

NO. 70827-9-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THOMAS BRET HAGGERTY.

Appellant,

v.

SAIYIN PHASAVATH,

Respondent.

BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

TABLE OF CONTENTS

INTRODUCTION..... 6

ASSIGNMENTS OF ERROR 9

ISSUES 9

STATEMENT OF THE CASE 10

ARGUMENT 11

 The Court abused its discretion by failing to
 properly apply RCW 26.50.010 11

 The Court abused its discretion by placing the
 minor children back in the home of the mother, exceeded
 its jurisdiction by amending an order that had been dismissed
 with prejudice; and by failing to make immediate referral
 to law enforcement pursuant to RCW 26.50.100.....
 21

 The Court abused its discretion in denying
 Haggerty’s Motion for Reconsideration and disallowing oral
 argument.....
 25

CONCLUSION 29

Request for Attorney’s Fees
29

TABLE OF AUTHORITIES

California v. Green, 399 U.S. 149, 26 L.Ed.2d 489,
90 S.Ct. 1930 (1970)), *review denied*, 81 Wn.2d
1006 (1972), *cert. denied*, 411 U.S. 985 (1973) 16

Condon v. Condon, No. 86130-7 (Wash. Sup. Ct. Mar 21, 2013) . . 24

Cork Insulation Sales Co. v. Torgeson, 54 Wn. App. 702, 705,
775 P.2d 970 (1989) 23

Dimmel v. Campbell, 68 Wn.2d 697,699,
414 P.2d 1022 (1966) 20, 26

Hecker v. Cortinas, 110 Wn. App. 865, 870,
43 P.3d 50 (2002) 13, 21

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380-81,
114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) 24

Marriage of Littlefield, 133 Wn.2d 39, 47 (1997) 12, 27

Marriage of Terry, 79 Wn. App. 866, 871, 905 P.2d 935 (1995) 29

Muma v. Muma, 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002)11,13,20

Noble v. Safe Harbor Family Preservation Trust, 167 Wn.2d 11,
17, 216 P.3d 1007 (2009)11, 27

Poole v. Perini, 659 F.2d 730, 733 (6th Cir.1981)16

Spence v. Kaminski, 103 Wn. App. At 332-33,
103 Wash.App. 325 (2000) 13, 21

<i>State ex. Rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)	11, 27
<i>State v. Bilal</i> , 77 Wn.App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013,902 P.2d 163 (1995)	20, 26
<i>State v. Buckner</i> , 223 Kan. 138, 574 P.2d 918 (1977)	17
<i>State v. Fullen</i> , 7 Wn. App. 369, 379, 499 P.2d 893 (1973)	16, 17
<i>State v. Greer</i> , 202 Kan. 212, 447 P.2d 837 (1968)	16
<i>State v. Harris</i> , 106 Wn.2d 784, 792, 725 P.2d 975 (1986), cert. denied, 107 S.Ct. 1592 (1987)	16
<i>State v. Koerber</i> , 931 P.2d 904 (Ct. App. 1996)	18
<i>State v. Madry</i> , 8 Wash.App. 61, 68, 504 P.2d 1156 (1972), quoting <i>In re Murchison</i> , 349 U.S. 133,136,75 S.Ct. 623, 99 L.Ed. 942 (1955))	19, 26
<i>State v. McCarty</i> , 90 Wn. App. 195 (1998)	12, 27
<i>State v. Neal</i> , 144 Wn.2d 600 (2001)	12, 28
<i>State v. Olivera-Avila</i> , 89 Wn. App. 313 (1997)	12, 27
<i>State v. Post</i> , 118 Wash.2d 596,619 n. 8,826 P.2d 172 (1992)	19
<i>State v. Rohrich</i> , 149 Wn.2d 647, 654, 71 P.3d 638 (2003)	18
<i>State v. Rundquist</i> , 79 Wn. App. 786, 793, 905 P.2d 922 (1995)	18
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986)	12, 27
<i>State v. Wilson</i> , 161 Wash. App. 1003, 4 (Wash. Ct. App. 2011)	
19	
CJC Cannon 2.	19, 26

