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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ERIN A. CULLEN,

Appellant,

v.

DAVID A. CULLEN,

Respondent.

RESPONDENT'S BRIEF

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ORIGINAL

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I. SUMMARY OF ARGUMENT.

Trial courts have broad discretion to decide when a parent's historical behavior should no longer be used to restrict their residential time with their children. The decisions are never easy, but they are fact specific and the trial court is in the best position to assess the weight of the evidence and the credibility of the witnesses when determining what is in a child's best interest.

In this case, David Cullen engaged in acts of domestic violence against his wife Erin prior to their separation. At trial in April 2014, the court thoughtfully and carefully listened to two days of testimony and concluded that an equally shared residential schedule was in the best interests of the Cullen children based on the strengths of both Erin and David's parenting as well as the significant bonds they both had with their children. The trial court concluded mandatory restrictions on David's residential time were not necessary under RCW 26.09.191(2)(n), but ordered him to continue with domestic violence treatment as a condition of his ongoing shared residential time. To be sure the shared schedule would work for the Cullen children, the trial court allowed for a review hearing before the end of the summer if either parent felt it necessary.

Erin was unhappy with the trial court's decision, obtained new counsel, and decided to try again. In November 2014, the trial court listened to testimony and argument over five days and reached the same conclusion; the shared residential schedule was still in the best interests of the Cullen children and that mandatory restrictions on David's residential time were not necessary. Instead, the trial court required David to continue to engage in domestic violence treatment and put new limits in place to eliminate any unnecessary contact between Erin and David.

On appeal, Erin does not challenge any of the trial court's extensive findings. Her statement of the case relies largely on pleadings that were not considered by the trial court at trial in April or at the review hearing in November. She provides no meaningful argument with citations to the record as required by the rules of appellate procedure. Instead, Erin summarily asks this Court to substitute its judgment for the trial court's and give her a third chance to persuade a different trial court to see the evidence the way she sees it. If this Court chooses to overlook the deficiencies in Erin's brief, this Court should decline to second-guess the trial court's fact specific discretionary decisions, and affirm.

II. RE-STATEMENT OF THE CASE.

A. The April 2014 Trial.

Erin Cullen filed a petition to dissolve her 12 year marriage to David Cullen on April 3, 2013. CP 483-490. Erin and David have three children, Aidan, Nathan (“Nate”), and Clare. 4/14/14 RP 36. Immediate restraining orders prevented David from seeing the children, but the parties entered into an agreed temporary parenting plan allowing David to see the children unsupervised every other weekend and every Wednesday evening as long as he was in compliance with his domestic violence treatment. CP 315-325 (temporary parenting plan); CP 358 (minute entry); CP 337-341 (agreed temporary order); CP 436-39 (ex parte temporary restraining order). The restraining orders remained in place limiting David’s contact with Erin or children outside of his residential time, until May 29, 2013, when the parties agreed to David could attend extracurricular activities when Erin was not present. CP 309-311; 4/14/14 RP 63-65, 184-185. In December 2013, the parties agreed to appoint Jessica Arango as a guardian ad litem (hereafter referred to as “GAL”). CP 283-286.

On April 14, 2014, the parties appeared for trial. David testified about the domestic violence incident in early 2013 that led

to them moving into separate bedrooms and sharing parenting responsibilities thereafter. 4/15/14 RP 245-251; See also 4/14/14 RP 35 (Erin agrees remained in same home prior to separation). David and Erin both testified there were acts of domestic violence toward Erin during the marriage. 4/14/14 RP 51, 4/15/14 RP 328. David testified about the domestic violence treatment he started in March 2013 so he could see his children and about his progress in treatment. 4/15/14 RP 253-54, 256-59, 262-66.

The bulk of the testimony at the initial trial was about the Cullen children and their needs. In April 2014, Aidan was seeing two psychologists; Dr. DuHamel for issues related to the separation and Dr. Weigand for obsessive compulsive disorder (OCD). 4/14/14 RP 38-40, 4/15/14 RP 227-28. Erin testified that Aidan was struggling with his parents' separation and how his OCD affected his behavior, making him oppositional, particularly towards her. 4/14/14 RP 40-45, 57, 134. Erin testified Aidan seemed to be "struggling with an allegiance between parents" despite her attempts to reassure him both parents loved him. 4/14/14 RP 45. The GAL recommended Erin and Aidan enroll in a program recommended by Erin's therapist, Seth Ellner, called "Kid's Club" to address their challenging relationship. 4/14/14 107.

Nate was not having the same struggles as Aidan but was seeing Dr. Weigand for OCD and Tourette's syndrome, and his treatment was going well. 4/14/14 RP 45-46, 4/15/14 RP 277. Erin testified that Clare initially saw Dr. DuHamel at the time of the separation and then stopped because she was doing well, but she had gone back because she had developed "extreme fears" after watching scary movies at David's house. 4/14/14 RP 47-48. David was not aware Erin had taken Clare back to Dr. DuHamel, and expressed concerns about Erin's involvement with and influence on the children's counseling. 4/15/14 RP 277-78, 336-37.

Erin described Aidan as incredibly bright and intellectually mature. 4/14/14 RP 45. Erin and David both testified Nate had recently tested into the accelerated program at his elementary school. 4/14/14 RP 47, 4/15/14 RP 227. Erin testified about Clare's trouble reading at school, and both parents testified about Clare's recent eye surgery to improve her eyesight. 4/14/14 RP 47; 4/15/14 276-77. Erin also testified that David was smart and able to guide the children in their "intellectual pursuits." 4/14/14 RP 50. David testified about his involvement at the children's school historically and how the restraining order impacted his ability to be presently involved. 4/14/14 RP 184-86.

Erin testified David was very loving and affectionate, the kids loved him dearly, and they were broken hearted when they couldn't see him. 4/14/14 RP 49-50; see also 4/15/14 RP 313 (children's reaction when they finally got to see David). Erin knew David loved the children very much, and acknowledged there were good things about him. 4/14/14 RP 49-50. Erin acknowledged that David was involved in their extracurricular activities. 4/14/14 RP 159. David testified about coaching Aidan's soccer team in the past and being the assistant coach on the basketball team Nate had been playing on. After the restraining order entered, however, Erin prevented Nate from playing basketball on the team even though David offered to resign his coaching duties. 4/14/14 RP 187-192.

Erin testified she believed the visitation between the children and David was going well, there had been an improvement in David's behaviors and parenting, and that there had been no incidents of domestic violence. Despite this, Erin had rigid concerns about David's parenting style; things such as house rules, consistent bedtimes, content of television and social media, and meals. Erin also felt David was too much of a "friend" to the children. 4/14/14 RP 51, 54-59, 133-34, 168-69. Because of these concerns, she did not want the trial court to increase David's residential time from

what had been occurring. 4/14/14 RP 49, 59-60. In Erin's opinion, even if David completed all his domestic violence treatment,

there would have to be a lot of changes in adopting a parenting style that shows he's putting the children's needs above his own, which I believe is the only competent parenting style.

