

No. 66551-1-I

King County Superior Ct. No. 09-3-08031-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

Marr Paul Madden
Appellant,
v.

Karen Lynn Madden,
Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Mariane C. Spearman

APPELLANT'S REPLY BRIEF

Marr Madden, Pro Se
10426 SE 25th St
Bellevue, WA 98004

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC 12 AM 10:55

Table of Contents

I INTRODUCTION..... 1

II REPLY ARGUMENTS..... 5

1. The Court Erred in Not Applying Residential Restrictions Upon
Karen as Required by RCW 26.09.191(2)(a)(iii). 5

A. Statutory Requirements..... 5

B. Karen’s Lack of Response to Evidence of Her History of
Domestic Violence..... 6

C. I Did Not Abandon or Waive My Claim for .191 Restrictions. 6

D. Because the Facts are Not Disputed, Credibility is Not at Issue. .. 9

E. One-sided Descriptions..... 10

2. The Court Erred in Not Applying Decision-making Restrictions Upon
Karen as Required by RCW 26.09.191(1)(c). 11

3. The Court Erred in Denying My Pre-trial Discovery Request for
Equal Access to Family and Personal Financial, Insurance, Medical
and Other Records Located in the Family Home. 11

4. The Court Erred by Excluding Family Calendars as Evidence at Trial That Would Have Shown Critical Dates and Events Vital to Marr’s Position That He Was the Primary Parent.....	12
5. The Court Erred by Denying My Motion for Discovery of Joint Counseling Records.	14
6. The Court Erred in Finding of Fact 2.13, Continuing Restraining Order, by Continuing a Restraining Order and Finding Karen “... has a reasonable fear of harm from Marr and that he has a history of controlling behavior, an abusive use of conflict, and an inability to control his anger.”.....	15
7. The Judge Erred by Awarding Attorney Fees to Karen for Marr’s Supposed Intransigence.....	15
8. The Court Erred by Finding Marr Was Emotionally Abusive and Financially Controlling.	19
9. The Court Erred by Finding Marr was Verbally Abusive.....	20
10. The Court Erred by Finding Marr Sent Abusive Emails to Karen. .	20
11. The Court Erred by Finding Marr Used Conflict as a Weapon to the Detriment of the Children.	21

12. The Court Erred by Making Findings, “Mr. Madden claims ... her refusal to have sex with him or engage in sexual activity with him at his preferred frequency will impact their sons’ sexual development.”	21
13. The Court Erred by Finding, “The court finds that Mr. Madden’s abusive use of conflict has negatively impacted the boys and creates a serious risk of ongoing psychological harm.”	22
14. The Court Erred in Finding Abusive Use of Conflict by Marr Warranted 26.09.191 Restrictions.	22
15. The Court Erred in Finding Abusive of Conflict by Marr Which Warranted RCW 26.09.187(2)(b)(i) Restrictions.	23
III REQUEST FOR EXPENSES.....	23
III CONCLUSION.....	25

Table of Authorities

Statutes

RAP 1.2(a).....	8
RAP 2.5(a).....	7, 8
RCW 26.09.187(2)(b)(i)	23

RCW 26.09.191	6
RCW 26.09.191(1)(c)	11
RCW 26.09.191(2)(a)(iii).....	5
RCW 9a.46.020(1)(a)(ii).....	9
WPIC 35.50 Assault—Definition.....	5

Cases

<i>Chapman v. Perera</i> , 41 Wn. App. 444, 456, 704 P.2d 1224, rev. denied, 104 Wn.2d 1020 (1985).....	18, 24
<i>Griffith v. Whittier</i> , 37 Wn. 2d. 351, 355, 223 P.2d. 1062 (1950).....	12
<i>Marriage of Akon</i> 160 Wn. App. 48, 248 P.3d 94 (2011)	8
<i>Marriage of Burrill</i> , 113 Wn. App. 863, 56 P.3d 993 (2002), rev. denied, 149 Wn.2d 1007 (2003).....	16, 22
<i>Marriage of Greenlee</i> , 65 Wn. App. 703, 829 P.2d 1120, rev. denied, 120 Wn.2d 1002 (1992).....	17
<i>Marriage of True</i> , 104 Wn. App. 291, 296-97, 16 P.3d 646 (2000)	14
<i>Re Detention of Strand</i> , 139 Wn.App 904, 910, 162 P.3d 1195 (2007)	7
<i>Redding v. Virginia Mason Medical Center</i> , 75 Wn. App. 424, 878 P.2d 483 (1994).....	14
<i>State v. Nunez</i> , 160 Wn. App. 150, 248 P.3d 103 (2011)	8

