatment was "reasonably calculated" to address a previously "identified harm," but it also failed to address (1) whether it had authority to require treatment that may encompass appropriate remedies but may also vastly exceed the limitations authorized by Washington law, (2) justification for entering limitations/restrictions on substances without any express findings on that issue, and (3) authority for ordering Mr. Flynn to admit in writing to behaviors that he denies and that the trial court expressly found did *not* occur.

Most importantly, the trial court made no reference to the provisions of its findings or the parenting plan in making its later comments. Mr. Flynn assigns error to the later decisions, and the interpretation of a parenting plan is a question of law, which this court reviews *de novo;* an appellate court is normally limited to the order's provisions to determine its intended effect.[12]

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[12] *Kirschenbaum v. Kirshenbaum*, 84 Wn.App. 798, 803, 929 P.2d 1204 (1997).

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Plain Language RE: Request for Reduction of Time:

Throughout her brief, Ms. Cartwright is consistently artful in her paraphrasing of the language in the parenting plan about her right to request a reduction of Mr. Flynn's time, and she completely fails to address the meaning of the following language:

> "If Father does not complete evaluation and/or treatment recommended, Mother may directly petition the Court, ***i.e. without mediation***, to reduce Father's visitation with the child."[13]

In his *Opening Brief*, Mr. Flynn asserted that this language was merely a waiver of the mediation requirement, not a waiver of all statutory procedure and due process as Ms. Cartwright argues in her response. "'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'"[14] "A failure to cite authority constitutes a

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[13] *Response*, pg. 9; CP 20.

[14] *Frank Coluccio Const. Co. v. King County*, 136 Wn.App. 751, 779, 150 P.3d 1147 (2007) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

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concession that the argument lacks merit."[15] By failing to address this assertion with cited argument, Ms. Cartwright concedes it.

III. ARGUMENT

A. The trial court erred when it entered the Order.

Characterization: Ms. Cartwright alleges that Mr. Flynn is prevented from discussing the Order's character unless he previously "challenged the manner in which the mother brought her motion in the trial court."[16] This is only partially true.

If a party is challenging a specific procedural point for the first time on appeal, RAP 2.5(a) certainly applies; however, where a party is simply identifying the standard of review and the governing law on appeal, this objection is without merit.

Mr. Flynn alleges that the entry of the Order suspending his residential time was a violation of due process, which he is permitted to raise for the first time on appeal pursuant to RAP

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[15] *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099 (1997).
[16] *Response*, pg. 34.

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2.5(a), and he alleges procedural errors that were previously raised to the trial court in his motion to vacate; therefore, Ms. Cartwright's argument is without merit.

1. The trial court erred when it entered remedial[17] sanctions against Mr. Flynn for failing to comply with the terms of the final parenting plan.

Inherent Powers: Ms. Cartwright asserts that a trial court is entitled to sanction contempt based on its 'inherent powers' without reference to any governing statute, and she asserts that "the mother therefore was not required to file a statutory contempt motion for the trial court..." [18] Puzzlingly, Ms. Cartwright cites to *Keller v. Keller*[19] for this proposition. The applicability of *Keller* to parenting plans was addressed in *Marriage of Farr,*[20] which Ms. Cartwright also cites, in which the mother argued that the trial court's sanctions were

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[17] Ms. Cartwright uses the term "coercive" in her response, which is synonymous in this context.
[18] *Response*, pg. 35.
[19] 52 Wn.2d 84, 323 P.2d 231 (1958).
[20] 87 Wn.App. 177, 940 P.2d 679 (1997).

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appropriate based on its inherent powers. The *Farr* court concluded that *Keller* "does not control this case," because it "predates the marriage dissolution act."[21] The *Farr* court noted that the marriage dissolution act "allows contempt proceedings *solely* for the purpose of coercing compliance with a parenting plan," and in such a case, RCW 26.09.160 governs:

> A court may utilize its inherent power to sanction contempt "**only** if there is **no applicable contempt statute** or **it makes a specific finding that statutory remedies are inadequate**."[22]

Because Ms. Cartwright was seeking relief that is governed by RCW 26.09.160, that statute governs here, too.

Ms. Cartwright does not dispute that the trial court failed to comply with RCW 26.09.160 or to make any specific finding that the remedies contained in RCW 26.09.160 were inadequate. Given the applicability of RCW 26.09.160, the trial court was not authorized to sanction Mr. Flynn based on its inherent powers.

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[21] *Farr,* 87 Wn.App. at 187.
[22] *Id;* emphasis added.

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There is also a more general contempt statute contained in RCW 7.21, and the trial court did not comply with the requirements of that statute, either; nor did it make any specific finding that the remedies in RCW 7.21 were inadequate. Given the applicability of RCW 7.21, the trial court had no authority to sanction Mr. Flynn based on its inherent powers.

i. The trial court erred when it determined that Mr. Flynn had failed to comply with the requirements of the final parenting plan.

Finding of Contempt vs. Failure to Comply: Puzzlingly, on page 37 of her brief, Ms. Cartwright characterizes the trial court's action suspending Mr. Flynn's residential time as a 'coercive sanction imposed for contempt,' but on *the very next page*, she admits that "the trial court did not find the father in contempt."[23] If the trial court did not find Mr. Flynn in contempt (as Ms. Cartwright admits), the entry of coercive sanctions imposed *for contempt* is clearly an abuse of discretion.

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[23] *Response,* pg. 38.

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In other places in the brief, however, Ms. Cartwright repeatedly asserts that the trial court found Mr. Flynn to be in violation of the parenting plan, but she does not identify the analysis that would govern such a determination or the evidence that was relied upon. On pages 14 and 39, she admits that Mr. Flynn was confused by the language of the plan and sought clarification; normally, such facts prevent a finding of contempt.

As discussed above, Ms. Cartwright does not address the plain language of the findings and the parenting plan.

No findings of substance abuse: Ms. Cartwright does not address the merits of Mr. Flynn's argument on this point. Instead, she makes two alternative arguments. First, she argues that the father never challenged this specific treatment recommendation when the mother brought her motion to enforce and argues that it is waived pursuant to RAP 2.5(a); however, Mr. Flynn clearly objected to the *entire* treatment recommendation, and Ms. Cartwright identifies no authority that would require him to identify every internal portion with which

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he disagreed. Further, it is apparent from Mr. Flynn's argument at hearing that he objected to *any treatment* outside the scope of the anger management ordered in the parenting plan.

Secondly, Ms. Cartwright argues that abstinence from substance use is a requirement of domestic violence intervention treatment pursuant to Washington law, but this evidence seems to undermine her position – if domestic violence perpetrator treatment is governed by legal definitions, then Mr. Flynn's requirement to participate ought to be predicated on meeting the legal definition of domestic violence, which the trial court explicitly found he did not.

Authority to Order Written Confession of Abuse: Ms. Cartwright never addresses how Mr. Flynn can be ordered to admit in writing to behaviors that he denies and that the court expressly concluded he did not commit.

ii. The trial court erred when it entered sanctions without having made a specific finding on the record that Mr. Flynn had, by a preponderance of the evidence, acted in bad faith when he failed to comply with the plan.

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RCW 26.09.160: Ms. Cartwright asserts that the trial court was not required to comply with the requirements of RCW 26.09.160, because the mother did not bring a motion pursuant to the RCW 26.09.160, even though the relief she requested is governed by RCW 26.09.160. As demonstrated above, Washington law refutes this assertion, and Ms. Cartwright asserts no authority for her position; therefore, she concedes it.[24]

No Authority to Sanction Without a Finding of Contempt: At the end of her argument in Section C, Ms. Cartwright asserts:

> "[T]he trial court did not abuse its discretion in suspending the father's residential time to coerce his compliance after he refused to participate in the recommended treatment because his behaviors will continue to detrimentally affect the child until he addresses them."[25]

Ms. Cartwright identified no authority or legal basis that permits a trial court to suspend a parent's residential time as a coercive sanction *without a finding of contempt*; therefore, this

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[24] *Frank Coluccio*, 136 Wn.App at 779; *McNeair*, 88 Wn.App. at 340.

[25] *Response*, pgs. 39-40.

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Court may disregard this assertion.[26] Not only does she provide no authority in support of this assertion, but Ms. Cartwright's own citations elsewhere in her brief *refute* this assertion. Ms. Cartwright cites to *Farr* where the court explicitly stated: "Having found [the father] *in contempt*, the lower court acted within its authority."[27] In her response, Ms. Cartwright explicitly admits that the trial court did not find Mr. Flynn in contempt.

Washington law is replete with case law refuting Ms. Cartwright's assertions, for example:

> **"[T]he trial court's exercise of discretion to essentially eliminate a parent's residential time** must be exercised in the context of other important considerations. First, the legislature has expressed a policy favoring maintaining relationships between parents and children when setting a residential schedule in a dissolution action. RCW 26.09.002 provides that '[t]he state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests.' Further, RCW 26.09.187(3)(a) provides that the trial court should make residential provisions for children that 'encourage each parent to

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[26] *Frank Coluccio*, 136 Wn.App at 779; *McNeair*, 88 Wn.App. at 340.

[27] *Farr*, pg. 186, emphasis added.

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maintain a loving, stable, and nurturing relationship with the child.' **The trial court must consider these policy directives before effectively eliminating residential time based solely on RCW 26.09.191(3) factors.** Second, parents have a fundamental liberty interest in the 'care, custody and management of their children.' *In re Dependency of J.H.*, 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). **A trial court also must consider this liberty interest before effectively eliminating a parent's residential time with his or her children based solely on the RCW 26.09.191(3) factors."**[28]

The trial court did not consider any of these concerns before *totally eliminating* Mr. Flynn's residential time.

iii. The trial court abused its discretion when it suspended visitation as a remedial sanction for failure to comply with the parenting plan in violation of the public policy contained in RCW 26.09.160.

Ms. Cartwright does not respond to Mr. Flynn's public policy argument other than to say that RCW 26.09.160 only prohibits a *parent* from conditioning one aspect of the parenting plan upon another, asserting that the "statute by its terms does not limit the *trial court's* authority to coerce a parent's compliance with the

[28] *In re Marriage of Underwood*, 181 Wn.App. 608, 612, 326 P.3d 793 (2014).

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parenting plan."[29] This was already addressed in Mr. Flynn's *Opening Brief*, however; therefore, Ms. Cartwright makes no meaningful response and concedes this argument.

2. The trial court erred when it entered an order modifying the final parenting plan in violation of Washington law.

i. The trial court erred when it entered an order modifying the final parenting plan without personal jurisdiction over Mr. Flynn for a proceeding to modify the plan.

Personal Jurisdiction: Ms. Cartwright is correct that the outcome of this argument depends on how this Court chooses to characterize the Order. As demonstrated above, (1) the trial court had no authority to enter sanctions absent a finding of contempt, and (2) the trial court had no authority to enter sanctions absent adherence to statute *or* entry of a specific finding that statutory remedies were insufficient (neither of which occurred); therefore, the Order could not have been properly issued on the basis of contempt.

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[29] *Response*, pg. 36.

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Absent contempt, Ms. Cartwright identifies no other basis for altering a residential schedule except modification, and the trial court did not obtain personal jurisdiction over Mr. Flynn for a modification proceeding. (Puzzlingly, Ms. Cartwright claims that Mr. Flynn "provides no authority for the proposition that personal service of a petition for modification of a parenting plan is required,"[30] but Mr. Flynn stated very clearly on page 25 of the *Opening Brief* that CR 4.1(a) requires personal service of modification proceedings.)

Retention of Jurisdiction: Ms. Cartwright claims that the trial court retained jurisdiction because it expressly authorized the mother to "directly petition the Court, i.e., without mediation, to reduce Father's visitation with the Child,"[31] but she does not explain how the language excusing Ms. Cartwright from mediation affects jurisdiction. Notably, the language still

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[30] *Response*, pgs. 23-24.
[31] CP 19-20.

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references a petition, not a motion, which suggests there is no procedural impact other than the mediation waiver.

Waiver: Ms. Cartwright also argues that somehow Mr. Flynn waived any jurisdictional objection to modification of the parenting plan when he sent an email to the trial court asking for clarification.[32] First, an email is not even a proper action on record before the court. Second, a request for clarification is, by its very definition, *not* a new proceeding and also not a modification. A modification, on the other hand, *is* a new proceeding.[33] The jurisdictional issues that govern a request for clarification and a new proceeding are starkly different. Ms. Cartwright provides no citation to authority for the assertion that a party's request for clarification of final orders waives any

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[32] *Response*, pg. 24.

[33] State ex. rel. Mauerman v. Superior Court, 44 Wn.2d 828, 830, 271 P.2d 435 (1954).

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jurisdictional objections in future proceedings, and this Court may disregard her argument.[34]

ii. The trial court erred when it entered an order modifying the parenting plan in violation of procedural statutory requirements.

Ms. Cartwright does not deny that the trial court failed to adhere to procedural statutory requirements for modification of a parenting plan; instead, Ms. Cartwright asserts that the Order was not a modification of the plan.

iii. The trial court erred when it entered the order modifying the parenting plan in violation of substantive statutory requirements.

Ms. Cartwright does not deny that the trial court failed to adhere to substantive statutory requirements for modification of a parenting plan; instead, Ms. Cartwright asserts that the Order was not a modification of the plan.

iv. The trial court erred when it entered the order modifying the parenting plan in violation of Mr. Flynn's right to constitutional due process.

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[34] *Frank Coluccio*, 136 Wn.App at 779; *McNeair*, 88 Wn.App. at 340.

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Ms. Cartwright argues that the trial court did not modify its decision when it required Mr. Flynn to participate in domestic violence perpetrator treatment, but she makes no meaningful explanation of this assertion, nor does she cite to any authority that would permit a court to require domestic violence perpetrator treatment when the parenting plan does not require it and the findings explicitly confirm that no domestic violence occurred. This Court may disregard uncited arguments.[35]

Restrictions (Identified Harm): Ms. Cartwright argues that Mr. Flynn's constitutional rights were not violated "based on the restrictions that were placed on him pursuant to RCW 26.09.191."[36] But, as discussed above, Ms. Cartwright fails to explain how domestic violence perpetrator treatment is "reasonably calculated" to address an "identified harm," when

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[35] *Frank Coluccio*, 136 Wn.App at 779; *McNeair*, 88 Wn.App. at 340.
[36] *Response*, pg. 45.

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the trial court specifically found that domestic violence was *not* an identified harm in this matter.

Law of the Case: Ms. Cartwright asserts that Mr. Flynn needed to have appealed the original trial ruling to preserve his due process argument because the trial court's ability to restrict his residential time is now the law of the case.[37] Mr. Flynn, however, does not merely complain that the trial court restricted his parenting time; rather, he complains that the trial court entirely suspended his time without any basis in the parenting plan or findings and without complying with any procedural protections required by statute in violation of Washington law. Had the plan said any of those things, Mr. Flynn likely would have appealed. Ms. Cartwright fails to address those issues directly and instead spends pages discussing whether the original trial ruling was appropriate, which is not before this Court.

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[37] *Id.*

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Liberty Interest in Parental Rights: Ms. Cartwright does not dispute that Mr. Flynn's parental rights are protected by the due process clause of the Fourteenth Amendment, but she argues that Mr. Flynn was "put on notice that he could lose residential time granted to him in the parenting plan if he failed to comply with treatment recommendations." This is true as far as it goes, but Ms. Cartwright does not explain how Mr. Flynn could possibly have been on notice that he could lose the entirety of his residential time for failure to comply with terms that do not exist in the parenting plan. The parenting plan does not tell him to obtain a domestic violence evaluation or to follow recommendations for domestic violence treatment, and, to the contrary, the trial court explicitly confirmed that no domestic violence occurred.

Liberty Interest in Good Name: Ms. Cartwright does not even acknowledge Mr. Flynn's assertions regarding his liberty interest in his good name; this argument is therefore conceded.

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Authority of Private Social Workers: As indicated above, Ms. Cartwright does not meaningfully address Mr. Flynn's argument that Washington law does not permit judicial decisions by duly elected officials to be overruled by private professionals in the absence of due process.

B. The trial court erred when it denied Mr. Flynn's motion to vacate.

Ms. Cartwright largely disregards the arguments made in this section and instead dismisses it by saying:

> "[a]ll the arguments raised by the father both in this Court and below are challenges to the merits of either the parenting plan, which he never appealed, or the enforcement order."[38]

1. The Order should have been vacated because it was obtained as the result of an irregularity pursuant to CR 60(b)(1).

Errors of Law: Ms. Cartwright never meaningfully explains why the irregularities asserted by Mr. Flynn are automatically

[38] *Response*, pg. 22.

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"errors of law." Her only attempt to explain this position is to say: "[f]or instance, under CR 60(b)(1), appellant alleges that the enforcement order should be vacated because it improperly modified the parenting plan," which is somehow *automatically* an "error of law" without any further analysis.[39]

Ms. Cartwright appears to have gotten tangled up in fallacious reasoning. The law indicates that "mere" errors of law are not a sufficient basis to vacate an order, but this does not somehow mean that errors of law are categorically *excluded* from being a sufficient basis to vacate an order. Pursuant to CR 60(b)(1), for example, irregularities are generally identified as a particular *kind* of legal error, specifically one that "has been defined as the want of adherence to some prescribed rule or mode of proceeding."[40] In other words, an irregularity is a subset of legal errors that affected the entry of the decision in a particular way; therefore, Ms. Cartwright cannot, as she attempts to do, dismiss

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[39] *Id.*

[40] Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978).

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Mr. Flynn's arguments without discussion simply because they reference 'legal errors' unless she also proves those legal errors to be outside the definition of an "irregularity."

Irregularities: Ms. Cartwright cites to no authority governing irregularities in the context of a motion to vacate nor does she specifically address any of the authority presented by Mr. Flynn. As demonstrated above, the trial court failed to adhere to any procedure regardless of whether the Order is considered a sanction for contempt or a modification, and Ms. Cartwright never disputes this; she therefore concedes the argument.[41]

2. The Order should have been vacated because it was void for lack of jurisdiction pursuant to CR 60(b)(5).

Ms. Cartwright's jurisdiction arguments are addressed above.