4/14/14 RP 169. David disagreed. He testified a shared residential schedule was appropriate because they had done it successfully when they lived together but apart in the home during the highly conflicted period prior the separation. 4/15/14 RP 324.

Erin's biggest concern at trial was keeping the restraining order in place, although she recognized it would be in the best interests of the children to remove it eventually. 4/14/14 63, 127-28. David, on the other hand, felt the restraining order was not necessary and that there could be restrictions within the parenting plan to make Erin feel comfortable while still allowing him to attend school and extracurricular events. 4/14/14 RP 192-93; 4/15/14 RP 134. He was particularly concerned continuing the restraining order would put him at risk of arrest given Erin's interpretation of the current order and her frequent calls to the police to report perceived violations. 4/15/14 RP 209-210, 258-60, 322.

The GAL testified that the children had a strong attachment with both parents and that having both parents in the children's lives would be an asset to everyone. She stated:

...I know both the mother and the father want to spend as much time as possible with the kids. And going into each home and seeing the kids with their parents, seeing all three of the children with their father, I saw nothing but positive interaction.

And you could tell that the children really care a lot about their father and want to spend time with him. And when the children were with their mother, I felt the same thing and observed the same thing, that they really felt comfortable in that home and comfortable with their mother and [it] just seemed like a really good relationship.

4/14/14 RP 100. In her report, the GAL stated Aidan and Nate both reported wanting to see David more, and Clare "misses one parent when she is with the other." CP 226. The GAL acknowledged that David wanted a shared residential schedule, but she recommended the current residential schedule continue with David's residential time contingent upon his continuing treatment in his domestic violence programs. 4/14/14 RP 99-101,105-06.

B. The Trial Court's Decision Following The April Trial.

The trial court found David engaged in a history of acts of domestic violence towards Erin. CP 84-85; 4/16/14 RP 13 (unchallenged finding). The trial court found David's behavior toward the children did not amount to a pattern of abuse. 4/16/14

RP 15-16 (unchallenged finding). The trial court was concerned about Erin's conduct, and came close to finding Erin had engaged in an abusive use of conflict which could pose a danger to the children. 4/16/14 RP 15-16, 21.

The trial court specifically found RCW 26.09.191(2)(a) would normally trigger a limitation on David's residential time but stated:

I don't find from the evidence at trial now over a year after any of that domestic violence that there is any likelihood that [David's] contact with the children or his residential time with them will lead to any physical, sexual, or emotional abuse or harm to any of the children. Whatever risk remains for that sort of adverse consequence to the children, in my judgment, is so remote that it is not in the best interests of the children to impose restrictions on the husband's residential time with the children.

I may be wrong, but that's my best assessment today having heard all of the testimony and reviewing the guardian ad litem's report. It seems consistent with the history in the relationship where the abuse was primarily directed toward the wife and not the children. So the ability of the Court to dispense with those [RCW 26.09.191(2)(a)] restrictions, I find, is supported by the evidence and the authority for dispensing with those restrictions found in RCW 26.09.191(2)(n).

4/16/14 RP 16-17 (unchallenged finding). The court also found:

[b]oth of these parents are extremely capable; they both enjoy the day-to-day activities, cooking, caring for the children, being domestic, helping with homework, being involved in sports, with school activities, going to parent-teacher conferences; and all of the day-to-day activities that

involve the children. That's not always the case. And I think that's something I'd like to encourage going forward.

Both have been very engaged with the children. The children are equally bonded to both parents, although Aidan, I think, at least for now has a conflicted relationship with this mother which they're trying to sort out through counseling.

Both parents in terms of proximity, are close to one another, and they're both close to the school.

4/16/14 RP 22-23 (unchallenged findings). Addressing the parental conflict, the trial court found:

[t]he children's problems are not solely attributed, in my view, to genetics or exposure to domestic violence. I think it is partly because they are caught in the middle of parental conflict. It's a conflict between the parents over issues of control and issues of decision-making and issues of significant differences in parenting styles.

4/16/14 RP 19 (unchallenged finding). Based on these findings, the trial court determined a shared residential schedule – two weeks alternating between parents – was in the children's best interests.

4/16/14 RP 21, 23 (unchallenged finding). The final parenting plan gave Erin sole decision making¹, and placed limitations on David's shared residential time by requiring he complete domestic violence treatment, enroll in and complete the DV Dads program, and complete a chemical dependency evaluation and follow any

¹ The final parenting plan allows for dispute resolution through mediation. Presumably, the parties agreed to this provision. See 11/16/14 RP 13 (court advises parties can agree to mediation); CP 90-91.

recommendations for treatment. 4/16/14 27-28, CP 87-88, 90. The trial court ordered Erin to enroll Aidan in “Kid’s Club” by June 1, 2014. CP 88.

Regarding Erin’s request for a continuing restraining order, the trial court found the original order was necessary and appropriate at the commencement of the case, but stated:

I don’t find there is a need going forward to continue that order in order to secure her physical safety.

4/16/14 RP 20 (unchallenged finding). Instead the trial court ordered limitations on Erin and David’s contact with each other during school and extracurricular events. CP 92.

Recognizing the schedule could be challenging, the trial court stated:

...if this isn’t working going forward, and there may not be enough opportunity to evaluate at the end of the school year how things have gone for the next couple months going forward, but, if it’s a disaster, I don’t want to perpetuate it going into the next school year. If it’s working reasonably well, then my plan is that this will be the permanent parenting Plan going forward...I don’t want to foreclose a review of the case that the end of the summer, and I’ll leave that discretion to either parent to initiate that review.

I will tell you at the outset what I will be looking at at that time...I’m going to want to see what the track record has been for the children at school, attendances, tardies, teacher reports, grade reports to the extent they are available, information or reports or declarations from teachers, school administrators, and anyone else who is significant in the children’s lives with respect to their schooling or outside

extracurricular activities. That's probably where I will place great emphasis.

I would also place great emphasis, I believe, on the reports that I may have from Dr. DuHamel and Dr. Weigand who have enough familiarity with things.

4/16/14 RP 31-33. On June 13, 2014, the trial court entered the final parenting plan containing the following provision:

The court will revisit the parenting plan without a change of circumstances at the end of Summer, 2014, if either party believes the plan is not working in the best interests of the children. At such a hearing, the court would entertain information from the school, the children's counselors, coaches, caregivers, and possible (sic) the children themselves, as to how they are doing with this plan. If the parties mutually agree upon a change to the plan it may be submitted to the trial Judge ex parte.

