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Division I
State of Washington
No. 73345-1-I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

ALEKSANDRA MILUTINOVIC,

APPELLANT,

v.

CHRISTOPHER OLIN MORITZ,

RESPONDENT.

**APPEAL FROM THE SUPERIOR
COURT OF KING COUNTY**

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Trial court erred by entering a Continuing Restraining Order against Ms. Milutinovic (and finding that she had agreed to this) in Section 3.8 of the Decree of Dissolution under RCW 26.09.050 with criminal penalties for disturbing the peace of Mr. Moritz or coming within 500 feet of his home, work place, school, or place of worship.
2. Trial court erred in entering Finding of Fact 2.13, by stating that the mutual restraining order in Section 3.8 of the Decree of Dissolution continued the same provisions of the temporary restraining order entered on May 15, 2014 (which in fact restrained only Mr. Moritz).
3. Trial court erred in entering a Continuing Restraining Order against Ms. Milutinovic without findings of fact to support such an order against her and when the findings of fact only supported the Continuing Restraining Order provisions which applied to Mr. Moritz.
4. Even if findings of fact and conclusions of law had been entered, substantial evidence would not support issuance of a Continuing Restraining Order against Ms. Milutinovic.
5. Trial court erred in entering provisions in Section 3.15 of the Order of Child Support and Section 4.2 of the Parenting Plan giving Mr. Moritz absolute veto power over incurring more than \$1,000.00 per month in expenses for work-related child care, educational expenses, and extracurricular activities.
6. In entering the Order of Child Support, trial court erred in failing to require each parent to pay their proportionate share of health insurance premiums (a health care cost mandated to be shared between the parents based on respective shares of net income under RCW 26.19.080(2)), and instead making Ms. Milutinovic pay all the health insurance costs, without contribution by Mr. Moritz.
7. Trial court erred in the Judgment Summary on the Order of Child Support by ordering only 6% per annum interest on back child support, when RCW 4.56.110(2) requires 12% per annum interest.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in entering a restraining order against Ms. Milutinovic under RCW 26.09.050, carrying the same gross misdemeanor and felony penalties for violation as the domestic violence protection order issued under Chapter 26.50 RCW against Respondent Christopher Moritz (which was extended as a result of the trial), when there were no specific findings of facts or conclusions of law (or appropriate evidence) to supporting the issuance of such a restraining

order against Ms. Milutinovic, when Mr. Moritz was the only party alleged or proven to have committed wrongful acts against the other party, and when Mr. Moritz had not petitioned or otherwise placed Ms. Milutinovic on proper notice that such order was sought?

2. Did the trial court err in giving Mr. Moritz veto power over having to pay his proportionate share of child care, educational and other special child raising expenses (in violation of RCW 26.19.080(3)), when Ms. Milutinovic was given sole decision-making power under RCW 26.09.187(2)(b) due to Mr. Moritz's domestic violence and other abuse?

3. Did the trial court err in failing to require each parent to pay their proportionate share of health insurance premiums for the children (a health care cost mandated to be shared between the parents based on respective shares of net income under RCW 26.19.080(3)), and instead making Ms. Milutinovic pay all the health insurance costs, without contribution by Mr. Moritz?

4. Did the trial court err in ordering only 6% per annum interest on back child support, when RCW 4.56.110(2) requires 12% per annum interest on back child support?

C. STATEMENT OF THE CASE

Appellant Aleksandra Milutinovic and Respondent Christopher Moritz were married on August 8, 2008 and separated on November 25, 2013. (CP 58) Two children were born of the marriage, Sophia in 2008 and Alexander in 2010. (CP 61)

Ms. Milutinovic filed a petition for a domestic violence protection order against Mr. Moritz on November 25, 2013, which was consolidated with the dissolution action. Ms. Milutinovic was granted a one year protection order on May 15, 2014 against Mr. Moritz, expiring on May 15, 2015. This protection order restrained Mr. Moritz from all contact with Ms. Milutinovic and the children (except for supervised visitation under the parenting plan), from assaulting, harassing, stalking, or threatening Ms. Milutinovic or the children, from coming within 500 feet of the home,

work place, school, or place of worship of Ms. Milutinovic or the children, required Mr. Moritz to surrender all firearms and other deadly weapons, and required Mr. Moritz to get domestic violence treatment. (CP 12-15)

Ms. Milutinovic filed a Petition for Dissolution on February 7, 2014. (CP 1-6) In Section 1.11 of the Petition, Ms. Milutinovic asked for a Continuing Restraining Order against Mr. Moritz to prevent him from disturbing the peace of herself or the children, from entering or coming within 500 feet of the home, work place, school, or place of worship of herself or the children, or from molesting, assaulting, harassing or stalking her. (CP 3)

A Temporary Restraining Order was entered on May 15, 2014, solely against Mr. Moritz. (CP 17-20) This Temporary Restraining Order protected Ms. Milutinovic and the children, and prohibited Mr. Moritz from disturbing the peace of Ms. Milutinovic or the children, from entering or coming within 500 feet of the home, work place, school, or place of worship of Ms. Milutinovic or the children, or from molesting, assaulting, harassing or stalking Ms. Milutinovic. (CP 18)

