

COURT OF APPEALS
STATE OF WASHINGTON
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NO. 73404-1-1

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

CAROLINE MARIA VAUGHAN, a/k/a Caroline Caylor

Appellant,

v.

NATHANIEL CAYLOR,

Respondent.

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

The Honorable Mary Roberts

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

The trial court's parenting plan and order of child support constitute an unconstitutional prior restraint on Ms. Vaughan's federal First Amendment right to free speech because these orders prohibit Ms. Vaughan from providing to daycare providers, school personnel, or other parents associated with the child or child's friends any negative information regarding the father, who has an extensive criminal, drug, and alcohol abuse history, and was involved in a drug-fueled 2009 hostile standoff with police that resulted in the police shooting him in the face.

The trial court abused its discretion when it terminated the existing domestic violence protection order protecting Ms. Vaughan and the parties' infant daughter and declined to issue a new one. Further, the trial court committed legal error when it failed to properly apply ER 803(a)(4) and excluded as inadmissible hearsay Ms. Vaughan's letter from her obstetrician detailing the safety concerns Ms. Vaughan disclosed to the obstetrician during her medical visit on January 25, 2013, the same day as the altercation with Mr. Caylor.

The trial court abused its discretion by failing to provide for the child's best interests pursuant to RCW 26.09.184(1)(g) when it entered a parenting plan that requires the parties' toddler to spend approximately ten hours in cars and ferries every week to facilitate visits with the father who

had not availed himself of previously ordered supervised visitation nor attempted to see his daughter since the week she was born. Further, the trial court abused its discretion when it required the mother, who works full time, to provide daytime midweek transportation for the child from Redmond to Edmonds and back, as this schedule failed to consider the mother's employment schedule and make accommodations consistent with that schedule, as required by RCW 26.09.187(3)(a)(vii).

The trial court abused its discretion when it failed to provide for the child to have any vacation time at all with either of her parents, contrary to RCW 26.09.184(6).

The trial court abused its discretion when it ordered the child to spend a week on/week off with each parent during summer vacation when she begins school, because the parties live on opposite sites of Puget Sound and the trip between their homes, including the ferry, takes two hours and 25 minutes with no traffic or stops. This schedule is contrary to RCW 26.09.187(3)(a)(v) because it does not provide for the child's involvement with significant activities in the summer, effectively limiting her to activities of no longer than a week. It is also contrary to RCW 26.09.187(3)(b) because the parents live too far away from one another to share summer schedule parenting functions, specifically transporting the child to normal summer activities.

The trial court abused its discretion when it ordered the mother to pay \$30,000 in attorney's fees to the father related to intransigence in financial discovery and Ms. Vaughan's unsuccessful claim of domestic violence because the father's extensive discovery and examination on financial details was disproportionate to this six-month marriage with no real property and very limited assets and because punishing Ms. Vaughan financially for bringing a reasonable claim of domestic violence has an undesirable chilling effect on victims' access to the judicial system.

Finally, this case should be remanded to a different trial judge because the trial court's errors regarding the domestic violence issue are sufficient to question her impartiality and the record reflects that the trial judge would have substantial difficulty overlooking her extremely strongly stated views and findings on remand.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in ordering an unconstitutional prior restraint on Ms. Vaughan's federal First Amendment right to free speech when it entered section 3.15 of the Order of Child Support, specifically "[i]f the mother has told the daycare provider any negative information about the father, or allegations about the father, she shall cease doing so immediately."

2. The trial trial court erred in ordering an unconstitutional prior

restraint on Ms. Vaughan's federal First Amendment and Washington Constitution Article 1, Section 5 right to free speech when it entered a parenting plan containing VI. Other Provisions Miscellaneous 4.

Prohibitions. "The mother shall be prohibited from providing negative information about the father to day care providers, school personnel, or other parents associated with the child or child's friends."