CP 89. The Decree of Dissolution did not contain a similar provision allowing for review of the necessity of a restraining order. See CP 3-11 (Decree). The Decree also contained a provision indicating the trial judge would retain jurisdiction over all future matters involving the case. CP 6.

C. The November 2014 Review Hearing.

Erin obtained new counsel and timely appealed the trial court's decision on July 9, 2014². CP 1-47. On August 21, 2014, Erin filed a motion requesting the trial court review the parenting

² By letter ruling dated September 29, 2014, this Court stayed review pending the outcome of the review hearing.

plan. In her motion, she asked the trial court to reinstate the residential schedule that had been in place prior to trial (i.e. David having unsupervised visitation every other weekend and every Wednesday), and to enforce other provisions of the Decree. Erin did not request a restraining order as part of her motion. CP 959-963. Both parties filed voluminous declarations, exhibits, and witness declarations, and the trial court reappointed Ms. Arango. See CP 610–958 (pleadings); CP 605-609 (Order Reappointing GAL).

The review hearing began on November 12, 2014. By that time, Erin was asking the trial court to completely eliminate David’s residential time rather than just return to the schedule that was in place prior to trial. 1 RP 15-16; 2 RP 22³. Erin also added a new request for a restraining order protecting her and the children under chapter 26.50 RCW. Resp. Supp. CP _____ (Petitioner/Mother’s Legal Memorandum). The main issues discussed at the review hearing were Erin’s allegations about David’s use of abusive language toward Erin around the children at two events in June 2014

³ The report of proceedings from the review hearing will be referred to as follows: 11/12/14 – 1 RP; 11/13/14 – 2 RP; 11/14/14 – 3 RP; 11/17/14 – 4 RP. The report of proceedings for the court’s oral ruling will be referred to as 11/21/14 RP.

and August 2014, David's neglect in providing the children medication, David's neglect by sending Clare to school dressed inappropriately, and how David's behavior negatively impacted the children – in particular Aidan. Over the next four days, the court heard testimony from Erin and David, the GAL, and 11 witnesses. CP 563; 2 RP 2 (trial court considered testimony at hearing and not earlier declarations).

Erin's testimony at the review hearing primarily focused on how she felt or reacted when she came into contact with David after trial. She testified her stress level had escalated and the conflict was through the roof because David showed up at school and soccer practices or games during her residential time. 1 RP 17-21; 2 RP 58-61 (Erin not comfortable seeing David in any situation); 2 RP 71-72 (Erin cannot heal because of continued abuse seeing David).

Erin testified she was fearful of David when he came to the home in June 2014 to obtain his belongings, but she did not call to police because she was afraid of him. Instead, she testified (contrary to her August declaration) that she confronted David about Clare not having the proper car seat and then called the police after David left with Clare. 2 RP 40-47, 63-66. Erin testified that she felt terrified all the time that David would disappear with the children because he

“took” them from her during her custodial time. 1 RP 23-24; 2 RP 84-90. Erin testified when she found out Clare was with David at the Challenge picnic in August 2014, she immediately believed David was going to kidnap Clare. 2 RP 78-84.

David did not agree with Erin’s characterization of how things had been going. He testified the limited interactions he had with Erin at the children’s school were fine. 4 RP 48-53 (no interaction at curriculum night); 4 RP 71 (at school during Erin’s residential time to talk to principal or for assembly); 4 RP 75 (volunteer during his residential time not Erin’s); 4 RP 76 (Erin giving children donuts and Halloween bags during David’s pick up at school). David testified that Erin stayed in the home when he came to pick up his property in June, but came outside to confront him about not having a car seat for Clare. 4 RP 89-97. David testified that he was not “taking” Clare from Erin at the Challenge picnic in August. 4 RP 124. He testified he did not see Erin when he arrived, that he wanted to keep his distance from Erin because of the restrictions in the parenting plan, and that he was playing on the playground with Clare when Erin found them, accused him of hiding Clare, and took all the kids home before the picnic was over. 4 RP 101-110, 121-125.

David acknowledged that he would attend the children's soccer practices and games, and testified

I have gone out of my way to be very conscious of [Erin's] presence at those things and not in any way interfere with her capacity to be at those games.

And so it feels as though there's nothing that I can do that would ever be looked upon as O.K., if that is her honest perspective of my behavior at an event like that.

4 RP 136. David recognized having contact with Erin at any time was impacting her, and, therefore the children. He testified:

While I agree with the Court's desire [in the original parenting plan] to make it so that the parents can both be at functions for the kids, it seems pretty clear that that's something that's now causing unrest, certainly for Erin, and I fear that it's causing additional unrest for the kids.

So I'm proposing that we don't have any such interaction anywhere, other than the handoffs of the kids themselves, which has to my mind worked well the whole time.

...hearing what I've heard, it seems as though there needs to be some adjustment. I just don't want a huge adjustment because the kids have gotten used to their lives.

4 RP 152-53. When asked if preventing David from attending any of the children's activities or events on her residential time would help alleviate her fear, Erin testified "no." 2 RP 77.

Regarding the impact the shared schedule was having on the children themselves, Erin did not testify about or raise any concerns to the GAL about their attendance or grades. 1 RP 1-36; CP 968-971. Erin did not report the children had any disciplinary problems

at school to the GAL, although Aidan was disciplined at school right after trial started. CP 968-971; 4 RP 2-3, 81-84. David, on the other hand, testified about how well each child was doing in school.

David testified that Clare was doing well in school; she doing better with reading but still behind because of her eyesight and she was doing well in math. He testified that Clare really liked her teacher and described her as a “pretty social, well-adjusted, confident little girl.” 4 RP 77-80. Regarding Nate, David testified he was very proud of Nate who had “jumped up” into the Challenge program at school that year and had received all “3’s and 4’s” on his recent progress report, with “4’s being exemplary.” 4 RP 80-81. Nate had perfect attendance. 4 RP 141. David testified that Aidan had just transitioned to middle school, and he had a close group of good friends. His grades had gone up and down, but he had a B average. 4 RP 84-85.

The GAL did not talk to the children’s teachers despite the trial court’s request. 2 RP 116-118; See also 2 RP 154-155. The GAL’s report indicated Ms. Freitas stated Clare and Nate were “doing better than many of the children in the context of the whole school” and there were no disciplinary problems. CP 979. Ms. Freitas told the GAL that Clare is always appropriately dressed for

school with the exception of one occasion where Erin pointed out that Clare's shorts were too short. Ms. Freitas also said she never would have noticed Clare's shorts if Erin did not point it out. CP 979; 2 RP 156. The GAL's report indicated Ms. Daniels said

Aidan is doing really well academically, does not have any discipline issues, seems to have a lot of decent friends, and appears happy for the most part.