Mr. Moritz filed a Response to the Petition for Dissolution on June 27, 2014. (CP 21-22) Among other things, Mr. Moritz denied there was any need for a Continuing Restraining Order against himself (CP 21) and did not request any such order against Ms. Milutinovic. (CP 22)

On December 23, 2014, Ms. Milutinovic filed a motion to extend the domestic violence protection order until May 15, 2017 (CP 34-35) and set the motion to be heard as part of the dissolution trial. (CP 32-33)

Mr. Moritz agreed to have the domestic violence protection order against him extended for two years beyond the trial date. (CP 60)

A two year domestic violence protection order was entered against Mr. Moritz on January 27, 2015, expiring on January 26, 2017. (CP 99-104) This protection order restrained Mr. Moritz from all contact with Ms. Milutinovic and the children (except as provided by the parenting plan), from assaulting, harassing, stalking, or threatening Ms. Milutinovic or the children, from coming within 500 feet of his home, work place, school, or place of worship of Ms. Milutinovic or the children, and required Mr. Moritz to surrender all firearms and other deadly weapons, and required Mr. Moritz to get domestic violence treatment. (CP 100-102)

The dissolution action was tried from January 5 to 8, 2015 (CP 57) and final orders entered on January 26, 2015. These included a Decree of Dissolution (CP 92-98), Findings of Fact and Conclusions of Law (CP 57-64), Parenting Plan (CP 65-76), and Order of Child Support. (CP 77-91)

Section 3.8 of the Decree of Dissolution contains a Continuing Restraining Order. Several provisions of this order are mutual, including restraining both Mr. Moritz and Ms. Milutinovic from disturbing the peace of the other, or from coming within 500 feet of his home, work place, school, or place of worship or the other. One provision applies only to Mr. Moritz, restraining him from molesting, assaulting, harassing or stalking Ms. Milutinovic. (CP 94)

The only Finding of Fact which appears to support this Continuing Restraining Order is Finding 2.13 (CP 60), which falsely states that the

mutual Continuing Restraining Order is merely continuing the provisions of the Temporary Restraining Order of May 15, 2014 (CP 17-20), which in fact restraining only Mr. Moritz (and not Ms. Milutinovic).

The Parenting Plan restricted Mr. Moritz's residential time and decision making based on a history of acts of domestic violence. (CP 65-66) Ms. Milutinovic was given primary residential time and Mr. Moritz was restricted to supervised visitation initially, with gradual increase to substantial regular residential time, provided that he enroll in and progress through domestic violence and other required treatment. (CP 66-72) Ms. Milutinovic was given sole decision-making authority in all areas, including education, non-emergency health care, and religious upbringing. (CP 73-74)

However, provisions were entered in Section 3.15 of the Order of Child Support (CP 82) and Section 4.2 of the Parenting Plan (CP 74) giving Mr. Moritz absolute veto power over Ms. Milutinovic incurring more than \$1,000.00 per month in expenses for work-related child care, educational expenses, and extracurricular activities. Unless Mr. Moritz specifically agreed to these expenses, he could not be obligated to pay more than \$1,000.00 per month for his share of these items. (CP 82)

The Order of Child Support did not require each parent to pay their proportionate share of health insurance premiums for the children. Only uninsured medical expenses were ordered to be divided in proportion to the parents' net incomes (41% for Ms. Milutinovic and 59% for Mr. Moritz) in Section 3.19 of the Order of Child Support. (CP 85) As a

result, Mr. Moritz is not required to share any of the expense for health insurance that Ms. Milutinovic is required to pay for the children through her employment in Section 3.18 of the Order of Child Support. (CP 83)

Section 3.20 of the Order of Child Support (CP 85) awarded Ms. Milutinovic a judgment for \$6,548.68 in back child support against Mr. Moritz. However, the Judgment Summary for this amount orders only 6% per annum interest on the back child support, instead of the 12% per year mandated by RCW 4.56.110(2). (CP 77) No explanation was given.

Ms. Milutinovic filed a motion for reconsideration on February 4, 2015 (CP 107-123), which was denied March 13, 2015. (CP 142) An appeal to the Court of Appeals was filed on April 10, 2015. (CP 159-213)

D. ARGUMENT

1. Continuing Restraining Order against Ms. Milutinovic Error, not Supported by Findings or Evidence, and Contrary to Law:

First of all, the “finding” by the trial court in Section 3.8 of the Decree of Dissolution (CP 94) that Ms. Milutinovic agreed to entry of a Continuing Restraining Order against herself was error and is totally without support in the record. Under CR 2A, the only agreements that can be enforced against the parties are those which are either signed by the parties (or attorneys), or which are entered on the record in open court.