<i>United States v. Monks</i> , 774 F.2d 945, 952 (9 th Cir.1985)	17
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons</i> ,	
122 Wn.2d 299, 339, 858 P.2d 1054 (1993)	18
CR 2a	24
<i>Wilson v. Pine Bluff</i> , 6 Ark. App. 286, 641 S.W.2d 33, 37,	
<i>review denied</i> , 643 S.W.2d 569 (1982)	15,16,17
CrR 6.13(b)	12,28
ER 404(b)	12, 27
<i>Federal Evidence</i> § 801.15 Commentary, at 756 (2d ed. 1986)	
16	
RCW 9A.46.110	13, 22
RCW 10.73	12, 27
RCW 26.50.010(1)	11, 12, 20, 28
RCW 26.50.100	21, 24
RCW 26.09.140	29

INTRODUCTION

This appeal arises on three decisions from the Snohomish County Superior Court.

Appellant Thomas Bret Haggerty, the father of two minor children, namely TJ Haggerty and Samuel Haggerty, obtained a temporary Domestic Violence Protection Order against Respondent Saiyin Phasavath, the mother, from Commissioner Tracy Waggoner on July 10, 2013, the Commissioner finding sufficient cause to enter the Order. CP 426-429. The mother, her current husband Chan Phasavath, and her oldest son Khoraphol have all been convicted from charges related to domestic violence. CP 435-438. Both Saiyin Phasavath and Karma Zaike were considered suspects in one or more assaults on TJ Haggerty. CP 444. Saiyin Phasavath was arrested for assaulting TJ Haggerty. CP 447. Law enforcement has been confronted by her husband Chan wearing a bullet proof vest and pistol. CP 447. The police found TJ Haggerty with several lateral abrasion and scratch marks across the front of both sides of his neck. CP 448. The police also found scratches and "claw marks" on both forearms of TJ Haggerty. CP 448. The incident of this assault was the result of TJ Haggerty intervening between Saiyin and the youngest son Samuel. CP 448. His testimony indicated that Saiyin punched him in the stomach, scratched his neck, dug her fingernails into both forearms, pushed him into a wall, and put him in a headlock. CP 448. Samuel Haggerty, the youngest child, told the police during this same incident that

Saiyin had tackled him in the past, CP 448, thrown a comb and make-up kit at him, CP 448, that he had seen Saiyin throw a knife at TJ Haggerty, and that he had seen Saiyin throw TJ against the wall. CP 448.

The police found probable cause to arrest Saiyin for DV Assault 4th Degree. CP 449.

Chan Phasavath was also arrested for assaulting TJ Haggerty. Phasavath had spit in TJ's face (CP 522), and threw him against a wall (CP 526), and had given a false report to the police. CP 522. The petition before the court brought by Haggerty on July 10, 2013, also alleged that Chan Phasavath had assaulted Samuel Haggerty. CP 434-435. This was confirmed by a letter from the boys' counselor Debra J. Sweeney stating that Samuel had suffered abuse from both his mother and her husband. CP 437.

These were the facts before the court when the court reviewed the preliminary order. On July 24, 2013, on review fourteen days later, Commissioner Lester Stewart denied the Domestic Violence Order Petition, ordered that the Parenting Plan be in full effect, and dismissed the petition with prejudice. CP 120.

Haggerty brought a motion for reconsideration by means of Civil Rule 59, filing and serving the motion for reconsideration on the 9th day following the entry of the order of dismissal. CP 77-86.

The minor children were placed back in the care and custody of the mother on the evening the Domestic Violence petition was dismissed by

order of Commissioner Stewart. TJ was forced to sleep on a mattress filled with urine. CP 55. He also went without food for days. CP 55. Within days of TJ being placed back in the care of his mother, (CP 32), Renton Police removed TJ Haggerty when TJ reported to the police that Respondent had been leaving both him and his younger brother Samuel in the custody of the mother's oldest son Khoraphol. CP 33; CP 55. At that time Khoraphol - a convicted felon - was the subject of two criminal domestic violence protection orders. CP 33. TJ reported to the police that Khoraphol had been given access to a bag that he knew was used to carry Chan Phasavath's .40 caliber semi-automatic pistol, a set of handcuffs, mace and a bullet proof vest. CP 33.