CP 979. Ms. Daniels also reported Aidan was experiencing stress regarding "due to the family's current issues." She reported Aidan "is being put in the middle of an adult fight," Erin was "more overtly putting Aidan in the middle," and "Aidan is concerned [his] mother is going to cut off his visitation with his father." CP 979; see also 2 RP 152-53.

Regarding medical issues, Erin testified Aidan successfully completed his treatment with Dr. Weigand for OCD and Tourette's. 2 RP 27-28. Erin also testified the boys missed their mediation every single time they were with David, but could not remember when the boys last saw Dr. Weigand or Dr. DuHamel. 2 RP 23-25. In fact, Nate had not been back to see Dr. Weigand after July 10, 2014, because Erin stopped taking Nate to Dr. Weigand for his treatment after Nate told Dr. Weigand Erin was mad at him because he didn't like her boyfriend. 2 RP 27-28; 3 RP 160, 171-72; CP

978. Erin similarly could not recall when she last took Clare to see Dr. DuHamel. 2 RP 52-56.

David testified he spoke with Nate's nurse practitioner about his medication, and described the pill boxes they used to make sure both boys took their medication. David's bigger concern was that Nathan had not been back to see Dr. Weigand, and that Erin had not made any appointments at all until the GAL report came out in late October. 4 RP 31-36. The GAL did speak with the children's therapists. She did not identify when Dr. DuHamel last saw Clare despite the fact there was testimony at the first trial regarding the same issues Erin was raising at the review hearing. CP 976; Compare 2 RP 51-52 with 4/14/14 RP 47-48. The GAL did verify that neither of the boys had been back to see Dr. Weigand since July 2014. CP 977-78.

Erin did not testify the children were afraid to be with David or that they were reporting anything negative while in his care. She testified generally that she felt the children were uncomfortable when Erin and David were in the same place. Erin's primary concern seemed to be that the children felt like they had to choose between parents. 1 RP 16, 18-19, 21-22. Erin testified Clare seemed confused at the Challenge picnic, "like she felt she should be in two

places and didn't know who to choose," but she was not frightened. 3 RP 46. Erin described the children as stressed all the time, and she didn't "believe they're ever fine in their life right now." 3 RP 68. David described how much fun the children had visiting family in Utah and how they loved seeing San Francisco during their summer vacation. 4 RP 142-43. Kevin and Maureen Wright testified that the children were doing well in David's care, and that they seemed relaxed, calm, and happy. 2 RP 197-198, 200, 204, 207-08.

Erin's biggest concern was Aidan, and his continued oppositional behavior toward her. At the hearing, Erin attributed Aidan's behavior solely to his contact with David, and David's behavior around Erin. 3 RP 53-54, 68. Despite her trial testimony that Aidan's OCD caused him to be oppositional with her, Erin minimized this as a cause for his oppositional behavior after trial given she had not taken Aidan back for treatment. Compare 4/14/14 RP 40-45, 57, 134 with 3 RP 63-67. The GAL relied on Erin's report of Aidan's oppositional behavior, and agreed with Erin's opinion. CP 981-83; 2 RP 118, 120, 129-133, 165-67, 179-80. Seth Ellner, Erin's therapist, also relied on Erin's report of Aidan's behavior to form his opinions that Aidan was acting as a "proxy" for David. 1 RP 143, 149-50, 153.

However, Erin's testimony was rife with exaggeration. Erin testified about a burglary at her home in July 2014 where she confronted a man in her garage and was assaulted by him before he ran off. 2 RP 95-98. Officer Troy Mellema testified Erin never reported an assault and her details of the event on the night it happened were completely different. 3 RP 112-116. Erin told the GAL about an incident in August 2014 where she took Aidan's cell phone away and he became angry and told Erin she was a liar because his father had never been violent. Erin told the GAL Aidan also accused her of "DV" during that incident. CP 983. During her testimony about this incident, Erin described it differently and said Aidan came to her for a hug and then started yelling she was hurting him. She testified he "took off all his clothes and was cowering in the corner." 2 RP 36. Erin eventually testified to a third version of events and admitted that she had grabbed Aidan by the shoulders to discipline him. 2 RP 36-42.

Erin acknowledged that Aidan was obsessed with the idea that she thought he was a bad person because he was like David. Despite this, Erin admitted she didn't enroll Aidan in Kid's Club or seek any other counseling for him after the trial. She only sought counseling after Aidan's disciplinary incident at school during trial.

1 RP 27-28; 2 RP 49-50, 54-55, 73-77; 3 RP 51-54, 59-60; 4 RP 4. David testified he was also concerned about Aidan's behavior. In particular, David testified he felt Erin was telling Aidan that he was a bad person in light of the recent suspension. 4 RP 81-84.

Ultimately, the GAL testified she had no reason to suspect the bond between the children and both parents was any different than it was at trial, and the children continued to be well bonded with both parents. 2 RP 163; see also CP 986 (GAL acknowledges reduced time with father will negatively impact children because of their bond and deep love for him). Despite this, the GAL recommended that David's residential time drastically reduced to supervised visits for approximately six (6) hours per week based on "continued domestic violence, emotional abuse of a child, abusive use of conflict, and failure to perform parenting functions (medical neglect)." CP 989.

D. The Trial Court's Decision Following The Review Hearing.

Consistent with its oral decision at the conclusion of trial, the trial court was keenly interested in information at the review hearing regarding how the children were doing to decide if the shared schedule was working for them, not whether it was working for Erin

or David. See 14/16/14 RP 31-32; 11/21/14 RP 5-6, 10-11. After considering all the testimony and evidence, the trial court entered 33 unchallenged written findings to support its decision not to fundamentally alter the shared schedule. CP 563-567.

Chief among the trial court's findings is unchallenged Finding of Fact 1.7 which states:

1.7 The two week alternating schedule is still in the best interests of the children. The following other changes to the parenting plan are necessary to minimize the conflict between the parents and ensure the children's best interests continue to be met:

- a. Restricting a parent's presence at the children's school or educational, extra-curricular, or social events to the weeks the children are with that parent; provided, however, the mother may be at the children's school for her PTA activities during her non-residential time provided she arranges her schedule so that she does not have contact with father.
- b. Requiring the parents to pick up the children at the commencement of their residential time at school; or, for exchanges that will need to occur away from the school by requiring the exchange to occur at a neutral location and requiring the parents to either bring or provide a third-party for the exchange.
- c. Implementing a case manager to oversee all communication between the parents and requiring the parents to communicate through the case manager until the case manager believes the parents can communicate directly.
- d. Revising the method for telephone contact between the parents and the children to two phone calls per week

initiated by the children at designated times for up to one hour per call.

e. Requiring Aidan and the Mother to engage in specific therapy (Step Up) to address their conflicted relationship.

f. Requiring father to reengage in a one-year DV program and reengage in DV Dad's when eligible.

g. Revising the language of the parenting plan regarding medical appointments to ensure that both parents are informed of medical providers and so both parents can participate in the children's medical appointments during their own residential time.