3. The trial court abused its discretion and failed to provide for the child's best interests pursuant to RCW 26.09.184(1)(g) when it entered section 3.1 of the Parenting Plan requiring the child to travel from Redmond to Port Townsend and back on Wednesdays, and from Redmond to Port Townsend on Fridays and back again on Saturdays or Sundays.

4. The trial court abused its discretion pursuant to RCW 26.09.187(3)(a)(v) and RCW 26.09.187(3)(b) when it entered a Parenting Plan that imposes a week on/week off schedule during the summers when the child reaches school age, and the parties live two and a half hours apart across Puget Sound.

5. The trial court abused its discretion pursuant to RCW 26.09.184(6) when it entered a Parenting Plan that failed to provide for the child to have any summer vacation with either parent.

6. The trial court abused its discretion pursuant to RCW 26.09.187(3)(a)(vii) when it entered section 3.1 of the Parenting Plan

requiring Ms. Vaughan to transport the child from Redmond to Edmonds and back the same day on Wednesdays during her work hours, and from Redmond to Edmonds on Fridays during her work hours.

7. The trial court abused its discretion when it terminated the domestic violence order protecting Ms. Vaughan and the child from the father and found that no domestic violence had occurred.

8. The trial court abused its discretion when it excluded as inadmissible hearsay a letter from Ms. Vaughan's obstetrician describing Ms. Vaughan's disclosure to her of domestic violence safety concerns on the same day as the altercation with Mr. Caylor.

9. The trial court abused its discretion by ordering Ms. Vaughan to pay \$30,000 in attorney's fees for intransigence primarily regarding financial discovery when there was no real or community property other than personal items and no assets of any significant value. Finding of Fact 2.15, Conclusion of Law 3.7, Decree of Dissolution 1.2, Line E., Attorney fees \$30,000 and Section 3.13.

10. The following Findings, contained in Exhibit AF to the Findings of Fact and Conclusions of Law, are unsupported by substantial evidence in the record:

a. Third paragraph "the court specifically finds that the claims of domestic violence were false or greatly exaggerated."

b. Fourth paragraph "The wife's position in this case was not supported by the evidence."

c. Eleventh paragraph "The wife provided inconsistent versions of events, with such descriptions getting more and more dramatic."

d. Twelfth paragraph "The wife came to court and asked that the husband be evaluated, based on events in 2009, when such evaluations had already been completed."

e. Fourteenth paragraph "The wife provided information to the court and Family Court Services that was exaggerated, incomplete, deceptive and, at times, outright false. Many more hours of trial preparation and trial were necessitated by her statements."

f. Fifteenth paragraph "The wife and her counsel have maintained positions in this trial that were not supported by the evidence. The court finds that the wife has engaged in a pattern of serious intransigence that required the father to incur significant additional legal fees and costs."

g. Sixteenth paragraph "The court determines that \$30,000 of the husband's fees and costs should be paid by the wife, either directly to Nancy Hawkins or reimbursed to the husband."

11. The trial court's finding that the father has been unable to build

a relationship with the child due to the parties' relationship is unsupported by substantial evidence in the record.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The first Amendment to the United States Constitution prohibits prior restraints against protected speech. In re the Marriage of Suggs, 152 Wn.2d 74, 82-83, 93 P.3d 161 (2004), notes that an order prohibiting speech must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate. Here, the court prohibited Ms. Vaughan from speech involving "negative information about the father." Is this prohibition unconstitutional under the Federal and Washington Constitution? (Assignments of Error 1, 2.)

2. RCW 26.09.184(1)(g) directs the trial court to protect the best interests of the child. Here, the trial court ordered that the child must spend approximately ten hours per week in transit between her parents' residences in Redmond and Port Townsend. Is the trial court's order an abuse of discretion? (Assignment of Error 3.)