Appellant Haggerty then brought a motion to shorten time to hear the Motion for Reconsideration. A hearing was held before Superior Court Judge Anita Ferris. On August 6, 2013, Judge Ferris entered an order denying the motion to shorten time, but imposed new restraints consistent with a temporary Domestic Violence Protection Order, which restricted Respondent until the hearing on Reconsideration could be heard. CP 94-95. By order, Judge Ferris set the hearing date for Reconsideration on August 21, 2013. CP 94.

On August 21, 2013, at the hearing on Reconsideration, Judge Bowden refused to allow argument on the motion, stating that the motion was untimely, the file too burdensome to read, and that it required a

special setting notwithstanding that the hearing had been set by order of the Court. CP 12.

ASSIGNMENTS OF ERROR

The Court erred and abused its discretion in its initial order by dismissing Haggerty's petition for a domestic violence protection order when the minor children had a reasonable expectation of fear.

The Court erred in its second order when the Court imposed new conditions on an order that had been dismissed with prejudice.

The Court in its third order erred in not considering argument when the hearing was set by order of the court.

ISSUES

Did the Court Commissioner abuse judicial discretion by denying a domestic violence protection order on behalf of the two minor children when an act of domestic violence had been perpetrated against the younger son, when both the mother and her husband had been convicted of acts of violence against the older son, and when the record went with contradiction and demonstrated reasonable fear?

Did the Court err by imposing new conditions on Phasavath when the underlying order had been dismissed with prejudice?

Did the Court err in denying Haggerty's motion for reconsideration, when the motion was timely, when the hearing date had

been set by the order of the Court, and when manifest justice concerning the lives of the two children were at stake?

STATEMENT OF THE CASE

Haggerty appeals the Order of the Court entered on August 21, 2013 denying his Motion for Reconsideration, appeals the Order of the Court entered on August 6, 2013, denying his motion to shorten time and imposing new domestic violence conditions on an order that had been dismissed with prejudice, and appeals the Order of the Court entered by Commissioner Stewart denying the Petition for a Domestic Violence Protection Order brought on behalf of the two minor children, TJ Haggerty, and Samuel Haggerty on July 24, 2013.

Haggerty appeals the Order Denying Motion for Reconsideration on the grounds that the court abused its discretion in not allowing oral argument when the hearing time was established by court order and when the motion was timely pursuant to CR 59.

Haggerty appeals the Order Denying Motion to Shorten Time on the grounds that the court denied the Motion to Shorten Time, yet entered new conditions and restrictions on Respondent although the order had been dismissed with prejudice.

Haggerty appeals the Order Denying Petition for Domestic Violence Protection Order on the grounds of abuse of discretion, given that a new event of domestic violence had occurred against the younger

son Samuel in the mother's household, that both the Respondent and her husband had been convicted of crimes related to the physical abuse of TJ Haggerty, and that both of the minor children had a reasonable expectation of fear in the home. *See Muma v. Muma*, 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002).

ARGUMENT

The Court abused its discretion by failing to properly apply RCW 26.50.010

An abuse of discretion occurs when a trial court bases its decision on untenable grounds or untenable reasons. *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A court abuses discretion if its decision is manifestly unreasonable. A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. A decision is based on untenable grounds if factual finds are unsupported by the record. Abuse occurs when the decision is based on an incorrect standard or facts do not meet the requirement of the correct standard. *Marriage of Littlefield*, 133 Wn.2d 39, 47 (1997)(court had no authority under facts presented to require a residential schedule requiring geographic restriction on mother).

A trial court abuses its discretion by misapplying the law. *State v. Olivera-Avila*, 89 Wn. App. 313 (1997)(reversing withdrawal of plea of guilty after three years based on failure to inform of community placement requirement and in light of RCW 10.73); see also, *State v. McCarty*, 90 Wn. App. 195 (1998)(trial court's grant of new trial predicated on erroneous interpretation of law, here money laundering); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986)(ER 404(b) requiring reversal).

The range of discretionary choices is a question of law and the judge abused his or her discretion if the discretionary decision is contrary to law. *State v. Neal*, 144 Wn.2d 600 (2001)(admission of a document not strictly compliant with CrR 6.13(b) which was, finally, hearsay, was an abuse of discretion).

RCW 26.50.010(1) provides that "(1) 'Domestic violence' means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member."

