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No. 70249-1-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Marriage of:

KARLA MAIA
(fka Karla Maia-Hanson),
Appellant,

v.

BRADLEY HANSON,
Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

KARLA MAIA'S REPLY BRIEF

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I. INTRODUCTION & GENERAL REPLY

The Response, sadly, strives to paint a picture of Karla as an exotic, wild creature who had to be controlled by the trial judge. Under the Response's view of the proceedings, the judge had no choice but to put Karla on a "leash" in the unique form of a "contempt-probation" order that kept the keys to the so-called "purging" of the order firmly in the trial court's pocket. Similarly, the Response contends Karla engaged in untoward tactics on appeal, having the temerity to challenge the May 31, 2012, rulings once they were made final in 2013 when written orders were at last entered. But though she is Brazilian, Karla has long been an American and British citizen, not a "wild-eyed," "loose cannon" bent on challenging everything the trial court did and determined to impose unnecessary costs on her boys' father, Brad, as the Response tries to paint her. Despite the myopic focus of the Response in its claim Karla is trying to get back at Brad, this appeal is not about Brad. Karla is a mother who, like any good mom, wants the best for her sons in terms of safety and also academically, socially, and athletically, so they can develop into well-rounded boys who maximize their unique talents in whichever spheres they manifest.

Karla also wants and deserves to be treated fairly by the courts. She appealed because she believes (and the record shows, unfortunately) the fairness she deserves was sorely lacking, as shown by the contempt issue. ***First,*** the May 31, 2012, contempt

order was not based on the evidence. The undisputed evidence is that Karla ***never*** made a report to CPS or a mandatory reporter. Instead, the evidence shows Karla contacted the parenting coach in 2011, but the coach did not know who Karla was because the coach, Ms. Keilin, had not been retained by Brad as the trial court had required him to do. *See* Opening Brief, pp. 12- 16 & fn. 7. ***Second,*** the contempt order was an improper and unconstitutional effort to control Karla by imposing prior restraints of the content of her speech and placing her under the trial court's "supervision."

The record thus shows that, while Karla moved for reconsideration after the trial because she genuinely hoped to reach the trial court with her reconsideration papers, after it was denied, she chose ***not*** to appeal from the trial. This was to save anxiety and expense for all, and because it was better for the boys.

The Response's substantial evidence argument in its Section D fails for two reasons, both of which are amenable to summary treatment. ***First,*** the Court need not even reach the substantial evidence issue because, as detailed in the Opening Brief and in Section II. A, *infra,* the contempt order was wholly illegal for violating Karla's constitutional rights of speech and to petition the government. ***Second,*** as pointed out in detail in the Opening Brief, the undisputed evidence demonstrates the contempt finding was erroneous and is ***not*** supported by ***any*** evidence, much less substantial evidence. *See* Opening Brief, pp. 12-16; 36-43.

Finally, any arguments in the Response not specifically addressed herein are not conceded, but need no further response given the Opening Brief and the record.

II. REPLY ARGUMENT

A. The Trial Court Contempt Order And Punishment Imposed Under It Must Be Vacated As Illegal Prior Restraints Which Imposed Genuine Harms On Karla In Disregard Of The Evidence.

1. The First Amendment public forum analysis applied by the Response is not applicable and fails to distinguish between prior restraints on protected speech and unprotected speech.

In an effort to combat Karla's controlling First Amendment prior restraint argument, which it cannot do on this record, the Response asks the appellate court to apply the wrong legal standard, the "time, place and manner restriction" that applies only when the ***government*** attempts to regulate speech in a public forum. Response, p. 36. This, however, is a prior restraint case which discriminates based on the content of Karla's protected speech Unlike "time, place and manner" restrictions, "[p]rior restraints carry a heavy presumption of unconstitutionality." *In re Marriage of Suggs*, 152 Wn.2d 74, 81, 93 P.3d 161 (2004) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)). As a result, prior restraints on protected speech are rarely permitted. *Id.*

In *Suggs*, our Supreme Court applied these principles to strike as improper an anti-harassment order which failed to distinguish between contacts that contained protected speech versus unprotected speech, the same as the prior restraint at issue here. *Suggs*, 152 Wn.2d at 84. The *Suggs* trial court had permanently restrained Shawn Suggs from "knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming Andrew O. Hamilton and for no lawful purpose." *Id.*, at 77-79. On review, the Supreme Court found that, although this order might prohibit some unprotected libelous speech, it lacked the specificity necessary for prior restraint on unprotected speech:

> Fearful of what allegations may or may not ultimately be deemed invalid and unsubstantiated, Suggs may be hesitant to assert any allegations, including those she deems truthful. Thus, Suggs is left with an order chilling all of her speech about Hamilton, including that which would be constitutionally protected, because it is unclear what she can and cannot say.