CP 564-65 (unchallenged finding 1.7).

The trial court was not charitable toward either David or Erin in its oral ruling. The trial court was critical of David's behavior. It was troubled by David's use of abusive language toward Erin in the children's presence during a time David was in domestic violence treatment. The trial court opined that David had not learned enough in his current treatment, and found it was necessary for him to restart treatment. 11/21/14 RP 7-12. The trial court's specific findings state:

3.2 The father used abusive language toward the mother in the presence of the children on two separate occasions in June and August. This behavior is damaging to the children.

3.5 The father's use of abusive language toward the mother, and his lack of understanding about the impact on the children, indicates he needs to restart a one-year DV treatment

program. He also needs to reengage in DV Dads when he is eligible. If the father fails to comply with these treatment programs, further restrictions as suggested by the GAL may be necessary.

CP 566 (unchallenged findings). The trial court also found:

3.4 The father's use of abusive language toward the mother does not amount to an act of domestic violence against the mother as defined by RCW 26.50, and does not justify the issuance of a domestic violence protection order protecting the mother and the children from the father. The likelihood of a recurrence of the father's historical harmful or abusive conduct against the mother is still so remote that it would not be in the best interests of the children to limit their contact with the father.

Id. (unchallenged finding). Regarding Erin, the trial court noted her overall lack of credibility, and it expressed concerns over her descriptions of the incidents bringing them back to court and her failure to get any kind of help for Aidan despite the fact his behavior escalated over the summer while in her care. 11/21/14 RP 2-6, 9-10;

CP 564 (unchallenged finding 1.4). The trial court found:

2.2 There are significant issues surrounding the Mother's credibility.

2.3 The mother's claim that the father's behavior towards her is negatively affecting the children emotionally is not supported by the evidence.

a. The mother's complaint about Clare's dress code violation did not demonstrate the father is not capable of parenting Clare when the mother herself was the one who reported the violation to the school and made an issue of it.

b. The mother's complaint that the father fails to give the children their medication every time they are with him is not credible.

c. The mother's overreaction to the father's presence at the school picnic escalated the situation unnecessarily.

CP 565 (unchallenged findings). The trial court also noted Erin had not made progress in therapy regarding her anxiety and PTSD since April, and discussed how taking David "out of the picture" would be helpful to her. 11/21/14 RP 14. The trial court found:

2.5 The mother has not made a lot of progress in her own therapy to address her PTSD since the trial in April. The current parenting plan has not been beneficial to the mother or to her therapy. Eliminating unnecessary contact between the mother and the father will eliminate conflict that is detrimental to the mother and will assist her progress with therapy.

CP 566 (unchallenged finding).

The trial court ultimately focused on the children. It found it would be detrimental for the children to be raised solely by Erin or David. CP 564 (unchallenged finding 1.5). The trial court also found

1.1 The children are strongly, if not equally, bonded with both parents.

1.2 The current parenting plan is working for the children despite the fact it is not working for the parents.

1.3 The children are doing well in school based on the information presented through the Guardian Ad Litem and

the Guardian Ad Litem is satisfied they are currently doing well in school.

1.4 The children are thriving with the exception of Aidan's oppositional defiance toward his mother. Aidan's behavior escalated between June and August when he was primarily with mother. His behavior resulted in disciplinary action at school during trial.

CP 564 (unchallenged findings).

Based on these findings, the trial court entered a final parenting plan leaving the shared residential schedule in place. CP 545. The parenting plan placed limitations/restrictions on David and required him to reengage with new domestic violence services. CP 545, 547-48. The trial court also appointed a case manager, required Erin to engage in therapy with Aidan, and entered the following restriction at paragraph 3.13(5) for both parents in lieu of a restraining order:

[b]oth parents are restricted from attending any child's event (educational, extracurricular, social, etc.) that occurs during the other parent's residential time. In the event either parent comes to a place where the other parent is (with or without the children) the parent who arrives last is required to leave that place and not engage the other parent or the children. However, the mother may be at the children's school for hey PTA/school related activities during her non-residential time provided she arranges her schedule so she does not have contact with the father.

CP 549. Erin timely filed an amended notice of appeal. CP 491-543.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY KEEPING IN PLACE A PARENTING PLAN THAT PROVIDED FOR EQUALLY SHARED RESIDENTIAL TIME BETWEEN PARENTS. THE CHILDREN WERE THRIVING, RESTRICTING THE FATHER'S CONTACT WITH THE CHILDREN WOULD BE DETRIMENTAL TO THEM, AND THE CONFLICT IMPACTING THE MOTHER AS A RESULT OF THE FATHER'S PRIOR DOMESTIC VIOLENCE WAS ADDRESSED THROUGH LIMITATIONS ON THE PARENTS' INTERACTION WITH EACH OTHER.

1. Standard Of Review.

A trial court's decision to adopt a parenting plan is reviewed for an abuse of discretion. In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), cert. denied, 133 S. Ct. 889 (2013). In this case, Erin fails to assign error to any of the trial court's extensive findings of fact so they are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). As verities, the trial court's findings are binding on this Court, and the only inquiry on appeal is whether the trial court abused its discretion by entering its final orders based on the unchallenged findings. Moreman v. Butcher, 126 Wn.2d 36, 39-40, 891 P.2d 725 (1995); See also, In re Estates of Palmer, 145 Wn. App. 249, 265, 187 P.3d 758, (2008) (only those findings properly challenged under

RAP 10.4(c) are reviewed for substantial evidence) (citing In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998)).

A trial court abuses its discretion only when its decision is “manifestly unreasonable or based on untenable grounds or untenable reasons.” In re Katare, 175 Wn.2d at 35. In this appeal, Erin argues the trial court’s decision was manifestly unreasonable. See Appellant’s Brief, page 21. A decision is manifestly unreasonable “if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

In her brief, Erin cites RCW 26.09.191(2)(a)(iii) for the proposition the trial court abused its discretion because it failed to “impose mandatory restrictions” on David’s residential time. Appellant’s brief, pp. 22-23. In the six pages of argument she presents on this issue, Erin does not provide any citations to the record to support her argument. Her failure to comply with the basic rules of appellate procedure should preclude further appellate review on this issue, and this Court should affirm the trial court. See RAP 10.3(a)(6) (requiring arguments with citations to the record); Cowiche Canyon, 118 Wn.2d at 819 (an appellate court has no obligation to search the record for evidence supporting a party’s

arguments). If this Court chooses to ignore these deficiencies and reach the merits of Erin's argument, the trial court appropriately exercised its discretion.