3. The Order should have been vacated for "other reasons justifying relief" pursuant to CR 60(b)(11).

Extraordinary Circumstances: Ms. Cartwright argues that there is nothing "extraordinary" or "fundamentally wrong" about

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[41] *Frank Coluccio*, 136 Wn.App. at 779; *McNeair*, 88 Wn.App. at 340.

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requiring the father to participate in treatment to address behaviors that the trial court found to be detrimental to the child; however, this is a very carefully worded statement intended to avoid addressing the more specific problem of ordering the father to engage in domestic violence perpetrator treatment when the trial court specifically found that no domestic violence had occurred. *That* outcome *is* extraordinary and fundamentally wrong, and Ms. Cartwright does not meaningfully dispute that.

Prejudice (Second Bite at the Apple): Ms. Cartwright does not dispute that the Order allowed her to revive claims and obtain relief that had been denied at trial, which is a profoundly prejudicial outcome and an extraordinary circumstance; she therefore concedes that argument.

Frustrates Purpose: Ms. Cartwright fails to address whether the Order frustrates the parenting plan; instead, she attempts to avoid the issue by arguing that the issue of frustration constitutes "a challenge to the merits of the enforcement order and is not grounds to vacate it." But Ms. Cartwright does not cite to *any*

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authority to support this assertion, nor does she make any attempt to refute or distinguish Mr. Flynn's cited authority indicating that circumstances are sufficiently extraordinary when an enforcement order materially frustrates the purpose of the underlying order.[42] This Court may disregard her argument.[43]

C. The trial court erred when it denied Mr. Flynn's request for attorney's fees.

Ms. Cartwright provides no argument in response to Mr. Flynn's request regarding intransigence and CR 11. She merely states that his request should be rejected with no explanation, and she provides no refutation of any of his assertions of fact or law. Her failure to provide argument with citation to authority is a concession.[44]

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[42] *Opening Brief*, pgs. 35-36 *See, e.g.*, *In re Marriage of Hammack*, 114 Wn.App. 805, 810-11, 60 P.3d 663 (2003); *In re Marriage of Thurston*, 92 Wn.App. 494, 503-04, 963 P.2d 947 (1998).

[43] *Frank Coluccio*, 136 Wn.App at 779; *McNeair*, 88 Wn.App. at 340.

[44] *Id.*

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Ms. Cartwright provides no response to Mr. Flynn's assertion that she violated RCW 26.09.160 in bad faith; instead, she simply asserts that, because the court's finding that Mr. Flynn had previously engaged in abusive use of conflict, she is somehow inoculated against any finding of bad faith against herself, regardless of her behavior. Her failure to provide argument with citation to authority is a concession.[45]

D. Mr. Flynn should be awarded attorney's fees on appeal.

Ms. Cartwright similarly does not address the same arguments with respect to fees on appeal; her failure to provide argument with citation to authority is a concession.[46]

E. Ms. Cartwright's request for attorney's fees on appeal.

RAP 18.1(a) provides that if "applicable law grants to a party the right to recover reasonable attorney fees or expenses on

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[45] *Id.*
[46] *Id.*

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review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses." A request for appellate attorney fees requires a separate section in a party's brief devoted to the request.[47] "The rule requires more than a bald request for attorney fees on appeal."[48] "Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs."[49]

Ms. Cartwright requests fees pursuant to RCW 26.09.140 pursuant to her need and the father's ability to pay, which will need to be proven should this Court entertain her request. Mr. Flynn reserves argument or objection until he is provided with evidence that would permit him to respond.

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[47] RAP 18.1(b).
[48] *Stiles v. Kearney*, 168 Wn.App. 250, 267, 277 P.3d 9 (2012).
[49] *Id.*

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IV. CONCLUSION

Mr. Flynn did not violate the parenting plan, and the trial court's erroneous decision has profoundly prejudiced Mr. Flynn and damaged his relationship with his daughter.

Mr. Flynn respectfully requests that this Court reverse the trial court's decision, immediately reinstate Mr. Flynn's residential time, award make-up time, require Ms. Cartwright to pay any therapeutic costs addressing the disruption of his relationship with the parties' daughter, and enter an award of attorney's fees to Mr. Flynn. Mr. Flynn also respectfully requests that this Court provide clear direction to trial courts with respect to their authority to suspend parenting time and the degree to which judicial authority may be delegated to private third parties so that no other parent will be subject to the same devastatingly arbitrary treatment that Mr. Flynn received.

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The undersigned certifies that the foregoing brief contains 5,641 words not including the appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and this certification of compliance.

Respectfully submitted this 2nd day of November, 2021,

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CERTIFICATE OF ATTORNEY

I certify that on November 2, 2021, I arranged for delivery of a copy of the foregoing *APPELLANT'S REPLY BRIEF* to the following:

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Appendix 5
Opinion (2020 Appeal)

FILED
5/31/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of: ALEXANDRA LEIGH CARTWRIGHT, Respondent, v. PATRICK RYAN FLYNN, Appellant.	)	No. 82231-4-I (Consolidated with No. 82530-5-I) DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Alexandra L. Cartwright brought a motion for an order enforcing the parenting plan following Patrick R. Flynn's failure to engage in the treatment plan recommended pursuant to a court-ordered anger management evaluation. The trial court granted the motion, suspending Flynn's residential time with their child until he engaged in treatment. The court also awarded Cartwright attorney fees associated with bringing the motion. Flynn appealed the order enforcing the parenting plan and later filed a CR 60 motion to vacate it, alleging that the order was invalid for a number of reasons. The court denied the motion to vacate. Flynn later separately appealed the denial of his CR 60 motion and the two appeals were consolidated.

The terms of the order enforcing the parenting plan reduced Flynn's residential time in a manner not provided for in the dissolution of marriage act,[1] thus we reverse and remand for compliance with proper statutory procedures. Because we reverse the order to enforce the parenting plan, we need not reach the assignments of error as to the denial of the CR 60 motion to vacate.

FACTS

The marriage of Patrick Flynn and Alexandra Cartwright was dissolved following a trial. Cartwright sought restrictions on Flynn's residential time with their child under RCW 26.09.191. The trial court found the father's actions "troubling," but stated it could not "find that they rose to the level of domestic violence as define[d] by statute and case[ ]law." The judge also rejected the assertion that Flynn's conduct constituted stalking. The trial court found that Flynn's actions "did constitute abusive use of conflict and orders [RCW 26.09.]191 limitations as stated in the Parenting Plan" because the "Father's constant efforts to undermine the Mother as an unfit parent, calling CPS[2] without justification, efforts to groom and enlist the child in his favor over the Mother and his overall behavior as detailed above support a finding of abusive use of conflict under 3(b) of the Parenting Plan." An amended parenting plan was entered April 14, 2020.[3] The trial court found that "[t]he Father has a history of undermining Petitioner Alexandra Cartwright

[1] Ch. 26.09 RCW.

[2] Child Protective Services.

[3] The record suggests some original orders were entered on March 26, 2020 after the conclusion of the dissolution trial, but it is unclear as to the reason for entry of the amended parenting plan just over a week later. Amended child support worksheets were also entered on April 14, 2020. Neither party appears to take issue with any amendment that may have occurred with regard to the parenting plan.

('Mother'), showing aggression toward the Mother, not being supportive of her role as a parent and other behaviors detrimental to the child." As a result, the trial court ordered Flynn to obtain an evaluation for anger management through Anger Control Treatment & Therapies (ACT&T) within 60 days of entry of the final parenting plan. The order specified that Flynn was to engage in "any treatment" recommended by ACT&T after its anger management evaluation.

Cartwright was designated the primary residential parent with sole decision-making authority as to their daughter. Flynn was granted two overnight visits, every other weekend, and one mid-week evening visit. The parenting plan also specified, "If Father does not complete evaluation and/or treatment recommended, Mother may directly petition the Court, i.e. without mediation, to reduce Father's visitation with the Child." (Emphasis added.)

Flynn underwent an evaluation for anger management with ACT&T as ordered. The evaluator found that Flynn "clearly meets the Behavioral Definition of domestic violence used in the assessment." The evaluator also noted concerns regarding Flynn's "pattern of abusive and controlling behaviors." The evaluator determined that Flynn's "abusive use of conflict is indicative of a pattern of coercive control that goes beyond what an anger management intervention would be effective [sic]" and, as a result, the evaluator recommended that Flynn "attend and complete a DSHS[4] certified domestic violence perpetrator program" because "[t]eaching perpetrators of domestic violence only anger management skills often

[4] Department of Social and Health Services.

only improves their ability to control their partners with lower arousal and more predatory skill sets." (Emphasis omitted.)

The treatment plan was drafted on July 7, 2020 and contained the following requirements:

- Father was to participate in a level 2 DSHS-certified domestic violence intervention program that is a minimum of 39 weekly group sessions;
- Upon completion of the weekly group phase of the domestic violence intervention program, the father would enroll and successfully complete DV Dads. While enrolled in DV Dads, the father would participate in monthly monitoring sessions in the domestic violence intervention program;
- The father would comply with the provider's contract; and
- The father would abstain from all mood and mind altering drugs without a doctor's prescription including alcohol and marijuana for the entire length of the treatment.

In October 2020, Flynn sent an email to the trial court requesting "clarification" of its order requiring his compliance with ACT&T's treatment recommendations. Flynn's position was that the trial court only intended for him to comply with treatment recommended for anger management and essentially that the July 7 treatment plan was outside of the scope of what the court had ordered. He noted, that "if [the Judge] felt there was an issue of domestic violence he would have himself ordered such treatment."

Based on Flynn's email to the court and continued assertions to opposing counsel that the treatment plan exceeded the court's original directive, Cartwright

filed a motion to enforce the parenting plan by requiring the father to comply with the July 7 treatment plan from ACT&T. Additionally, and presumably based on the language contained in the underlying parenting plan allowing her to forego mediation, she asked the trial court to restrict Flynn's residential time until he completed the recommended treatment, and suspend his residential time altogether if he became non-complaint with treatment. Cartwright also sought an award of attorney fees for bringing the motion.

The court heard oral argument on the motion to enforce the parenting plan and Flynn appeared pro se. Flynn's sole argument at the hearing was that, since the trial court did not find he had committed domestic violence, he should not be required to participate in treatment for domestic violence. The court responded that the parenting plan was quite clear that Flynn was required to engage in "any treatment" recommended by the provider and had been warned "that if [he didn't] comply with the evaluation and treatment that [was] required under the parenting plan that [his] visitation may be suspended or reduced."

In granting the order enforcing the parenting plan, the trial court reiterated that the parenting plan required Flynn to "comply with any treatment as recommended by the evaluation." The court then specifically ordered the following based on the results of the ACT&T evaluation:

> a. Patrick Flynn must comply with the recommended treatment of 39 weekly group sessions of a level 2 D.S.H.S. certified domestic violence intervention program before he can resume residential time with W[.] F[.]. Patrick Flynn must enroll in the treatment program [within] 30 days of this order and provide proof to Mother's counsel.
> b. The treatment program entered into by Mr. Flynn should be with [ACT&T] as recommended by Dr. Monique Brown in her

parenting evaluation report and he shall comply with the [ACT&T] provider contract.

c. Mr. Flynn must abstain from all mood and mind-altering drugs without a doctor's prescription including alcohol and marijuana for the entire length of treatment.
d. Mr. Flynn must enroll and successfully complete DV Dads with Mark Adams LMHC when he successfully complete[s] the weekly group [phase] of the DSHS certified domestic violence program with [ACT&T]. Mr. Flynn will then move to monthly monitoring sessions in his DV programs, where he shall remain until he successfully completes DV Dads with Mark Adams, LMHC.
e. Patrick Flynn must pay $4105.00 in attorneys' fees incurred by Alexandra Cartwright for having to bring this motion to enforce a parenting plan. Fees shall be paid to Luminosity Law PLLC within 60 days of entry of this order, or work out a payment plan [with] counsel.

(Emphasis added.) On December 23, 2020, Flynn filed a Notice of Appeal seeking review of the order enforcing the parenting plan.

Flynn did not engage in any treatment, which led to the suspension of his residential time under the order enforcing the parenting plan. Instead, Flynn retained counsel who, in February 2021, filed a motion to vacate the order enforcing the parenting plan under CR 60. Following oral argument, the trial court denied the motion to vacate the enforcement order. Flynn subsequently appealed the order denying his motion to vacate in April 2021. Both of Flynn's appeals have been consolidated here.

ANALYSIS

I. Statutory Mechanisms to Change Residential Time with a Child

Chapter 26.09 RCW sets out the exclusive methods by which a court may change a parent's residential time with their child(ren) as provided in a parenting plan. Each contains its own requirements which are designed to afford parents

due process as to their parental rights. A parent has a fundamental civil right as to custody and control of their children, which cannot be infringed upon without complete due process safeguards. Halsted v. Sallee, 31 Wn. App. 193, 195, 639 P.2d 877 (1982).

"There is some overlap between the trial court's authority under RCW 26.09.187, to establish the terms of a parenting plan and its authority under RCW 26.09.191(3), to 'preclude or limit any provision of the parenting plan.'" In re Marriage of Chandola, 180 Wn.2d 632, 650, 327 P.3d 644 (2014) (quoting RCW 26.09.191). A court may restrict a parent's residential time with their child under RCW 26.09.191(3) if it finds a parent's conduct may have an adverse effect on the child's best interest and any of the factors set out within the statute are present.

The court imposed restrictions on Flynn's residential time based on a finding that he engaged in abusive use of conflict. However, even in light of that finding and an order to engage in treatment meant to address the behavior underlying the restriction, the parenting plan provided Flynn with one evening visit per week and residential time with their child every other weekend.

A. Self-Executing Conditions in a Parenting Plan

One of the means by which a court may change an existing residential schedule contained in a parenting plan is by including self-executing language in that original order. Typically, the court would identify a triggering condition and explain the consequence that would flow from that condition. In this scenario, the parties would have either agreed to the self-executing provision in the parenting plan through mediation, arbitration or settlement negotiations or the court would

craft such language after the conclusion of a trial. In any of those circumstances, the parents would have had notice and an opportunity to present argument on the issue, satisfying due process requirements.

While the transcript of proceedings suggests that the trial court believed the language in the parenting plan is self-executing, it is not. After finding that Flynn engaged in the abusive use of conflict under RCW 26.09.191, the court ordered him to obtain an anger management evaluation at ACT&T, provide the parenting evaluation from the dissolution to the ACT&T evaluator, and comply with "any treatment as recommended by the evaluation" from ACT&T. The order then states "If Father does not complete evaluation and/or treatment recommended, Mother may directly petition the Court, i.e. without mediation, to reduce Father's visitation with the Child." Compliance with treatment at ACT&T is the .191 restriction on his residential time. However, the reduction of Flynn's residential time under the plain language of the order is not automatic once the triggering condition (failure to comply with the evaluation or treatment) occurs, but depends on a "petition" from Cartwright.[5]

B. Petition to Modify a Parenting Plan

The next way that the court may change a parent's residential time in a parenting plan is through a petition to modify under RCW 26.09.260 and .270. Before the court will conduct a hearing on the matter, the petitioner must submit an affidavit that demonstrates there is adequate cause to alter the existing plan.

[5] The record suggests that the parties both understood the reduction of Flynn's residential time was intended as a consequence of noncompliance, but regardless of the belief of the parties, or the court, we are tasked with reviewing the propriety of the ordering language.

RCW 26.09.270. A trial court may only modify a parenting plan if it finds that "a substantial change has occurred in the circumstances of the child or the nonmoving party and . . . the modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1). The procedure for modification is very specific and requires consideration of certain criteria such that the court's discretion is limited. See RCW 26.09.260–.270. A modification is proper when new facts have arisen since the prior plan or the facts now alleged were unknown to the court at the time of entering the prior plan. RCW 26.09.260

Because the language in the parenting plan indicates that Cartwright "may directly petition the Court" in the event of Flynn's non-compliance with the evaluation or treatment, Flynn claims that the court essentially allowed a modification without following the proper statutory procedures. (Emphasis added.) This language appears to suggest the parenting plan directly contemplated Flynn's noncompliance, again likely believing it was self-executing, which would have rendered a modification unnecessary. As explained above, however, the provision was not self-executing. Cartwright did not present the court with a statutorily sufficient motion to modify under RCW 26.09.260(1), nor did the court treat it as such.

C. Contempt Proceedings

Finally, a court may adjust a parent's residential time in a parenting plan based on contempt proceedings under RCW 26.09.160. "'Failure to comply with a provision in a parenting plan or a child support order may result in a finding of

contempt of court.'" In re Marriage of Lesinski and Mieno, __ Wn. App 2d __, 506 P.3d 1277, 1284 (2022) (quoting RCW 26.09.184(7)). A parent seeking to compel another parent to comply with a parenting plan should move the court for a contempt order and must establish the contemnor's bad faith by a preponderance of the evidence. In re Marriage of Rideout, 110 Wn. App. 370, 376, 40 P.3d 1192 (2022). "A parent who refuses to perform the duties imposed by a parenting plan is per se acting in bad faith." Id. at 377. A parent is "deemed to have the present ability to comply with the order establishing residential provisions unless [they] establish[] otherwise by a preponderance of the evidence." RCW 26.09.160(4). Once the court finds that a parent has acted in bad faith as to their failure to comply with the parenting plan, "the court shall find the parent in contempt of court." RCW 26.09.160(2)(b). "Upon a finding of contempt, the court shall order" the contemnor to (1) provide additional visitation time to make up for the missed time, (2) pay the other parent's attorney fees and costs, and (3) pay the other parent a penalty of at least $100. RCW 26.09.160(2)(b); e.g. In re Marriage of Farr, 87 Wn. App. 177, 940 P.2d 679 (1997). Other than sending a parent to jail, punishment for contempt in this context is mandatory, not discretionary. Rideout, 110 Wn. App. at 376.

RCW 26.09.160(2)(a) states:

> A motion may be filed to initiate a contempt action to coerce a parent to comply with an order establishing residential provisions for a child. If the court finds there is reasonable cause to believe the parent has not complied with the order, the court may issue an order to show cause why the relief requested should not be granted.

RCW 26.09.160 specifically requires a finding of bad faith before a contempt order may be entered and a parent sanctioned through loss of residential time, as

occurred here. "In determining whether the facts support a finding of contempt, the court must strictly construe the order alleged to have been violated, and the facts must constitute a plain violation of the order." In re Marriage of Humphreys, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995).