Id., at 84. This rationale applies with equal force here and controls, where Karla is left not knowing what she can or cannot say about Brad, and further, where the order makes her responsible for what the teen-age boys privately report to third parties.

The June 24, 2011, order prohibits Karla from contacting a government agency or mandated reporter with any report of abuse without prior approval of the court-appointed case manager. As in

Suggs, the order does not distinguish between legitimate reports made by Karla or her children out of genuine concern for their safety and allegations intended to be libelous and harassing or otherwise arguably improper. Therefore, the order does not distinguish between a contact that involves protected or unprotected speech and must be invalidated under *Suggs*. If anything, Karla's situation is a more egregious violation of speech rights than in *Suggs*.

The Response attempts to distinguish *Suggs* by arguing the *Suggs* order was overbroad because it restrained Suggs from making unsubstantiated allegations to any third party, whereas Karla is "only" restricted from reporting abuse to government agencies and mandatory reporters, but remains free to make reports to other third parties. *See* Response, p. 38. But the Response misinterprets the *Suggs* holding. The Court in *Suggs* found the order was overbroad in that it did not distinguish between protected and unprotected speech, and therefore had an unconstitutional chilling effect on Suggs's protected speech. *Suggs,* 152 Wn.2d at 84. The breadth of the potential audience for the contested speech was never at issue.

The Response also misunderstands the *Suggs* holding and Karla's argument - restraining Karla from making reports to mandatory reporters chills her constitutional right to petition the government, which *Suggs* held the courts cannot do. The Response's assertion that restraints may properly be imposed because she is "only" restrained from reporting abuse to government

agencies and mandatory reporters confirms the problem with the orders and their violation of the right to petition the government as construed in *Suggs*. It is, in effect, a concession of the legal error made below. *Suggs* controls and requires vacation of the challenged orders and underlying orders that support them.

The Response also cites to cases where this Court upheld prior restraints contained in marriage dissolution orders. Response, pp. 37-38. Yet unlike the order here, the orders in these cases distinguished between protected and unprotected speech. In *Dickson v. Dickson*, the trial court entered an injunction prohibiting the defendant from representing to others that his ex-wife was insane and that they remained married. 12 Wn. App. 183, 529 P.2d 476 (1974), *rev. denied*, 85 Wn.2d 1003 (1975). The defendant and his wife were legally divorced, and upon review this Court determined these representations to be defamatory as they implied the wife was adulterous or bigamous if she explored relationships with other men. This Court upheld the injunction to the extent that the defendant falsely attempted to represent that his wife was insane and that they remained legally married, but ordered that the injunction be modified to allow the defendant to state that he remain married according to the tenets of his religion, as this speech was protected under the First Amendment. *Id.* at 191.

Like *Dickson*, the other cases cited by the Response also distinguish between protected and unprotected speech. *See In re*

Marriage of Olson, 69 Wn. App. 621, 630, 850 P.2d 527 (1993) ("Because freedom of speech is a paramount constitutional right, we interpret the trial court's prohibition against 'disparaging remarks' to be those which are defamatory of his former wife"); *In re Marriage of Farr*, 87 Wn.App.177, 180, 940 P.2d 679 (1997), *rev. denied*, 134 Wn.2d 1014 (1998) (upholding a finding of contempt when father violated provision of parenting plan which prohibited *disparaging* remarks made to the children about their mother) (emphasis added).

2. Because the contempt order failed to distinguish between protected and unprotected speech, it was an unconstitutional prior restraint on Karla's First Amendment and State Constitutional right to petition the government, regardless of her past actions.