The legislature has expressed its intention that chapter 26.50 RCW is to prevent acts of domestic violence. Minor children who have already experienced abuse are not required to wait until Respondent commits further acts of violence against them before seeking yet another order for protection. *Muma v. Muma*, 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002), (a

petitioner need not “wait [for] further acts of violence . . . in order to seek an order of protection”); *Spence v. Kaminski*, 103 Wn. App. at 332-33, 103 Wash.App. 325 (2000), (parties' continuing contact while they struggled over custody issues, together with evidence that petitioner continued to be afraid of the respondent, was sufficient to support protection order); *Hecker v. Cortinas*, 110 Wn. App. 865, 870, 43 P.3d 50 (2002), (“the Act does not require infliction of physical harm; rather, the infliction of ‘fear’ of physical harm is sufficient”).

Commissioner Stewart ignored the record before the court, that Respondent had been arrested, charged and convicted for assaulting TJ Haggerty; that Chan Phasavath, Respondent’s husband, had also been arrested, charged and convicted for assaulting TJ Haggerty, and that a few weeks prior to the bringing of the petition, Samuel Haggerty had also been assaulted by Chan Phasavath.

None of these allegations or the allegations of domestic violence were contradicted or refuted by Respondent in her declarations. CP 193-202.

The record also disclosed fraudulent reporting to police and witness tampering by attorney Karma Zaike. Zaike made a false report to the Renton Police on August 9, 2011, when she told the police that “the biological father is prohibited from having contact or parental rights to the children, per an order.” CP 453. Haggerty has always had residential time with both sons pursuant to the Parenting Plan, CP 488, and enjoyed those

rights at the time of this incident because the Superior Court of King County denied the mother's request for a new restraining order. CP 188. On August 11, 2011, Zaike met with Chan Phasavath and TJ Haggerty at her office without the benefit of a guardian ad litem, and was advised during the course of this meeting by the Renton Police that she was suspected of advising TJ to not testify or to recant his story. CP 456.

On August 9, 2011, TJ Haggerty reported to the Renton Police that Zaike said "TJ, you are a liar. You did this to yourself. You need to stop lying about this whole thing. You need to take back your statement. This is your fault. You escalated the situation to the point where your mother lost it." CP 461; 480. TJ later explained to the police that he had been repeatedly assaulted by Saiyin; that she had hit him with a book, a spatula, a pan, a hanger, make-up, a chair, and the remote control (CP 477). Saiyin has also slapped him, back-handed him to the face, and even attacked him with a knife. CP 462.

On August 11, 2011, TJ Haggerty gave a sworn statement to the Renton Police that Zaike had called him a liar and demanded that he recant his testimony. CP 472-473.

Phasavath entered an appearance pro se in this action. CP 192. Zaike entered a limited appearance, (CP 118-119), for the domestic violence hearing only. Limited appearances such as this one have the overall effect of allowing Zaike and the Bugni & Associates law firm, to craft legal documents, amass exhibits and an evidentiary file, make ex

parte contact with police departments and even judges and courtrooms without notice to opposing counsel, and then burden counsel with having to serve the adversary, rather than the adversary's attorney.

For instance, even though the record supports only a limited appearance by Zaike in this case, this Court required that Appellant provide proof of service on Zaike and her law firm, notwithstanding the failure to appear generally, or to appear in this action, and the directive from Zaike that "upon completion, the Petitioner [sic] can thereafter be contacted as follows: Saiyin Phasavath, 19980 101st Ave. SE, Renton, WA 98055.

Adoptive admissions are, by their very nature, attributed to the defendant, even though couched in the words of a third person. It is the defendant's response to the incriminating statement that "makes it evidence." *See Wilson v. Pine Bluff*, 6 Ark. App. 286, 641 S.W.2d 33, 37, review denied, 643 S.W.2d 569 (1982); *State v. Lounsbery, supra* (incriminating evidence is defendant's reaction to accusations).

Constitutional confrontation rights are not implicated by the admission of the defendant's own incriminating out-of-court statements. *See State v. Harris*, 106 Wn.2d 784, 792, 725 P.2d 975 (1986), cert. denied, 107 S.Ct. 1592 (1987); see also *Wilson v. Pine Bluff, supra*; *Poole v. Perini*, 659 F.2d 730, 733 (6th Cir.1981) ("An adoptive confession avoids the confrontation problem because the words of the hearsay become the words of the defendant."), cert. denied, 455 U.S. 910 (1982).