Ms. Milutinovic has limited resources, and there is no reason for her to transcribe an entire four day trial, at the costs of many thousands of dollars, simply to prove that no such agreement was entered on the record. Counsel has reviewed the trial recordings with his client, and found no

such agreement by Ms. Milutinovic (or her attorney) made during the trial. If Mr. Moritz believes that Ms. Milutinovic made such an agreement at trial, then he (or his attorney) can either transcribe the portion of the trial (which would be very brief, if it actually existed) where Ms. Milutinovic made such an agreement – or request that Ms. Milutinovic be required to transcribe such portion of the trial. In addition, there is likewise no written agreement anywhere by Ms. Milutinovic to entry of a Continuing Restraining Order against herself – otherwise Mr. Moritz could simply designate such pleading for Clerk’s Papers and present it to this Court.

Next, Finding of Fact 2.13 (CP 60) is in error, where it falsely states that the mutual Continuing Restraining Order in Section 3.8 of the Decree of Dissolution (CP 94) was merely continuing the provisions of the Temporary Restraining Order of May 15, 2014 (CP 17-20). Obviously, the Temporary Restraining Order of May 15, 2014 restrained only Mr. Moritz, while the Continuing Restraining Order in Section 3.8 of the Decree of Dissolution adds several restraints against Ms. Milutinovic.

A Continuing Restraining Order entered under RCW 26.09.050 isn’t just some sort of “feel good” admonition. Rather, this is a very serious order, which is entered into law enforcement databases against the restrained party. When any restraining order is entered under Chapter 26.09 RCW, violation of provisions “excluding the person from a residence, workplace, school, or day care” or “from knowingly coming within, or knowingly remaining within, a specified distance of a location” (as are the provisions against Ms. Milutinovic) are criminal offenses under

RCW 26.50.110, which can be punished as either gross misdemeanors or Class C felonies, depending upon the circumstances of the violation. These are the SAME penalties which are provided for violation of a domestic violence protection order issued under Chapter 26.50 RCW.

RCW 26.09.050(1) allows a dissolution court to “make provision for any necessary continuing restraining orders”. There is little guidance in the statute, besides the word “necessary”, and apparently no case law on the subject of when a continuing restraining order with criminal penalties should be issued.

However, RCW 26.09.050(1) also allows a dissolution court to issue domestic violence protection orders under Chapter 26.50 RCW and anti-harassment orders under Chapter 10.14 RCW. Both of these causes of action result in protection orders with criminal penalties, and both of these require good reason, such as domestic violence or unlawful harassment in order to be issued. If a party’s conduct does not rise to the level of domestic violence or unlawful harassment, a dissolution court should find very compelling reasons to issue a restraining order with criminal penalties under the general provisions of RCW 26.09.050(1).

In the present case, the trial court found that Mr. Moritz had engaged in a long history of domestic violence against Ms. Milutinovic – a fact that was not in serious dispute. Not only was a Domestic Violence Protection Order issued against Mr. Moritz on May 15, 2014 (CP 12-16) and renewed for two years on January 27, 2015 (CP 99-104) – both with

the normal findings that domestic violence had been committed – but the trial court made further specific findings against Mr. Moritz, including:

The parties have had a tumultuous relationship. It has been marked by episodes of serious physical abuse of Petitioner by Respondent. Respondent admits he has no tools to deal with his frustration and anger, and instead lashes out physically at Petitioner. Respondent contends this reaction would not transfer to his children, and Petitioner has not alleged that it has, but Petitioner has always been the primary caregiver. Respondent has been away from home for extended periods of time. And Respondent's violent outbursts toward Petitioner have occurred with the children present.

Finding of Fact 2.21.3 (CP 62)

Basically, what we have here is a Domestic Violence Protection Order against Mr. Moritz, which imposes criminal penalties under RCW 26.50.110 if he comes within 500 feet of the home, work place, school, or place of worship of Ms. Milutinovic or the children. This DVPO is based upon solid and undisputed acts of domestic violence, found by the court.

While Ms. Milutinovic is clearly the VICTIM of domestic violence and other abuse by Mr. Moritz, and while there are NO findings of any wrongful conduct whatsoever on the part of Ms. Milutinovic, the trial court has effectively stated that Ms. Milutinovic is someone guilty of evil conduct and softened the harshness of the DVPO, by imposing a RCW 26.09.050(1) restraining order against Ms. Milutinovic, with the same criminal penalties under RCW 26.50.110 if she comes within 500 feet of the home, work place, school, or place of worship of Mr. Moritz.

When the Legislature overhauled the Domestic Violence Protection Act in 1992, it condemned the practice (then widespread) of

issuing mutual protection orders (especially without the petitioner having notice and opportunity to be heard), when only the respondent was guilty of committing domestic violence:

Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more. The crisis is growing.

While the existing protection order process can be a valuable tool to increase safety for victims and to hold batterers accountable, specific problems in its use have become evident. Victims have difficulty completing the paperwork required particularly if they have limited English proficiency; model forms have been modified to be inconsistent with statutory language; different forms create confusion for law enforcement agencies about the contents and enforceability of orders. Refinements are needed so that victims have the easy, quick, and effective access to the court system envisioned at the time the protection order process was first created.

When courts issue mutual protection orders without the filing of separate written petitions, notice to each respondent, and hearing on each petition, the original petitioner is deprived of due process. Mutual protection orders label both parties as violent and treat both as being equally at fault: Batterers conclude that the violence is excusable or provoked and victims who are not violent are confused and stigmatized. Enforcement may be ineffective and mutual orders may be used in other proceedings as evidence that the victim is equally at fault.