The Response cites *State v. Alphonse* for the proposition that the right to petition the government is not absolute. Yet the *Alphonse* opinion clearly differentiates between protected and unprotected speech. In *Alphonse*, the defendant was convicted of felony and misdemeanor telephone harassment of a police officer after leaving the officer multiple voicemails containing death threats and descriptions of sexual acts he planned to perform on the officer's wife. *Alphonse*, 147 Wn. App. at 891. Although this Court recognized that the petition clause "protects a significant amount of verbal criticism and challenge directed at police officers," it

determined that the defendant's right to petition the government was not violated as the specific communication for which he was convicted was *unprotected* harassment. *Id.* at 901-02.

Although the right to petition the government is not absolute, a prior restraint is not justified by the court's fear that a communication to the government will contain some harassing or libelous statements. *See In re Marriage of Meredith*, 148 Wn. App. 887, 902, 201 P.3d 1056 (2009)("[A] lower court may not institute a sweeping prior restraint of government petitions based on Meredith's past bad deeds.").

The Response attempts to distinguish *Meredith* by arguing that the order prohibiting Karla from reporting abuse to any government agency or mandatory reporter is a post-speech restriction after a showing of abusive speech, rather than a prior restraint. Response, pp. 39-40. Yet this Court rejected the very same argument in *Meredith*. Despite Meredith's earlier attempts to report Muriel to immigration officials, the appellate court vacated a trial court order restraining Meredith from contacting any agency regarding Muriel's immigration status without first obtaining approval from the court. *Meredith*, 148 Wn. App at 897. The Court noted that the trial court did not find that Meredith had abused his right to speak, but instead determined that future reports on Muriel's immigration status would not be in the best interest of their child. *Id.* The same situation exists here as the trial court never determined

that Karla had abused her speech rights. Rather, the court found that her previous reports were "detrimental" to her sons, and incorporated the restraining order into the parenting plan on that basis. CP 896.

Lastly, the Response attempts to compare the trial court's order to those orders limiting a litigant's ability to file court pleadings when they have abused the privilege. Response, p. 40. This comparison misses the mark. The right to access the courts is not subject to the same presumption of unconstitutionality as a First Amendment prior restraint based on the content of the speech. *In Re Marriage of Giordano*, 57 Wn. App. 74, 77, 787 P.2d 51 (1990) citing *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1974); *Ortwein v. Schwab*, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973). The courts have always had the ability to regulate their own proceedings in order to ensure equal access for all. *Giordano,* 57 Wn. App at 77-78, citing *People of the State of Colorado v. Carter*, 678 F.Supp 1484, 1486 (D. Colo. 1986). A different legal standard applies when a court steps outside the management of its own proceedings and issues an order that restricts a party from contacting any government agency or other parties outside the judicial system, as the trial court did here. Such orders are unlawful prior restraints to the extent they fail to distinguish between protected and unprotected speech, and when they discriminate based on the content of the speech, as occurred here.

B. Karla Was Harmed By The Contempt Proceedings Which Must Be Vacated For Both The Past Harms Inflicted And To Foreclose Their Being Used To Harm Her in the Future.

1. Karla was aggrieved by the contempt proceedings which allows her to seek review under RAP 3.1.

The Response incorrectly argues that because Karla's contempt was finally purged by the March 2013 order, she is not an "aggrieved party" required by RAP 3.1("only an aggrieved party may seek review by the appellate court"). Response, p. 22. An aggrieved party is one who suffers the "denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation." *State v. G.A.H.*, 133 Wn. App. 567, 574, 137 P.3d 66 (2006), citing *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 854–55, 210 P.2d 690 (1949). Karla properly appealed the contempt order because it imposed both immediate punishment and future burdens and obligations, both of which can be ameliorated by her appeal. This Court can give genuine relief to her as an aggrieved party.

Here, Karla suffered the immediate imposition of nearly $4,000 in monetary sanctions in the form of a requirement to pay Brad's attorney's fees as a result of the contempt order. RP (11/4/11) p. 35:3-4.[1] This money was not returned to her when the contempt

[1] Karla was ordered to pay Brad $3,000 in attorney's fees on November 4, 2011 (CP 116-123) and also to pay him $951.50 on April 22, 2013 (CP 859), both based on the underlying illegal contempt orders.

was purged; she remains "aggrieved" by the loss. Karla also suffered from the denial of her First Amendment rights and the obligation of continued court appearances in front of a trial court without a clear way to purge her contempt, and all the costs those obligations imposed.