Here, the report of proceedings from the hearing on Cartwright's motion demonstrates that the court was aware of its authority to impose a remedial sanction, and the motion itself is clear that is what Cartwright was seeking. However, the court also noted: "I'm not in the business of just sanctioning people for not complying with my orders. What I want to see is a family who's willing to move forward and a Father who's willing to, you know, learn from the lessons that he learned and move forward." In addition to the fact that the court did not follow the proper statutory procedure for contempt under RCW 26.09.160, this excerpt appears to indicate that the court was not yet imposing a sanction for noncompliance, but rather clarifying its directive as Flynn requested and providing another opportunity to satisfy the treatment requirement before a remedial sanction would be ordered.

II. Clarification, Enforcement and the Court's Inherent Authority

Parties may seek clarification of a court's order, which Flynn did when he emailed the court after he received the treatment recommendation from ACT&T. He believed that the treatment plan from ACT&T went beyond what the court ordered.[6] The court treated his email inquiry like a motion to clarify, as

[6] Flynn also assigns error to the court's finding that he failed to comply with the evaluation and treatment requirement as set out in the parenting plan because the recommendation from ACT&T includes domestic violence and other forms of treatment. He avers this exceeds the scope

demonstrated by the transcript of the hearing on the motion to enforce wherein the judge explained that his order was to comply with "any treatment as recommended in the evaluation," including a domestic violence intervention program, DV Dads, and prohibitions on the consumption of alcohol or non-prescribed drugs during his treatment. The court used the hearing to clarify that when it ordered "any treatment" in the parenting plan, it truly meant any treatment that was recommended.

Further, a court may order enforcement of prior conditions or directives contained in other court documents. A party's first attempt to assure that the orders of the court are carried out need not be an action in contempt or a petition to modify. If the order enforcing parenting plan only incorporated the July 7 treatment plan from ACT&T and reiterated that Flynn must complete it, there would be no error. However, because paragraph 3(a) of the order enforcing states that Flynn must complete specific treatment "before he can resume residential time with W[.] F[.]," it deviated from the statutory procedures for changing a parent's residential time.

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of the court's original requirement, but relies on language contained in the "Findings and Conclusions about a Marriage" (FFCL) that were entered on March 26, 2020 at the conclusion of the dissolution trial.

The FFCL, which Flynn did not appeal, merely recites the general rulings contained in the Parenting Plan. The order of the court that requires Flynn to act with regard to treatment is contained in the Parenting Plan, which is properly before us on appeal. The ordering language regarding compliance with "any treatment as recommended by the evaluation" is clear. (Emphasis added.)

Because the recommendations to which Flynn objects resulted from an anger management assessment from ACT&T, after consideration of the precise collateral materials explicitly noted by the court, they do not exceed the scope of the court's order.

During oral argument at this court, Cartwright claimed that the trial court acted within its inherent powers in effectuating the ordering language contained within the parenting plan. RCW 2.28.150 states:

> When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

(Emphasis added.) However, even the statute setting out the court's inherent authority recognizes the interplay with other related statutes. "A court may only resort to its inherent power if there is no applicable contempt statute or it makes a specific finding that statutory remedies are inadequate." Farr, 87 Wn. App. at 187. Here, RCW 26.09.160 was the applicable contempt statute for the matter before the trial court and the record demonstrates that the court did not make any findings that existing statutory remedies, such as a properly framed petition to modify, were inadequate.

Though Cartwright claims that the trial court acted within its inherent powers, this was not the case and would be improper here. A recent opinion from this court, In re Marriage of Cox, provides an example of a context wherein a court necessarily resorted to it inherent power to enforce its orders. 20 Wn. App. 2d 594, 501 P.3d 155 (2021). In Cox, the trial court utilized its inherent power to enter a writ of restitution against one party in a dissolution when the wife repeatedly refused to vacate the family home so that the community asset could be sold as ordered in the dissolution. Id. at 596–97. However, Cox is distinguishable because the court had directed the wife to vacate the home by a date certain in

the original dissolution orders regarding the property distribution. Id. The writ of restitution at issue in Cox was merely another attempt to command compliance with a previous order; it did not otherwise disturb the property distribution or modify its previous directive. There was no need for the trial court here to resort to its inherent authority as it did in Cox; particularly when no action had been taken yet as to Flynn's noncompliance and there were statutory procedures, modification or contempt action under RCW 26.09.160, which could provide an adequate remedy. Accordingly, we reject Cartwright's argument that this was a proper exercise of the trial court's inherent authority.

The language contained in the order enforcing the parenting plan constitutes an abuse of discretion because the court misinterpreted the law regarding its inherent authority and the statutory remedies for noncompliance where the language in the original order is not self-executing. The trial court should have upheld the procedural requirements for either contempt proceedings or a modification of the parenting plan as set out in the respective statutes. Flynn was prejudiced by this procedural lapse, particularly as he was representing himself at the time. Proceeding under the proper statutory framework provides notice to the party facing a sanction as to the standards they must meet and the process they can expect. Because the means by which the court attempted to resolve this matter rested upon a misinterpretation of the law, it constitutes an abuse of discretion. Accordingly, we reverse the order enforcing parenting plan.[7]

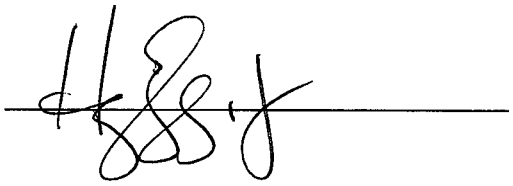
[7] In light of our reversal of the order enforcing parenting plan, we need not reach Flynn's other assignments of error as to this order, including a number of challenges that were never presented to the trial court and raised for the first time on appeal.

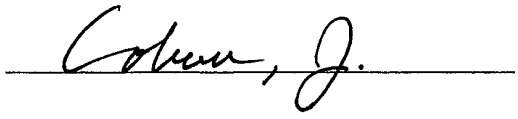
III. Attorney Fees

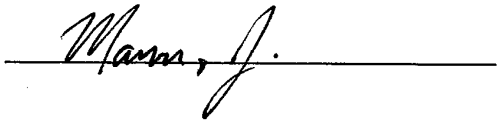
Finally, RCW 26.09.140 allows this court to award fees to the prevailing party, if merited. The relevant portion of RCW 26.09.140 states, "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs." While both Flynn and Cartwright request fees, and properly provide both authority and some argument for their respective requests, we decline to award fees to either party.

Reversed and remanded.

WE CONCUR:







Further, and for similar reasons, we do not reach the assignments of error associated with his later appeal of the denial of his CR 60 motion to vacate the order enforcing parenting plan. This includes Flynn's challenge to the trial court's denial of his request for attorney fees based on his unsuccessful motion to vacate.

Appendix 6
Opening Brief (2022 Appeal)

COURT OF APPEALS OF THE STATE OF WASHINGTON
Division I

Court of Appeals No. 843435

In re:

PATRICK RYAN FLYNN,

Appellant,

and

ALEXANDRA LEIGH CARTWRIGHT,

Respondent.

APPELLANT'S OPENING BRIEF

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i. ***Post-trial, the Superior Court had/has no authority to order limitations related to domestic violence (including an evaluation).***

ii. ***Post-trial, the Superior Court had/has no authority to order limitations related to substance abuse (including an evaluation).***

f. <u>The principles of constitutional law support Mr. Flynn's interpretation of the language in the *Parenting Plan.*</u>

2. Alternatively, Mr. Flynn did not intentionally violate the *Parenting Plan,* and/or he had reasonable cause to violate the *Parenting Plan.*

C. The Superior Court erred when it suspended Mr. Flynn's residential time and entered a contempt order that modified the residential schedule as terms for "purging" contempt.

1. The Superior Court erred when it entered punitive sanctions against Mr. Flynn without providing appropriate constitutional due process.

a. <u>The suspension of Mr. Flynn's parental visitation for one month, regardless of his compliance, is a punitive sanction.</u>

b. <u>The ability to "purge" Mr. Flynn's contempt is outside his control and depends on whether "the professional supervisor deems it appropriate"; therefore, the sanction is punitive.</u>

c. <u>The additional requirement for supervised visitation is effective regardless of whether Mr. Flynn complies with the order; therefore, the sanction is punitive.</u>

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2. **The Superior Court erred when it entered an order that modified the *Parenting Plan* as a remedial sanction pursuant to RCW 26.09.160.**

    a. **Modification of a parenting plan is not available as a remedial sanction pursuant to RCW 26.09.160.**

    b. **A parenting plan cannot be modified via a contempt order.**

        i. ***Contempt findings only provide a basis for adequate cause.***

        ii. ***Adequate cause requires multiple findings of contempt.***

        iii. ***Adequate cause requires multiple findings of contempt for violation of residential time provisions, specifically.***

3. **The Superior Court erred when it modified the *Parenting Plan* in violation of Washington law.**

    a. **The Superior Court erred when it modified the *Parenting Plan* without personal jurisdiction over Mr. Flynn for a modification proceeding.**

    b. **The Superior Court erred when it modified the *Parenting Plan* in violation of procedural statutory requirements.**

    c. **The Superior Court erred when it modified the *Parenting Plan* in violation of substantive statutory requirements.**

        i. The Superior Court made no findings to justify domestic violence or substance abuse limitations.

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I. SUMMARY OF ARGUMENT

This case returns to this Court to address precisely the same issues for which it previously arrived. Regretfully, the errors only proliferated on remand. As before, Ms. Cartwright again pursued creative methods to obtain a modification of the parenting plan in violation of statutory requirements, and this time she also persuaded the Superior Court to enforce the defunct order that had already been reversed by this Court as the basis for finding contempt and to impose punitive sanctions without the benefit of due process. Mr. Flynn has still not seen his daughter in a year a and a half, and he begs this Court to note the lack of meaningful consideration on remand (particularly with respect to constitutional issues) and to avoid further injustice by resolving this matter on the merits.

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II. ASSIGNMENTS OF ERROR

The Superior Court erred when it entered the *Contempt Hearing Order ("Contempt Order")* on July 15, 2022,[1] and when it...

#1: ... failed to identify the language in the parenting/custody order that had not been obeyed in Section 4, choosing instead to identify the relevant portion of the order as "[o]ther parts of the parenting/custody orders."

#2: ... failed to specifically identify how the parenting/custody order was not obeyed in Section 4, saying instead:

> *The parenting/custody order was not obeyed as follows:*
>
> *As described in the Motion for Contempt Hearing.*
>
> *See Declaration of Alexandra Cartwright in Support of Motion for Contempt.*

#3: ... found that Mr. Flynn could legally be found in contempt of the *Order Enforcing Parenting Plan (December 4, 2020)* ("*December Order*"), which had already been reversed by this Court prior to the date Ms. Cartwright's *Motion for Contempt* was filed.

#4: ... characterized the domestic violence treatment recommended by ACT&T as "court-ordered treatment."

#5: ... found that "Patrick Flynn refused to follow Section 4.b. of the Final Parenting Plan" and when it found that "Patrick Flynn understood his obligation to comply with the Final Parenting Plan."

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[1] CP 217-22.

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#6: ... determined in Section 4(b) that Mr. Flynn had an obligation to comply with the *December Order* when that order had already been reversed, and when it determined that failure to comply demonstrated an "intentional and bad faith refusal."

#7: ... found that Mr. Flynn demonstrated an "intentional and bad faith refusal to comply" with the *Parenting Plan.*

#8: ... implied that Mr. Flynn was obligated to provide evidence of his willingness to comply with the *December Order* when it had already been reversed.

#9: ... affirmed the attorney fee award associated with the *December Order* that had already been reversed.

#10 ... found that the request for fees was "reasonable and appropriate under the Lodestar method," without distinguishing between the *December Order* fees request and the *Contempt Order* fees request.

#11: ... determined that Mr. Flynn was in contempt under RCW 26.09.160 and RCW 7.21.010.

#12: ... completely suspended Mr. Flynn's residential time with his child for one month as a remedial sanction pursuant to RCW 26.09.160.

#13: ... modified the *Parenting Plan* to institute supervised visitation as a remedial sanction pursuant to RCW 26.09.160.

#14: ... entered "purge" terms that subjected Mr. Flynn to "remedial" sanctions that continue for a minimum of seven (7) months even if he complies.

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#15: ... completely suspended Mr. Flynn's residential time for one month regardless of whether he complies with the *Parenting Plan*, which is a punitive sanction that violated Mr. Flynn's due process rights.

#16: ... arbitrarily violated Mr. Flynn's parenting rights without due process.

#17: ... arbitrarily deprived Mr. Flynn of his liberty interest in his good name without due process.

#18: ... refused to acknowledge Mr. Flynn's assertion of affirmative defenses and submission of evidence to rebut Ms. Cartwright's "prima facie case."

III. ISSUES PRESENTED

1. Whether the Superior Court erred when it found Mr. Flynn in contempt of the *December Order,* which had previously been reversed by this Court.

2. Whether the Superior Court erred when it found Mr. Flynn in contempt of the *Parenting Plan.*

3. Whether the Superior Court erred when it suspended Mr. Flynn's residential time and entered a contempt order that modified the residential schedule as terms for "purging" contempt.

4. Whether the Superior Court violated Mr. Flynn's constitutional rights when it entered the *Contempt Order.*

5. Whether the Superior Court erred when it granted Ms. Cartwright's request to "affirm" the fees that were awarded in the *December Order* which had already been reversed.

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IV. STATEMENT OF THE CASE

Patrick Flynn and Alexandra Cartwright were married on September 18, 2010, and the marital community ended seven years later, on April 30, 2017.[2] The parties had one daughter together, who was five (5) years old at the time of trial.[3]

February 10, 2020: The parties went to trial on the dissolution of their marriage.[4] At trial, Ms. Cartwright made allegations of domestic violence, stalking, and abusive use of conflict.[5] In support of her claims, Ms. Cartwright brought a domestic violence expert witness, Tracee Parker, who testified that Mr. Flynn had engaged in stalking behaviors, and while she admitted that "there was no physical violence against the Mother in this case," she nevertheless claimed that Mr. Flynn showed "dangerous lethality factors sufficient to constitute domestic

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[2] *Findings of Fact and Conclusions of Law ("FFCL"),* pg. 2; designated in *Supplemental Designation of Record* ("*SDR*") filed simultaneously with this brief.
[3] *FFCL,* pg. 4.
[4] *FFCL,* pg. 1.
[5] *FFCL*, pgs. 5-7.

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violence."[6] The Superior Court had also appointed a parenting evaluator, Monique Brown, who produced a 49-page report that was admitted at trial.[7]

MARCH 26, 2020: The Superior Court entered findings and conclusions, which included the definition of domestic violence pursuant to RCW 26.50.10(3) and the definition of stalking pursuant to RCW 9A.46.110.[8] After its consideration of the testimony of Ms. Cartwright, Tracee Parker, and Monique Brown, the Superior Court entered specific findings indicating that Mr. Flynn had ***not*** engaged in domestic violence or stalking.[9] The Superior Court did find that Mr. Flynn's behavior with respect to co-parenting rose to an abusive use of conflict, and it indicated:

> "... the Court orders the Father to undergo evaluation and ***any treatment*** **for** ***anger management***. As stated above, the Father must

[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

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> address his inner anger and feelings about the Mother as shown in his daily journal like entries.[10]

The *Parenting Plan* included limitations on Mr. Flynn.[11] The Superior Court declined to enter RCW 26.09.191 findings related to domestic violence, explicitly indicating: **"Neither parent has any of these problems."[12]** Similarly, it made no findings in Section 3(b) that either parent had an alcohol or substance abuse problem.[13]

In the *Parenting Plan,* the Superior Court ordered that Mr. Flynn "[b]e evaluated ***for anger management*** through ACT&T[14] within 60 days entry of the Final Parenting Plan," and indicating that "Father must comply with any treatment as recommended by the evaluation."[15]

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[10] *FFCL,* pg. 7.
[11] CP 2.
[12] CP 1.
[13] *Id.*
[14] "Anger Control Treatment & Therapies."
[15] CP 2.

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JULY 7, 2020: Mr. Flynn complied as directed, and a report was issued on July 7, 2020, revealing that, without permission from the Superior Court, ACT&T unilaterally proceeded to evaluate Mr. Flynn not only for anger management, as authorized, but also for substance abuse and domestic violence, which the Superior Court had not instructed (presumably because it had already entered findings that Mr. Flynn had no problems with domestic violence or substance abuse).[16]

Pursuant to its evaluation, ACT&T did not find that Mr. Flynn had an anger management problem, indicating that his *Buss/Durkee Hostility Inventory* "did not reveal an overall propensity for hostility nor did it in any subcategories."[17] The report noted that anger management addresses impulse control and affect regulation disorders, and ACT&T concluded that Mr.

[16] *ACT&T Report*, included in *SDR*.
[17] *Id.*

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Flynn "did not reveal any impulse control disorder or any affect management dysregulation."[18]

ACT&T also did not find that Mr. Flynn had a substance abuse problem; his *Substance Abuse Subtle Screening* (SASSI-3) revealed a low probability of a substance abuse disorder.[19]

With respect to domestic violence, ACT&T specifically reported that Mr. Flynn's *Propensity for Abuse Scale* (PAS) score was 42%, which is normal.[20] ACT&T noted that scores under 48% are considered normal, and "high scores correlated with relational abuse" are over 60%.[21]

Then, inexplicably, ACT&T completely disregarded its own test data as well as the information provided by Mr. Flynn and the specific legal findings and conclusions of the Superior Court and chose instead to rely ***solely*** on the report of Monique Brown, even though the Superior Court had already considered the

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

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report and testimony of Monique Brown at trial and made specific findings that no domestic violence, stalking, or substance abuse existed anyway.[22]

Mr. Waterland, the social worker who conducted the evaluation (who appears to have no legal education, is not licensed to practice law and was never elected to the office of Superior Court Judge for King County) unilaterally determined that Mr. Flynn "clearly meets" the definition of domestic violence based on (1) his personal interpretation of the significantly outdated[23] 2006 edition of the "DV Manual for Judges," (2) his informal evaluation of incomplete evidence without any reference to jurisprudential standards of any kind, and (3) his clear misinterpretation of the legal terminology contained in the Superior Court's ruling, which reflects a

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[22] *Id.*

[23] The most recent edition at the time of trial was the 2016 edition, which is freely available on the internet and easily located via a Google search at: https://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index

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mistaken belief that the term "abusive use of conflict" is equivalent to a finding of domestic violence, when, in fact, the Superior Court made *precisely the opposite finding*.[24]

In his evaluation, Mr. Waterland effectively *overrules* the Superior Court's final orders and *revises* them to make alternative factual findings. He determines that Mr. Flynn *had* engaged in the behaviors alleged in Monique Brown's report (even though the Superior Court explicitly found he had not) and arrives at the legal conclusion that Mr. Flynn's behaviors qualify as domestic violence as *a matter of law* despite the Superior Court's ruling that they did not. Mr. Waterland then subsequently recommended that Mr. Flynn (1) complete a level 2 DSHS certified domestic violence intervention program that is a minimum of 39 weekly group sessions, (2) comply with the

[24] *Id;* "His accountability and readiness to change is low due to his belief that he has never engaged in acts of domestic violence and yet the court found in the Findings and Conclusions about a Marriage, "... The court finds that the Father's actions did constitute abusive use of conflict and orders 192 [sic] limitations as stated in the Parenting Plan."