3. RCW 26.09.187(3)(a)(v) and RCW 26.09.187(3)(b) requires the court to take into account the parents' geographic proximity when determining whether it is in a child's best interest to frequently alternate her residence and to protect the child 's involvement in significant activities. Here, the parents live two and a half hours apart on opposite

sides of Puget Sound and the trial court ordered the child to alternate weeks at each parent's home during the summers once she begins school. Did the trial court abuse its discretion by failing to take into account the geographic distance between the parents' homes when fashioning a summer schedule? (Assignment of Error 4.)

4. RCW 26.09.184(6) requires the trial court to provide for summer vacations when there are no parenting limitations. Here, the trial court failed to provide the child any summer vacation with either parent. Did the trial court abuse its discretion by failing to follow RCW 26.09.184(6)? (Assignment of Error 5.)

5. RCW 26.09.187(3)(a)(vii) requires the trial court to consider each parent's employment schedule and make accommodations consistent with those schedules. Here, although the father is unemployed and the mother works full time, the trial court ordered the mother to transport the child from Redmond to Edmonds during her daytime employment hours on Wednesdays, and from Edmonds to Redmond on Fridays. Did the trial court abuse its discretion by failing to follow RCW 26.09.187(3)(a)(vii)? (Assignment of Error 6.)

6. RCW 26.50.010(1)(a) defines domestic violence in part as "physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household

members." Here, the court terminated the existing domestic violence protection order protecting Ms. Vaughan and the parties' child and failed to issue a new one even though Ms. Vaughan had a same-day emergency obstetrician visit to check for damage to her baby, and Mr. Caylor has a history of making threatening statements to police. Did the trial court abuse its discretion in failing to enter a domestic violence protection order? (Assignments of Error 7, 10a, 10b, 10c, 10e, 10f.)

7. The father was ordered in the original vacated parenting plan to have supervised visitation with the child; he never attempted to exercise the visitation nor did he attempt to exercise visitation after vacation of the original dissolution orders. At the time of this trial, he had never attempted to exercise visitation. Did the trial court abuse its discretion in finding that the father was unable to build a relationship with the child due to the parties' relationship? (Assignment of Error 11.)

8. ER 803(a)(4) provides an exception to the prohibition of hearsay for statements made for purposes of medical diagnosis or treatment. Here, the trial court excluded as inadmissible hearsay a letter from Ms. Vaughan's obstetrician describing Ms. Vaughan's domestic violence concerns shared for the purposes of diagnosis and treatment during her emergency obstetrician visit. Did the trial court abuse its

discretion when it excluded the obstetrician's letter? (Assignments of Error 8, 10b, 10e)

9. The trial court may consider the extent to which one spouse's intransigence caused the spouse seeking a fee award to require additional legal services. Discovery sanctions should be proportional to the nature of the discovery violation and the surrounding circumstances of the case. Here, \$30,000 attorney's fees were awarded primarily based on Ms. Vaughan's financial discovery violations. Did the trial court abuse its discretion by imposing disproportionate attorney's fees in a 6 month marriage where the court found no community property beyond minor undisputed personal items and no separate property that had been commingled with community property? (Assignments of Error 9, 10g.)

10. The wife testified that she repeatedly witnessed Mr. Caylor consume and sell illegal drugs while they were married in 2012 and 2013 and drink alcohol contrary to his medication guidelines. Did the trial court abuse its discretion by entering an unsupported finding that the wife came to court and asked that the husband be evaluated, based on events in 2009, when such evaluations had already been completed."? (Assignment of Error 10d.)

D. STATEMENT OF THE CASE

1. Procedural History. The parties were married in July 2012 and separated on January 25, 2013, before their child was born. CP 437. Ms. Vaughan filed for dissolution in February 2013 and received a default Decree of Dissolution in January 2014 providing for Mr. Caylor to have supervised visitation with the child. CP 11, CP 21. This dissolution was subsequently vacated. CP 447. Mr. Caylor never exercised his supervised visitation time. 1 RP 135, CP 461.