When a defendant has adopted a statement, its reliability no longer depends on the veracity and demeanor of a third person not in court. *See State v. Greer*, 202 Kan. 212, 447 P.2d 837 (1968). The lack of opportunity to cross-examine the declarant in situations involving admissions is deprived of significance by the incongruity of the party objecting to his own statement on the ground that he was not subject to cross-examination by himself at the time. M. Graham, *Federal Evidence* § 801.15 Commentary, at 756 (2d ed. 1986), quoted in *United States v. McKinney*, *supra* at 387 n. 4 (Belloni, J., dissenting).

The right of confrontation serves ultimately to test the truth of the witness' testimony. *See State v. Fullen*, 7 Wn. App. 369, 380, 499 P.2d 893 (quoting *California v. Green*, 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1970)), *review denied*, 81 Wn.2d 1006 (1972), *cert. denied*, 411 U.S. 985 (1973).

The court's analysis of the relationship between the accusation and the admission is equally applicable to adoptive admissions by silence and does not depend on the manner in which the defendant adopted the statement. *State v. Fullen*, 7 Wn. App. 369, 379, 499 P.2d 893 (1973).

Adoptive admissions are deemed to be the defendant's own statements and when not admitted to prove the truth of the matter asserted, no confrontation rights are violated. *See, e.g., United States v. Giese*, *supra* at 1195; *Wilson v. Pine Bluff*, *supra*; *State v. Buckner*, 223 Kan.

138, 574 P.2d 918 (1977); *But cf. United States v. Monks*, 774 F.2d 945, 952 (9th Cir.1985).

Both Zaike and Phasavath were given ample time and opportunity to deny such accusations, and to this date, have failed to do so.

Commissioner Stewart nonetheless allowed attorney Zaike to argue on behalf of Respondent, and ignored the record before the court indicating that both TJ Haggerty and Samuel Haggerty had demonstrated multiple reasons in regard to the infliction of fear of physical harm, including the arrest and conviction of Saiyin Phasavath, and Chan Phasavath from crimes committed against TJ, and the testimony that Samuel had been thrown to the ground by Chan numerous times.

Commissioner Stewart erred by not applying the proper standard under the statute and applicable case law.

A court abuses its discretion when an “order is manifestly unreasonable or based on untenable grounds.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A discretionary decision “is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003), (emphasis added) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). Indeed, a court “would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Fisons*, 122 Wn.2d at 339.

Commissioner Stewart dismissed the petition of Haggerty, brought on behalf of the two minor children “with prejudice.” To dismiss with prejudice under criminal procedure, the state is required to find prosecution misconduct or an arbitrary action which materially prejudiced the defendant. This remedy is the last resort. *State v. Koerber*, 931 P.2d 904 (Ct. App. 1996). It should not be employed for minor acts of negligence by third parties, beyond the State’s direct control, when the defendant is not materially prejudiced. *Koerber*, 931 P.2d at 905. For example, when the state’s witness had the flu and was uncertain when they would recover, the court found no government misconduct. *Id.* Nor was it misconduct when the State called a witness’s family for more than six weeks with no results. *State v. Wilson*, 161 Wash. App. 1003, 4 (Wash. Ct. App. 2011).

Respondent did not seek dismissal with prejudice, and did not establish misconduct or arbitrary action, as the hearing came on regularly on the 14 day review of a preliminary domestic violence protection order based upon the petition and declaration of Haggerty. Commission Stewart declared the petition dismissed with prejudice *sua sponte*.

Due process requires the absence of actual bias, “our system of law has always endeavored to prevent even the probability of unfairness.” *State v. Madry*, 8 Wash.App. 61, 68, 504 P.2d 1156 (1972), quoting *In re Murchison*, 349 U.S. 133,136,75 S.Ct. 623, 99 L.Ed. 942 (1955)).