2. The Trial Court Had The Authority Under RCW 26.09.191(2)(n), To Exercise Its Discretion And Decline To Limit The Father's Residential Time After Finding A Shared Parenting Plan Was In the Best Interests Of The Children So Long As The Father Continued With Domestic Violence Treatment.

Decisions on residential provisions are based on the child's best interests, as found at the time of trial. RCW 26.09.187(3)(a); In re Littlefield, 133 Wn.2d at 52. Because the trial court has a unique opportunity to observe the parties, an appellate court is "extremely reluctant to disturb child placement dispositions." In re Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (quoting In re Marriage of Schneider, 82 Wn. App. 471, 476, 918 P.2d 543 (1996)); see also In re Marriage of Murray, 28 Wn. App. 187, 189, 622 P.2d 1288 (1981) (appellate court will not disturb custody designation if findings demonstrate consideration of required factors under RCW 26.09.187(3)(a)).

RCW 26.09.187 provides criteria for establishing permanent parenting plans; RCW 26.09.191 provides applicable restrictions for those plans. RCW 26.09.191(2)(a) requires limitation of residential

time if the parent has engaged in a history of acts of domestic violence. RCW 26.09.191(2)(a)(iii); In re Marriage of Underwood, 181 Wn. App. 608, 611, 326 P.3d 793, review denied, 181 Wn2.d 1020, 340 P.3d 228 (2014). RCW 26.09.191(2)(a) does not describe what these limits are; this description is found in other sections of the statute. Underwood, 181 Wn. App. at 611. One of these sections is RCW 26.09.191(2)(n). Under that section, a trial court does not have to limit a parent's residential time if the court finds that contact with a parent will not harm the child and the likelihood of recurring harmful or abusive conduct is so remote limitations are not likely to be in the child's best interest. RCW 26.09.191(2)(n).

On appeal, Erin argues restrictions on David's time are mandatory under RCW 26.09.191(2) because of his history of acts of domestic violence, and the trial court's failure to grant those mandatory restrictions did not comply with the legislative intent identified in RCW 26.09.003. See Appellant's brief, pp. 22-27. Her argument ignores the law. The trial court clearly had the authority under RCW 26.09.191(2)(n) to decline to limit David's residential time and the trial court carefully and thoughtfully did so – twice.

Erin does not challenge the trial court's initial parenting plan following the April trial; she focuses solely on the parenting plan following the November review hearing. Her sole reference to the trial court's April decision is as follows:

[t]hough the trial court made...express findings under [RCW 26.09.191(2)(n)] in its ruling of April 16, 2014,...the trial court made no such findings in its ruling of November 21, 2014.

Appellant's Brief, p. 22. This statement ignores the trial court's written findings of fact following the review hearing. Specifically, the trial court found:

1.5. Having the children raised solely by the mother or the father would be detrimental to the welfare of the children.

1.6. Suspending the father's visitation or limiting his visitation to professional supervised visits for several months as recommended by the Guardian Ad Litem until he gets further along in DV therapy will be damaging to all three children, not just Aidan.

3.3. The father's use of abusive language toward the mother does not amount to an act of domestic violence against the mother as defined by RCW 26.50, and does not justify the issuance of a domestic violence protection order protecting the mother and the children from the father. The likelihood of a recurrence of the father's historical harmful or abusive conduct against the mother is still so remote that it would not be in the best interests of the children to limit their contact with the father.

3.4. Continuing contact between the father and the children will not cause physical, sexual, or emotional abuse or harm to the children.

CP 564, 566 (unchallenged findings of fact). These findings amply demonstrate the trial court considered and relied upon RCW 26.09.191(2)(n) when deciding not to eliminate or restrict David's residential time. An express reference to the statute itself is not necessary.

Erin's remaining argument relies on vague references to the testimony from the GAL, Mark Adams, and Seth Ellner, at the review hearing as well as to four studies about the effects of domestic violence on children. See Appellant's brief, p. 23-25. These studies were not part of the evidence considered by the trial court and vague references regarding the effect of domestic violence on children in general is singularly unhelpful to this Court in this appeal regarding the Cullen children.

The actual testimony at the November hearing is illuminating. Mark Adam generally testified about how domestic violence can impact a child's development, but he did not provide any opinion specific to Aidan, Nate, or Clare Cullen. 1 RP 44-45. Instead, Mr. Adams testified "all behavior sends a message and communicates meaning. So...all of us as individuals have an impact on those kids that we have interaction with." 1 RP 82. Mr. Ellner testified he did not have a therapeutic relationship with the

Cullen children and did not consult with any of the child psychologists that had been providing treatment to them. Mr. Ellner admitted his opinions regarding Aidan's behavior were based primarily on information he received from Erin and from the GAL report. 1 RP 149-150, 153; See also 11/21/15 RP 5 (trial court's oral ruling); 2 RP 68 (Erin testifies she never gave Mr. Ellner children's therapy records). The GAL testified she did not talk with any of the Cullen children despite the trial court's specific request she do so as part of the review hearing. 2 RP 115-116. The GAL admitted that she relied primarily on the information she received from Erin to form her opinions regarding both David's and the children's behaviors. 2 RP 118, 120, 129-133, 165-167, 179-180. The trial court found Erin was not credible. CP 565 (unchallenged finding of fact 2.2); see also 11/21/15 RP 3-6 (trial court's oral ruling). Based on this, the trial court found

[Erin's] claim that [David's] behavior toward her is negatively affecting the children emotionally is not supported by the evidence.

CP 564 (unchallenged finding of fact 2.3).

Erin does not argue or discuss the remaining evidence before the trial court. To change the parenting plan as Erin requested, the trial court had to conclude the current residential schedule was

detrimental to the children, not to Erin. The trial court's findings show the exact opposite – that the children were strongly and equally bonded with both parents, were overall doing well with the current parenting plan, and, most importantly, that restricting time with David would be detrimental to them. CP 564 (unchallenged findings 1.1, 1.2, 1.3, 1.4, 1.7).

An appellate court does not review the trial court's credibility determinations or weigh conflicting evidence. In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). Based on the unchallenged facts found by the trial court, its decision that it was in the children's best interests to keep shared residential schedule in place, with additional limitations on both parents, was not manifestly unreasonable.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY DECLINING TO ENTER AN ORDER FOR PROTECTION UNDER RCW 26.50 AS PART OF A REVIEW HEARING REGARDING A PARENTING PLAN.