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"provider's contract," (3) abstain from all mood and mind-altering drugs without a doctor's prescription, including alcohol and marijuana, for the entire length of treatment, and (4) enroll in a course entitled "DV Dads," during which he would be monitored monthly until completion.[25]

The paperwork for Mr. Flynn to enroll in ACT&T's program requires him to admit to engaging in violence and abuse, to admit that he engages in coercive and abusive behaviors that are rooted in ownership and entitlement, and to commit to changing that behavior, and to agree to provide specific examples of his own abusive behaviors.[26]

Mr. Flynn did not comply with ACT&T's domestic violence recommendations because he did not believe he was required to since they were unrelated to anger management.[27]

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[25] *Id.*
[26] *Declaration of Patrick Flynn,* 02/18/21, included in *SDR.*
[27] CP 71-89.

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NOVEMBER 20, 2020: Ms. Cartwright made a motion to "enforce the parenting plan" arguing that Mr. Flynn had failed to comply with the requirements of the *Parenting Plan*.[28] Ms. Cartwright asserted that Mr. Flynn was required to comply with *any* recommendations made by ACT&T, based on any evaluation for any treatment for any reason.[29] Because Mr. Flynn had not complied with ACT&T's unlawful domestic violence recommendations, Ms. Cartwright requested the suspension of *all* Mr. Flynn's residential time and the entry of parenting restrictions against him.[30] Ms. Cartwright also sought attorney's fees for "having to bring this motion to enforce the court-ordered Amended Parenting Plan."[31] She provided no reference to any Washington law that authorized her fee request.

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[28] *Motion to Enforce, 11/20/20; Declaration in Support of Motion to Enforce, 11/20/20);* included in *SDR.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

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DECEMBER 4, 2020: The Superior Court held a hearing, and Mr. Flynn, who was unrepresented, informed the Superior Court that it was his understanding that he had only been ordered to comply with anger management recommendations because the Superior Court had already ruled that no domestic violence had occurred.[32] He noted that two of the six pages comprising ACT&T's report were allegations copied and pasted from Monique Brown's report, which the Superior Court had evaluated at trial when Monique Brown had admitted on the stand that she had been unable to corroborate Ms. Cartwright's allegations.[33] Mr. Flynn reported that when he spoke to ACT&T, he was told that they had based their recommendation *solely* on Monique Brown's report and that they would reevaluate their recommendation if he provided them with "all of the information from the trial"; he explained that, because of the pandemic closures, he had not been able to obtain any

[32] CP 80-83.
[33] *Id.*

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information about how to acquire that information,[34] and he asked for some direction.[35] The Superior Court declined to provide any.[36] The Superior Court subsequently entered the *December Order*:[37]

> a. Patrick Flynn must comply with the recommended treatment of 39 weekly group sessions of a level 2 D.S.H.S. certified domestic violence intervention program before he can resume residential time with Winter Flynn. Patrick Flynn must enroll in the treatment program within 30 days of this order and provide proof to mother's counsel.
>
> b. The treatment program entered into by Mr. Flynn should be with ACT&T as recommended by Dr. Monique Brown in her parenting evaluation report and he shall comply with the ACT&T provider contract.
>
> c. Mr. Flynn must abstain from all mood and mind-altering drugs without a doctor's prescription including

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[34] Mr. Flynn indicated that he had repeatedly contacted the judge's chambers to "get clarification as to your intent whether you meant any treatment recommended by ACT&T or specific to the evaluation that they were conducting," and explained that because all of the family law facilitators were no longer available as a result of the pandemic, he had no access to the resources that had previously permitted him to represent himself in this matter and did not know what else to do. (CP 83-89.)
[35] CP 86-87.
[36] *Id.*
[37] CP 17-19.

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alcohol and marijuana for the entire length of treatment.

d. Mr. Flynn must enroll and successfully complete DV Dads with Mark Adams LMHC when he successfully completes the weekly group phase of the DSHS certified domestic violence program with ACT&T. Mr. Flynn will then move to monthly monitoring sessions in his DV program, where he shall remain until he successfully completes DV Dads with Mark Adams, LMHC.

e. Patrick Flynn must pay $4,105.00 in attorney's fees incurred by Alexandra Cartwright for having to bring this motion to enforce a parenting plan. Fees shall be paid to Luminosity Law PLLC within 60 days of the entry of this order or work out a payment plan w/counsel.

DECEMBER 24, 2020: Mr. Flynn appealed.

MAY 31, 2022: This Court reversed the *December Order,* concluding the Superior Court "should have upheld the procedural requirements for either contempt proceedings or a modification of the parenting plan as set out in the respective statutes," noting "Flynn was prejudiced by this procedural lapse."[38]

[38] CP 177-78.

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JUNE 10, 2022: Ms. Cartwright filed a motion for contempt.[39] Ms. Cartwright alleged that Mr. Flynn was in contempt of the *Parenting Plan* and the *December* Order, which had been reversed by this Court almost a month earlier.[40]

She complained that since receiving ACT&T's report on December 4, 2020, Mr. Flynn had failed to (1) "enter and complete a level 2 D.S.H.S. certified domestic violence intervention program that is a minimum of 39 weekly group sessions"; (2) "[c]omply with provider contract," (3) "[a]bstain from all mood and mind-altering drugs without a doctor's prescription including alcohol and marijuana for the entire length of treatment"; and "[e]nroll and successfully complete DV Dads with Mark Adams upon successful completion of #1, above."[41]

The motion then requested "terms" by which Mr. Flynn could "purge" the finding of contempt, which included total suspension

[39] CP 20-24; 25-102.
[40] CP 21-22.
[41] *Id.*

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of Mr. Flynn's residential time, required supervised visitation, and an extremely complex multi-phasal modification of the *Parenting Plan's* residential schedule that would take a minimum of seven months before Mr. Flynn could "purge" the contempt even if he immediately and perfectly complied.[42]

Ms. Cartwright asked for attorney's fees, and she also requested that the Superior Court "affirm" the attorney fees previously awarded to Petitioner in the *December Order*, which had subsequently been reversed.[43]

JULY 1, 2022: Mr. Flynn responded, asserting that he had fully complied with the *Parenting Plan*.[44] He argued that because this Court had reversed the *December Order,* the only order governing the question of contempt was the *Parenting Plan*.[45] Mr. Flynn argued that his due process rights were violated when ACT&T exceeded the scope of its authorization

[42] CP 22-24
[43] *Id.*
[44] CP 136-77.
[45] CP 141-43.

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by evaluating whether Mr. Flynn was a domestic violence perpetrator when the Superior Court had already made legal findings that he was not.[46]

JULY 15, 2022: At hearing, Ms. Cartwright's attorney re-argued the trial evidence and urged the Superior Court to revise the findings and conclusions *years* after the fact, based on new legal definitions that did not exist at trial:

> So, he's engaged, as this Court noted, in all kinds of surveilling, controlling behaviors that now meets the updated definitions of domestic violence and therefore he has committed domestic violence. It just wasn't in effect at the time and doesn't mean that ACT&T didn't properly find that after assessing him..."[47]

Astonishingly, she even made the following argument:

> Just because this Court held that at the time Mr. Flynn didn't meet the statutory definition of domestic violence doesn't mean he didn't engage in domestic violence.[48]

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[46] *Id.*
[47] Verbatim Report of Proceedings for July 15, 2022, pg.19.
[48] *Id.* at 18.

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(Contrary to Ms. Baugher's comments, however, a review of the *FFCL* reviews that the Superior Court never even *mentioned* the words "coercion" or "control" in its findings *or* in the *Parenting Plan.* It never used words like "abusive" or "controlling" to describe Mr. Flynn's behavior. The Superior Court never made findings to suggest that Mr. Flynn engaged in assaultive or coercive behaviors for the purpose of gaining and maintaining power and control over Ms. Cartwright. Ms. Cartwright has made it relentlessly clear that she believes the Superior Court *could* have and *should* have made such findings, but the fact still remains that it never did.)

Judge Chung, however, seemingly persuaded by Ms. Baugher's encouragement, relies on his memory of the evidence at trial two years prior and finds that Mr. Flynn's previous behavior "came very close to [a] finding of domestic violence," and, being apparently satisfied that "close" is good enough, he found Mr. Flynn in contempt without conducting any meaningfully discussion regarding the explicit language of the

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final orders, the inconsistency of ACT&T's report, or Mr. Flynn's constitutional due process rights.[49]

The *Contempt Order* found Mr. Flynn in contempt of the *Parenting Plan* and in contempt of the *December Order,* which had already been reversed.[50] The Superior Court wholly suspended Mr. Flynn's residential time for at least a month, with no purge terms for that period of time.[51] The Superior Court extensively modified the *Parenting Plan* to add supervision requirements not included in the *Parenting Plan* and to set out a modified residential schedule for a minimum of seven months, regardless of compliance.[52]

The Court also awarded Ms. Cartwright fees. [53] Without any analysis/explanation specifically justifying the "affirmation" of a reversed fee award, the Superior Court indicated that it

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[49] Id. at 19-20.
[50] Id.
[51] *Id.*
[52] *Id.*
[53] *Id.*

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reviewed the "attorney's fee request" generally and "finds them reasonable and appropriate under the Lodestar method," and it "affirmed" the reversed award.[54]

AUGUST 2, 2022: Mr. Flynn appealed.[55]

DISRUPTION OF RELATIONSHIP: Mr. Flynn has not been permitted to exercise residential time with his daughter for nearly a year and a half at the time of the July hearing.[56]

V. ARGUMENT

A. The Superior Court erred when it found Mr. Flynn in contempt of the *December Order,* which had already been reversed by this Court.

STANDARD OF REVIEW: A contempt ruling based on an erroneous view of the law or on an incorrect legal analysis constitutes an abuse of discretion and is subject to reversal.[57]

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[54] *Id.*
[55] CP 240-246.
[56] CP 30.
[57] *In re Smaldino*, 151 Wn.App. 356, 364, 212 P.3d 579 (2009).

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ANALYSIS: The U.S. Supreme Court observed in 1891 that an order that has been reversed is "without any validity, force, or effect."[58] It is axiomatic that, absent further direction, when an order is reversed, the matter maintains the same procedural posture as if the order had never been entered.[59]

The Superior Court found that Mr. Flynn "refused to follow" the *December Order* but Mr. Flynn had no obligation to follow the *December Order* because it had already been reversed. [60] Where, as here, an appellate court reverses an order, the order becomes immediately invalid and unenforceable; therefore, no party may be held in contempt for failing to adhere to an order that a reviewing court has determined to be unlawful.

This outcome is distinguishable from a situation where a trial court's decision is not stayed pending appeal, and enforcement

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[58] *Butler v. Eaton*, 141 U.S. 240, 244 (1891).
[59] See, e.g., *Welsenburg v. Cragholm*, 5 Cal.3d 892, 896, 489 P.2d 1126 (1971).
[60] CP 217-22.

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is sought *prior* to reversal by the reviewing court.[61] In that case, it is clear that, pursuant to RAP 8.1(b), a trial court may hold a party in contempt even while the party is seeking a stay.[62] Had Ms. Cartwright brought a motion at any point between the entry of the *December Order* and this Court's reversal of that order, Mr. Flynn could potentially have been found in contempt, but no order may be enforced *after* it has been found unlawful and reversed by an appellate court.

CONCLUSION: The Superior Court's conclusion was based on an erroneous view of the law and an incorrect legal analysis and was therefore an abuse of discretion.[63] This Court should reverse the decision.

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[61] See, e.g., *Cronin v. Central Valley School District*, 12 Wn.App. 2d 123, 131, 456 P.3d 857 (2020)(acknowledges that a trial court decision may be enforced pending appeal through contempt proceedings unless stayed and holds "that a trial court may find a contumacious party in contempt even while the party is in the process of seeking a stay of that order").

[62] *Id.*

[63] *Smaldino*, 151 Wn.App. at 364.

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B. The Superior Court erred when it found Mr. Flynn in contempt of the *Parenting Plan.*

STANDARD OF REVIEW: The question of whether a court has authority to impose sanctions for contempt is a question of law, reviewed de novo.[64] Where a court does have authority to impose sanctions, contempt rulings are reviewed for an abuse of discretion.[65] A contempt ruling based on an erroneous view of the law or on an incorrect legal analysis constitutes an abuse of discretion.[66]

ANALYSIS: Where a court bases its contempt finding on a court order, "the order must be ***strictly construed in favor of the contemnor***, and '[t]he facts found must constitute ***a plain violation*** of the order."[67] A court's order must be clear enough

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[64] *In re A.K.*, 162 Wn.2d 632, 644, 174 P.3d 11 (2007).
[65] *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn.App. 720, 768, 271 P.3d 331 (2012).
[66] *Smaldino*, 151 Wn.App. at 364.
[67] *In re Rapid Settlements, Ltd's*, 189 Wn.App. 584, 601-02, 359 P.3d 823 (2015), quoting *Tiger Oil Corp.*, 166 Wn.App. at 768;

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that the contemnor understands what is necessary for compliance.[68] A parent seeking a contempt order pursuant to RCW 26.09.160[69] must establish the contemnor's bad faith by a preponderance of the evidence.[70] Once the moving party has established a prima facie case, the responding party must rebut the showing with evidence.[71] To avoid being held in contempt, a noncomplying parent must establish by a preponderance of the evidence that he lacked the ability to comply or had a reasonable excuse for noncompliance.[72]

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emphasis added. See also, *In re Humphreys*, 79 Wn.App. 596, 599, 903 P.2d 1012 (1995).

[68] *Tiger Oil*, 166 Wn.App. at 768.

[69] The Superior Court indicated that it found Mr. Flynn in contempt under both RCW 26.09.160 and RCW 7.21.010, but it did not specifically involve either in its analysis. Presumably, because RCW 26.09.160 specifically governs contempt of parenting plans, that is the statute that ought to be applied. This Court's previous opinion confirmed this when it said that "RCW 26.09.160 was the applicable contempt statute for the matter before the trial court"; the matter now before this Court is the very same claim).[69] In any case, the analysis under RCW 7.21 is largely the same as is articulated for RCW 26.09.160.

[70] *In re James*, 79 Wn.App. 436, 442, 903 P.2d 470 (1995).

[71] *Id.*

[72] *In re Rideout*, 150 Wn.2d 337, 352-53, 77 P.3d 1174 (2003).

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1. Mr. Flynn did not violate the plain language of the *Parenting Plan.*

a. <u>A reviewing court interprets an order *de novo* based on examination of the language itself.</u>

The interpretation of a parenting plan is a question of law, reviewed *de novo*.[73] The court is limited to examining the actual language when resolving issues concerning its intended effect,[74] and, because review is *de novo*, this Court provides no deference to a judge's subjective interpretation of his previous order. Intent is determined by focusing on the objective manifestation of intent reflected in writing rather than on the unexpressed subjective intent of the author; in other words, "[courts] do not interpret what was *intended* to be written but what *was* written."[75]

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[73] <u>*Kirschenbaum v. Kirshenbaum*</u>, 84 Wn.App. 798, 803, 929 P.2d 1204 (1997).
[74] <u>*Gimlett v. Gimlett*</u>, 95 Wn.2d 699, 705, 629 P.2d 450 (1981).
[75] <u>*Hearst Commc'ns, Inc. v. Seattle Times Co.,*</u> 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005); emphasis added.

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b. <u>The Superior Court's *Contempt Order* fails to explicitly identify the plain language that was violated.</u>

The *Contempt Order* identifies the "[t]he parenting/custody order that was **not** obeyed" as:

> *Patrick Flynn did **not** obey the following parts of the parenting custody order signed by the court on April 14, 2020.*
>
> *Other parts of the parenting/custody orders.*[76]

"Other parts of the parenting/custody orders" is not a helpful description. It is unclear how a court can "strictly construe" language if it does not identify the language it is construing.

c. <u>The Superior Court's *Contempt Order* fails to explicitly identify the conduct that constitutes the violation.</u>

The *Contempt Order* identifies the "[t]he parenting/custody order that was not obeyed as follows:"

> As described in the *Motion for Contempt Hearing.*
>
> *See* Declaration of Alexandra Cartwright in Support of Motion for Contempt.[77]

[76] CP 218.
[77] *Id.*

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The *Declaration of Alexandra Cartwright* is 78 pages long.[78] It is unclear how the Superior Court determined whether the "facts found" constituted a plain violation of the order if it did not identify the facts it found.

d. <u>The rules of general construction and grammar support Mr. Flynn's interpretation of the language in the *Parenting Plan*.</u>

In interpreting a court's orders, a reviewing court applies the general rules of construction that apply to statutes, contracts, and other writings.[79] If an order is ambiguous, the reviewing court ascertains the intention by using the general rules of construction.[80] The meaning of language in orders is construed by reading orders in their entirety and considering all language relating to the same subject matter.[81] Whenever possible, orders

[78] CP 25-102.
[79] <u>*In re Smith*</u>, 158 Wn.App. 248, 256, 241 P.3d 449 (2010).
[80] <u>*In re Thompson*</u>, 97 Wn.App. 873, 988 P.2d 499, 502 (1999).
[81] <u>*State v. Veliz*</u>, 176 Wn.2d 849, 298 P.3d 75, 77 (2013).