“[E]very procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the later due process of law. *Id.* While the appearance of fairness is fundamental, courts have required that there be some “evidence of a judge's or decision maker's actual or potential bias[,]” prior to application of the doctrine. *State v. Post*, 118 Wash.2d 596,619 n. 8,826 P.2d 172 (1992). The Washington State Code of Judicial Conduct emphasizes this requirement by additionally mandating that judges avoid “impropriety and the appearance of impropriety in all their activities.” CJC Cannon 2. This rule requires that judges act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. *Id.* Nonetheless, the appearance of fairness doctrine can be violated without any question as to the judge's integrity or violation of judicial ethics. *See Dimmel v. Campbell*, 68 Wn.2d 697,699, 414 P.2d 1022 (1966). Ultimately, the test of whether the appearance of fairness doctrine was violated is whether “a reasonably prudent and disinterested observer would conclude that [the defendant] obtained a fair, impartial, and neutral [hearing].” *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674, *review denied*, 127 Wn.2d 1013,902 P.2d 163 (1995).

In this case, the commissioner's personal intervention in this case, as evidenced by his dismissal with prejudice *sua sponte*, is evidence of his actual or potential bias. Despite the failure of the Respondent to ask the court for relief granted--a denial of the petition, and its dismissal with

prejudice--the court evidenced actual or potential bias against Haggerty by taking such action on his own initiative.

Most importantly, Commissioner Stewart abused his discretion by ignoring the law as expressed in RCW 26.50.010(1)(a), because the record is dispositive that the two minor children evidenced the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members, and the edicts long established in Washington that minor children who have already experienced abuse are not required to wait until Respondent commits further acts of violence against them before seeking yet another order for protection. *Muma v. Muma*, 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002), (a petitioner need not “wait [for] further acts of violence . . . in order to seek an order of protection”); *Spence v. Kaminski*, 103 Wn. App. at 332-33, 103 Wash.App. 325 (2000), (parties' continuing contact while they struggled over custody issues, together with evidence that petitioner continued to be afraid of the respondent, was sufficient to support protection order); *Hecker v. Cortinas*, 110 Wn. App. 865, 870, 43 P.3d 50 (2002), (“the Act does not require infliction of physical harm; rather, the infliction of ‘fear’ of physical harm is sufficient”).

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The Court abused its discretion by placing the minor children back in the home of the mother, exceeded its jurisdiction by amending

**an order that had been dismissed with prejudice; and by failing to
make immediate referral to law enforcement pursuant to RCW
26.50.100.**

Haggerty brought a motion to shorten time to hear the motion for reconsideration based on exigent circumstances. As a result of the Domestic Violence Protection Order being dismissed by Commissioner Stewart on July 24, 2013, TJ and Samuel were placed back in the care and custody of Saiyin Phasavath. Phasavath shared a home with her husband Chan Phasavath, and her oldest son, Koraphol Alam, aka Koraphol Galavon. Koraphol Alam is a convicted felon, currently on probation, and at that time, subject to two felony domestic violence restraining orders – one for five years and one for ten years.

After the boys were returned to the mother's house, the mother and her husband left both of the minor children in the care and custody of Koraphol. On August 5, 2013, TJ (16), found Koraphol in possession of Chan's bag, which he knew to contain a .40 caliber handgun, a bullet proof vest and mace. Although he did not see the .40 caliber handgun, the mace and the vest had already been taken out.

Koraphol Alam is a violent offender, subject to outbursts of extreme violence, known to be suicidal, and is a serial offender. He was recently jailed for fourth degree assault and wrongful imprisonment. Uncontroverted evidence was introduced at this hearing that there were three convicted perpetrators of domestic violence living in Phasavath's

home, two of whom were charged with violence against the son TJ.

Haggerty alleged that Phasavath was engaged in an ongoing criminal offense of criminal mistreatment in the second degree in her household pursuant to RCW 9A.42.030, being “the parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life,” and that she recklessly created an imminent and substantial risk of death or great bodily harm.

In addition, Haggerty also alleged that the mother had committed the crime of abandonment of a dependent person in the second degree, being the parent of the children, recklessly abandoning the children and creating an imminent and substantial risk that one or more of the children or other dependent person would suffer great bodily harm.

