

72209-3

72209-3

NO. 72209-3-I

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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ERIN A. CULLEN,

APPELLANT

v.

DAVID A. CULLEN,

RESPONDENT

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**REPLY BRIEF OF APPELLANT**

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ORIGINAL

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## I. ARGUMENT

### A. Compliance with Rules of Appellate Procedure.

The Father boldly alleges that the court should not even consider the Mother's appeal due to her failure to comply with the Rules of Appellate Procedure. *See* Brief of Respondent, p. 29. His argument that she has provided "no meaningful argument with citations to the record" is rebutted merely by taking more than a cursory glance at the Mother's opening brief, and the Father's assertion that the Mother's brief did not provide *any* citations to the record to support her argument in the six specific pages to which he refers is simply blatantly false. *See Id.* Furthermore, there is nothing in the rules of appellate procedure which prohibit a party from summarizing testimony, with references to the record, which are painstakingly and explicitly set forth in the party's statement of the case. Such a rule would lead to substantial needless repetition.

The Father also provides absolutely no support for his assertion that the Mother's case relies largely on pleadings that were not considered by the trial court at the trial in April or at the November review hearing. The Mother's argument clearly relies solely on evidence that was

presented to the trial court.

RAP 1.2(a) provides, “These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or non-compliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).” Not only has the Mother complied with the rules, the Father fails to present any compelling circumstances which would justify the court failing to issue a decision on the merits.

**B. Father’s Re-Statement of the Case.**

The Mother would like to briefly address several mischaracterizations and misstatements of fact contained within the Father’s re-statement of the case. First, the Father’s characterization of the Mother’s request for the court to review the parenting plan at the end of summer, 2014 as an attempt to “try again” because she was unhappy with the trial court’s decision is unnecessarily combative. *See* Brief of Respondent, p. 2. The Mother had already initiated this appeal when she sought the review hearing. CP 1-2. However, it was necessary for her to utilize the review mechanism established by the trial court to address the

possibility that the parenting plan proved to be the “unmitigated disaster” that the trial court feared before moving forward with this appeal. *See* Court’s 11/21/14 Ruling RP 2, line 21.

Second, the Father’s brief states that at the review hearing, the Mother sought to *completely eliminate* the Father’s residential time. *See* Brief of Respondent, p. 13. Not only does the Father attempt to make the Mother appear vindictive, as opposed to requesting a parenting plan that followed the recommendations of the GAL, this does not accurately characterize the Mother’s requested parenting plan. The GAL’s recommendations were to *suspend* the Father’s residential time until he re-entered DV treatment and to phase back in his residential time, starting with professionally supervised visits, based on his progress in treatment. Ex 2, pages 25-26. Furthermore, the change in the GAL’s recommendations from the April, 2014 trial (CP 243-247) to those at the November, 2014 review hearing (Ex 2, pages 25-26) serve to illustrate how severely the Father’s behavior continued to escalate, and how circumstances continued to deteriorate.

Finally, the Father grossly exaggerates the trial court’s findings regarding the Mother’s credibility. *See* Brief of Respondent, page 25.

Though the court did state that there were issues surrounding the Mother's credibility (Court's 11/21/14 Ruling RP 3, lines 4-5), the trial court recognized that the Mother suffers from PTSD as a result of the Father's abuse, which creates a constant source of anxiety and concern, and that due to continued exposure to the Father's abusive behavior, the Mother has been unable to make much progress in therapy. Court's 11/21/14 Ruling RP 14, lines 7-15.

Regardless of how the Father has attempted to portray the series of events in this case, the children's emotional well-being and their relationship with their Mother continues to be sabotaged by the Father due to their exposure to his ongoing abusive behavior. It is imperative that a parenting plan which is truly in the best interests of the children be established before any irreparable damage occurs.