The Response cites *Breda v. B.P.O Elks Lake City 1800 So-620*, 120 Wn. App. 351, 90 P.3d 1079 (2004), in support of his argument, but the facts of that case are not comparable to this one. The *Breda* court found that clients were not "aggrieved" by the trial court's sanction of their attorney for his own misconduct, and the clients thus could not appeal the sanctions. The trial court here held Karla in contempt for her own alleged misconduct, not a third party's, and she suffered directly from the ultimate consequences of her sanctions, unlike the plaintiffs in *Breda*.

Karla's case is not moot for similar reasons. A case is not moot if a court can still provide effective relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). This court has found the proper inquiry to be "whether a court can grant effective relief by restoring the parties to the status quo, not whether the party complied with the trial court's order." *Pentagram Corp. v. City of Seattle*, 28 Wn.App.219, 223, 622 P.2d 892 (1981). The sanctions for Brad's fees were not erased by the purging of Karla's contempt, and this Court retains the power to reverse these monetary sanctions and return Karla to the status quo.

The other cases cited by the Response may be distinguished on this basis. *Orwick v. City of Seattle* involved a challenge to the Seattle Police Department's use of radar detectors in issuing traffic citations for speeding. 103 Wn.2d 249, 692 P.2d 793 (1984). The Court dismissed the portion of plaintiffs' claim which challenged the original issuance of the citation, because the citations had all been dismissed prior to the initial municipal court hearing. *Id.,* at 253. Unlike Karla, those plaintiffs never faced monetary sanctions, and the court was unable to provide effective relief. Similarly, the appellant in *Lunsford v. Waldrip* served jail time rather than pay the monetary sanctions as a result of his contempt order and failed to allege a cause of action that would entitle him to damages for the time served. *Lunsford v. Waldrip*, 6 Wn. App. 426, 432, 493 P.2d 789 (1972). Consequently, this Court was unable to provide effective relief by reversing the contempt order and found the challenge to be moot. *Id.* Here, the Court's reversal and vacation of the contempt orders and underlying illegal restraint would entitle Karla to repayment of the monetary sanctions. The Court retains the ability to grant Karla effective relief.

2. Vacation of the contempt order is necessary to prevent future harm to Karla from its later application in the "discretion" of the trial court.

As the record in this case makes abundantly clear, absent action by this Court, the trial court will continue to threaten Karla

with punishment under its continuing jurisdiction over her and the parenting plan until the twins are 18. *See* RCW 26.12.010. Karla's requested relief includes the request to remand to a different trial court, something which this Court has the power to grant as part of providing effective relief.

But even if the case is not remanded to a different judge, this Court can provide meaningful relief and instruction to the trial court with a clear decision that the contempt was improperly imposed and cannot be used as a basis for future punishment or orders of any kind. This is the critical minimum ruling, since the trial court has explicitly stated it intends to use the contempt in the future, showing (again) that it does not trust Karla or find her credible. Such statements by the trial court, as set out in the Opening Brief, show a proper basis to remand to a different judge so that Karla and the boys can have a fair and impartial hearing on any future matters under the parenting plan that are brought to court by either Brad or by Karla.

For all these reasons, Karla's appeal is not moot.[2]

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[2] Even if the Court believed Karla's appeal might be moot, it still should be addressed because it is an important issue capable of repetition in the family law context and too often evades review. This is the reason that appeals were decided in two cases in the juvenile setting which found the trial courts there, as here, had improperly imposed punitive contempt because "**the orders on contempt did not give [the contemnor] 'the immediate opportunity to purge' the contempt** and did not comply with criminal due process." *In re Dependency of M.H.*, 168 Wn. App. 707, 709, 278 P.3d 1145 (2012) (quoting *In re Interest of J.L.*, 140 Wn. App. 438, 445, 166 P.3d 766 (2007))(emphasis added). In *J.L.*, although the trial court apparently tried to create an opportunity for the juvenile to remedy her failure to attend school by the contempt orders, it actually amounted to

3. The trial court abused its discretion in its May 2012 order on review by holding Karla in ongoing contempt based on a September 2011 CPS report by Dr. Greenberg pre-dating the original finding of contempt.