Laws 1992, ch. 111, § 1 (emphases added).

As a result, the Legislature has prohibited mutual domestic violence protection orders under RCW 26.50.060, unless both parties have

filed a petition or counter-petition, including a prohibition of any order against a petitioner, unless the petitioner is found to be the abuser:

(4) In providing relief under this chapter, the court may realign the designation of the parties as "petitioner" and "respondent" where the court finds that the original petitioner is the abuser and the original respondent is the victim of domestic violence and may issue an ex parte temporary order for protection in accordance with RCW 26.50.070 on behalf of the victim until the victim is able to prepare a petition for an order for protection in accordance with RCW 26.50.030.

(5) Except as provided in subsection (4) of this section, no order for protection shall grant relief to any party except upon notice to the respondent and hearing pursuant to a petition or counter-petition filed and served by the party seeking relief in accordance with RCW 26.50.050.

RCW 26.50.060(4),(5)

In the present case, the trial court clearly abused its discretion, as well as violating the express prohibitions of RCW 26.50.060, by effectively issuing a mutual domestic violence protection order – which also imposed the exact same potential criminal penalties against the victim Ms. Milutinovic – when only Ms. Milutinovic was seeking a domestic violence protection order, when Mr. Moritz had not even petitioned for a continuing restraining order (see Response to Petition for Dissolution, CP 21-22), when Mr. Moritz was the only person who was found to have committed domestic violence, and when there is not a single finding of any sort of bad conduct by Ms. Milutinovic to justify an order against her.

The absence of any findings of fact to justify a continuing restraining order against Ms. Milutinovic is also a serious error.

CR 52(a)(1) requires the court to enter findings of fact and conclusions of law in all actions tried upon the facts without a jury:

In all actions tried upon the facts without a jury ..., the court shall find the facts specially and state separately its conclusions of law.

In addition, CR 52(a)(2) requires findings and conclusions when temporary injunctions are granted or refused, and in all final domestic relations decisions, including uncontested dispositions. Since this is a dissolution action with a trial, findings of fact are very clearly required.

Thomas v. Thomas, 477 A.2d 728 (D.C. 1984), interpreted the District of Columbia domestic violence act. That jurisdiction uses federal-patterned civil rules similar to Washington rules.

The trial court entered a protection order simply based upon stating there was "good cause to believe" commission of domestic violence, without entering findings of fact. The respondent appealed, claiming that the trial court's ruling was a "farce".

The appellate court agreed with respondent, reversing and remanding to the trial court:

[T]he finder of fact must provide this court with findings sufficient to facilitate appellate review.... We have no such findings before us. This absence is particularly critical since appellant's sole contention is that the allegations offered by appellee are untrue. We hereby remand the record of this proceeding to the trial court with instructions to prepare a written statement of its findings, based upon the hearing already completed.

Thomas, 477 A.2d at 729.

A long line of Washington cases have uniformly required findings of fact and conclusions of law in all non-jury cases (both civil and criminal). Bard v. Klee, 1 Wash. 370, 25 P. 467, 27 P. 273 (1890); Colvin v. Clark, 83 Wash. 376, 145 P. 419 (1915); Western Dry Goods Co. v. Hamilton, 86 Wash. 478, 150 P. 1171 (1915); State ex rel. Dunn v. Plese, 134 Wash. 443, 235 P. 961 (1925); State v. Medcraft, 167 Wash. 274, 9 P.2d 84 (1932); Seattle v. Silverman, 35 Wn.2d 574, 214 P.2d 180 (1950); State v. Helsel, 61 Wn.2d 81, 377 P.2d 408 (1962); State v. Wood, 68 Wn.2d 303, 412 P.2d 779 (1966); State v. Russell, 68 Wn.2d 748, 415 P.2d 503 (1966); State v. Wilks, 70 Wn.2d 626, 424 P.2d 663 (1967); State v. Edwards, 3 Wn. App. 638, 477 P.2d 28 (1970); Turner v. Walla Walla, 10 Wn. App. 401, 517 P.2d 985 (1974).

On appeal, a judgment entered without findings of fact and conclusions of law must be vacated and remanded to the trial court for their entry, before the judgment may be reinstated.

Every reported decision has vacated judgments entered without findings and conclusions, with instructions for the trial court to make findings and conclusions before reentering judgment. Bard, 1 Wash. at 376; Colvin, 83 Wash. at 381-82; Western Dry Goods, 86 Wash. at 482; Plese, 134 Wash. at 450; Silverman, 35 Wn.2d at 578; Helsel, 61 Wn.2d at 83; Wood, 68 Wn.2d at 304; Wilks, 70 Wn.2d at 629; Edwards, 3 Wn. App. at 639; Turner, 10 Wn. App. at 406.

When a judgment has been vacated for entry of required findings and conclusions, the trial court has the discretion to take additional

evidence prior to reentry of judgment. Wilks, 70 Wn.2d at 629; Turner, 10 Wn. App. at 405.