<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	7
<i>State v. Robinson</i> , 171 Wn.2d 292, 304, 253 P.3d 84 (2011)	7, 9
<i>State v. Russell</i> , 171 Wn.2d 118, 122, 249 P.3d 604 (2011).....	8
<i>State v. Scott</i> , 110 Wn.2d 682, 685, 757 P.2d 492 (1988)	7
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981).....	13

Other Authorities

Domestic Violence Manual for Judges	3
-------------------------------------------	---

I INTRODUCTION

While I can appreciate the Respondent attorney's continued flair for the dramatic and their creative writing skills, the facts in this case speak for themselves. Karen has a history of domestic violence for which the trial court does not have the discretion to excuse. The law states that a parent's residential time with the children shall be limited if there is a history of domestic violence.

And while Karen's response repeatedly quotes from the conclusory findings of the trial court, she never disputes many of the specific facts I pointed out in my opening brief. She does not address her admitted acts of multiple assaults, threats, physical destruction, and public disturbances in front of our children. Fortunately, her trial testimony does – it also documents her repeated attempts to deny and rationalize her actions, one of the tactics of domestic violence perpetrators. Karen's trial response to questioning by my attorney, (RP III 407 @3)

Q: And isn't it true that you broke both the door on the bedroom and the bath, one of the bathrooms in altercations with your husband?

A. No.

Q. Isn't it true that you pounded on those doors when you were arguing with your husband?

A. Yes.

Q. And isn't it true that those doors cracked under your pounding?

A. There is a crack, yes.

This seems to contradict one of her earlier declarations: (CP 261@16)

“I also strongly deny that I am some madwoman that breaks down doors to get to Marr.”

Karen does admit to aggressive physical behavior. (RP III 405 @14)

Q: Have you ever grabbed for objects that he has in his possession?

A. Yes.

Q. When you grab for objects in his possession, is there physical contact with your husband?

A. Um, him shoving my hands away, yes.

During the 911 incident, she kicked me in the shins and tried to trip me as I was going to meet the police. (RP III 585 @14). At trial, she testified that she didn't try to trip me, and then agrees she did, and then tries to rationalize her physical contact - even though in the police report she admits to trying to trip me. (CP 600). She responds to questioning from her attorney. (RP II 276 @6)

Q. Was it, uh, ever your intention, uh, you talked about when you were on the phone afterwards, you mentioned having your leg up. Was it your intention to trip him, to make him fall down?

A. No.

Q. Did he trip or fall down?

A. No.

Q. He's, uh, Mr. Madden has talked about, uh, in his testimony prior in this case that you had intended to trip him. Is that, uh, not true then in your opinion?

A. I did not try to, t--, trip him.

Q: Have you ever tried to trip him?

A. No.

Karen responds to questioning from my attorney, (RP III 406@8)

Q. Isn't sticking your leg out when someone is passing by tripping them?

A. If he trips over, it was not my, it was my intention to, if we're referring to the 28th, December 28th, I was intending to slow him down. It was not my intention to trip him. I did not expect him to fall flat on his face.

Q. So as long as the unwanted physical touching that your devising is okay with your intent, then are, do I understand correctly that it's okay to use physical, uh, input, or physical force on him?

A. No.

Domestic Violence Manual for Judges

There is substantial evidence that shows Karen is the primary aggressor who often escalated verbal arguments into physical action against me and our children. The trial court apparently did not follow the recommendations from the Domestic Violence Manual for Judges, p. 2-24, bolding is mine:

“The court can cut through a perpetrator’s minimization, denial, and/or externalization by focusing on descriptions of the **perpetrator’s behavior** during an incident and over several incidents, rather than on the circumstances surrounding the behavior. **How and when the perpetrator acted provides more relevant information** for the court, **than why he or she acted**, and allows for more productive fact-finding.”