The Response claims that the trial court did not abuse its discretion in finding that Karla had not purged her contempt by May 2012, because "[i]t must be left to the considered discretion of the trial court to decide whether the contemnor has purged [herself] of contempt by [her] subsequent conduct and attitude." Response, p. 23, citing *Keller v. Keller*, 52 Wn.2d 84, 91, 323 P.2d 231 (1958). This argument and reliance on *Keller* fail for at least three reasons.

First, *Keller* pre-dates the United States Supreme Court's development of contempt law since that time, culminating in *Bagwell*[3] in 1994 and our Supreme Court's application of *Bagwell*in *In re Dependency of A.K.,* 162 Wn.2d 632, 644-652, 174 P.3d 11 (2007) and *In re Silva*, 166 Wn.2d 133, 141-142, 206 P.3d 1240 (2009). They clarified and settled the core principle that "[i]n determining whether sanctions are punitive or remedial, courts look not to the 'stated purposes of a contempt sanction,' but to whether it has a coercive effect—whether 'the contemnor is able to purge the

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imposition of determinate sentence provisions which were suspended on conditions and as such, was a criminal sentence, not a remedial, if coercive, civil sanction. The Supreme Court also reviewed a moot case to make sure such issues were addressed. *See In re Dependency of A.K.,* 162 Wn.2d 632, 174 P.3d 11 (2007).

[3] *International Union, United Mine Workers of America v. Bagwell,* 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994), discussed in the Opening Brief at pp. 31-33, 36.

contempt and obtain his release by committing an affirmative act.'" *Dependency of A.K.,* 162 Wn.2d at 646, (quoting *Bagwell,* 512 U.S. at 828). *Accord, Silva*, 166 Wn.2d at 141-142.[4]

Second, the quoted phrase in *Keller* was not a holding in that case, but *dicta* which was not even derived from any source, authoritative or otherwise. Whatever may have been its possible appropriateness in the understanding of contempt law in 1958, there is no such basis for it now after *Bagwell* and the clear definition of the boundaries of punitive and coercive contempt. The days of holding a person in contempt for a "bad attitude" are long over, consigned to the dustbin of history along with exile to the gulags to correct a person's thinking in the old, now-disbanded Soviet Union.

Third, and substantively, a trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds, which includes a decision that is not supported by the facts, or is based on an incorrect view of the law. *In re Marriage of Horner,* 151 Wn.2d 884, 894, 93 P.3d 124 (2004) (reversing the trial court) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)); *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). *See* Opening Brief, pp. 18-20. The court's authority to

[4] For constitutional analysis, the principles stated in *Bagwell* control the definition of whether a contempt order is punitive or coercive.

impose contempt is a question of law reviewed *de novo. Dependency of A.K.,* 162 Wn.2d at 644.

Here, while the trial court explicitly stated at the hearing that it wanted to see no additional CPS reports ("I'm giving her a really clear warning. No more contempts," RP (11/4/11) p. 35:6-7), the record shows that Karla subsequently ***complied*** with the trial court's instructions, and no new CPS reports were made from November 4, 2011 to the review hearing date in May 2012. But despite Karla's compliance, the trial court decided to hold Karla in ongoing contempt at the May 2012 oral hearing, confirmed by the March 29, 2013 order. This decision to hold Karla in ongoing contempt was thus based on a CPS report by Dr. Greenberg in September 2011 that occurred more than a month ***before*** the original November 2011 finding of contempt. CP 62-63 (stating, in effect, "I would purge the contempt today but for the CPS report made by Dr. Greenberg.")

The Response claims that the CPS report to Dr. Greenberg had not been fully investigated at the time of the November 4, 2011, hearing, and that this justifies the trial court's reliance on the same report six months later. Yet the trial court discussed both the report to the school nurse and the September report by Dr. Greenberg before deciding to hold Karla in contempt on that day. RP (11/4/11) pp. 4:17-5:14; 8:23-9:15; 18.4; 28:21-23.

The trial court clearly relied on Dr. Greenberg's report when it ***first*** held Karla in contempt in November, 2011, then proceeded to

rely on the very same report as justification for continuing to hold Karla in contempt almost six months later, even though Karla had complied with the original order since the date of the order. That ruling defies common sense and logic, as well as the facts and the law, is "manifestly unreasonable," and an abuse of discretion. What is clear is the trial court wanted to keep Karla under a close level of supervision, one that would allow Brad to be in control by giving him a mechanism to bring fast contempt motions before the trial judge who was pre-disposed to disregard whatever Karla said.