1. The Mother Does Not Appeal The Trial Court's Decision Not To Enter A Restraining Order In The Decree Of Dissolution.

Parties to a dissolution proceeding can request entry of restraining orders or domestic violence protection orders as part of

temporary orders (RCW 26.09.060) and as part of the Decree of Dissolution (RCW 26.09.050). RCW 26.09.050 provides:

In entering a decree of dissolution of marriage...the court shall determine the marital or domestic partnership status of the parties, make provision for a parenting plan for any minor child of the marriage or domestic partnership, make provision for the support of any child of the marriage or domestic partnership entitled to support, consider or approve provision for the maintenance of either spouse or either domestic partner, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing restraining orders including the provisions contained in RCW 9.41.800, make provision for the issuance within this action of the restraint provisions of a domestic violence protection order under chapter 26.50 RCW or an antiharassment protection order under chapter 10.14 RCW, and make provision for the change of name of any party.

RCW 26.09.050. Although issued under the restraint provisions of the Decree of Dissolution, an order based on the Domestic Violence Protection Act (DVPA), chapter 26.50 RCW, is properly labeled an “order for protection.” See State v. Turner, 118 Wn. App. 135, 139-141, 74 P.3d 1215 (2003), review denied, 151 Wn.2d 1015, 88 P.3d 965 (2004). (DVPA order for protection issued as a temporary order in dissolution case under RCW 26.09.060(3)).

The distinction between a “restraining order” and an “order for protection” is often and mistakenly blurred by family law practitioners and litigants. The orders, and the authority for their

issuance, are different. Requests for each order must be separately
pled in the mandatory form petition for dissolution developed by the
Administrative Office of the Courts. RCW 26.09.006; See
<http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=13>
(Form WPF DR 01.0100). A petitioner must plead and prove the
existence of domestic violence in order to obtain an order for
protection under the DVPA. RCW 26.50.030(1); Spence v.
Kaminski, 103 Wn. App. 325, 330-331, 12 P.3d 1030 (2000).
Under chapter 26.09, however, the court has the power to grant any
“necessary continuing restraining orders;” a finding of necessity is
the only requirement. RCW 26.09.050(1); Trowbridge v.
Trowbridge, 26 Wn.2d 181, 173 P.2d 173 (1946).

In this case, Erin did not request a domestic violence
protection order in her petition for dissolution; she requested a
continuing restraining order. CP 489. She obtained temporary
restraining orders under RCW 26.09.060 prior to trial. CP 436-39,
337-41, 305-11 (temporary restraining orders). At trial in April
2014, no orders protecting Erin under the DVPA existed, and she
did not request an order under the DVPA. See CP 146 (Petitioner’s
Trial Memorandum). The trial court denied her request to enter
restraining orders as part of the Decree, finding the restraints entered

in the earlier temporary orders were no longer necessary. 4/16/14 RP 20 (unchallenged finding); CP 52 (Decree).

On appeal, Erin does not challenge the trial court's decision denying her request for a continuing restraining order as part of the Decree. She does not reference the April 2014 trial testimony or challenge the trial court's finding at that time that further restraints were unnecessary. 4/16/14 RP 20. She does not challenge the Decree in any way. Instead, Erin argues the trial court abused its discretion by not entering an order under the DVPA as part of its review hearing in November.

Her brief on appeal restates, almost word for word, the legal memorandum she presented at the commencement of the review hearing, and she relies exclusively on the testimony and evidence presented during that hearing to support her argument. See Resp. Supp. CP ____ (Petitioner/Mother's Hearing Memorandum); Appellant's Brief, pp. 27-32. Her arguments, like her arguments regarding the parenting plan, fail to comply with the requirements of RAP 10.6. She provides scant references to the record to support conclusory statements that the trial court abused its discretion. Her failure to comply with the basic rules of appellate procedure should preclude appellate review. If this Court decides to review this issue,

the trial court's decision was well within the reasonable outcomes given the facts of this case.

2. Without A Petition and Notice Under RCW 26.50, The Trial Court Could Not Enter An Order For Protection As Part Of A Review Hearing Regarding A Parenting Plan.

At the time of the November hearing, Erin had not filed or served David with a separate petition for a DVPA order as required by RCW 26.50.020. Although Erin uses the words “restraining order,” “protection order,” and “order for protection” interchangeably in her brief, she consistently relies on chapter RCW 26.50 as the legal authority for her argument. See Appellant’s Brief, pp. 27-32. The first time David had notice Erin was requesting this type of order was on November 12, 2014, the first day of the hearing. Resp. Supp. CP _____ (Petitioner/Mother’s Legal Memorandum); See also, 1 RP 3 (request for continuance because of new stalking allegations). Without a petition and proper notice, the trial court did not have the authority to enter an order for protection under the DVPA. See RCW 26.50.060 (court may enter order after notice and a hearing). Erin has waived any argument in this Court that there were other statutes giving the trial court this authority. See

RAP 10.3(c); Cowiche Canyon, 118 Wb.2d at 809 (arguments raised for first time in reply brief are not considered).

3. Without A Finding Of “Domestic Violence” As Defined In RCW 26.50.010(1)(a) or (1)(c), The Trial Court Properly Exercised Its Discretion And Did Not Enter An Order Restraining The Father From The Mother And The Children.

If this Court concludes that Erin’s request for a “continuing restraining order” is sufficient notice for an order under the DVPA, the trial court did not abuse its discretion by denying Erin’s request. See In re Marriage of Stewart, 133 Wn. App. 545, 550, P.3d 25 (2006) (decision to grant DVPA order is reviewed an abuse of discretion).

Domestic violence is defined as

(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.

RCW 26.50.010(1). The trial court specifically found David’s abusive use of language and behavior toward Erin did not amount to an act of domestic violence under this statute to warrant the issuance of a protection order. See CP 566 (unchallenged finding 3.3). This unchallenged finding, together the trial court’s unchallenged finding

regarding Erin's lack of credibility, demonstrate the trial court considered the correct legal standard, weighed the competing evidence, and appropriately exercised its discretion to deny her request for an order for protection. See Moreman, 126 Wn.2d at 39-40 (only inquiry for appellate court is whether unchallenged findings support trial court's conclusion).

Erin's argument that the trial court abused its discretion by failing to enter an order under RCW 26.50.010(1)(a) is legally flawed. She incorrectly states that the trial court only needed to find a history of abuse plus "present fear" to enter an order for protection under RCW 26.50.010(1)(a). Appellant's brief, p. 28-29. Present fear alone is insufficient. The present fear must be of "imminent" harm, and it must be reasonable. In re Marriage of Freeman, 169 Wn.2d 664, 674, 239 P.3d 557 (2010). The trial testimony Erin cites in her brief does not demonstrate she felt in fear of imminent harm when she was around David at soccer games, the children's school or events, or the grocery store. See Appellant's Brief, p. 28-29 (citing 1 RP 18-24). She did not testify she was in imminent fear of harm when David came to get his property in June, 2 RP 41-45, and she didn't testify she was in imminent fear of harm at the Challenge picnic. 3 RP 44-45. Further, Erin provides no argument

regarding the reasonableness of her fear, and, given the trial court's unchallenged credibility finding, it is impossible for her to make such an argument. Without evidence of a reasonable fear of imminent harm, the trial court did not abuse its discretion by refusing to enter an order for protection under RCW 26.50.010(1)(a).