Further, p. 2-26:

“Although there seems to be a gender pattern to domestic violence, the courts must determine the primary aggressor and take

domestic violence seriously regardless of who is doing what to whom. “

Creative Terminology

Karen mentions three times that I received “liberal” residential time -- every other weekend and Wednesday nights. (BOR 6, 19, 23). This is not liberal, as I was a stay at home dad and watching the children nearly 85% of the time before separation. The family calendars would have been further evidence regarding this issue.

Further, she repeatedly brings up, ‘...the mother, who the trial court found was a "credible, open, and honest witness" (FF 2,19, CP 1044, unchallenged).’ (BOR 2, 16). For Karen to write that I don’t challenge her being an open, credible, and honest witness is not true. The trial transcripts and this appeal are replete with her conflicting statements and testimony. This court does not determine credibility and, therefore, I do not specifically address her lack of credibility.

She also brings up several times the issue of my deposition regarding her gynecological condition. Karen has admitted to having a physical condition, but I did not bring this up at trial, nor would I ever have. Her attorney brought her gynecological issues up at trial. (RP II 329)

II REPLY ARGUMENTS

1. The Court Erred in Not Applying Residential Restrictions Upon Karen as Required by RCW 26.09.191(2)(a)(iii).

A. Statutory Requirements

I established the necessary legal foundation for a finding a history of domestic violence against Karen Madden. My opening brief clearly states the statutory requirements for mandatory residential restrictions due to a history of domestic violence and the definitions for domestic violence and assault. (BOA 20-22). I also detail Karen's history of assault, threats, public outbursts and domestic violence through her own testimony and her excuses for her conduct. (BOA 16- 20). Karen has an admitted history of domestic violence for which the trial court does not have the discretion to excuse. A husband, or any person, should not be subject to physical attack and the Washington state pattern jury instructions for assault are very clear (WPIC 35.50 Assault—Definition):

An assault is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

B. Karen's Lack of Response to Evidence of Her History of Domestic Violence.

Karen's response is devoid of any argument defending her history of assault and domestic violence, save one, the incident where she threatened grievous bodily harm during an argument. (BOR 25). She recalls her trial testimony, in which she trivialized the incident because she didn't have a knife in hand. She neglects to mention that there was a knife within several feet of our bed (RP II 279@10) and I testified that her verbal and physical attacks caused anxiety and fear (RP IV 662@22)

In summary, Karen did not deny my claims of her history of domestic violence, nor did she provide any other testimony or evidence to refute the claims that she assaulted me and perpetrated acts of domestic violence.

C. I Did Not Abandon or Waive My Claim for .191 Restrictions.

Karen argues that I cannot appeal the trial court's failure to impose RCW 26.09.191 restrictions on her because I abandoned that claim at trial. While I hoped to avoid .191 restrictions against either side, I did present evidence – much of it undisputed – that Karen was in fact guilty of a history of domestic violence against me and our children. Further, when the trial court indicated that it would sign findings and conclusions imposing restrictions upon me, my attorney specifically challenged the

court's failure to include findings regarding Karen's domestic violence.

(RP IV 743@21-25).

ATTORNEY ROSE: --from our side. Number one, does the Court make any findings with regard to the mother's, uh, commission, or not, of acts of domestic violence and emotional abuse?

THE COURT: I'm not finding the mother has committed domestic violence or emotional abuse upon the father.

It is true that RAP 2.5(a) generally precludes review of any "claim of error" which was not raised in the trial court. But as the Washington Supreme Court recently clarified, the purpose of this rule is to encourage "the efficient use of judicial resources." *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011), quoting *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). "Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *Robinson*, 171 Wn.2d at 304-05. See also *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009) (Court refuses to review an error which the trial court, if given the opportunity, might have corrected to avoid an appeal and a consequent new trial); *In Re Detention of Strand*, 139 Wn. App 904, 910, 162 P.3d 1195 (2007) ("To preserve an error for appeal, counsel must call it to the trial court's attention so the trial court has an opportunity to correct it.")