On August 6, 2013, pursuant to Haggerty’s motion to shorten time to hear his motion for reconsideration, Judge Ferris conducted a hearing on the motion. As a result of this hearing, Judge Ferris denied Haggerty’s motion to shorten time, but entered “Conditions of Order” which restrained Respondent consistent with a Domestic Violence Protection Order, including that 1) “Mom will not allow oldest son in the house.” 2) Mom will not use physical discipline, and will not allow others to use force or physical discipline in the house.” 3) “If there is a violation of the conditions, the matter will be heard immediately.” 4) “No contact with

Koraphol, until August 21, 2013, or until the motion for revision is heard.”
CP 94-95.

The failure to remove the children from the home when granting a domestic violence protection order in part is error. To do so while denying a motion to shorten time to hear reconsideration is extraordinary and unwarranted under existing law.

Dismissal with prejudice ends all litigation, thus removing the court's jurisdiction. *Cork Insulation Sales Co. v. Torgeson*, 54 Wn. App. 702, 705, 775 P.2d 970 (1989). In *Cork*, the Court of Appeals held that the trial court lacked jurisdiction to enter a judgment awarding terms against the defendant in connection with a motion to vacate a default judgment weeks after the plaintiff obtained a voluntary dismissal of his claims.

The court's action is distinguishable from exceptions found under ancillary jurisdiction. However, the underlying Agreed Parenting Plan is comparative to other CR 2a Agreements for purposes of this analysis. See, for instance, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380-81, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) where the Court allowed that ancillary jurisdiction could exist following dismissal of a settlement in order to 1) protect its proceedings and 2) vindicate its authority if the parties' obligation to comply with the terms of a settlement agreement had been made part of the order of dismissal-either by separate provision (such as a provision “retaining jurisdiction” over the settlement agreement) or by incorporating the terms of the settlement agreement in

the order. *Condon v. Condon*, No. 86130-7 (Wash. Sup. Ct. Mar 21, 2013).

In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. *Id.* at 381. However, the court is not at liberty to otherwise exercise jurisdiction following a dismissal with prejudice. *See Condon v. Condon*, No. 86130-7 (Wash. Sup. Ct. Mar 21, 2013), (finding the court improperly implied additional terms into the agreement following dismissal with prejudice.)

In addition, the court having provided new terms to an order of dismissal while denying the motion before it, also failed to meet its burden pursuant to RCW 26.50.100, which required that the clerk of the court forward a copy of an order for protection granted under this chapter “on or before the next judicial day to the appropriate law enforcement agency specified in the order.” The requirement of this statute also provides that “the law enforcement agency shall forthwith enter the order into any computer-based criminal intelligence information system available in this state used by law enforcement agencies to list outstanding warrants. The order shall remain in the computer for the period stated in the order. The law enforcement agency shall only expunge from the computer-based criminal intelligence information system orders that are expired, vacated, or superseded. Entry into the law enforcement information system

constitutes notice to all law enforcement agencies of the existence of the order. The order is fully enforceable in any county in the state.”

The Court abused its discretion in denying Haggerty’s Motion for Reconsideration and disallowing oral argument.

Following an unrecorded evidentiary hearing on Haggerty’s motion to shorten time to hear motion for reconsideration, the court by order set the hearing on reconsideration to be heard on August 21, 2013. CP 94-95. Respondent filed a cumulative set of documents in excess of 100 pages from prior hearings held in 2011 in another case in King County. Haggerty’s pleadings were well within page limits established by local rule in regard to domestic violence petitions.

The court then asserted that 1) the motion for reconsideration was untimely; 2) the file was too burdensome to read; and 3) the motion should have been a special set. The court then denied the motion on those grounds without allowing oral argument.

Due process requires the absence of actual bias: “our system of law has always endeavored to prevent even the probability of unfairness.” *State v. Madry*, 8 Wash.App. 61, 68, 504 P.2d 1156 (1972), quoting *In re Murchison*, 349 U.S. 133,136,75 S.Ct. 623, 99 L.Ed. 942 (1955)).