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are to be construed so that no clause, sentence, or word shall be superfluous, void, or insignificant.[82]

In this instance, there are three related orders, entered simultaneously, that determine Mr. Flynn's obligations; they are the *FFCL,* the *Decree*, and the *Parenting Plan.* Because all three orders are interdependent, entered simultaneously, and effective collectively, it is important to consider "the entirety of all language relating to the same subject matter."[83] A court discerns plain meaning from the context where a provision is found, related provisions, and the orders as a whole.[84]

Ms. Cartwright suggests that the language in the *FFCL* is irrelevant because the contempt alleged is confined to the *Parenting Plan,* but the same obligation is described in the *FFCL,* which provides the findings that justify the limitations in

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[82] *Ruff v. Worthley*, 198 Wn.App. 419, 425, 393 P.3d 859 (2017).
[83] *Veliz*, 298 P.3d at 75, quoting *State v. Morales*, 173 Wn.2d 560, 567 n. 3, 269 P.3d 263 (2012).
[84] See, e.g., *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

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the *Parenting Plan*, without which the Superior Court's limitations would be unlawful; therefore, the basis/context for interpreting the *Parenting Plan* necessarily requires reference to the *FFCL.* The Superior Court entered *extensive* findings regarding limitations in this case and concluded: "the Court orders the Father to undergo ***evaluation and any treatment for anger management***."[85] The Superior Court further confirmed that the purpose of treatment for anger management was for Mr. Flynn to "address his inner anger."[86]

The *FFCL* and the *Parenting Plan* also explicitly state that neither parent has problems regarding domestic violence nor any issue with substance abuse. As a result, the obligations laid out in Section 4(b) of the *Parenting Plan* must be interpreted in light of the language contained in the *FFCL*.

[85] *FFCL*, pg. 7 (included in *SDR*); emphasis added.
[86] *Id.*

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Section 4(b) says:

> Father Patrick Flynn must:
>
> Be evaluated for anger management through ACT&T within 60 days entry of the Final Parenting Plan. Dr. Monique Brown's Parenting Evaluation shall be provided to the evaluator. If ACT&T is not available, the evaluation should be completed by a provider referred by ACT&T. **Father must comply with any treatment recommended by the evaluation**.[87]

The bolded sentence is the only matter in dispute.

MS. CARTWRIGHT'S ARGUMENT: Ms. Cartwright argues that this sentence means that Mr. Flynn is subject to literally *any* type of evaluation – for anger management, domestic violence, diabetes, latent superpowers, etc. She argues that this sentence authorizes any evaluation, regardless of the Superior Court's findings.

[87] CP 2; emphasis added.

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Grammatical Construction. Rules of grammar should be employed in construing the plain meaning of language.[88] Ms. Cartwright's interpretation is not supported by the grammar of the sentence itself. If the Superior Court had intended to reference *any* evaluation, the sentence would read "... as recommended by *an* evaluation" or "*any* evaluation," but the language is "*the* evaluation." The use of a definite article in this context, rather than an indefinite article, reflects an intention to reference previously disclosed identifying information, and indeed, previously disclosed identifying information exists here. "*The* evaluation" is referencing *the anger management evaluation to be conducted through ACT&T* described in the first sentence of the paragraph. The same language that requires the evaluation to be conducted by ACT&T is the language that limits the authorized evaluation to one for anger management.

[88] *Cardwell v. Cardwell,* 16 Wn.App. 2d 90, 98, 479 P.3d 1188 (2021).

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Contextual Interpretation. Ms. Cartwright ignores that the Superior Court explicitly *only* authorized an *anger management* evaluation and that it authorized no other type of evaluation. She ignores that the Superior Court explicitly ordered *anger management treatment*[89] and that it authorized no other type of treatment. She ignores that the Superior Court explicitly articulated that the purpose was for Mr. Flynn to "address his inner anger."[90] She ignores that the Superior Court explicitly made findings that Mr. Flynn never engaged in domestic violence and had no substance abuse problems; findings which directly contradict any conclusion that Mr. Flynn requires treatment for domestic violence or substance abuse.

Ms. Cartwright fails to acknowledge the clear absurdity that is easily justified by her interpretation. If the sentence "Father must comply with any treatment as recommended by the evaluation," is not limited by the other language in the final

[89] *FFCL*, pg. 7 (included in *SDR*).
[90] *Id.*

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orders, then Mr. Flynn could be required to submit to *literally any* treatment, without any right of review by the Court. If ACT&T claims that it evaluated Mr. Flynn's past life karma and recommends that he eat a dozen pickles a day and follow a grueling training schedule to develop competency in the art of resonant throat singing, Ms. Cartwright could make the same argument for enforcement just as successfully. Contextual consideration prevents this type of problem, and the rules of construction do not support Ms. Cartwright's argument.

MR. FLYNN'S ARGUMENT: Mr. Flynn argues that because a review of the final orders in this case confirms that the Superior Court (1) explicitly ordered an *anger management* evaluation and (2) did so explicitly with the intention of obtaining recommendations for *anger management treatment* (3) explicitly for the purpose of addressing the *inner anger* of a person who had (4) explicitly been found ***not*** to have engaged in domestic violence or substance abuse; therefore, the sentence must be interpreted to mean that Mr. Flynn is obligated to

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undergo an *anger management* evaluation (and no other kind), and that he is obligated to comply with treatment for *anger management* (and nothing else). Mr. Flynn's interpretation makes sense of all the language in the final orders and complies with typical grammatical construction.

Pursuant to the plain meaning of the orders, which must be strictly construed in Mr. Flynn's favor, Mr. Flynn complied with his obligations under the *Parenting Plan* because he underwent the anger management evaluation, and ACT&T concluded that he did *not* have an anger management issue made no recommendations for anger management treatment.

e. Washington law supports Mr. Flynn's interpretation of the *Parenting Plan.*

i. Post-trial, the Superior Court had/has no authority to order limitations related to domestic violence (including an evaluation).

The Superior Court made explicit findings that no domestic violence occurred pursuant to RCW 26.09.191(3), and, consistent with those findings, it did not order Mr. Flynn to be

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evaluated/treated for domestic violence. There is no language in the *Parenting Plan* regarding evaluation/treatment for domestic violence; therefore, Mr. Flynn could not have violated a term that does not exist. This interpretation complies with Washington law: **A court is not authorized to limit parenting conduct without specific findings that indicate a restriction is appropriate pursuant to RCW 26.09.191(3). Limitations include requiring a parent to obtain an evaluation, get treatment, take a parenting class, or refrain from certain behaviors.**[91] The Washington Supreme Court has ruled that RCW 26.09.09.191(3) bars a trial court from limiting any provisions of a parenting plan unless the evidence shows that a parent's conduct may otherwise have an adverse effect on the child's best interests.[92] A finding under RCW 26.09.191(3) *must* be supported by substantial evidence that the parent's

[91] *In re Chandola*, 180 Wn.2d 632, 642, 646, 327 P.3d 644 (2014).
[92] *Chandola*, 180 Wn.2d at 642.

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involvement or conduct caused the restricting factor.[93] Restrictions of a parent's conduct can only be imposed pursuant to RCW 26.09.191(3), and cannot be entered as features of a parenting plan under RCW 26.09.187.[94] By requiring trial courts to identify specific harms to the *child* before ordering parenting plan restrictions, RCW 26.09.191(3) prevents arbitrary imposition of the court's preferences.[95]

Absent a finding of domestic violence, RCW 26.09.191(3) does not authorize a court to preclude or limit any provisions of the parenting plan based on domestic violence concerns, nor may a court require a parent to be evaluated or treated for domestic violence.

Based on its findings, the Superior Court had no authority to require Mr. Flynn to be evaluated or treated for domestic violence, and, appropriately, it did not; therefore, Mr. Flynn did

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[93] *In re Watson*, 132 Wn.App. 222, 233, 130 P.3d 915 (2006).
[94] *Chandola*, 180 Wn.2d at 645.
[95] *Chandola*, 180 Wn.2d at 655.

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not violate the orders when he declined to follow ACT&T's unauthorized recommendation.

ii. Post-trial, the Superior Court had/has no authority to order limitations related to substance abuse (including an evaluation).

The Superior Court made no findings that Mr. Flynn had problems with substance abuse pursuant to RCW 26.09.191(3); in fact, it specifically ruled that Mr. Flynn *did not* have a substance abuse problem. Consistent with those findings, it did not order Mr. Flynn to be evaluated/treated for substance abuse. There is no language related to evaluation/treatment for substance abuse; therefore, Mr. Flynn could not have violated a term that does not exist.

Because the Superior Court made no findings that would give it authority to require Mr. Flynn to be evaluated or treated for substance abuse, it cannot delegate any authority to ACT&T. ACT&T's recommendation was inappropriate.[96]

[96] These recommendations were inappropriate not only because they were based on an unauthorized evaluation, but the outcome

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f. The principles of constitutional law support Mr. Flynn's interpretation of the *Parenting Plan.*

Courts must construe language so as to render it constitutional. [97] Ms. Cartwright's interpretation of the *Parenting Plan* renders it unconstitutional, while Mr. Flynn's renders it constitutional. Constitutional arguments related to the Superior Court's violation of Mr. Flynn's rights will be addressed in their own section of the brief, below.

2. Alternatively, Mr. Flynn did not intentionally violate the *Parenting Plan,* and/or he had reasonable cause to violate the *Parenting Plan.*

It is undisputed that Mr. Flynn originally sought clarification because he did not believe the *Parenting Plan* required him to undergo a domestic violence evaluation or a substance abuse evaluation, because the Superior Court found that neither parent had those problems.

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of the evaluation confirmed that Mr. Flynn had no substance abuse problem. There is literally no evidence *anywhere* in the record that would permit the judiciary to infringe on Mr. Flynn's liberty regarding legal substances.

[97] *In re MB,* 101 Wn.App. 425, 3 P.3d 780, 792 (2000).

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Ms. Cartwright argues that Mr. Flynn is willfully refusing to follow the *Parenting Plan* out of recalcitrance, but the Superior Court repeatedly refuses to address his objections in any substantive way. Importantly, **as one example among many,** if Mr. Flynn enrolls in the program recommended by ACT&T, he must confess in writing to having engaged in domestic violence.[98] Mr. Flynn does not believe engaged in domestic violence, and the facts found by the Superior Court in this matter *explicitly state* that Mr. Flynn did not engage in domestic violence. Mr. Flynn objects to being forced to make false admissions, and he particularly objects to doing so where his coerced statements may be provided to Ms. Cartwright for use against him; he has *repeatedly* begged the Superior Court to respond to this issue, and it simply refuses.[99] Whether Mr. Flynn

[98] *Declaration of Patrick Flynn,* 02/18/21, included in *SDR.*
[99] To the degree that Ms. Cartwright might be inclined to use any such coerced statements as the basis for pursuing the filing of criminal domestic violence charges against him, Mr. Flynn asserts Fifth Amendment rights and objects to being coerced by

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can be forced to make false statements in order to comply with the recommendations of ACT&T in direct contradiction to the Superior Court's own findings of fact is a different question than simply determining what the recommendations of ACT&T *are.* The Superior Court has been presented with this question at every substantive hearing since trial, and it absolutely refuses to acknowledge the issues. Once the moving party has established a prima facie case, the responding party is then entitled to rebut,[100] but the Superior Court repeatedly refuses to address the substantive arguments on rebuttal.

Mr. Flynn does not want to falsely confess to violent conduct that he *factually* did not commit *pursuant to the Superior Court's own explicit findings.* This is reasonable cause for refusing to comply with the Superior Court's unlawful interpretation of the *Parenting Plan.*

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the Superior Court to turn over false manufactured evidence of potentially criminal behavior against himself.

[100] *Id.*

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CONCLUSION: The Superior Court erred when it found Mr. Flynn in contempt based on an interpretation that contradicts general rules of construction and grammar, Washington law, constitutional principles, and the findings of fact at trial. This Court should reverse the decision.

C. The Superior Court erred when it suspended Mr. Flynn's residential time and entered a contempt order that modified the residential schedule as terms for "purging" contempt.

STANDARD OF REVIEW: The question of whether a court has authority to impose sanctions for contempt is a question of law, reviewed de novo.[101] The question of whether the Superior Court's contempt sanction is punitive is a question of law, reviewed *de novo*.[102] Where a court does have authority to impose sanctions, contempt rulings are reviewed for an abuse of discretion.[103]

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[101] *In re A.K.*, 162 Wn.2d at 644.
[102] See, *In re MB*, 101 Wn.App. at 454.
[103] *Tiger Oil Corp.*, 166 Wn.App. at 768.

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The modification of parenting plans is reviewed for abuse of discretion.[104]

A ruling based on an erroneous view of the law or on an incorrect legal analysis constitutes an abuse of discretion.[105]

ANALYSIS: "[T]he contempt power must be used with great restraint."[106] "As the U.S. Supreme Court has noted, 'the contempt power is also uniquely liable to abuse.'"[107]

1. The Superior Court erred when it entered punitive sanctions against Mr. Flynn without providing appropriate constitutional due process.

Under the marriage dissolution act, contempt proceedings are allowed solely for the purpose of coercing compliance with a parenting plan.[108] Parents must be given an opportunity *to agree to comply* and *thereby avoid the coercive sanction*.[109]

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[104] *In re Chandola*, 180 Wn.2d 632, 642, 646, 327 P.3d 644 (2014); quoting RCW 26.09.191(3).
[105] *Smaldino*, 151 Wn.App. at 364.
[106] *In re MB*, 3 P.3d at 788.
[107] *Id.*
[108] RCW 26.09.160(2)(a); *In re Farr*, 87 Wn.App. 177, 187, 940 P.2d 679 (1997).
[109] *Id.*

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If a contempt order is remedial, then the proceeding is civil and does not implicate constitutional due process rights; however, if the order is punitive, then the proceeding is criminal and the alleged contemnor is entitled to the same due process rights as criminal defendants, including the right to a jury trial.[110]

"A 'punitive sanction' is a 'sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court,' and a 'remedial sanction' is 'a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.'"[111] "An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for non-compliance."[112] "The mere presence of purging-type language in a contempt order does not determine whether a

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[110] *In re Didier*, 134 Wn.App. 490, 140 P.3d 607, 609 (2006).
[111] *Didier*, 140 P.3d at 612-14.
[112] *Id.*

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penalty is punitive or coercive."[113] "The penalty is coercive if and only if the contemnor has *at all times* the capacity to purge the contempt and obtain his release."[114] A civil sanction will stand as long as it serves coercive, not punitive, purposes.[115]

a. <u>The suspension of Mr. Flynn's parental visitation for one month, regardless of his compliance, is a punitive sanction</u>.

Here, the Superior Court wholly suspended Mr. Flynn's residential time for at least one month regardless of whether he complies with the *Parenting Plan*. This sanction is not designed to coerce compliance since it is unaffected by Mr. Flynn's compliance and cannot be avoided; therefore, it is punitive, and the Superior Court violated Mr. Flynn's constitutional due process rights.

b. <u>The ability to "purge" Mr. Flynn's contempt is outside his control and depends on whether "the professional supervisor deems it appropriate"; therefore, the sanction is punitive.</u>

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[113] *Id.*
[114] *Id.*
[115] *Id.*

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In order for a sanction to be remedial rather than punitive, a contemnor must have complete control over his compliance with the terms required to purge his contempt.[116] "The contemnor must carry the keys of the prison door in her own pocket."[117] If the terms required to purge contempt are not "within her sole control" and the contemnor's ability to "purge herself of contempt is dependent upon the actions of a third party, the purpose of civil contempt is defeated."[118]

Here, Mr. Flynn is not in sole control over whether he is able to purge his contempt; therefore, the civil purpose of the sanction is defeated, and it is punitive.

c. <u>The additional requirement for supervised visitation is effective regardless of whether Mr. Flynn complies with the order; therefore, the sanction is punitive.</u>

The Superior Court also restricted Mr. Flynn's visitation to require supervision regardless of compliance. This sanction is

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[116] *<u>In re MB</u>,* 3 P.3d at 800.
[117] *Id.*
[118] *Id.*

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not designed to coerce compliance since it unaffected by compliance; therefore, it is punitive.

CONCLUSION: The Superior Court violated Mr. Flynn's due process rights by subjecting him to punitive sanctions without due process. This Court should reverse the decision.

2. The Superior Court erred when it entered an order that modified the *Parenting Plan* as a remedial sanction pursuant to RCW 26.09.160.

a. <u>Modification of a parenting plan is not available as a remedial sanction pursuant to RCW 26.09.160.</u>

The sanctions that are available on a first time finding of contempt are explicitly listed in RCW 26.09.160(2)(b). The sanctions available on a second finding of contempt within two years are also explicitly listed in RCW 26.09.160(3). Modification of a parenting plan is not included in any of them.

b. <u>A parenting plan cannot be modified via a contempt order.</u>

With the exception of making temporary alterations to afford the aggrieved party the make-up time specifically outlined in RCW 26.09.160, a parenting plan cannot be modified pursuant

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to a contempt order. "The withholding of visitation because a parent is in contempt for failure to obey provisions of the dissolution decree is an abuse of discretion."[119]

A court is required to retain the residential schedule established by the decree or parenting plan *unless "[t]he 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 in the court-ordered parenting plan..."*[120] This language confirms three important things:

i. Contempt findings only provide a basis for adequate cause.

The existence of contempt findings provides a *basis* for a finding of adequate cause to modify a parenting plan. Contempt findings do not provide an automatic modification or an alternative procedural avenue to those contained in RCW

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[119] *Wulfsberg v. MacDonald*, 42 Wn.App. 627, 632, 713 P.2d 132 (1986)("The paramount concern in deciding whether to withhold visitation rights of a parent is the welfare of the child.")
[120] RCW 26.09.260(2)(d).