Karen cites *Marriage of Akon* 160 Wn. App. 48, 248 P.3d 94 (2011) where Mr. Akon argued on appeal that the trial court erred in failing to appoint a GAL for the child in that paternity action. The court found the issue waived, however, because Akon never requested in the trial court that the GAL address parentage issues. This ruling makes sense because there is no way to know on appeal what the GAL might have had to say on the issue had she addressed it.

In my case, however, I made a complete record in the trial court of Karen's history of domestic violence so the facts are available for this court's review. Further, I expressly objected to the court's failure to make findings regarding Karen's domestic violence, thereby giving the trial court the opportunity to correct the error which I am now raising on appeal. For these reasons, RAP 2.5(a) should not apply.

In the alternative, even if the Court were to find that the rule technically applies, it should decline to preclude my claim. Because the rule states that the appellate court "may" refuse to review any claim of error which was not raised in the trial court, application of the rule is discretionary. See *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). See also *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011). Further, RAP 1.2(a) mitigates the stringency of the rule, providing that the RAPs are to 'be liberally interpreted to promote justice and facilitate the

decision of cases on their merits.’ *Robinson*, 171 Wn.2d at 304. In my case, it would be unfair to bar consideration of my claim where it is clear there was nothing I could have done in the trial court to resolve the issue. Since the trial judge was unwilling to make findings regarding Karen’s domestic violence, it is obvious that the trial court would not have imposed .191 restrictions against her even if I had expressly argued for that.

D. Because the Facts are Not Disputed, Credibility is Not at Issue.

Karen’s response states: “Second, after assessing the credibility of the parties, the trial court clearly and summarily rejected the father's allegations that the mother has a "history of domestic violence." (BOR 24). It is true that the court refused to make that conclusion, but that refusal could not have been based on credibility since both sides agreed to much of the conduct at issue. Karen admitted the following:

- Grabbing and hitting me on two different occasions while I was seated and she was standing over me.
- Splitting two doors after hitting them in anger, trying to get at me.
- Damaging my work computer and threatening to smash my equipment; harassment under RCW 9a.46.020(1)(a)(ii).
- Threatening grievous bodily harm.

- Starting public arguments, in front of the children, where she hysterically yelled, cried and berated me. She physically kept me from standing up in one argument.
- Kicking me and telling the police she tried to trip me, and then later telling the court she didn't, then admitting that she did.
(BOA 17-18)

- Left the children unattended in a parking lot. The kids were terrified and unbuckled and hid behind the seats.

These are the facts. They are not credibility issues. The facts show Karen is a domestic violence perpetrator and primary aggressor.

E. One-sided Descriptions

Karen's response further tries to deflect attention off of her acts by stating, "But his descriptions are wholly one-sided, exaggerated, and fail to disclose his participation in the conflict." (BOR 25). As discussed previously, my descriptions were for the most part conceded by Karen.

My reply to the statement that I failed to disclose my participation has also been documented in my opening brief and at trial. Generally, my response was to get away from her, which she claimed only inflamed the issue. (BOA 16). She was the primary aggressor and my actions were in response to her physical and verbal attacks upon me. She escalated to physical violence and appears to be blaming the victim, a common tactic

for domestic violence perpetrators. Even the parenting evaluator even commented that Karen pursued me after I disengaged from an argument. (RP III 486@5).

2. The Court Erred in Not Applying Decision-making Restrictions Upon Karen as Required by RCW 26.09.191(1)(c).

The same argument presented above and in my opening brief also requires the court to impose decision-making restrictions under RCW 26.09.191(1)(c). The court must impose decision-making restrictions on Karen as a history of domestic violence requires these restrictions, even when there is no grievous bodily harm.

3. The Court Erred in Denying My Pre-trial Discovery Request for Equal Access to Family and Personal Financial, Insurance, Medical and Other Records Located in the Family Home.