C. Karla Properly Preserved And Raised The Issue Of The May 31, 2012, Hearing Transcript, Which Should Be Considered By The Appellate Court, Since It Was Considered By The Trial Court.

1. Karla preserved her right to appeal the trial court's failure to make the corrections it deemed necessary to the proffered "transcript" of the May 31, 2012 hearing.

The Response argues that Karla may not now appeal the trial court's refusal to accept the "transcript" of the May 31, 2012 hearing because she did not preserve the issue for appeal by asking the court to "settle the record" or make "corrections" to the report if it found it was inadequate. However, Karla preserved the issue for appeal by preparing the report and filing it for acceptance by the court.

Karla both identified her counsel's notes as a "narrative report of proceedings" necessary to conduct a proper appellate review under RAP 9.3, and she specifically requested the trial court approve

the report as such. CP 836. As Karla submitted the report under the belief that it was a fair and accurate statement of the May 31, 2012, hearing, she was not required to ask the court to "settle the record." RAP.9.5(c) provides that the court must hear any objections or proposed amendments to a narrative report, and settle the record accordingly. Here, although Judge Shaffer stated that the notes were "pretty good" and "considered for what they are," she refused to either accept the transcript or make any corrections. RP (3/29/13) pp. 3-4; CP 859. At minimum, they should be considered at face value since Judge Shaffer stated that she considered them "for what they are" and the nature of appellate review is that the appellate court reviews what the trial court considered.

Neither RAP 9.3 or 9.5(c) allow for the trial court to simply refuse acceptance of the report and leave a gap in the trial record. It is the trial court's refusal to either approve the report as submitted, or to follow RAP 9.5(c) and "settle the report" into an acceptable narrative report which Karla now appeals. Karla's attempt to preserve the record is supported by the principle "that a trial court must articulate on the record the reasons behind its determinations." *Marriage of Horner*, 151 Wn.2d at 894. Since in this case the trial court stated its general approval of the substance of the "transcript," but did not specify any changes or additions necessary to make it accurate, the court's ruling that the report was not permitted should

be vacated and Karla's counsel's notes should be considered as the narrative report of the May 31, 2012 oral decision.

2. The Response's fee request should be denied because Karla only sought to raise a trial court error for review which she is entitled to do.

The Response requests an award of fees to sanction Karla's "transgression" in citing to the narrative report without advising this Court of the trial court's ruling refusing acceptance of the report. Response, p. 27. However, not only does the Response fail to provide any direct authority for this request, it also fails to recognize that Karla, through her assignment of error, has made this Court fully aware of the trial court's refusal to accept the report. Opening Brief, p. 3. Karla properly preserved her right to appeal the trial court's failure to accept the report, and she should not be sanctioned for her attempt to provide this Court with a complete record.

D. Remand Should Be To A Different Judge To Insure The Appearance And Fact Of Fairness And Impartiality In Future Proceedings In The Highly Discretionary Area Of Parenting Plans.

1. The trial court's eventual finding that Karla purged her contempt does not override the appearance of bias exhibited by the trial court.

The Response argues that this Court should reject Karla's request to remand this case to a new trial judge to ensure the appearance of fairness for future proceedings because "the mere fact that the trial court previously ruled against a party is not evidence of

bias" and because the trial court in this case eventually ruled in Karla's favor by purging her contempt. Response, p. 41-42.

The Response misstates the issue. Karla is not requesting remand to a different trial judge simply because the trial court ruled against her. Rather, Karla is requesting remand to a different trial judge because the trial court continuously abused its discretion by finding Karla not credible and in contempt contrary to the actual evidence and the trial court's own comments on the evidence; by imposing, applying, and extending an unlawful order well in excess of its jurisdiction; and by refusing to accept Karla's attempt to create a complete trial record for purposes of appeal. There is no indication that such errors will cease if the matter is remanded to the same judge, who seemed to relish close control over cases, here to be Karla's personal probation officer.[5]

2. The appellate court should remand to a new trial court to insure the appearance of fairness for future proceedings in this most highly discretionary area of law.