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26.09.260 (which is the only path to modification of a parenting plan). Ms. Cartwright failed to file a modification proceeding, and she cannot modify a plan through a contempt proceeding.

ii. ***Adequate cause requires multiple findings of contempt.***

Adequate cause cannot be granted on only one finding of contempt; pursuant to the modification statute, there must be two findings. Mr. Flynn did not have two findings.

iii. ***Adequate cause requires multiple findings of contempt for violation of residential time provisions, specifically.***

For contempt to provide a basis for modification, the contemptuous behavior must violate the *residential time provisions* of the plan, not just the plan generally. This makes sense because the public policy underlying the modification statutes, contained in RCW 26.09.002, strongly disfavors the disruption of a child's contact with either parent. The language of the modification statute (RCW 26.09.260), taken in context of the underlying public policy (RCW 26.09.002*),* confirms that a court should only consider modification of a child's residential

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schedule as a response to contempt when the underlying contemptuous behavior *already* inherently disrupts the child's residential schedule. Modification in such circumstances is then directed at achieving *increased stability* regarding the child's residential time. Otherwise, residential time should not be disrupted for the purpose of punishing a parent for contempt of non-residential portions of a parenting plan, because doing so causes harm to the child. RCW 26.09.160 itself clearly states a parent's contact with the children cannot be suspended based *solely* on that parent's failure to comply with some other obligation in the plan, child support order, or decree. This is because residential schedules are intended to serve the best interests of *the child*, not to be used as tools to punish a parent or as leverage to manipulate parents' behavior at the expense of the child. Suspending residential time as a remedial sanction traumatizes *the child*, which directly violates public policy.

The best interest of the child is served by requiring that adequate cause and other statutory requirements are met before

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making any change; the high burden of adequate cause serves the best interests of the child.[121] Modification procedures were specifically intended to "protect stability by making it more difficult to challenge the status quo."[122]

CONCLUSION: The Superior Court's repeated suspensions of Mr. Flynn's residential time and repeated modifications of the residential schedule constitute reversible error and are, frankly, a *startling* ongoing violation of Washington law and Mr. Flynn's constitutional rights as well as the child's. This Court should reverse the Superior Court's decision.

3. The Superior Court erred when it modified the *Parenting Plan* in violation of Washington law.

STANDARD OF REVIEW: The modification of parenting plans is reviewed for abuse of discretion.[123]

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[121] *Ruff*, 198 Wn.App. at 429.
[122] *Id.*
[123] *In re Chandola*, 180 Wn.2d at 642, quoting RCW 26.09.191(3).

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ANALYSIS: Modifications of parenting plans are governed by RCW 26.09.260. "Procedures relating to the modification of a prior custody decree or parenting plan are statutorily prescribed and compliance with the criteria set forth in RCW 26.09.260 is mandatory."[124]

a. The Superior Court erred when it modified the Parenting Plan without personal jurisdiction over Mr. Flynn for a modification proceeding.

A judgment is void if it is entered without personal jurisdiction.[125] Whether a judgment is void is reviewed de novo.[126] A request to modify a parenting plan requires a new proceeding:

> A proceeding to modify the child custody provisions of a divorce decree, upon changed conditions since entry of that decree, is a new proceeding. It presents new issues arising out of new facts occurring since

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[124] *In re Shyrock,* 76 Wn.App. 848, 852, 888 P.2d 750 (1995)(emphasis added).
[125] *Castellon v. Rodriguez*, 9 Wn.App.2d 303, 418 P.3d 804, 808 (2018).
[126] *Id.*

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> the entry of the decree. It is not ancillary to or in aid of the enforcement of the divorce decree.[127]

Pursuant to RCW 26.09.260, a party seeking to modify a parenting plan is required to file a petition. Proper service of a summons/petition is essential to invoke personal jurisdiction.[128] Pursuant to CR 4.1(a), "actions authorized by RCW 26.09[129] shall be commenced by filing a petition or by service of a copy of a summons together with a copy of the petition on respondent as provided in Rule 4." Ms. Cartwright failed to serve a summons or a petition when she made a request to modify the *Parenting Plan* in her *Motion for Contempt*.

As a result, the Superior Court did not have personal jurisdiction over Mr. Flynn for a modification proceeding;

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[127] *State ex rel. Mauerman v. Superior Court*, 44 Wn.2d 828, 830, 271 P.2d 435 (1954).
[128] *Allstate Ins. Co. v. Khani*, 75 Wn.App. 317, 324, 877 P.2d 724 (1994).
[129] Actions authorized by RCW 26.09 include dissolutions and modification proceedings.

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therefore, the portion of the *Contempt Order* that modifies the *Parenting Plan* is void.

b. <u>The Superior Court erred when it modified the *Parenting Plan* in violation of procedural statutory requirements.</u>

Pursuant to Washington State statute, a court "shall not modify" a parenting plan unless it adheres to the procedures of RCW 26.09.260.

The record confirms that the Superior Court did not adhere to *any* of the procedures in RCW 26.09.260.

The Superior Court erred when it modified the *Parenting Plan* without adhering to the procedures required by RCW 26.09.260; therefore, this Court should reverse the Superior Court's decision.

c. <u>The Superior Court erred when it modified the *Parenting Plan* in violation of substantive statutory requirements.</u>

While a parenting plan is reviewed for abuse of discretion, that discretion is restricted by RCW 26.09.191(3).[130]

[130] <u>*Chandola*</u>, 180 Wn.2d at 642-45

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Limitations on a parent's conduct can only be imposed pursuant to RCW 26.09.191(3) and cannot be entered as a feature of the parenting plan under RCW 26.09.187.[131] Limitations include **requiring a parent to obtain an evaluation, get treatment,** take a parenting class, or refrain from certain behaviors.[132] A court is not authorized to limit parenting conduct without making findings identifying specific harms.[133]

i. The Superior Court made no findings to justify domestic violence or substance abuse limitations.

The Superior Court erred when it entered limitations without findings to confirm a restriction was appropriate pursuant to RCW 26.09.191(3), which bars a trial court from limiting any provisions of a parenting plan unless the evidence shows that a parent's conduct may have an adverse effect on the child's best interests.[134] The Superior Court further erred when it entered

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[131] *Id.*
[132] *Id.*
[133] *Chandola*, 180 Wn.2d at 655.
[134] *Chandola*, 180 Wn.2d at 642.

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limitations based on the findings of a private social worker, which is a procedure that did not comply with RCW 26.09.191(6)(requiring that decisions to impose limitations must be made by a court, and requiring that the court shall apply the civil rules of evidence in determining whether any of the conduct described by RCW 26.09.191(3) occurred).

Further:

> [P]arents have a fundamental liberty interest in the 'care, custody and management of their children.' *In re Dependency of J.H.*, 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). **A trial court also must consider this liberty interest before effectively eliminating a parent's residential time with his or her children based solely on the RCW 26.09.191(3) factors."**[135]

ii. The best interests of the child were not protected.

The Superior Court erred when it modified the *Parenting Plan* without adhering to the procedural requirements that protect the interests of the child pursuant to RCW 26.09.002.

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[135] *In re Underwood*, 181 Wn.App. 608, 612, 326 P.3d 793 (2014).

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> **"[T]he trial court's exercise of discretion to essentially eliminate a parent's residential time must be exercised in the context of other important considerations**. First, the legislature has expressed a policy favoring maintaining relationships between parents and children when setting a residential schedule in a dissolution action. RCW 26.09.002 provides that '[t]he state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests.' Further, RCW 26.09.187(3)(a) provides that the trial court should make residential provisions for children that 'encourage each parent to maintain a loving, stable, and nurturing relationship with the child.' **The trial court must consider these policy directives before effectively eliminating residential time based solely on RCW 26.09.191(3) factors.**[136]

The Superior Court did not consider any of these concerns before effectively eliminating Mr. Flynn's residential time.

iii. No adequate cause was found.

The Superior Court erred when it modified the *Parenting Plan* without first conducting the substantive analysis related to adequate cause pursuant to RCW 26.09.260(1).

CONCLUSION: The Superior Court erred when it modified the *Parenting Plan* as a remedial sanction in violation of

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[136] *Id.*

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Washington statute and constitutional principles. This Court should reverse the decision.

D. The Superior Court violated Mr. Flynn's constitutional rights when it entered the *Contempt Order.*

STANDARD OF REVIEW: Claims of constitutional error are reviewed de novo.[137]

ANALYSIS: "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[138] "'Liberty' and 'property' are broad and majestic terms," that require some definition.[139] "Judgments entered in a proceeding failing to comply with the procedural due process requirements are void."[140]

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[137] *State v. Curtis*, 110 Wn.App. 6, 11, 37 P.3d 1274 (2002).
[138] *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).
[139] *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).
[140] *In re Ebbighausen*, 42 Wn.App. 99, 102, 708 P.2d 1220 (1985).

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1. Mr. Flynn has constitutional liberty interests that were affected by the *Contempt Order.*

a. <u>Mr. Flynn has a liberty interest in his parental rights.</u>

"It has long been recognized that the family entity is the fundamental element upon which the modern civilization is founded."[141] "A parent's interest in the custody and control of minor children was a 'sacred' right recognized at common law."[142] *Id.* A parent's right to his child has been characterized as "more precious to many people than the right of life itself."[143] "Given a parent's significant interest in his children, there can be no doubt the Fourteenth Amendment establishes a parental constitutional right to the care, custody, and companionship of the child."[144] "Parental rights have been categorized as a 'liberty' protected by the due process clause of the Fourteenth Amendment."[145]

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[141] *Id.*
[142] *Id.*
[143] <u>*In re Gibson,*</u> 4 Wn.App. 372, 379, 482 P.2d 131 (1971).
[144] <u>*Ebbighausen*</u>, 42 Wn.App. at 102-03.
[145] *Id.*

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b. Mr. Flynn has a liberty interest in his good name.

"The Due Process Clause also forbids arbitrary deprivations of liberty."[146] "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," liberty interests are implicated.[147] Mr. Flynn's liberty interest is implicated by the Superior Court's characterization of him as a domestic violence perpetrator despite its explicit findings to the contrary.

The paperwork to enroll in the programs "recommended" by ACT&T requires Mr. Flynn to admit to engaging in acts of violence. For the Superior Court to require him to admit to behavior that it explicitly found he did not commit on pain of never seeing his child again without the benefit of due process is both cruel and blatantly unconstitutional.

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[146] *Goss v. Lopez*, 419 U.S. 565, 574 (1975).
[147] *Roth*, 408 U.S. at 573.

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2. Mr. Flynn was entitled to due process.

"Once it is determined that due process applies, the question remains what process is due."[148]

a. <u>Mr. Flynn was entitled to notice before he was deprived of his liberty interests.</u>

The Due Process Clause requires "at a minimum," "that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[149] Mr. Flynn's due process right to receive notice was violated in two ways.

First, Mr. Flynn was not given notice in the Superior Court's final orders that he would subsequently be subject to a re-adjudication of the Superior Court's findings without any procedural protections at the hands of ACT&T or that ACT&T would be empowered to determine that he *had* engaged in domestic violence and enter limitations despite the Superior

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[148] *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).
[149] *Goss,* 419 U.S. at 579.

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Court's explicit findings to the contrary. Had the final orders indicated that information, Mr. Flynn would have undoubtedly exercised his right to appeal.

Second, Mr. Flynn was not given any notice or opportunity for hearing regarding the Superior Court's seemingly automatic adoption of ACT&T's findings. There was no judicial review. There was no hearing. There was no opportunity for Mr. Flynn to object or otherwise be heard regarding the serious flaws and internal inconsistencies of ACT&T's evaluation. Ms. Flynn has been desperately trying to make objections and address the substantive problems associated with violation of his due process rights in multiple hearings, but every time, the Superior Court simply ignores the constitutional issues at hand.

b. <u>Mr. Flynn was entitled to confront and cross-examine witnesses.</u>

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront

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and cross-examine adverse witnesses."[150] This is especially important in circumstances where the evidence consists of "the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy."[151] These protections are formalized in the requirements of confrontation and cross-examination.[152]

Mr. Flynn was given no opportunity to confront or cross-examine ACT&T's evaluator as to how he arrived at his conclusions or to confront or cross-examine the information provided by witnesses to ACT&T; in fact, he was not even permitted to have complete knowledge of the information provided to ACT&T. Given that one of the witnesses is his ex-wife in a deeply acrimonious dissolution proceeding, it is not

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[150] *Id.*
[151] *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).
[152] *Id.*

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unlikely that some of what might have been said in secret was motivated by malice or vindictiveness.

c. <u>Mr. Flynn was entitled to a meaningful opportunity to be heard before a proper authority.</u>

"Procedural elements of this constitutional guarantee are notice and the opportunity to be heard and defend before a competent tribunal in an orderly proceeding adapted to the nature of the case."[153] ***"[A]ny modification, no matter how slight, requires an independent inquiry by the court and cannot be delegated."***[154] Judges *may* delegate the interpretation of their orders to third parties as long as the parties retain the "right of review" (i.e., a meaningful opportunity to be heard) with respect to any third-party decision to which they object.[155] Elected judges are not permitted to delegate their adjudicative powers.[156]

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[153] *Id.*

[154] *In re Smith-Bartlett*, 95 Wn.App. 633, 640, 976 P.2d 173 (1999); emphasis added.

[155] *Id;* see also, *Kirschenbaum v. Kirschenbaum,* 84 Wn.App. 798, 929 P.2d 1204 (1997).

[156] See, e.g., *In re Lilly*, 75 Wn.App. 715, 716, 880 P.2d 40 (1994)(mentioned without questioning superior court's ruling

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Here, the Superior Court originally provided appropriate due process at trial, but it later deferred its judgment (which had complied with Washington law and principles of due process) to the opinion of a private social worker who effectively modified the *FFCL* and *Parenting Plan* to reverse the Superior Court's findings,[157] expand the scope of his evaluation, and expand the scope of authorized treatment without any right of review to the Superior Court. The right of review is especially important here because ACT&T's "recommendations" directly contradict the findings of the Superior Court, itself.

The Superior Court has repeatedly made the *alarming* suggestion that an unelected social worker's lay interpretation of

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that a parenting plan term that permitted changes to visitation only with concurrence of therapists was usurping the power of the court to determine the parenting plan and concluding that therapist could recommend changes but the ultimate decision-making power rested with the court).

[157] The record confirms that ACT&T provided no deference to the Superior Court's findings of fact; it even informed Mr. Flynn that it might change its recommendations if he provided ACT&T with all the trial evidence for its independent review. CP 85-86.

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an outdated deskbook's "definition" of domestic violence could be informally applied to an incomplete collection of hearsay evidence and evaluated by a secret, undisclosed standard (without any reference to the governing statute) to reach a "finding" that somehow legitimately *supersedes* an elected judge's formal findings and conclusions made pursuant to a five-day in-person trial. Such an assertion can be characterized as nothing less than astonishing. That the Superior Court believes the "expert" social worker is entitled to assert complete decision-making power over the parties is particularly troubling, especially given that in a trial context, expert witnesses are not permitted to even *opine* with respect to determinations of ultimate fact and credibility, because these subjects are the province of the judge/jury pursuant to ER 704.[158]

Due process requires that parties be provided a meaningful opportunity to be heard, and Washington law does not permit

[158] State v. Rafay, 168 Wn.App. 734, 285 P.3d 83, 113 (2012).

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judicial decisions by duly elected officials to be overruled by therapists/social workers in the absence of due process. [159]

CONCLUSION: The Superior Court violated Mr. Flynn's constitutional rights when it modified the *Parenting Plan* through a third party without due process. This Court should reverse the Superior Court's decision.

E. The Superior Court erred when it granted Ms. Cartwright's request to "affirm" the fees previously awarded in the *December Order* when that order had already been reversed by this Court.

STANDARD OF REVIEW: A trial court's decision regarding attorney's fees is reviewed for abuse of discretion.[160]

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[159] Children also have independent constitutional interests with respect to the resolution of parenting issues. See, e.g., *In re Furrow*, 115 Wn.App. 661, 63 P.3d 821 (2003). Ensuring the regularity of parenting proceedings also protects children from outcomes that violate their own constitutional rights. Children are rarely treated independently inside of a dissolution proceeding because the assumption is that the due process provided to the parents will ensure the appropriate protection to the children; however, when due process does not occur, the rights of children may also be implicated.

[160] *In re Mattson*, 95 Wn.App. 592, 604, 976 P.2d 157 (1999).

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ANALYSIS: First, no trial court can "affirm" an order that has already been reversed by an appellate court. The *Contempt Order* articulated no analysis that justified its attempt to "affirm" or revive the fee award from the reversed *December* Order, and as indicated above, reversed orders are facially invalid and unenforceable. The Superior Court does not have the authority to revive an order that this Court had already reversed. The Superior Court's attempt to revive an order reversed by this Court must be reversed.

Second, in Washington, attorney's fees may be recovered only when authorized by a private agreement of the parties, a statute, or a recognized ground of equity."[161] When it comes to family law cases, attorney's fees are generally only available on two bases: (1) pursuant to RCW 26.09.140 or (2) pursuant to a finding of bad faith or intransigence by the party being ordered

[161] *Mellor v. Chamberlin*, 100 Wn.2d 643, 649, 673 P.2d 610 (1983).

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to pay fees.[162] In her declaration, Ms. Cartwright claimed that the fees that had been previously awarded in the *December Order* (which had subsequently been reversed) were based on "Mr. Flynn's intransigence because he: 1) was not complying with the Final Parenting Plan; 2) never brought his own motion for clarification; 3) did not even provide a written response in compliance with the civil rules; and 4) incurred no fees of his own."[163] Of these alleged bases, only intransigence would actually be a proper basis under Washington law, but Ms. Cartwright never alleged intransigence related to the *December Order*, no evidence was ever submitted, no authority was ever provided, and the Superior Court never ruled on it. Ms. Cartwright's original request for fees provided no legal authority or explanation for the request beyond asserting she was entitled to fees "for having to bring this motion,"[164] and the

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[162] *In re Williams*, 84 Wn.App. 263, 272, 927 P.2d 679 (1996).
[163] CP 33.
[164] *Motion for Order for Enforcement of Parenting Plan,* 11/20/20, designated in *SDR*.

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December Order itself articulated no basis for the award of attorney's fees beyond "for having to bring this motion."[165]

"Having to bring this motion" is not an agreement of the parties, a statute, or a recognized ground of equity, and is therefore not a basis to award fees pursuant to Washington law. Further, this Court reversed the *December Order* because Ms. Cartwright's motion was deficient and did not provide Mr. Flynn with sufficient notice; Ms. Cartwright ought not receive an award of fees for bringing a motion that made no effort to comply with the law.

In the *Contempt Order,* the Superior Court did not even distinguish between the fees it awarded pursuant to the *Contempt Order* and the fees it "affirmed" from the reversed *December Order,* and it provided no basis for its decision.