The trial court unfairly limited my discovery requests for financial and insurance documents in Karen's control at the family home to the timeframe stipulated in her interrogatory and RFP requests, generally, for the previous year. In doing so, I was unable to present evidence which would show I was not financially controlling and that Karen had undertaken suspect financial transactions similar to the illegal ones she undertook against court orders after separation (BOA 24).

In reply to Karen's claim that I could have obtained the records elsewhere, the records I requested were not obtainable by any other means and I have stated this several times and in my COA motion for discretionary review (CP Exhibits #95). Our credit union follows federal guidelines and only keeps records for seven (7) years; I have a pre-trial declaration stating this.

As for the records themselves, I certainly would not have access to her personal credit card, banking, and financial statements solely in her name, which, in conjunction with the joint credit union statements and cancelled checks in her possession, would show a history of her purchases and a history of my paying for them.

In regards to the detail I requested in my interrogatory and RFP requests, I stated in my response to her motion that the number of items requests was nearly equal to hers. (CP 570-571)

4. The Court Erred by Excluding Family Calendars as Evidence at Trial That Would Have Shown Critical Dates and Events Vital to Marr's Position That He Was the Primary Parent.

Karen cites to an old case, *Griffith v. Whittier*, 37 Wn. 2d. 351, 355, 223 P.2d. 1062 (1950). In that case, Mrs. Whittier filed a motion for a new trial, arguing that a certain entry in a desk calendar book amounted to newly discovered evidence. The handwriting in this book, however, was

not alleged to be that of the opposing party, but rather that of Mrs. Whittier's deceased husband. Obviously, the husband could not confirm that the entries were in his handwriting or verify the significance of them. Further, a new trial cannot be granted based on newly discovered evidence if the evidence is "merely impeaching." See, e.g. *State v. Williams*, 96 Wn.2d 215, 634 P.2d 868 (1981).

In my case, however, I could have testified to how the entries were made and thereby laid sufficient foundation regardless of whether Karen agreed that the calendar was authentic. Any dispute over the authenticity would go to the weight of the evidence and not its admissibility.

While Karen's response states, "But as the trial court accurately noted, the calendars did not set forth times for any particular event (RP 670)..." This is not true. Our family calendars had definite dates and times for family events. Both of us wrote the starting and ending times, as well as the event name. (CP 209-253) Listed below are just a few examples - several show Karen absent all day, while I cared for the children:

1. SMS, 9:00-10:00 (CP 209). Note - this was a regular event.
2. Co-op Sit, Darcy, 5:30-10:30 (CP 210)
3. Marriage Renewal Weekend, 7:45A - 9P (CP 210)
4. CM, 10-10, (CP 235). (Creative Memories)

5. KM, Aug 31-Sept 3, 2007 (CP 245-6) (Karen vacation, without kids)

My access to these family calendars could have corroborated my testimony and refuted the conclusory finding that the trial court, “reject[ed] the father's testimony that the mother was routinely 'absent' from the home and that he was primarily responsible for the children's care while the mother was nowhere to be found.” (FF 2.19). In reply, I have never claimed that she was “nowhere to be found” – she could be found at the events listed on the calendars. I do claim that she was routinely absent, as admission of the calendars would have clearly shown.

5. The Court Erred by Denying My Motion for Discovery of Joint Counseling Records.

While Karen cites *Marriage of True*, 104 Wn. App. 291, 296-97, 16 P.3d 646 (2000), this is not the correct standard for release of joint counseling records. I correctly cite *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 878 P.2d 483 (1994) (BOA 27) for the release of joint counseling records. I further cite an Alaskan Supreme Court ruling in my opening brief.

The real question is to whether these are joint counseling sessions. Karen admits that we started joint counseling together. (CP 880) In my motion for release of joint counseling records I also state, (CP 896)

‘We both signed the counselor’s forms, we both started joint counseling together, and we both continued for dozen of sessions. In fact, billing records Exhibit D show that we started in 2003, and, by Karen’s own admission, we were still seeing her in 2005. Clearly, this more than “a couple of sessions”.’