A Domestic Violence Order of Protection was entered protecting Ms. Vaughan and the parties' child on August 28, 2014. CP 403, CP 1025. In January 2014, Family Court Services completed a Domestic Violence Assessment which that recommended the trial court issue a Domestic Violence Order of Protection, require Mr. Caylor to participate in a state certified domestic violence batterer's treatment program, and that the father's residential time should be supervised. CP1040.

Trial took place from January 12-29, 2015. The trial court terminated the domestic violence order of protection. CP 464. Ms. Vaughan moved to reconsider on March 25, 2015, and the trial court denied her motion on April 10, 2015. CP 324, 473. This appeal timely followed. CP 965.

2. Relevant Facts.

a. Background. In May, 2009 Nathaniel Caylor, who later married the petitioner here, Carrie Vaughan, became suicidal when his girlfriend died. 2 RP 13. Mr. Caylor was in an apartment with his toddler, Wyatt, and according to his aunt, who called the police, Mr. Caylor was threatening to harm himself. Id. The aunt let police into the apartment building with her key and the police knocked on the door requesting entry. 2 RP 14. In response, Mr. Caylor became very agitated and swore at the police, telling them to go away. 2 RP 15. The police wanted to check Wyatt's safety but they were unable to do so. Id. After more cursing, shouting, and insults from Mr. Caylor, they called a crisis intervention officer. Id.

During the crisis officer's exchanges with Mr. Caylor, Officer Scott Miller at the scene heard Mr. Caylor threaten that if police entered his apartment he would shoot them. 2 RP 18-19. "If you guys come in here, I have a 20 gauge shotgun. I'm going to put slugs through the officers that come in here. If you try kicking the door open, you're going to hurt my son because he's right in front of the door."

Officer Miller also heard Mr. Caylor say "suicide by cop doesn't sound like a bad idea," and "there's going to be a hell of a firefight." 2 RP 21.

Eventually, an officer shot Mr. Caylor when he stepped out onto his porch; after the shot, police forced entry and determined that Wyatt was safe and there were no weapons in the apartment. 2 RP21-2. Later, Mr. Caylor received a \$1.975 million civil settlement. See <http://www.seattletimes.com/seattle-news/spd-1975m-use-of-force-settlement-thought-to-be-citys-largest/> . Mr. Caylor was convicted of felony harassment. CP 1033-34.

b. The parties' relationship and subsequent events. In April 2012, Mr. Caylor and Ms. Vaughan met when they lived next door in the Ballard neighborhood of Seattle. 1 RP 66. Mr. Caylor told Ms. Vaughan many tragic details of his life, and she thought he was very sweet. 1 RP 69. He also told her that he had a son who was eight years old but he was not allowed to see his son because the mother was "difficult." 1 RP 72, 77, 80-81.

In June, 2012 Ms. Vaughan became pregnant with Mr. Caylor's child and they decided the next month to marry. 1 RP 74. They moved in together at the end of July. 1 RP 82. At that point, Mr. Caylor had a tackle box with many prescription drugs for his shooting injuries. 1 RP 77. She told the court that Mr. Caylor began drinking heavily. 1 RP 92. Ms. Vaughan began spending much of her time in the bedroom to avoid exposing her unborn baby to the constant pot smoke in the main part of the

house. 1 RP 87. She also explained that he carried around a baseball bat in the middle of the night and check all the doors, and slept with a hunting knife under the pillow. 1 RP 93.

Soon Mr. Caylor had surgery, and when he came back home, according to Ms. Caylor, he had a major "temper tantrum" and screamed. 1 RP 94. Shortly afterward, in early September, Ms. Vaughan miscarried. 1 RP 94. After the miscarriage, their marriage was under a great deal of stress and Ms. Vaughan began to question what Mr. Caylor told her. 1 RP 97. He became angry and told her to "f----g die." 1 RP 98.