**C. Mother's Argument that the Court Abused its Discretion in Failing to Limit the Father's Residential Time Pursuant to RCW 26.09.191 is Supported by Law.**

The Father's brief incorrectly cites the language of RCW 26.09.191(a) in relation to the *Underwood* case. See Brief of Respondent, pp.30-31. That case states that the authority to completely *eliminate* a party's residential time is found in other subsections of RCW 26.09.191,

not a description of the court's mandatory *limitations* on a party's *residential time*. See *In re Marriage of Underwood*, 181 Wn. App. 608, 611, 326 P.3d 793 (2014) (emphasis added).

The Father's assertion that the Mother's argument regarding mandatory restrictions under RCW 26.09.191 "ignores the law" is unsupported by the record. See Brief of Respondent, p. 31. The Mother's opening brief does not deny that courts have the authority under RCW 26.09.191(n) not to apply the limitations, "If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or *emotional* abuse or *harm* to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations..." (emphasis added). The Mother's argument is clearly that absent these findings, the restrictions must be imposed. The Father selectively cites to specific findings of fact regarding the importance of the children's relationship with their Father, but ignores findings of fact which explicitly state that the Father's behavior is "damaging to the children," which is inconsistent with a determination under RCW 26.09.191(n). See CP 566.

Furthermore, the transcript of the court's oral ruling was attached to the written findings of fact and incorporated by reference CP 567. Oral findings that the trial court expressly incorporates into its findings of fact are binding. *State v. Truong*, 168 Wn.App. 529, 539 n. 6, 277 P.3d 74, *review denied*, 175 Wn.2d 1020 (2012). Specific relevant findings related to the persistence of the Father's abusive conduct, his failure to benefit from DV treatment, and how this behavior is damaging to the children are referenced with specificity in Section D below.

Moreover, though the court found that the children remain strongly bonded to their Father, and thus limiting his time with the children would be damaging (CP 564), the GAL clearly stated in her report that though she is "keenly aware that reduced time with the Father with whom the children are bonded with and have a deep love for has a negative impact to the children...the negative impact of the Father's perpetuation of domestic violence...outweighs any benefit of the children maintaining their current levels of exposure to the Father." Ex 2, pages 22-23. This information was reiterated in her testimony at the November, 2014 hearing, at which time the GAL testified that the "negative behavior outweigh[s] the bond, and it require[s] the need for protection for the children." 2 RP 191, lines 1-9.

She explained more generally that the children's bond with their Father results in "negative consequences to the children." 2 RP 164, lines 8-12. She testified further, in response to a direct question from the trial court regarding the impact of limiting the Father's residential time on the children, that though the children would initially perceive the change as negative, in the long run, it was necessary to give the children the chance to "develop normally." 2 RP 191, lines 20-23.

The studies referenced in the Mother's opening brief regarding the effects of domestic violence toward children were very clearly provided in the Mother's supplemental memorandum to the trial court and have been designated as clerk's papers by the Father. Their inclusion is necessary to inform this Court of all of the relevant background information provided to the trial court in making its decision.

The Father's brief attempts to undermine the testimony of Mr. Adams, Mr. Ellner, and the GAL due to their lack of a direct involvement with the children. *See* Brief of Respondent, pp.33-34. However, in her testimony at the November, 2014 hearing, the GAL explained, "It's very rare in a case where I'll be so concerned that I'll choose not to interview the children." 2 RP 117, lines 4-5. She explained further that her reasons

for choosing not to do so in this case were that involving the children in the court proceedings, particularly Aiden, would increase the children's stress, increase the strain on the Mother's relationship with the children, and make the children feel responsible for the outcome of the court proceedings. 2 RP 117, lines 10-14. Involving the children in these proceedings would thus have been more damaging to the children and their relationship with their Mother than the benefit the court would have received from that information.

Finally, though the Father is correct in asserting that this Court cannot substitute its judgment for that of the trial court or weigh evidence or the credibility of witnesses (*See* Brief of Respondent, p. 35), this is not what the Mother is asking this Court to do. Rather, given the findings of fact made by the court, including that the persistence of the Father's abusive behavior is "terribly damaging to the children," (Court's 11/21/14 Ruling RP 7, lines 1-8) the Mother requests that this Court determine that the trial court abused its discretion in failing to impose mandatory limitations on the Father's residential time pursuant to RCW 26.09.191.