CONCLUSION: There is no substantial evidence in the record or basis in Washington law to support an award of fees to

[165] CP 17-19.

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Ms. Cartwright related to the reversed *December Order.* The Superior Court abused its discretion when it awarded the fees related to the *December Order* on both occasions; therefore, this Court should reverse its decision.

VI. FEES ON APPEAL

Mr. Flynn seeks an award of fees on appeal. He makes this request pursuant to RAP 18.1(b) and based on Ms. Cartwright's bad faith litigation and intransigence.

When entertaining a request for attorney's fees, a court may consider "the extent to which one spouse's intransigence caused the spouse seeking a fee award to require additional legal services."[166] Intransigence encompasses behavior that makes litigation unduly difficult and unnecessarily increases legal costs.[167] "If intransigence is established, the financial resources of the spouse seeking the award are irrelevant."[168]

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[166] *In re Wallace*, 111 Wn.App. 697, 708, 45 P.3d 1131 (2002).
[167] *In re Morrow,* 53 Wn.App. 579, 770 P.2d 197 (1989).
[168] *In re Crosetto*, 82 Wn.App. 545, 564, 918 P.2d 954 (1996).

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In making her motion, Ms. Cartwright continues her established practice of actively urging the Superior Court into reversible error. Ms. Cartwright's attorney has systematically misrepresented the record and the law throughout this proceeding, but this most recent hearing is perhaps the most astonishing. That any attorney would actually assert that a trial court is entitled to *retroactively* apply current domestic violence definitions to a prior time period wherein they were *admittedly* not effective for the explicit purpose of *sua sponte* revising final un-appealed findings of fact and conclusions of law that were entered pursuant to trial more than two years prior is genuinely *staggering*. Ms. Baugher's argument that Mr. Flynn's behavior from more than two years ago (which has already long been adjudicated) "now meets the updated definition of domestic violence and therefore he has committed domestic violence," *despite* the Superior Court's explicit findings to the contrary is absolutely without merit. Her comment: **"Just because this Court held that at the time Mr. Flynn didn't meet the**

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statutory definition of domestic violence doesn't mean he didn't engage in domestic violence" utterly boggles the mind. No authority was ever provided for any of these assertions, which is unsurprising because Ms. Baugher's contentions fly in the face of well-established jurisprudence as well as humanity's conventional understanding regarding the one-directional flow of time. Nevertheless, as the troubling comments of the Superior Court reflect, they were persuasive.

Parties and attorneys are required to act with candor to the tribunal, and Ms. Cartwright's utterly unfounded representations have repeatedly led the Superior Court into error (as confirmed by this Court's previous opinion noting that neither Ms. Cartwright nor the Superior Court had followed *any* of several available procedures in entering the last order requested and drafted by Ms. Cartwright's attorney), which has resulted not only in massive expense to Mr. Flynn, but it has, *unconscionably*, cost him over a year and a half with his daughter *without basis in Washington law*.

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VII. CONCLUSION

The implications of this case are tragic and terrifying for parents and children as well as for any person who hopes for due process protections in the adjudication of matters most precious. This case does not require a solution to an uncommon or particularly thorny problem. All the necessary procedures and protections are clearly stated in the law. What is needed is the attention of a tribunal willing to resolve this dispute through a meaningful evaluation of both the procedural and substantive merits. The damage that has been caused here is profound, and it is difficult for any description to do it justice. Mr. Flynn prays that this Court resolves this matter so that Mr. Flynn and the parties' child may finally have some relief.

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The undersigned certifies that the foregoing brief contains 11,877 words not including the appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and this certification of compliance.

Respectfully submitted this 27th day of December, 2022,

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I certify that on December 27, 2022, I arranged for delivery of a copy of the foregoing *APPELLANT'S OPENING BRIEF* to the following:

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Appendix 7
Reply Brief (2022 Appeal)

COURT OF APPEALS OF THE STATE OF WASHINGTON
Division I

Court of Appeals No. 843435

In re:

PATRICK RYAN FLYNN,

Appellant,

and

ALEXANDRA LEIGH CARTWRIGHT,

Respondent.

APPELLANT'S * AMENDED * REPLY BRIEF

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I. OBJECTION

Ms. Cartwright's response to the *Opening Brief* violates RAP 10.3(b), because it does not answer the brief of Appellant. As a result, drafting a reply brief has been unnecessarily challenging and time-consuming. This brief replies to Ms. Cartwright's arguments in the order in which they arise, because her arguments do not correspond to any particular issue presented in the *Opening Brief* and are not otherwise organized. Mr. Flynn objects to Ms. Cartwright's ongoing refusal to comply with the proper procedure associated with any proceeding, which consistently operates to his detriment.

II. ARGUMENT

Page 2: Mr. Flynn's appeal makes no attempt to "bring up the merits of an underlying order."

On page 2 of her brief, Ms. Cartwright observes (without context) that "[a]n appeal from a contempt order does not bring up the merits of the underlying order." Ms. Cartwright makes no attempt to explain why she believes Mr. Flynn is arguing the

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merits of an underlying order. Courts generally refuse to address assertions not adequately briefed or argued on appeal.[1]

Mr. Flynn does not assign error to any underlying order. He does not assign error to the *Findings of Fact and Conclusions of Law* (hereinafter, "*FFCL*"), the *Decree* or the *Parenting Plan*. Mr. Flynn assigns error to the *Contempt Order*, which was entered after the previous appeal and is appropriately the subject of this appeal.

Mr. Flynn also *previously* assigned error in his prior appeal to the *December Order*, which was subsequently reversed by this Court. Mr. Flynn now assigns error to the Superior Court's *enforcement* of that reversed order in its current *Contempt Order*. Mr. Flynn did not assign error to the *December Order*, because this Court already reversed it in the previous appeal.

[1] *Ameriquest Mortg. Co. v. Attorney Gen.,* 148 Wn. App. 145, 166, 199 P.3d 468 (2009).

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Page 2: Credibility is not at issue.

On page 3 of her brief, Ms. Cartwright includes two quotations addressing issues of credibility, but she does not explain how they apply to this case or how the question of credibility is relevant; therefore, this Court may ignore it.[2]

There is no issue of credibility in this matter. The facts before the Superior Court on the motion for contempt were undisputed; the issues before the Superior Court on Ms. Cartwright's motion for contempt were limited to questions of what could be inferred from the undisputed facts and what conclusions could be drawn. No issue before the Superior Court involved determining the credibility of any witness or believing one witness over the other.

Page 3: None of Mr. Flynn's substantive arguments can be dismissed based on Ms. Cartwright's claim that they were (a) waived, (b) presented and rejected, or (c) could have been presented before.

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[2] *Ameriquest,* 148 Wn.App. at 166.

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On pages 3-4 of her brief, Ms. Cartwright asserts that "[a]l of appellant's substantive arguments were either waived, presented and rejected, or could have been presented, before."

The *Opening Brief* makes the following arguments:

> A. The Superior Court erred when it found Mr. Flynn in contempt of the *December Order,* which had already been reversed by this Court.

WAIVED: Ms. Cartwright makes no attempt to identify in the record how this argument was waived; therefore, this Court may ignore this assertion.[3]

Mr. Flynn raised this issue before the Superior Court, noting repeatedly that the *December Order* had already been reversed by this Court.[4] No party can be properly bound by an order that has already been determined to be unlawful by a higher reviewing court and subsequently reversed; the suggestion that a citizen can somehow *waive* their right to be free of an order that

[3] *Ameriquest,* 148 Wn.App. at 166.
[4] *Verbatim Report of Proceedings*, pgs. 13-15; CP 136-77.

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no longer exists simply has no basis in Washington law or American jurisprudence.[5] An order that has been reversed cannot be enforced. Ms. Cartwright provides no citation to authority for the suggestion that this argument was waived. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'"[6] "A failure to cite authority constitutes a concession that the argument lacks merit."[7] These arguments may be ignored.

PRESENTED AND REJECTED: This argument has never previously been presented to this Court, and Ms. Cartwright makes no attempt to identify in the record where this argument was previously presented and rejected; therefore, the Court may ignore this assertion.[8]

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[5] *Butler v. Eaton*, 141 U.S. 240, 244 (1891).
[6] *Frank Coluccio Const. Co. v. King County*, 136 Wn.App. 751, 779, 150 P.3d 1147 (2007) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).
[7] *State v. McNeair,* 88 Wn.App. 331, 340, 944 P.2d 1099 (1997).
[8] *Ameriquest,* 148 Wn.App. at 166.

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COULD HAVE BEEN PRESENTED BEFORE: This argument could not have been presented to this Court before this appeal because at the time Mr. Flynn previously presented arguments to this Court, the order in question had not yet been reversed (which was the outcome of the previous appeal), and the Superior Court had not yet enforced the reversed order. Ms. Cartwright makes no attempt to demonstrate otherwise; therefore, the Court may ignore this assertion.[9]

B. The Superior Court erred when it found Mr. Flynn in contempt of the *Parenting Plan.*

WAIVED: Ms. Cartwright makes no attempt to identify in the record how Mr. Flynn waived his right to appeal the finding of contempt; therefore, the Court may ignore this assertion.[10]

Mr. Flynn presented *thorough* argument to the Superior Court to support his contention that he ought not to be found in

[9] *Id.*
[10] *Id.*

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contempt, and there is no basis to conclude that he waived his right to appeal.[11]

PRESENTED AND REJECTED: The Superior Court never previously found Mr. Flynn in contempt of the *Parenting Plan*, which was the basis for this Court's previous reversal; therefore, Mr. Flynn's current argument that the Superior Court erred when it found contempt could not have been previously rejected.

Ms. Cartwright suggests that because this Court's previous decision contained dicta in a footnote about the Superior Court's authority to require domestic violence perpetrator treatment, the Court is now prevented from addressing the question in this appeal; however, that conclusion is inaccurate. "A statement is dicta when it is not necessary to the court's decision in a case."[12] "Dicta is not binding authority."[13] The question of whether the

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[11] Verbatim Report of Proceedings, pgs. 10-16; CP 136-77.
[12] *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn.App. 201, 215, 304 P.3d 914, review denied, 178 Wn.2d 1022 (2013).
[13] *Id.*

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Superior Court could find Mr. Flynn in contempt for not attending domestic violence perpetrator training was not necessary to this Court's previous decision, because it determined that the Superior Court had not actually found Mr. Flynn in contempt for anything in the first place; therefore, footnotes discussing whether the Superior Court *could have* found Mr. Flynn in contempt (when it did not) are dicta and are not binding on this Court with respect to resolution of this appeal. The conclusion that these comments are dicta is supported by their placement in a footnote rather than as part of the main decision; statements necessary to a decision do not generally appear in footnotes. This Court is free to address the issue without reference to its previous comments. Not only is it free to do so, it *should* do so for several reasons.

In footnote 6 of this Court's previous decision, the Court appears to understand Mr. Flynn to complain about the *FFCL*, which he had not previously appealed, but Mr. Flynn had no quarrel with the *FFCL*. The *FFCL* is very specific (as is the

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Decree and the *Parenting Plan*), and it explicitly found that Mr. Flynn did not engage in domestic violence and did not have a substance abuse problem, and, in contrast, it specifically stated that he *did* have a problem with abusive use of conflict and was therefore required to "undergo evaluation and ***any treatment for anger management.***"[14] Mr. Flynn has never disputed that he was required to undergo an assessment *for anger management* or that he was obligated to comply with any recommendations *for anger management treatment*. Mr. Flynn does not complain about the *FFCL*; in fact, he seeks to enforce the language of the *FFCL* and the *Parenting Plan*, neither of which require domestic violence perpetrator's treatment.

The *FFCL* provided no hint that would have put Mr. Flynn on notice that he could be required to engage in domestic violence perpetrator's treatment; to the contrary, the only comment about domestic violence in the final orders of this case (*FFCL*, *Decree*,

[14] *FFCL,* pgs. 5-7; CP 268-70.

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and *Parenting Plan*) confirms that Mr. Flynn did not engage in domestic violence and therefore has no restrictions on his parenting as a result of or related to domestic violence (in compliance with the requirements of Washington law that any restriction on parenting must be supported by a specific finding in the .191 section).

Mr. Flynn has not objection to the *FFCL* as written; however, he does observe that if this Court interprets the explicit language of the *FFCL* to silently imply authorization of domestic violence perpetrator's treatment, a problem is then created that did not previously exist. If it could have been understood from the language in any of the final orders that Mr. Flynn could be subjected to domestic violence perpetrator's treatment, he would have appealed them when they were entered (as his subsequent actions confirm), but there is nothing that provides any notice of such an outcome. Therefore, Mr. Flynn argues that if this Court determines that he is required to attend domestic violence perpetrator's treatment despite the absence of any such

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requirement in the final orders, his constitutional rights to due process would then be violated because he was given no notice or opportunity to appeal that requirement, which he believes violates Washington law.

The footnote also states that "[t]he order of the court that requires Flynn to act with regard to treatment is contained in the Parenting Plan, which is properly before us on appeal." Unfortunately, this statement is inaccurate on two different counts. First, the *Parenting Plan* was not properly before the Court on appeal. The *Parenting Plan* was entered at the same time as the *FFCL*, and Mr. Flynn did not appeal or assign error to either of those documents.[15] Second, as demonstrated above, the *Parenting Plan* was not the only order of the court that required Mr. Flynn to act, because the FFCL specifically stated: "... the Court orders the Father to undergo evaluation and *any*

[15] The *Amended Parenting Plan* did not substantively change any of the language relevant to the appeals in this matter and was itself never appealed.

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treatment for anger management."[16] Not only that, but even if it were true that the *Parenting Plan* is the only relevant order (which it is not), the *Parenting Plan* itself states that Mr. Flynn was to "[b]e evaluated **for anger management,"**[17] and it does not authorize an evaluation for domestic violence treatment or substance abuse (as indeed it cannot without findings of domestic violence or substance abuse in the .191 section pursuant to Washington law).

The footnote also makes the statement that: "... the recommendations to which Flynn objects resulted from an anger management assessment from ACT&T," but this is also inaccurate. The report from ACT&T clearly indicates that it conducted three distinct assessments through the use of distinct psychological tools: anger management, domestic violence, and substance abuse.[18] It clearly articulates that Mr. Flynn does not

[16] FFCL, pg. 7; CP 270; emphasis added.
[17] CP 2.
[18] CP 619-25.

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need anger management treatment based on the evaluative tools it described.[19] It uses entirely different tools to assess domestic violence, which confirms that those assessments are distinct.[20] It also used a third set of tools to determine propensity for substance abuse.[21] That resulted in three different assessments, two of which the Superior Court could not order without having made findings to support restrictions in the .191 section of the *Parenting Plan*, which the Superior Court did not make.

To conclude, this Court is not bound by its previous dicta in the footnote of the prior decision, and further, it should reconsider those comments, because, in contrast to the rest of the decision, the footnote's recitation of the record is inaccurate, and its conclusions are in conflict with Washington's law and Constitution.

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[19] *Id.*
[20] *Id.*
[21] *Id.*

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COULD HAVE BEEN PRESENTED BEFORE: This argument could not have been presented before because the Superior Court did not find Mr. Flynn in contempt before. Ms. Cartwright makes no attempt to explain how this issue could have been addressed before; therefore, this Court may ignore it.[22]

C. The Superior Court erred when it suspended Mr. Flynn's residential time and entered a contempt order that modified the residential schedule as terms for "purging" contempt.

WAIVED: Ms. Cartwright makes no attempt to identify in the record how Mr. Flynn waived his right to appeal the *Contempt Order*; therefore, the Court may ignore this assertion.[23]

Mr. Flynn argued to the Superior Court that Ms. Cartwright could not seek the reduction of his parenting time until she directly petitioned for a modification of the parenting plan.[24] He

[22] *Ameriquest,* 148 Wn.App. at 166.
[23] *Id.*
[24] CP 143-44.

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also argued that the Parenting Plan does not provide for the total automatic suspension of his parenting time.[25]

PRESENTED AND REJECTED and COULD HAVE BEEN PRESENTED BEFORE: The Superior Court never previously found Mr. Flynn in contempt, nor did it previously enter a contempt order, nor did it previously modify the residential schedule as terms for purging contempt. Therefore, this argument could not have been previously presented to and rejected by this Court.

D. The Superior Court violated Mr. Flynn's constitutional rights when it entered the *Contempt Order.*

WAIVED: Ms. Cartwright makes no attempt to explain how this issue could have been addressed before; therefore, this Court may ignore her assertion.[26]

[25] *Id.*
[26] *Ameriquest,* 148 Wn.App. at 166.

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Mr. Flynn argued to the Superior Court against the *Contempt Order* on the basis of his constitutional rights.[27] Further, even if he had not, his failure to do so does not prevent his making an argument related to a manifest error affecting a constitutional right pursuant to RAP 2.5(a).

PRESENTED AND REJECTED: The previous appeal did not address the question of remedial versus punitive sanctions. Ms. Cartwright makes no attempt to explain how this issue could have been addressed before; therefore, this Court may ignore it.[28]

The Court's opinion on the previous appeal noted that a party could modify a parenting schedule through a motion for contempt in compliance with the statute, and Mr. Flynn does not dispute this. The issue now before this Court on appeal is *not* whether the statute permits a trial court to make *any* modification, but rather whether the statute permits the Superior Court to make the modifications it actually made. In his *Opening*

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[27] CP 141-42.
[28] *Ameriquest,* 148 Wn.App. at 166.

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Brief, Mr. Flynn thoroughly argued why it does not. Ms. Cartwright entirely ignored these arguments in her response.

COULD HAVE BEEN PRESENTED BEFORE: Mr. Flynn could not have addressed the sanctions that were contained in the *Contempt Order* during the previous appeal, because they were entered subsequent to the resolution of the previous appeal and did not previously exist.

E. The Superior Court erred when it granted Ms. Cartwright's request to "affirm" the fees previously awarded in the *December Order* when that order had already been reversed by this Court.

WAIVED: Ms. Cartwright makes no attempt to explain how this issue was waived; therefore, this Court may ignore her assertion.[29]

A Superior Court does not have the authority to award fees that were reversed by this Court. Mr. Flynn's objection to those fees is not waived because their unlawful nature was already

[29] *Ameriquest,* 148 Wn.App. at 166.