In addition, Ms. Milutinovic was denied due process of law and the opportunity to defend herself against the possibility of a Continuing Restraining Order being entered against her at the dissolution trial. Mr. Moritz did not petition for this, and instead the trial court simply entered the order sua sponte after trial, as a total surprise to Ms. Milutinovic.

Procedural due process is required in any judicial proceeding which may affect life, liberty or property. U.S. Const. amend. XIV, sec. 1; Wash. Const. art. I, sec. 3. A full evidentiary hearing is required at some stage of a judicial proceeding. Case law uniformly holds the element of procedural due process to include presentation of witnesses and evidence, cross-examination of adverse witnesses, record of proceedings, compulsory process, representation by counsel, impartial decision maker, and a written decision based upon the evidence introduced at the hearing.

The trial court had entered a permanent protection order in In re Penny R., 509 A.2d 338 (Pa. Super. 1986) based upon a letter in the case file, without allowing any testimony to be presented. The appellate court ruled that due process rights of the parties had been violated:

The hearing of July 11, 1984 ... does not fulfill the requirement as no evidence was taken nor testimony elicited, beyond reference to the letter from the Mental Health Center, which was inadmissible. Such a record does not provide an adequate basis for appellate review....

Penny R., 509 A.2d at 340.

The appellate court reversed and remanded for a proper hearing, using due process principles:

Such a hearing, of course, must contain all the elements of due process, which, above all, requires sufficient evidence, which, by its preponderance, will support restriction of a member of the family to his or her rights under the law.... [A]n appropriate evidentiary proceeding with competent witnesses, called if necessary by the court, is required.

Penny R., 509 A.2d at 340.

The trial court in Ehrhart v. Ehrhart, 776 S.W.2d 450 (Mo. App. 1989) held a protection order proceeding. "No witnesses were sworn nor was any documentary evidence offered." Ehrhart, 776 S.W.2d at 451.

The appellate court reversed and remanded for a due process evidentiary hearing, holding:

Nothing in the record indicates that the witnesses were sworn, no other evidence was offered at the hearing and counsel was not afforded the opportunity to cross-examine witnesses. In short, no adversarial proceeding of any kind occurred in a case which contained a contested issue. We thus hold that there is insufficient evidence to uphold the award.

Ehrhart, 776 S.W.2d at 451.

Schraer v. Berkeley Property Owners, 207 Cal. App. 3d 719, 255 Cal.Rptr. 453, 461-62 (1989) held that due process required defendants in an anti-harassment action be allowed to present witnesses and evidence and cross-examine opposing witnesses, even though it was a "highly expedited lawsuit".

El Nashaar v. El Nashaar, 529 N.W.2d 13, 14 (Minn. App. 1995) held that a "full hearing" in a domestic violence action included the right

to present and cross-examine witnesses, to produce documents, and have a decision made on the merits.

Brand v. Elliot, 610 So.2d 37, 38 (Fla. App. 1992) held that a "full hearing" in a domestic violence action required presentation of evidence, and was not satisfied by mere argument of counsel.

Deacon v. Landers, 68 Ohio App. 3d 26, 587 N.E.2d 395, 398-99 (1990) held that "full hearing" in domestic violence actions included presenting evidence, both direct and rebuttal, as well as the opportunity to cross-examine opposing witnesses.

The Court of Appeals should reverse the trial court, and strike the provisions in Section 3.8 of the Decree of Dissolution which impose a Continuing Restraining Order against Ms. Milutinovic. Absent a total reversal, these provisions against Ms. Milutinovic should be vacated, with direction to the trial court to enter appropriate findings of fact, with Ms. Milutinovic having the opportunity to defend appropriately, and make a proper determination based upon those findings of fact as to whether a Continuing Restraining Order against Ms. Milutinovic is appropriate.

2. Financial Veto by Mr. Moritz Violates Sole Decision Making and Requirement to Apportion Expenses Based on Income

The trial court committed a legal error in Section 3.15 of the Order of Child Support (CP 82) when it barred Ms. Milutinovic from obligating Mr. Moritz to more than \$1,000 in additional monthly costs for special expenses – including work-related child care, educational expenses, and extracurricular activities, without Mr. Moritz's consent. The Parenting

Plan grants Ms. Milutinovic sole decision-making powers (CP 73-74), because of Mr. Moritz's domestic violence. (CP 66) But Section 3.15 improperly subjects Ms. Milutinovic's decision-making to Mr. Moritz's veto, contrary to statute and case law. In addition, the provision as written will have the effect of allocating special expenses on a basis other than comparative incomes – also contrary to statute and case law.

In the Parenting Plan, the trial court found that Mr. Moritz was abusive, and had committed domestic violence. As a result, the trial court assigned all decision-making powers to Ms. Milutinovic, as required by statute whenever a parent's authority is limited by RCW 26.09.191. *See* RCW 26.09.187(2)(b)(i), RCW 26.09.191(1). But Section 3.15 of the Order of Child Support forces Ms. Milutinovic to negotiate with Mr. Moritz and gain his agreement to otherwise reasonable special expenses, if they exceed \$1,000. Similarly, Section 4.2 of the Parenting Plan, after granting Ms. Milutinovic sole decision-making, states all expenses above \$1,000, not agreed to by Mr. Moritz, will be borne by Ms. Milutinovic.