**D. Father Mischaracterizes Mother's Argument that the Court Abused its Discretion in Failing to Enter a Restraining Order.**

The Petitioner did not request a domestic violence protection order

(DVPO) at the evidentiary review hearing, and she does not argue that the court abused its discretion in failing to enter one at the review hearing, as the Respondent's brief contends. Rather, at the November review hearing, the Mother requested that the court review its decision regarding the necessity of a continuing restraining order based on the Father's ongoing and escalating acts of domestic violence, stalking and controlling behavior, and his failure to comply with the terms of his DV treatment. *See* Resp. Supp. CP \_\_ (Petitioner/ Mother's Hearing Memorandum). This was clearly evident from the proposed *restraining order* provided to the Father at the hearing.

There is scant case law in which the court has interpreted the term "necessary" as used within RCW 26.09.050. However, temporary restraining orders were deemed necessary in this case and entered against the Father throughout the dissolution action based on his *acts of domestic violence*. CP 436-39, 337-41, 312-14, 305-08. Furthermore, RCW 26.09.050(3) specifically provides that violation of a restraining order under this statute constitutes a criminal offense under chapter 26.50 RCW. Thus, absent any other guiding principles, it was proper for the Mother to analyze whether the entry of a continuing restraining order was

“necessary” on the basis of whether the Father’s domestic violence behavior would support the entry of a DVPO pursuant to RCW 26.50.060.

The trial court made no findings that it did not have authority to hear the Mother’s request or that it was not properly before the court. Rather, the court simply held that the behavior of the Father did not amount to the sort of domestic violence that would warrant a DVPO. Court’s 11/21/14 Ruling RP 6, lines 13-15. However, the case law provided by the Mother for the review hearing and on appeal support the contrary conclusion, given the court’s extensive findings regarding the Father’s behavior. Furthermore, because the court determined only that a DVPO was not necessary, while making no findings as to whether the *restraining order* requested by the Mother was “necessary,” it was an abuse of discretion for the court not to enter the restraining order given its extensive findings of fact regarding the Father’s ongoing domestic violence behavior, which are specifically addressed in pages 19-20 of the Mother’s opening brief with corresponding references to the record. For example, as stated in the Mother’s opening brief, the court made specific findings that, “The Father completed domestic violence treatment, but his abusive behavior persists...It’s abusive, and it’s terribly damaging to the

children.” Court’s 11/21/14 Ruling RP 2, lines 6-7.

Moreover, the escalation of the Father’s abusive behavior and his failure to comply with treatment were circumstances unanticipated by the trial court at the April, 2014 trial. Though the court did determine in its April 16, 2014 ruling that there was not a “need going forward to continue [the restraining] order in order to secure [the Mother’s] physical safety” (Court’s 4/16/14 Ruling RP 20, 23-25), the court had already stated that concerns surrounding the Father’s domestic violence behavior were mitigated by the Father’s participation and progress in treatment. The court stated, “The husband has recognized his domestic violence issues and history, and he is addressing that behavior. He seems to be doing so appropriately. He’s followed recommendations for DV treatment. It is a work in progress.” Court’s 4/16/14 Ruling RP 16, lines 21-25.

The court’s findings in its November 21, 2014 ruling, however, indicate that these safeguards or mitigating factors are no longer in place. The court stated, “The father completed domestic violence treatment, but his abusive behavior persists either deliberately in seeking to bully the mother by berating her and using vulgar language or he’s simple incapable of helping himself.” Court’s 11/21/14 Ruling RP 7, lines 1-5. “He shows