From the trial, I discuss why we stopped going to joint counseling, (RP III 580@8), and Karen corroborates this as she responds to her attorney, (RP I 114@22)

6. The Court Erred in Finding of Fact 2.13, Continuing Restraining Order, by Continuing a Restraining Order and Finding Karen “...has a reasonable fear of harm from Marr and that he has a history of controlling behavior, an abusive use of conflict, and an inability to control his anger.”

Karen responds that she has fear of “...the father’s escalating anger, over which he has little control.” (BOR 33) but there was no evidence that anyone’s anger is escalating and I can definitely control any anger from escalating to physical violence, unlike Karen. See my opening brief at 29-30.

7. The Judge Erred by Awarding Attorney Fees to Karen for Marr’s Supposed Intransigence.

Neither Karen nor the trial court point to any intransigence on my part after the CR2A agreement was signed, nor did Karen prove that my pre-

trial, trial, and appellate actions were unusually difficult. There was no foot-dragging, obstructionist or intransigent behavior by me. In fact, I made every effort to streamline the trial by offering a stipulation, which Karen and the court accepted, while Karen presented all of her witnesses live. My trial focused on the issues before the court, while Karen spent hours bringing up matters at trial that were litigated during earlier motions.

Karen seems to maintain that the CR2A agreement does not truly preclude the trial court from considering intransigence that took place before it was signed. If that were true, what would be the point of the agreement? I certainly would not have made such an agreement if Karen were nevertheless free to seek additional fees for the same events.

Karen also suggests that the trial court had no need to segregate which fees related to intransigence and which do not. (BOR 43). She cites *Marriage of Burrill*, 113 Wn. App. 863, 56 P.3d 993 (2002), rev. denied, 149 Wn.2d 1007 (2003), but in our case there were no bad acts that permeated the proceeding. In fact, the judge in our case did segregate fees, seemingly admitting that bad acts did not permeate the entire proceedings. (RP IV 743@4)

ATTORNEY SEDELL: So just so that we're clear, uh, the award of fees is per the CR 2A Agreement it's from the period that as it says in the CR 2A Agreement through preparation for trial, the appeals, and the trial itself.

THE COURT: Right. **Where he was intransigent.**

ATTORNEY SEDELL: Right. Thank you.

Karen also cites *Marriage of Greenlee*, 65 Wn. App. 703, 829 P.2d 1120, rev. denied, 120 Wn.2d 1002 (1992),(BOR 43), but there is absolutely no evidence that I made the trial “unduly difficult”. She goes on to claim that I made unsubstantiated and false allegations and that the trial court found I acted intransigently "by engaging in a serious and ongoing abusive use of the court process by using litigation as a weapon in the divorce." (FF 2.15, CP 1042-43). This is false, as there was no serious and ongoing abusive use of the court process during this litigation. I have shown that my claims of her harassment, physical damage, threats and domestic violence were not unsubstantiated, nor false. The actions taken by both parties were normal in a contested divorce.

Karen’s response also states, “... The father had also disclosed that he intended to examine a large number of witnesses at trial. The mother's attorney had to spend considerable time preparing to address any testimony offered by these witnesses, only to have the father withdraw these witnesses at the last minute. (See CP 1170)”. (BOR 42) I find it odd that my ‘large’ list of witnesses was smaller than Karen’s and his ‘considerable’ efforts were applied to the next door neighbors and the husband of one of her witnesses.

In fact, the approved witness list for trial (CP 991) is shown in the next paragraph. Karen listed one more witness than I did, and called all of her listed witnesses and insisted on presenting them through live testimony. I decided two of mine were unnecessary and I also agreed to present the remaining five witnesses through stipulations, although I was under no obligation to do so. I believed this would save everyone time and money. Had I known I would be accused of intransigence for streamlining the trial, I would have simply called all my witnesses to the stand.