The Washington State Code of Judicial Conduct mandates that judges avoid “impropriety and the appearance of impropriety in all their activities.” CJC Cannon 2. This rule requires that judges act in a manner that promotes public confidence in the integrity and impartiality of the

judiciary. *Id.* Nonetheless, the appearance of fairness doctrine can be violated without any question as to the judge's integrity or violation of judicial ethics. *See Dimmel v. Campbell*, 68 Wn.2d 697,699, 414 P.2d 1022 (1966). Ultimately, the test of whether the appearance of fairness doctrine was violated is whether “a reasonably prudent and disinterested observer would conclude that [the defendant] obtained a fair, impartial, and neutral [hearing].” *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674, *review denied*, 127 Wn.2d 1013,902 P.2d 163 (1995).

In this case, the court did not allow Haggerty to address the court for any purpose, such as pointing out that the hearing was set by the order of Judge Ferris, that the motion was filed and served nine days following the entry of Commissioner Stewart’s order of July 24, 2013, and that the burdensome file was the result of Respondent’s redundant pleadings, rather than the petition, declaration and exhibits of Haggerty.

For these reasons, the court erred, and the error constitutes abuse of discretion. An abuse of discretion occurs when a trial court bases its decision on untenable grounds or untenable reasons. *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A court abuses discretion if its decision is manifestly unreasonable. A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. A decision is based on untenable grounds if factual finds are unsupported by the record. Abuse occurs when the decision is based on an incorrect standard or facts do not meet the requirement of the correct standard. *Marriage of Littlefield*, 133 Wn.2d 39, 47 (1997)(court had no authority under facts presented to require a residential schedule requiring geographic restriction on mother).

A trial court abuses its discretion by misapplying the law. *State v. Olivera-Avila*, 89 Wn. App. 313 (1997)(reversing withdrawal of plea of guilty after three years based on failure to inform of community placement requirement and in light of RCW 10.73); see also, *State v. McCarty*, 90 Wn. App. 195 (1998)(trial court's grant of new trial predicated on erroneous interpretation of law, here money laundering); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986)(ER 404(b) requiring reversal). The range of discretionary choices is a question of law and the judge abused his or her discretion if the discretionary decision is contrary to law. *State v. Neal*, 144 Wn.2d 600 (2001)(admission of a document not strictly compliant with CrR 6.13(b) which was, finally, hearsay, was an abuse of discretion).

Conclusion

In conclusion, the Court ignored the obvious facts before it and the long established law set forth in its denial of the petition for a domestic violence protection order pursuant RCW 26.50.010(1)(a). Instead of protecting the minor children, the court placed them back in the care of the mother who had been charged and convicted as a result of her strangling TJ, and her husband, who had been charged and convicted of assaulting TJ, and who was accused of pushing the youngest child to the ground more than ten times.

When Haggerty sought immediate reconsideration of this order on his motion to shorten time, the Court recognized the exigency of the circumstances by imposing new restrictions on the mother. The Court did not remove the children from the home even when it was learned that the mother has placed both children in the care of the oldest son while she and her husband were at work. Instead, the court excluded the oldest son from his home without notice or hearing, entered new conditions on a domestic violence order that had been dismissed with prejudice, and yet continued to place the children in the environment of violence.

Finally, the court on reconsideration denied the motion on grounds unsupported on the record, and therefore abused its discretion.

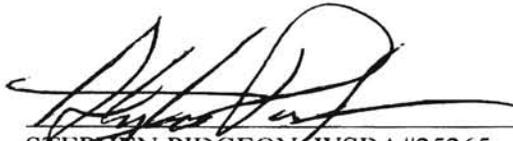
For these reasons, Appellant respectfully requests that this Court reverse the opinion of the Court on Reconsideration, reverse the opinion of the Court in augmenting the decision of the Court to deny the Petition for

Domestic Violence Protection Order, and reverse the opinion of the Court in denying the Domestic Violence Protection Order.

Bret Haggerty Requests an Award of Attorney's Fees

The court has the discretion to order a party to pay the other party's attorney fees associated with the appeal of a dissolution and modification actions. RCW 26.09.140. The decision to award fees under RCW 26.09.140 is discretionary and must be based upon a consideration that balances the needs of the spouse seeking fees against the ability of the other spouse to pay. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995).

Signed in Everett, this 14th day of January, 2014.



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CERTIFICATE OF SERVICE

The undersigned now certifies that a true copy of the Notice of Appeal in this action was served on the following:

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by electronic mail, and by first class, U.S. Mail, postage prepaid, this 15th day of January, 2014.



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