up at...events for the purpose of interacting with the children during the mother's residential time, which has been disruptive to her and increases her fear and anxiety." Court's 11/21/14 Ruling RP 7, lines 15-20. "He has used abusive language toward the mother in the presence of the children including particularly vulgar language directed toward her on at least two separate occasions in June and August. And that, following a trial in April, I find is unexplainable other than being symptomatic of his history of domestic violence." Court's 11/21/14 Ruling RP 7, lines 21-25; 8, line 1. "More importantly, the Father has failed to timely disclose that abusive behavior to his domestic violence therapist in accordance in their contract and, in fact, denies any inappropriate behavior on those occasions and minimizes his own misconduct. He selectively has self-reported or selectively has made nondisclosure to evaluators and therapists. His failure to provide a copy of the GAL report to the chemical dependency evaluator...is troubling as well." Court's 11/21/14 Ruling RP 8, lines 2-10. "The Father failed to complete the DV Dad's program...the question is begged that had he been candid in his disclosure of his own behavior, would he still be in the program, or would they be willing to work with him? Part of the problem, it seems to me, is his unwillingness to recognize

his behavior.” Court’s 11/21/14 Ruling RP 8, lines 18-24. The court stated further that the Father’s controlling behavior with regard to the Mother, “creeps me out.” Court’s 11/21/14 Ruling RP 10, lines 14-15. “The Father’s testimony at trial is to deny his own misconduct and blame the mother for overreacting...” Court’s 11/21/14 Ruling RP 10, lines 19-20. “The Father needs to restart the domestic violence treatment program because it’s evident to me he hasn’t gained any benefit from that program.” Court’s 11/21/14 Ruling RP 12, lines 1-3.

It is abundantly clear that the treatment and progress anticipated by the court in its ruling of April 16, 2014 on this issue did not come to fruition. Rather, the testimony explicitly referred to in the Mother’s opening brief, along with the court’s ruling summarized above, clarifies that circumstances have continued to deteriorate, and that the Father’s influence and example that he continues to set for the children have resulted in issues that that have “escalated since trial to the point of needing intervention.” Court’s 11/21/14 Ruling RP 6, line 25; 7, line 1.

Therefore, because the ongoing acts of domestic violence on the part of the Father do rise to to the level that would support the entry of a domestic violence protection order, as argued in the Mother’s opening

brief, and because the trial court made no findings as to the necessity of a restraining order pursuant to RCW 26.09.060, the Court abused its discretion in failing to enter a restraining order against the Father.

**E. Affidavit of Prejudice.**

The Respondent is correct that seeking removal of a judge without cause under RCW 4.12.050 requires a motion to be filed before the judge has made a discretionary ruling. When the judgment of trial court is reversed on appeal and remanded, a party to the original trial is not entitled to disqualify the judge that presided over first trial *without cause*. *State v. Belgarde* 119 Wn.2d 711, 715, 837 P.2d 599 (1992) (emphasis added). The court in that case stated that while it shared the petitioner's concern that appellate reversal of trial court rulings may engender bias toward a party upon the return of the action to the trial court, it was not prepared to assume *as a matter of law* that such bias is *always present* when a case returns to the trial court after an appellate court reverses a trial court decision. *Id.* at 717-18. However, the Mother is not requesting that this case be set before a new judge on remand without cause. Given the trial judge's decision to implement a parenting plan that did, in fact, prove to be a "disaster" (Court's April 16, 2014 Ruling RP 32,

line 3), and his abuse of discretion at the return hearing in maintaining that plan despite explicit findings that the Father's "abusive behavior persists...and it's terribly damaging to the children," (Court's November 21, 2014 Ruling, RP 7, lines 2-6), the Mother requests that this Court find there is good cause to set this matter before a new judge, should it be remanded to the trial court.

**F. Attorney Fees.**

The Respondent's brief contends that there is no information before this Court to support an award of fees based on need and ability to pay, citing the trial court's findings. *See* Brief of Respondent, p. 45. However, the Mother is requesting an award of fees pursuant to RAP 18.1 and RCW 26.09.140 for her fees and costs associated with *this appeal*. She did not allege that the trial court erred in determining that it did not have sufficient information to award attorney fees for the evidentiary hearing on this basis. RAP 18.1(c) provides that a party requesting an award of fees must file and serve on the other party an "affidavit of financial need" ten days prior to the date the case is set for oral argument. The Mother is well aware of this deadline, which has not yet passed, and she will be timely filing the financial affidavit in accordance with this rule.