<u>Witness</u>	<u>Party(ies) Offering Witness</u>	<u>No Objection</u>
Karen Madden	Petitioner/Respondent	X
Marr Madden	Petitioner/Respondent	X
Margo Waldroup, MSW	Petitioner/Respondent	X
Dr. Jim Tedford	Petitioner	X
Wanda Yamashita	Petitioner	X
Andrea Arnone	Petitioner	X
Kristin Robinson	Petitioner	X
Kim Conn	Petitioner	X
Eilcen Vierra	Petitioner	X
Eileen Chen	Petitioner	X
Tony Vierra	Respondent	X
Paul Doherty	Respondent	X
Beatriz Troncoso	Respondent	X
Clayton LaPlant	Respondent	X
Megan March	Respondent	X
Jon Holtman	Respondent	X

Karen cites to *Chapman v. Perera*, 41 Wn. App. 444, 456, 704 P.2d 1224, rev. denied, 104 Wn.2d 1020 (1985) as an example of intransigence. I would agree with her citing *Chapman* as an example of a case which involved truly obstructionist tactics. Our case, to the contrary, bears no

resemblance to *Chapman*. I attempted to present my side of the case and was not obstructionistic or intransigent. Clearly, there was no foot-dragging and my position was largely well taken since the parenting evaluator agreed with me on many points, including the central one: that I should have equal time with the children. The court may have been free to reject the recommendations of the parenting evaluator, but it is hardly intransigence if a party presents testimony to support the position that the independent parenting evaluator likewise supported.

In summary, there was no intransigence on my part during pre-trial, after the CR2A, at trial, or during the appeal process and the fees I paid should be returned.

8. The Court Erred by Finding Marr Was Emotionally Abusive and Financially Controlling.

I address her issue of emotional abuse and sensitivity in my opening brief at 38-39.

Regarding finances, Karen responds by quoting trial testimony, “Marr controlled all of the parties' money except what Karen earned babysitting (RP 123-24).” While I could debate the literal meaning of ‘all’, substantial evidence showed that she had the financial freedom and resources to buy whatever she wanted and that I paid for it. BOA (35-36). She was proven to have several savings accounts with substantial balances

and also controlled the boys' college funds and had several IRA and retirement accounts. She also declines to mention that in her initial ex parte filing she claimed that I took her name off of "all" our accounts. Her use of the term is meant to instill fear and outrage, but was proven false on both accounts - my trail response, (RP IV 664@13), and Karen's response to my attorney regarding her account balances, (RP III 409@16). She also originally denied the money she earned went to her personal use, and then admitted it did. She responds to my attorney (RP III 410@14)

9. The Court Erred by Finding Marr was Verbally Abusive.

I won't restate my opening brief, but there is no substantial evidence that the conversations and arguments we had had were not out of the ordinary for a couple going through a divorce.

10. The Court Erred by Finding Marr Sent Abusive Emails to Karen.

While Karen's response attaches several more emails, I guess I must do the same. (CP 788-798). These emails are samples from a previous motion and demonstrate Karen's inability to co-parent and the pool incident. My communications are civil in tone, rational, and I suggest compromises to settle disagreements. There has never been any claim of profanity by either side. See my opening brief at 39. For more details, see (RP IV 684@14).

11. The Court Erred by Finding Marr Used Conflict as a Weapon to the Detriment of the Children.

There is no substantial evidence that I used conflict as a weapon. This was a contentious relationship but I did not use conflict as a weapon in the courts, or in interpersonal relationships. Karen's response states that I, "...acted intransigently by engaging in a serious and ongoing abusive use of the court process by using litigation as a weapon in this divorce." I have denied this and address it multiple times in this document and in my opening brief.

12. The Court Erred by Making Findings, "Mr. Madden claims ... her refusal to have sex with him or engage in sexual activity with him at his preferred frequency will impact their sons' sexual development."

Karen's response perpetuates this misstatement by further stating (BOR 3) that I claimed that Karen's, "gynecological health impacts her ability to provide appropriate care for the boys and that her refusal to have sex with him or engage in sexual activity with him at his preferred frequency will impact their sons' sexual development."

While I did express a viewpoint that her repression of her sexuality may affect the boys, I did not make the leap that she could not provide

‘appropriate care’ for our sons. I was concerned about their sexual development, which is just one part of their lives.

In regards to sexual activity and frequency, there was never any testimony claiming that frequency of sexual activity would ever affect the boys’ sexual development. Karen’s and my intimate life is not known to the boys and could not affect their sexual development. I talked about her sexuality during joint counseling, for which the joint counseling records would corroborate. My response to her attorney, (RP IV 647@9) :

13. The Court Erred by Finding, “The court finds that Mr. Madden’s abusive use of conflict has negatively impacted the boys and creates a serious risk of ongoing psychological harm.”