These financial provisions in the Order of Child Support and the Parenting Plan place an arbitrary and inappropriate condition on Ms. Milutinovic's sole decision-making. A similar provision was invalidated in In re Marriage of Mansour, 126 Wn. App. 1, 11, 106 P.3d 768 (2004). Just as here, father had been found responsible of physical abuse and mother awarded sole decision-making powers. At the same time, though, the trial court required mother to get father's approval before authorizing extra-curricular activities or nonemergency health care that required

additional expenditures. The Mansour court held this provision violated statute because it undermined mother's decision-making powers:

Although the court ordered sole decision-making authority to the mother in matters of education and non-emergency health care, it also ordered that she was not entitled to commit the child to extracurricular activities that would interfere with the father's residential time, or incur additional expense, absent agreement of the parties or court order. The court further ordered the same for non-emergency health care that would involve significant expense.

The proviso protecting the father's residential time is logical and makes the paragraph consistent with other clauses in the plan. **But the father's financial veto substantially diminishes the mother's decision-making authority in violation of RCW 26.09.187(2)(b)(i), converting her authority to decide into an authority to propose.**

The father argues that if there is a conflict, the mother simply needs to go to court. **But it is not her burden to justify her decisions by seeking court approval.** The Legislature designed a system whereby sole decision-making is granted to the parent that has not committed physical abuse. Therefore, if the parent who has committed abuse wants to challenge a decision, it is his responsibility to go to court.

The trial court was correct to anticipate the potential impact of these decisions upon the financial well-being of the parties, and thus the best interest of the child. **But that concern may be alleviated by requiring that the mother give sufficient notice to the father of decisions that would incur significant costs, e.g., orthodontia or private school, so the father is able to seek timely court intervention if he chooses.**

Mansour, 126 Wn. App. at 10-11 (emphases added).

The provisions in question here, limiting Ms. Milutinovic's spending unless she gains agreement from Mr. Moritz, share the same

flaw as the invalid provision in Mansour, even though it does not apply until expenditures reach \$1,000. Reasonable costs for the child’s day care, education or extracurricular activities may exceed this amount, but Ms. Milutinovic will still be required to get Mr. Moritz’s permission before incurring these expenditures. The sole difference from Mansour is that Section 3.15 sets the line where Ms. Milutinovic’s decision-making powers are clipped at \$1,000 instead of zero. But once expenditures pass that arbitrary line, Ms. Milutinovic’s decision-making powers are again converted from a power to decide to a power to propose, with Mr. Moritz having an absolute non-reviewable financial veto.

As noted in Mansour, if Mr. Moritz believes proposed expenditures are not valid, either because not related to the categories of daycare, education or extracurricular expenses or because unnecessary or unreasonably excessive, he can bring the matter to the attention of the court by motion. *See* RCW 26.19.080(4) (“The court may exercise its discretion to determine the necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation”).

Besides infringing on Ms. Milutinovic’s sole decision-making powers, Section 3.15 also violates RCW 26.19.080(3), which states:

Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses **shall be shared by the parents in the same proportion as the basic child support obligation.**

(emphasis added). Pursuant to this statute, Washington courts have held a trial court errs when it requires special expenses to be shared in any proportion other than called for by the proportional share of parents' income, unless the court specifically finds reason for a deviation:

In Hewitt, this court subsequently agreed with *Casey's* conclusion that **a deviation from extraordinary expenses is permissible when the court deviates from the basic support obligation.** Hewitt, 98 Wn. App. at 89-90, 988 P.2d 496. In Hewitt, however, we reversed a 100 percent apportionment of travel expenses because the trial court did not deviate from the standard calculation. Hewitt, 98 Wn. App. at 90, 988 P.2d 496. Likewise, in Scanlon, we reversed a 50/50 apportionment that was not in proportion with the parties' incomes. Scanlon, 109 Wn. App. at 181, 34 P.3d 877.

A trial court has broad discretion in setting child support. In re Marriage of Peterson, 80 Wn. App. 148, 152, 906 P.2d 1009 (1995). **But the legislature, in enacting RCW 26.19.080(3), has eliminated that discretion when the court allocates extraordinary expenses.** Murphy, 85 Wn. App. at 350, 932 P.2d 722. In the only case to approve a deviation from the extraordinary expense allocation, the trial court also ordered a deviation from the basic support obligation. Casey, 88 Wn. App. at 668, 967 P.2d 982.

Here, the trial court did not deviate from the basic support obligation. Instead, it stated in its findings that it was ordering the 100 percent allocation partly because Yeamans' decision to move made the expenses necessary and partly because it was denying Knowles' request to reduce her basic support obligation from \$192 to \$25 per month. It expressly stated that its decision to deny Knowles' deviation request was to defray the travel costs to be imposed on Yeamans. **The Casey exception only permits a court to deviate from extraordinary expenses if it first deviates from the basic support obligation. It follows that if a court does not deviate from the basic support obligation, then it cannot deviate from the extraordinary expenses.** We therefore reverse the trial court's order requiring Yeamans to pay 100 percent of the long distance travel expenses.