Remand to a different judge is required where a judge's impartiality might be questioned by a reasonable person with knowledge of the relevant facts. *See Sherman v. State*, 128 Wn.2d

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[5] *See, e.g., Calvert v. Berg*, 177 Wn. App. 466, 312 P.3d 683 (2013) (reversing this trial court for abuse of discretion in attempting to retain control over litigants beyond the authority permitted under the civil rules); *Bunch v. Nationwide Mutual Ins. Co.*, ___ Wn. App. 2d ___, ___ P.3d ____, 2014 WL 1202741 (2014) (reversing this trial court for abuse of discretion in attempting to retain control of litigation despite clear rules of priority of federal action).

164, 205-06, 905 P.2d 355 (1994); *In re Custody of R.,* 88 Wn. App. 746, 763, 947 P.2d 745 (1997). This is mandated by due process, the appearance of fairness doctrine, and the Code of Judicial Conduct. *In re Matter of Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L. Ed. 942 (1955); *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992); CJC 3 (A)(5); CJC 3(D)(1).

In re Custody of R. illustrates this principle. In that case, the trial judge stated in court that he "did not like" what the mother had done, making remarks personal as to her. The trial court then denied the mother's request for a short continuance to provide the documents requested by the court. The Court of Appeals held the trial court had abused its discretion in denying the continuance and that the court's personal remarks, coupled with the denial of the continuance, necessitated remand to a different judge "to promote the appearance of fairness." 88 Wn. App. at 758, 763. The same is required here given the trial court's errors on the contempt orders and its clear statements it does not believe Karla, it does not find her credible, and requiring the continuing contempt mechanism in order to insure that Karla did not engage in conduct that the trial court, as in *Custody of R*, "did not like," *i.e.,* direct or indirect reports to CPS.

The Response attempts to distinguish *Custody of R* by arguing that the trial court here eventually ruled in Karla's favor by "purging" her contempt. Response, p. 42. But the appearance of bias is not overcome by the trial court's belated determination Karla

had "purged" her contempt after a year-and-a-half of compliance, what was, quite explicitly, a probation period. Rather, it is the trial court's abuse of discretion throughout the post-trial period, coupled with the trial court's statements making it clear that it "did not like" what it had decided Karla had done, that counsels remand to a different judge to promote the appearance and fact of both fairness and impartiality in future proceedings.

E. Brad's Request for Fees Should be Denied.

Brad's request for fees is based on his incorrect argument that Karla's appeal is "false and a sham." Response, p. 43. Her appeal of the contempt orders were proper, as detailed *supra*.

The primary point that needs elaboration in this section is the reminder that, until the belated entry of the orders in 2013, Karla had no basis to appeal the order of the trial court on May 31, 2012. One can only imagine the kind of complaint Brad's counsel would have raised had Karla tried to appeal from oral rulings that had not been reduced to writing. As pointed out in Section II. B., *supra,* the underlying contempt order was invalid for violating Karla's fundamental constitutional rights of speech and petitioning the government which are well-established under *Suggs* and associated decisions. That order was harmful to Karla by imposing financial penalties, as well as by imposing future "supervision" of Karla under the guise of letting the trial court decide, at some later time, whether

Karla had purged herself, as opposed to being an order which had a constitutionally proper purge provision that Karla could exercise immediately. Fees should be denied under any of the statutes raised because the appeal is proper and not frivolous.

III. CONCLUSION

Appellant Karla Maia respectfully requests the Court to vacate each of the contempt orders entered against her, including all associated penalties and fee awards, and strike the prior restraint provision that remains in the parenting plan and any associated orders. Karla also asks the Court to deny Brad's request for fees and remand the case to a different trial judge for all further proceedings under the parenting plan.

Respectfully submitted this 14th day of April, 2014.

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NO. 70249-1-I

WASHINGTON STATE COURT OF APPEALS
DIVISION I

In re the Marriage of: KARLA MAIA-HANSON, Appellant, v. BRADLEY HANSON, Respondent.	CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below, I caused to be delivered in the manner indicated a copy of *APPELLANT KARLA MAIA'S REPLY BRIEF,* and this certificate of service on the following parties:

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DATED this 14th day of April, 2014.

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