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addressed and memorialized in the previous appeal and confirmed by this Court's reversal of the order in its entirety.

PRESENTED AND REJECTED and COULD HAVE BEEN PRESENTED BEFORE: This argument *was* previously presented and previously accepted (not rejected), which is why this Court reversed the Superior Court's order. There was no basis to award the fees associated with the *December Order,* which was unlawful.

Page 4: Ms. Cartwright is not permitted to refer this Court to her briefing in a different proceeding.

Ms. Cartwright also attempts to "direct this Court" to her previous brief in the previous case, but this is not a privilege available to her under the appellate rules. Ms. Cartwright cites to no authority that would permit this Court to seek out information to her benefit that she herself has declined to provide; therefore, this Court may ignore her request.[30]

[30] *Frank Coluccio*, 136 Wn.App. at 779; *McNeair,* 88 Wn.App. at 340.

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Further, Mr. Flynn inquired and was informed that he could not reference the record from the previous appeal (which references largely the same documents as this one), and he was required to pay to have the documents provided to this Court a second time; it would be prejudicial if Mr. Flynn were required to reproduce all relevant information from the previous appeal, and Ms. Cartwright was provided with privileges that Mr. Flynn was not afforded.

Page 5: This Court should deny Ms. Cartwright's request for attorney fees.

Ms. Cartwright's brief contains a mere five pages of substantive argument, most of which communicates an explicit refusal to meaningfully participate in this proceeding, which Ms. Cartwright disrespectfully characterizes as "whack-a-mole." She demonstrates a startlingly dismissive attitude given that this appeal (like the previous one) is necessitated purely as a result of Ms. Cartwright's ongoing lack of respect for the requirements of Washington law and court rules (a continuing pattern which is

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demonstrated again in her deficient response on appeal). As this Court will recall, Mr. Flynn's previous appeal resulted in a reversal based on Ms. Cartwright's failure to observe procedural requirements; an error which she has not only repeated but proliferated on remand. That Ms. Cartwright would view *herself* as entitled to take the posture of being too exasperated to participate on appeal confirms her lack of respect for the legal process. If anyone has the right to be frustrated with the need for a second appeal, it is Mr. Flynn, whose rights have been repeatedly violated, or it is this Court, who must resolve this matter once again, this time without any meaningful assistance from Ms. Cartwright, who is the cause of the problem.

Ms. Cartwright's attorney makes a puzzling professional announcement that she is not up to the task she is being paid hundreds of dollars an hour to perform (lacking the requisite "fortitude and patience" for the work of her vocation, i.e., assisting the Court as an appellate attorney), and she refuses to fulfill her obligation as a judicial officer by producing a brief that

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complies with the rules of appellate procedure. This is a puzzling thing to *announce* publicly in writing, but this tactic makes a great deal more sense when one recognizes that Ms. Cartwright's attorney, who is actually very clever and not at all lacking in fortitude, likely recognizes that Mr. Flynn's arguments have merit and has informed her client, and Ms. Cartwright does not want to pay the cost of thoroughly responding to an appeal that she will ultimately lose. A prudent decision, to be sure, though certainly not as admirable (or compliant with CR 11) as candor to the tribunal would have been. In any case, it seems Ms. Cartwright's huffy commentary is merely so much sound and fury masking what is otherwise a total forfeit. This is confirmed by the snide comment at the very end of the argument, where Mr. Flynn's appeal is characterized as a "a Cadmean victory"; a term which characterizes "a victory that damages the victors as much as the vanquished." This comment, while bitter, nevertheless acknowledges that Mr. Flynn is likely to be victorious.

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It is curious, then, that Ms. Cartwright would request fees on appeal when she straightforwardly made a "decision not to fully brief the multitude of issues raised," thereby solving her own problem by refusing to assist the Court in order to avoid the need for attorney fees. It is unclear what fees she is entitled to seek having performed no service to the Court.

Further, her fee request is deficient. It is limited to two sentences. The first simply paraphrases RAP 18.1(b), and the second says only: "Both RCW 26.09.160(1) and RCW 26.09.140 provide a basis for fees to respondent." Pursuant to Washington law, "[t]he rule requires more than a bald request for attorney fees on appeal."[31] "Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs."[32] Ms. Cartwright provides no argument whatsoever related to attorney fees. This Court should deny Ms. Cartwrights request for fees on appeal.

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[31] Stiles v. Kearney, 168 Wn.App. 250, 267, P.3d 9 (2012).
[32] *Id.*

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Page 5: This Court should grant Mr. Flynn's request for attorney fees.

In addition to all the reasons Mr. Flynn provided in his *Opening Brief*, which Ms. Cartwright fails to address in any fashion, Mr. Flynn is entitled to fees for having to respond to Ms. Cartwright's deficient response brief, which failed to comply with RAP 10.3(b) and required unnecessary efforts by Mr. Flynn's attorney who had to exert a great deal of effort to defend every single argument on appeal because Ms. Cartwright could not be bothered to identify which argument she was attacking or where in the record alleged "waivers" occurred, etc. This Court should award attorney's fees to Mr. Flynn on appeal.

III. CONCLUSION

Ms. Cartwright's failure to follow any of the rules on appeal is consistent with her ongoing refusal to comply with Washington law in the underlying case despite relentlessly interfering with Mr. Flynn's parental relationship with his child. This Court should reverse the *Contempt Order,* rule that Mr.

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Flynn is not required to participate in domestic violence perpetrator treatment (given there are no findings that would support such a restriction), and award fees to Mr. Flynn on appeal. Mr. Flynn prays that this Court completely resolves this matter so that Mr. Flynn and the parties' child may finally have some relief from the ongoing burden of managing Ms. Cartwright's disregard for the law and her obstruction of Mr. Flynn's parental relationship.

The undersigned certifies that the foregoing brief contains 3,736 words not including the appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and this certification of compliance.

Respectfully submitted this 24th day of February, 2023,

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Appendix 8
Motion for Reconsideration (2022 Appeal)

COURT OF APPEALS OF THE STATE OF WASHINGTON
Division I

Court of Appeals No. 843435

In re:

PATRICK RYAN FLYNN

Appellant,

and

ALEXANDRA LEIGH CARTWRIGHT,

Respondent.

MOTION FOR RECONSIDERATION

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I. IDENTITY OF MOVING PARTY:

Appellant, PATRICK FLYNN, is the moving party.

II. STATEMENT OF RELIEF SOUGHT:

Appellant respectfully requests reconsideration of the unpublished opinion filed on May 1, 2023, pursuant to RAP 12.4.

III. GROUNDS FOR RELIEF AND ARGUMENT

Issue 1: ONGOING CONTEMPT: The Opinion's conclusion that Mr. Flynn remains in *ongoing* contempt of the Parenting Plan until he completes the treatment recommendations (regardless of whether he complies with the treatment recommendations) enforces language that (1) does not exist in the Parenting Plan, (2) contradicts the explicit language contained in the Parenting Plan governing the procedure to limit parenting time in the event of a failure to complete recommendations, and (3) violates well-settled Washington law governing contempt and parenting plans.

The Opinion cites to RCW 7.21.030(2)(c) and the language of the Parenting Plan to affirm the trial court's conclusion that Mr. Flynn will remain in ongoing contempt of the Parenting Plan until he *completes* the recommendations made by ACT&T[1]; however, no language contained in RCW 7.21.030(2)(c) or in the Parenting Plan supports that conclusion.

[1] *Opinion,* pg. 13.

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RCW 7.21.030(2)(c) states that a court's authority is limited to "[a]n order designed to ensure *compliance* with a prior order of the court."[2] As this Court rightly observed: "[i]mposing a sanction beyond this authorization would be an abuse of discretion."[3] RCW 7.21.030(2)(c) requires that sanctions must be designed to ensure compliance with a previous order, but it does not permit the trial court to *add* requirements to the actual language of the underlying order being enforced. Once a party complies with the specific, explicit, actual terms of a prior order, that party can no longer be considered in contempt of that order and any remedial sanction must cease.

Where a court bases its contempt finding on a court order, "the order must be strictly construed in favor of the contemnor, and '[t]he facts found must constitute a plain violation of the order."[4] In this case, the Parenting Plan specifically says: "Father must comply with any treatment as recommended by the evaluation."[5] The Opinion implies that compliance and completion are essentially interchangeable terms when it characterizes the concept of

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[2] *Emphasis added.*
[3] *Opinion, pg. 13.*
[4] *In re Rapid Settlements, Ltd's*, 189 Wn.App. 584, 601-02, 359 P.3d 823 (2015), quoting *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn.App. 720, 768, 271 P.3d 331 (2012); emphasis added. See also, *In re Humphreys*, 79 Wn.App. 596, 599, 903 P.2d 1012 (1995).
[5] CP 2.

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completion as "full compliance" or compliance over time,[6] but the specific language of the Parenting Plan itself does not condition the exercise of Mr. Flynn's parenting rights on completion of the recommendations, nor does it condition Mr. Flynn's visitation with his child on achieving any particular duration of ongoing compliance or on achieving "full compliance" within any specific time frame; therefore, the plain language of the Parenting Plan requires that the moment Mr. Flynn is actively engaged in the treatment recommended to him by ACT&T, he becomes in compliance with the actual terms of the Parenting Plan, and he can no longer be considered in contempt.

It is further clear that the Parenting Plan does not equivocate 'compliance' with 'completion,' because it addresses both circumstances. The Parenting Plan indicates no intention to limit parenting time until some progression in treatment is achieved or a particular duration of treatment has occurred; rather, it assumes that active participation in treatment recommendations is sufficient. Had Mr. Flynn immediately complied with the recommendations of ACT&T on the day they were made, it is apparent that his residential time would have remained unchanged from what was awarded in the Parenting Plan, regardless of how long it would take him to complete the

[6] *Opinion,* pg. 15.

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recommendations. *After* trial and *after* the entry of the Parenting Plan, ACT&T recommended that Mr. Flynn engage in a minimum of 39 weekly group sessions, which would have taken almost a year to complete; to interpret the language the way the Opinion does would mean that even if Mr. Flynn had immediately and perfectly complied with ACT&T's recommendations the very day they were made, he would still have automatically been in contempt for almost a year until the requirements were complete, and there would be nothing he could do to purge it. "A penalty is only coercive ***if and only if*** the contemnor has ***at all times*** the capacity to purge the contempt and obtain his release."[7] Here, Mr. Flynn has no ability to purge the contempt for at least 39 weeks; therefore, the penalty is not coercive but punitive.

Finally, the Parenting Plan itself confirms that it does not consider 'compliance' and 'completion' to be interchangeable concepts because while it only conditions parenting time on compliance, it specifically indicates the procedure that is available to Ms. Cartwright if Mr. Flynn ultimately fails to complete the treatment recommendations prescribed to him:

> *"Mother may directly petition the Court, i.e., without mediation, to reduce Father's visitation with the Child."*[8]

[7] *In re Didier*, 134 Wn.App. 490, 140 P.3d 607, 609 (2006).
[8] CP 2.

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If the Parenting Plan intended to condition parenting time on completion of treatment recommendations, it would have simply done so (rather that what it actually did, which was to award Mr. Flynn parenting time conditioned only on compliance), and it certainly would not have identified an additional procedure that would need to be undertaken to limit his parenting time; rather, it would have limited Mr. Flynn's time automatically and required completion first prior to regaining the time. By *explicitly* articulating the proper procedure for addressing a failure to complete treatment recommendations as distinct from the compliance required to maintain the parenting schedule described, the Parenting Plan distinguishes between the concepts of compliance and completion. The Parenting Plan gives Ms. Cartwright a very clear path forward when it comes to limiting Mr. Flynn's parenting time for failing to complete the treatment recommendations; she need not (and, indeed, cannot) achieve a modification by improperly shoehorning it through the contempt statute.

By finding Mr. Flynn in ongoing contempt until he completes the treatment recommendations rather than until he complies with the treatment recommendations, the Opinion affirms an order that exceeded its authority pursuant to RCW 7.21.030(2)(c) by entering sanctions designed to do more

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than merely ensuring compliance with a prior order of the court, and therefore it abused its discretion.

Mr. Flynn requests that this Court reconsider its affirmation of the trial court's erroneous decision to consider Mr. Flynn in ongoing contempt of the Parenting Plan until all the recommendations are complete, regardless of whether he complies with the terms actually stated in the Parenting Plan.

Issue 2: CONSTITUTIONAL ARGUMENTS AND WASHINGTON LAW: The Opinion fails to meaningfully address the constitutional arguments made in the Opening Brief.

The Opinion fails to even *acknowledge* the detailed arguments made in the Opening Brief regarding Mr. Flynn's constitutional due process objections nor does it address them.

After trial, and *after entry of final orders,* and *after the appeal period had run,* and *without notice or an opportunity to be heard or to cross-examine a new expert witness who had provided no sworn testimony to the court,* the trial court enforced new limitations that were not explicitly contained in the Parenting Plan. These limitations require findings of domestic violence and substance abuse to support them pursuant to Washington law, and no such findings were made. To the contrary, the trial court had entered positive findings that explicitly found that Mr. Flynn had *not* engaged in domestic

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violence or substance abuse.

The Opinion concludes that if the Parenting Plan orders that future limitations be "any treatment," then any treatment is fine. It does not matter if the limitations are based on inquiries conducted entirely off the record. It does not matter if the limitations are entered *after trial* with no opportunity for a party to object or appeal. It does not matter if the limitations are determined by a private third party employed by the organization whose paid services are (shockingly) the services that are recommended. It does not matter whether the limitation was justified by any evidence or determined pursuant to any standard. It makes no difference whether the limitation complies with Washington law or the constitution or whether the limitation is supported by any findings of the court. In fact, entry of such limitations is permissible even where the limitations unquestionably violate Washington law and constitutional due process *on their face* and even where the court itself would not have been lawfully permitted to enter them.

It is difficult to even articulate sufficient dismay.

The Opinion does not address the fact that Mr. Flynn did not even get the minimal required notice and a hearing before being subjected to post-trial limitations "recommended" by a private entity. The Opinion does not address the fact that Mr. Flynn had no opportunity to object to or appeal the limitations

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recommended by ACT&T. The Opinion does not address the fact that Mr. Flynn did not get a chance to cross-examine the ACT&T social worker as an expert witness or to address the efficacy of the tests used to reach his conclusions. The Opinion does not address the fact that the limitations are entirely unsupported by the findings of fact, as *required by Washington law.*

The Opinion asserts that the Parenting Plan required Mr. Flynn to comply with "*any* treatment recommended by the anger management evaluation," but it fails to address the requirement that the Opinion must consider that phrase in light of all relevant language in all the final orders[9] and that it is required to interpret the Parenting Plan in a way that is consistent with Washington law and the constitution (the Opinion's interpretation is violative of both).[10]

If a court were inclined to look into the report and evaluate what information is available related solely to anger management, it will see that the test scores related to anger management were normal and that no treatment *for anger management* was recommended. The "evaluation" then goes on to evaluate Mr. Flynn for domestic violence and substance abuse, which it was not authorized to do.

[9] State v. Veliz, 176 WN.2d 849, 298 P.3d 75, 77 (2013).
[10] In re MB, 101 Wn.App. 425, 3 P.3d 780, 792 (2000).

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Instead, the Opinion chooses to treat evaluation and recommendations for domestic violence (which were *not* authorized by the Parenting Plan or by Washington law) and evaluation and recommendations for anger management (which *were* authorized by the Parenting Plan and by Washington law) are somehow interchangeable when it comes to fulfilling the Parenting Plan's language that requires "*any* treatment recommended by the anger management evaluation." ***They are not.*** One was properly authorized by the trial court and supported by its findings in compliance with Washington law. The other was not authorized by the trial court or supported by its findings and was therefore entirely unlawful pursuant to Washington law and violative of Mr. Flynn's constitutional rights.

Mr. Flynn prays that this Court reconsider and withdraw its approval of the trial court's profoundly troubling violation of his civil rights.

Issue #3: TRIAL COURT OVERRULES COURT OF APPEALS; ENFORCEMENT OF VOID ORDER: The Opinion errs when it concludes that subsequent to reversal by this Court, a trial court may "affirm" the reversed order or enforce a void order, effectively overruling the Court of Appeals.

The Opinion's decision on this issue represents a considerable departure from traditional appellate jurisprudence. Not only does it confirm that a trial court may simply overrule the decision of the Court of Appeals as it pleases,

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without any reference to authority or even meaningful analysis or articulating a basis, but it also permits trial courts to enforce invalid orders that were already reversed by this Court. A party need not object with "enough specificity to alert the trial court" to the nature of the problem when this Court *itself* already wrote an opinion explaining the nature of the problem when it reversed the order for being unlawful.

The trial court does not have the authority to affirm an order that this Court has reversed, and this Court should not want to assist the trial court in undermining its own decisions or in enforcing an unlawful order that has already been reversed. The interest of all proceedings is justice. There is no justice in permitting a trial court to immediately overrule a hard-won decision from this Court. An order by a trial court purporting to affirm an order that has already been reversed by the court of appeals is void ab initio; the U.S. Supreme Court acknowledged as early as 1891 that an order that has been reversed is "without any validity, force, or effect."[11] No superior court judge has the power to affirm an order reversed by this Court, and the suggestion that a successful appellant must continue to repeat all the same arguments on remand that he already won on appeal to avoid being accused of waiving his

[11] *Butler v. Eaton*, 141 U.S. 240, 244 (1891).

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rights is unreasonable, particularly given that the Court of Appeals already issued an opinion explaining the problem in detail when it reversed the order. Mr. Flynn objected to enforcement of a reversed order. There need be no more specificity than that. A trial court may not enforce a reversed order. The trial court may not "affirm" an invalid order or overrule the Court of Appeals. The suggestion that a trial court can simply affirm a reversed order is entirely without authority and the fact that both the trial court and this Court appear to be exerting significant effort to subject Mr. Flynn to the terms of an order that this Court already found to be unlawful does not meet with the appearance of fairness.

Mr. Flynn requests that this Court reconsider its conclusion that its previous Opinion may be subsequently overruled by the trial court.

The undersigned certifies that the foregoing motion contains 2,307 words not including the appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and this certification of compliance.

RESPECTFULLY SUBMITTED this 22nd day of May, 2023.

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