In re Yeamans, 117 Wn. App. 593, 600-01, 72 P.3d 775, 779 (2003) (emphasis added), *See also* State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 427-28, 154 P.3d 243 (2007) (an allocation of extraordinary expenses not proportional to income allowed only in context of a deviation).

Here, the Order of Child Support specifically denies any deviation from standard child support calculation. There is no basis therefore for a division of extraordinary expenses other than by proportional income. But the challenged provisions will have the effect of dividing the expenses other than by income. Forcing Ms. Milutinovic to bear all expenses above \$1,000/month, if she cannot get Mr. Moritz's agreement, means her overall share of expenses will increase from 41% to something greater. Her only means to avoid this disproportionate division is to seek Mr. Moritz's permission for expenditures which, again, contradicts the grant of sole decision-making powers.

It is totally contrary to Washington law to give a domestic abuser financial veto power over the custodial parent's sole decision-making. Moreover, with such financial veto, the custodial parent victim of domestic violence is placed in a much worse position than the "normal" situation where both parents have joint decision making. When joint decision making is ordered, any disputes over expenses would be resolved through the dispute resolution process, and then can be appealed to the court. *See* RCW 26.09.184(4). But when a domestic abuser is given a financial veto, the custodial parent (who otherwise has sole decision making), does not have any

further recourse. The financial veto by the domestic abuser is simply the final decision on the matter, and the dispute resolution provisions do not apply,

Because they are contrary to statute and case law, the offending parts of Section 4.2 of the Parenting Plan and Section 3.15 of the Order of Child Support must be stricken. Mr. Moritz must not be allowed to have an unreviewable absolute veto power over the special expenses related to the children.

3. Health Insurance Costs must be Shared Pro-Rata by Income

Under RCW 26.19.080(2), ALL health care costs (including insurance) must be allocated between the parents, based upon the worksheet percentages:

(2) Health care costs are not included in the economic table. Monthly health care costs shall be shared by the parents in the same proportion as the basic child support obligation. Health care costs shall include, but not be limited to, medical, dental, orthodontia, vision, chiropractic, mental health treatment, prescription medications, and other similar costs for care and treatment.

Health care, long distance travel, and day care expenses are not accounted for in the basic child support obligation. RCW 26.19.080(2), (3). Once the trial court determines that the expenses not accounted for in the basic obligation are reasonable and necessary, “it is required to allocate them in proportion with the parents' income.” In re Yeamans, 117 Wn. App. 593, 600, 72 P.3d 775 (2003); In re Marriage of Scanlon and Witrak, 109 Wn. App. 167, 181, 34 P.3d 877 (2001); In re Paternity of Hewitt, 98 Wn. App. 85, 88-89, 988 P.2d 496 (1999); Murphy v. Miller, 85 Wn. App. 345, 349, 932 P.2d 722 (1997); RCW 26.19.080(2),(3) (such expenses “shall be shared by the parents in the same proportion as the basic child support obligation.”)

For example, in Yeamans, the trial court ordered the father to bear 100 percent of the long distance travel expenses. The trial court explained that it ordered the allocation “partly because [the father's] decision to move made the expenses necessary and partly because it was denying [the mother's] request to reduce her basic support obligation.” Yeamans, 117 Wn. App. at 601. The trial court “expressly stated that its decision to deny [the mother's] deviation request was to defray the travel costs to be imposed on [the father].” *Id.* The Court of Appeals reversed, holding “if a court does not deviate from the basic support obligation, then it cannot deviate from the extraordinary expenses.” *Id.* Nevertheless, because the amount of child support was determined in relation to the disproportionate travel expenses allocated, the Court of Appeals held that the trial court could revisit the issue on remand and determine whether to grant or deny a deviation based upon the evidence before it. *Id.*

Nothing in the statute authorizes the trial court to exercise discretion in the allocation of such costs. Although the trial court has broad discretion in setting child support, in enacting RCW 26.19.080, the Legislature has eliminated that discretion with respect to allocation of the costs designated in the statute. Yeamans, 117 Wn. App. at 601; Murphy, 85 Wn. App. at 350. The trial court's discretion is limited to determining whether the health care, day care, and other expenses not included in the basic support obligation amount are necessary and reasonable. In re Hewitt, 98 Wn. App. at 89; RCW 26.19.080(4).

Washington courts have recognized only one exception to the proportional allocation rule. That is, when a trial court decides to deviate from the standard support calculation, it may also deviate with respect to the expenses set forth in RCW 26.19.080. Yeamans, 117 Wn. App. at 600; Hewitt, 98 Wn. App. at 89-90; In re Marriage of Casey, 88 Wn. App. 662, 667, 967 P.2d 982 (1997). In Casey, where the mother's income was approximately 10 percent of the parties' combined income, the trial court granted the mother a deviation from her basic support obligation in the child support order. The order reduced her monthly payment to \$0 and imposed 100 percent of travel expenses on the father to transport the children from his new home in Texas to Washington, where the parents had lived during the marriage. The Court of Appeals affirmed the child support order on appeal, including its allocation of 100 percent of the travel costs to the father, because the trial court deviated from the basic support obligation. Casey, 88 Wn. App. at 667.