See opening brief at 41.

14. The Court Erred in Finding Abusive Use of Conflict by Marr Warranted 26.09.191 Restrictions.

Karen cites *Marriage of Burrill*, 113 Wn. App. 863, 56 P.3d 993 (2002), rev. denied, 149 Wn.2d 1007 (2003), but a fair-minded person would see that ours was a contentious relationship primarily due to Karen’s uncontrolled anger and verbal and physical attacks upon me and our children. While she makes excuses and attempts to blame me for her behavior, there is no excuse to elevate arguments into physical contact.

No one should be physically attacked over a piece of mail or while paying a household bill, as I have been.

15. The Court Erred in Finding Abusive of Conflict by Marr Which Warranted RCW 26.09.187(2)(b)(i) Restrictions.

Karen states that after consideration of statutory factors the trial court awarded sole-decision making to her. She goes on to say that I refuse to follow the recommendations of the children's treating professionals.

In reply, the statutes deny sole-decision making when there is a history of domestic violence. Karen does not deny my claims of her history of domestic violence.

In regards to treating our children, I listen to the professionals and make informed decisions. Karen's trial testimony has a good summary of our beliefs. (RP III 500@19) and my testimony further clarifies. (RP III 559@14) She also admits that she waited so long to take one of our children to the doctor that he had to be prescribed antibiotics.

III REQUEST FOR EXPENSES

Karen asks for fees because of continued intransigence (BOR 44) and my "frivolous" litigation (BOR 45) and believes I am not constrained by the cost of litigation (BOR 45). I disagree on all three points.

1. I have shown that there was no intransigence on my part. I pursued my case in a routine manner and offered a stipulation to

speed up the trial. I could have filed multiple contempt of court motions against Karen for her admitted selling of community property and taking community funds against court orders, but I did not. I only filed one motion to the court of appeals, contrary to Karen's Response (BOR 42), and this was dropped during trial, as per the CR2A agreement.

2. In regards to her 'frivolous' claim – I do not see how my position could be considered frivolous when the parenting evaluator also disagreed with the trial court's parenting plan. Further, the failure of the trial court to acknowledge domestic violence is a very serious issue and definitely not frivolous. I believe I have also raised legitimate points about discovery rights and abuse of discretion. Karen cites to *Chapman v. Perera*, 41 Wn. App. 444, 456, 704 P.2d 1224, rev. denied, 104 Wn.2d 1020 (1985), but our case bears no resemblance to *Chapman* as we did not have excessive fillings nor is this a meritless appeal.
3. Karen writes, 'While most litigants perceive the potential expense of attorney fees as a constraint before pursuing a frivolous appeal, the appellant has no such "check."' In reply, I have not hired a lawyer to represent me on this appeal because I simply can't afford

it, as I am still paying off \$50,000 for trial legal fees. I have incurred over \$11,000 in court processing, transcript and legal fees; see opening brief at 43.

Karen never mentions that this appeal is financially burdensome. I certainly do not wish to cause Karen any financial hardship and it is my understanding that her parents have significant resources and are continuing to pay her legal fees.

III CONCLUSION

For the foregoing reasons, the Court should reject the arguments in the Brief of the Respondent and grant me the relief requested in my opening brief.

DATED this 9th day of December, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Madden', written in a cursive style.

Marr Madden, Pro Se
10426 SE 25th Pl
Bellevue, WA 98004

DECLARATION OF SERVICE

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

On December 9, 2011, I mailed, via U.S. Mail, the foregoing Reply Brief of the Appellant, to:

1. Office of Clerk
Court of Appeals – Division I
One Union Square
600 University Street
Seattle, WA 98101

2. Valerie A. Villacin
Smith Goodfriend, PS
1109 1ST AVE, STE 500
Seattle, WA 98101-2988



Marr Madden, Pro Se
10426 SE 25th Pl
Bellevue, WA 98004

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC 12 AM 10:56