The Mother has alleged intransigence on appeal because of the Father's behavior which corresponds with precisely the conduct cited by Father in his brief. Similar to the circumstances of the *Chapman* case, the Father filed a motion to stay this appeal while he carried out his unrelated proceedings to terminate his maintenance obligation in Superior Court, forcing the Mother to file a motion to reinstate and accelerate the briefing schedule in this matter, which the Father opposed and which needlessly increased her fees. *See Chapman v. Perera*, 41 Wn. App. 444, 456, 704 P.2d 1224 (1985). The Mother therefore continues to request an award of fees on both of these bases.

**H. Mother's Appeal is Not Frivolous.**

RAP 18.9(a) authorizes an award of terms or compensatory damages against a party who uses the appellate rules "for the purposes of delay, files a frivolous appeal, or fails to comply with [the] rules." In determining whether an appeal is frivolous, courts are guided by the following principles:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
- (5) an appeal is frivolous if there are no debatable issues

upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

*Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442–43, 730 P.2d 653 (1986) (quoting *Streater v. White*, 26 Wn.App. 430, 434–35, 613 P.2d 187 (1980)). “Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous.” *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). As provided above, the Mother has substantially complied with the Rules of Appellate Procedure. Her appeal is clearly not frivolous given the contradictory nature of the trial court’s findings and its ruling, and thus there are debatable issues about which reasonable minds might differ. At the outset of its November ruling, the trial court clarified, “This is a very difficult case for the Court.” Court’s 11/21/14 Ruling RP 2, line 2. The trial court even began to question its decision mid-ruling, stating that if circumstances continue to escalate, the GAL’s recommendations would need to be adopted, admitting, “I just don’t know how best to address these issues.” Court’s 11/21/14 Ruling RP 16, lines 17-22. Allegations that a party has filed a frivolous appeal are severe, and are clearly inappropriate in a case such as

this one, where the Mother is utilizing her right to an appeal to seek to save her children from further damage caused by the trial court's incorrect decision, before this damage becomes irreversible. The Father's request for attorney fees pursuant to RAP 18.9(a) should therefore be denied.

## II. CONCLUSION

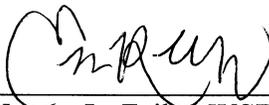
The Father asserts throughout his brief that the Mother has attempted to use this appeal to simply re-argue her case and hope for a better outcome, and that she asks the Court to "substitute its judgment" for that of the trial court. Contrary to this assertion, and as is clearly set forth in the Mother's opening brief and in this reply, in accordance with the rules of appellate procedure, the Mother has argued that given the trial court's findings of fact and the legal standards applied, the court abused that discretion and came to the wrong decision. This parenting plan was, and continues to be the "unmitigated disaster" that the trial court feared. *See* Court's 11/21/14 Ruling RP 2, line 21.

The trial court's recognition that the Father continues to engage in domestic violence behavior despite his DV treatment, and that the children's exposure to the such behavior and the example the Father currently sets for them is "incredibly damaging to the children," while

making absolutely no changes to the current residential schedule or entering a restraining order to shield the Mother and the children from exposure to ongoing abuse is clearly an abuse of discretion. The Mother therefore requests that the court overturn the trial court's decision and remand this case to Snohomish County Superior Court to enter a parenting plan and restraining order pursuant to this Court's decision.

Respectfully submitted this 26<sup>th</sup> day of May, 2015.

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A handwritten signature in black ink, appearing to read 'Karma L. Zaiké', written over a horizontal line.

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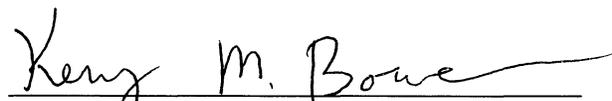
**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of May, 2015 the original of the Reply Brief of Appellant was transmitted for filing to the Court of Appeals, Division I, by legal messenger, and that copies were sent via email and U.S. Mail as follows:

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