But the Order of Child Support in this case did not deviate from the standard calculation. Moreover, since Ms. Milutinovic makes only 41% of the parties' combined income, it would be hard to justify ordering a deviation that would instead require Ms. Milutinovic to contribute 100% of the children's health insurance premiums, and for Mr. Moritz to contribute absolutely nothing.

On remand, the trial court should be directed to allocate the health insurance premium costs between the parents based on their pro-rata net incomes, with 41% for Ms. Milutinovic and 59% for Mr. Moritz.

4. Back Child Support Must Bear 12% Annual Interest

RCW 4.56.110(2) mandates 12% per annum interest on back child support: “All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.”

The trial court must enter a judgment interest rate in compliance with the statutory interest rate set forth in RCW 4.56.110. In re Marriage of Knight, 75 Wn. App. 721, 731, 880 P.2d 71 (1994), *rev. denied*, 126 Wn.2d 1011, 892 P.2d 1089 (1995); (*quoting Safeco Ins. Co. of Am. v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 23, 680 P.2d 409 (1984)). “Failure to do so constitutes error meriting remand for correction of the judgment's interest rate to the statutory rate.” Knight, 75 Wn. App. at 731, 880 P.2d 71.

Here, Section 3.20 of the Order of Child Support (CP 85) awarded Ms. Milutinovic a judgment for \$6,548.68 in back child support against Mr. Moritz. But the Judgment Summary for this amount orders only 6% per annum interest on the back child support, instead of the 12% per annum mandated by RCW 4.56.110(2). (CP 77)

This Court must correct the interest rate on the back child support judgment to 12% per annum, as required by RCW 4.56.110(2).

5. Ms. Milutinovic Should be Awarded Her Attorney Fees

RCW 26.18.160 requires that a prevailing obligee in an action to enforce a child support order is entitled to reasonable attorney fees and costs, without having to show financial need. Hunter v. Hunter, 52 Wn.

App. 265, 758 P.2d 1019 (1988); In re Marriage of Anderson, 49 Wn. App. 867, 746 P.2d 1220 (1987). Part of this appeal involves Ms. Milutinovic enforcing the back child support obligation of Mr. Moritz by requiring him to pay interest on the \$6,548.68 in unpaid child support at the 12% per annum statutory rate. As such, Ms. Milutinovic is entitled to recover her reasonable attorney fees for this from Mr. Moritz.

Another part of this appeal involves Ms. Milutinovic enforcing her right to a proper Domestic Violence Protection Order against Mr. Moritz under Chapter 26.50 RCW by eliminating the improper Continuing Restraining Order which was entered against Ms. Milutinovic in violation of RCW 26.50.060(4),(5) and the principles set forth in Laws 1992, ch. 111, § 1. As such, this Court is authorized to award Ms. Milutinovic her reasonable attorney fees and costs on appeal under RCW 26.50.060(1)(g). Scheib v. Crosby, 160 Wn. App. 345, 353, 249 P.3d 184 (2011).

Finally, Ms. Milutinovic would request an award of reasonable attorney fees and costs for the overall appeal pursuant to RCW 26.09.140, which allows for an award of attorney fees based upon relative need, after considering one party's needs versus the other party's ability to pay. In re Marriage of Lilly, 75 Wn. App. 715, 880 P.2d 40 (1994). Pursuant to RAP 18.1(c), each party is required to file a financial affidavit at least 10 days before oral argument or other consideration of this appeal.

While Ms. Milutinovic was making 41% of combined income, per the Order of Child Support at trial, she has since lost her prior employment as a financial analyst and has considerably lower income at present. Mr.

Moritz is believed to still be working as a commercial diver, which is very well paid, and should be considerably more than Ms. Milutinovic makes.

If attorney fees are awarded, Ms. Milutinovic will file a declaration of attorney fees within 10 days after the decision pursuant to RAP 18.1(d).

E. CONCLUSION

The Continuing Restraining Order provisions in Section 3.8 of the Decree of Dissolution against Ms. Milutinovic should be reversed and stricken. The absolute financial veto provisions given to Mr. Moritz in Section 3.15 of the Order of Child Support and Section 4.2 of the Parenting Plan should be reversed and stricken. The Order of Child Support should be amended to require Mr. Moritz to pay his 59% pro-rata share of the children's health insurance premiums, based on the parties' relative net incomes. The interest rate on the judgment for back child support against Mr. Moritz should be corrected to the statutory rate of 12% per annum. Mr. Moritz should be required to pay the attorney fees and costs incurred by Ms. Milutinovic in this appeal.

RESPECTFULLY SUBMITTED on May 6, 2016.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the above and foregoing, postage prepaid, on May 6, 2016 to:

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Signed at Bellevue, Washington on May 6, 2016.

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