Erin correctly cites the statutory definition of stalking to argue the trial court abused its discretion by not entering an order under RCW 26.50.010(1)(c), but this argument fails based on a lack of evidence. To establish stalking, Erin had to present credible evidence to demonstrate (1) that David intentionally followed or harassed her on two or more occasions; (2) that she feared physical injury; (3) that a reasonable person in the same situation would also experience fear; and (4) that David intended to frighten, intimidate, or harass Erin or knew or reasonably should have known Erin was afraid, intimidated, or harassed. See RCW 9A.46.110.

Erin does not provide any argument regarding each of these elements in her brief. Instead, she just summarily argues the "clear testimony" at trial showed David "has taken specific steps to target and intimidate Russell Jack" and that David took "specific steps" to stalk Erin in the presence of the children. See Appellant's brief, p.

31 (citing 1 RP 181-187 and 1 RP 21-22). Erin grossly overstates the trial testimony. Mr. Jack testified he felt David's conduct was "a little strange and unnerving." 1 RP 184; see also 11/21/14 RP 7 (trial court notes Mr. Jack did not find David's behavior intimidating so it could not be considered stalking).

Further, there was no testimony about any "specific steps" to "stalk" Erin. The trial court did not find David intentionally followed Erin and children to Fred Meyer, Target, and QFC. See 11/21/14 RP 10 (trial court questions whether contact is accidental but concludes no stalking). Erin did not testify she felt in fear of physical harm during these encounters with David, 1 RP 20-21, and her own conclusory testimony that she considered David's behavior "stalking" is not sufficient. 2 RP 93.

The record is completely devoid of any specific credible testimony regarding the elements to establish stalking. Without it, the trial court did not abuse its discretion by refusing to enter an order for protection under RCW 26.50.010(1)(c).

C. THE MOTHER CANNOT REMOVE THE TRIAL JUDGE UNDER RCW 4.12.050(1) IN THE EVENT OF REMAND BECAUSE THE TRIAL JUDGE HAS MADE A DISCRETIONARY RULING.

Erin's desire to avoid future proceedings in front of the trial judge, Judge Bowden, is understandable given the circumstances. After sitting through a two day trial and a four day evidentiary hearing, Judge Bowden had a significant difference of opinion regarding what was in the best interests of the Cullen children, as well as significant concerns about Erin's credibility. If this Court concludes Judge Bowden abused his discretion, and remands for further proceedings, Erin wants the opportunity to convince another jurist of the truth of her claims. This Court cannot give her this opportunity.

There is no constitutional right to the removal of a judge; the right is created by statute. In re the Marriage of Lemon, 59 Wn. App. 568, 572, 799 P.2d 748 (1990). A party or attorney has one opportunity to file an affidavit of prejudice against a judge before whom an action is pending, provided that the "motion and affidavit is filed and called to the attention of the judge" before the judge has made any discretionary ruling. RCW 4.12.050(1). If this Court

determines a remand is appropriate, the remand must be to Judge Bowden. He has made discretionary rulings. Erin has no ability to file an affidavit under RCW 4.12.050(1).

D. THE TRIAL COURT DETERMINED THERE WAS NO EVIDENCE TO CONCLUDE THE FATHER WAS INTRANSIGENT AT TRIAL, AND HE IS NOT INTRANSIGENT ON APPEAL. THIS COURT SHOULD DENY THE MOTHER'S REQUEST FOR FEES.

Erin requests attorney fees and costs on appeal under RAP 18.1 based on RCW 26.09.140, the "need and ability to pay" statute, and based on David's intransigence. The trial court specifically denied Erin's requests following the review hearing finding:

[t]here is no information before the court for an award of attorney fees based on need and ability to pay. The court does not find sufficient misconduct or intransigence on the part of the father to award fees to the mother or to reallocate the payment of the GAL fees.

CP 567 (unchallenged finding 4.3). Erin does not assign error to this finding or otherwise challenge the trial court's decision to decline to award fees.

Intransigence on appeal can result in an award of fees. Chapman v. Perea, 41 Wn. App. 444, 456, 704 P.2d 1224, review denied, 104 Wn.2d 1020 (1985). However, intransigence is fact specific, and Erin makes no argument that David's conduct on

appeal unnecessarily increased her litigation costs. See Id.
(intransigence demonstrated by filing of motions in appellate court).

E. BECAUSE THE MOTHER FAILS TO COMPLY WITH THE RULES OF APPELLATE PROCEDURE AND SIMPLY ASKS THIS COURT TO SECOND-GUESS THE TRIAL COURT, THIS COURT SHOULD AWARD FEES TO THE FATHER UNDER RAP 18.9(a).

This Court should award David attorney fees and costs on appeal under RAP 18.9(a) for this frivolous appeal. “An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” Chapman, 41 Wn. App. at 455-56. Erin fails to follow the rules of appellate procedure, and her arguments turn on the trial court's clear and explicit determinations of credibility, and the weight of the evidence. Because these matters are not subject to appellate review, this Court cannot find an abuse of discretion, and there is no reasonable possibility of reversal.

IV. CONCLUSION.

It is within the purview of the trial court, after considering all of the facts and circumstances of each case, the evidence and the demeanor of the witnesses, and the credibility of the parties, to exercise its discretion and enter a parenting plan it concludes is in a child's best interest. An appeal of the trial court's discretionary

decision regarding a parenting plan is not an avenue for a litigant to simply re-argue their case and hope for a better outcome as Erin has done here. The record amply demonstrates the trial court thoughtfully and carefully considered the appropriate legal standards at the time of trial and at the review hearing. The trial court's decision is not manifestly unreasonable and should be affirmed. Similarly, even if the trial court had the authority to enter a protection order under Chapter 26.50 RCW as part of the review hearing regarding the parenting plan, it did not abuse its discretion by refusing to do so without a finding of domestic violence.

David requests this Court affirm the trial court and award him fees and costs pursuant to RAP 18.9(a).

Respectfully submitted this 27 day of April, 2015.

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By 

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Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 28 day of April, 2015, I caused a true and correct copy foregoing document to be delivered to the following:

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Dated this 27 day of April, 2015 at Everett, Washington.



Karen D. Moore, WSBA 21328