In November, 2012 Ms. Vaughan again became pregnant. 1 RP 109. Ms. Vaughan explained that after she became pregnant for the second time, Mr. Caylor became "increasingly violent ... he started throwing things at me ... he threw a remote control at my head ... he threw his wedding ring at my face. 1 RP 109-110. She also testified that "strange people were coming to our house in the middle of the day" and she believed he was selling drugs to them. 1 RP 110. He was almost constantly impaired or intoxicated. 1 RP 110.

On Christmas Eve 2012, they had an argument and according to Ms. Vaughan, "he came at me with a closed fist ... [h]e leaped from across the room ... [a]nd his fist was right up under my chin ... [a]nd he was pushing his fist into my chin saying that he wanted me to feel as bad as he

did." 1 RP 111. In general, Ms. Vaughan explained, Mr. Caylor's behavior went up and down and "when he was on a lot of drugs he would have a lot of energy." 1 RP 113.

On January 25, 2013, Ms. Vaughan explained, Mr. Caylor had filled their living room with pot smoke and when she asked that he not do that, he lit up his bong and blew marijuana smoke all over the living room. 1 RP 112. Ms. Vaughan responded by going back upstairs. 1 RP 112. While she was walking upstairs, Mr. Caylor demanded a ride to his pain management appointment, and Ms. Vaughan testified that "it was clear he was high. And he was enraged. And he was about to get out of control." 1 RP 112. She did not want to give him the ride. 1 RP 112.

Her phone was in her back left pocket and Mr. Caylor grabbed it out of her pocket and headed toward the garage. 1 RP 112. Ms. Vaughan followed him, she explained, because it was her work phone and it was a Friday, so she needed it. 1 RP 113. Mr. Caylor "started swatting me with his cane..." 1 RP 113. He had her phone in his right hand and a PICC line in his right arm, a tube that flowed antibiotics into his body. 1 RP 114. Mr. Caylor got in the car, which was in the driveway. 1 RP 114-15.

Ms. Vaughan stepped onto the running board on the driver's side and put her arm in the open window to try to reach her phone, and Mr. Caylor rolled up the window on her arm. 1 RP 115-16. Her arm was stuck

in the car and it was painful. 1 RP 117. Mr. Caylor put the vehicle in reverse and depressed the accelerator and the car headed toward a parked car at about 5 miles an hour. 1 RP 117-18. Then, Ms. Vaughan explained, "he is going straight for the parked car. I'm about to hit the parked car and then he slams on the brake and rolls down the window. So then I fly off onto the parked car ... and then he speeds off as fast as he could with my phone." 1 RP 118. Mr. Caylor released her from the window at the same time he applied the brake. 1 RP 118. She then "knocked" off the parked car. 1 RP 118. She did not hit the car "that hard" but she was "definitely shook up." 1 RP 118.

Ms. Vaughan told the court her first thought was "oh, my God, my baby. I had been under a lot of stress, I had had that miscarriage. And I was so -- so cautious with this pregnancy. I didn't go up ladders or anything. And so I didn't have a phone. Nathaniel went off with my phone. And so I went and knocked on a neighbor's door to see if I could use their cell phone and I was trying to calm myself down, because I was hysterical. I was crying and just really shook up." 1 RP 119.

She called her father, "the only phone number I had memorized" and he came immediately. 1 RP 120. She also called for an emergency obstetric appointment, which she obtained the same day. 1 RP 120. She

then went to coffee with her father and then went straight to her obstetrician within about an hour. 1 RP 120-22.

Her obstetrician provided a letter, which the trial court excluded as inadmissible hearsay:

Caroline Vaughan was under my care for her pregnancy in 2013. She was under a significant amount of stress related to her relationship with her husband throughout the pregnancy. She reported to me several times being afraid for her and her baby's safety given his reckless and irrational behavior. She presented on 1/25/13 reporting severe domestic problems and a "terrible fight" with her husband. She was very concerned about the well-being of her pregnancy under severe circumstances of stress.

1 RP 125; (Attachment C to Motion For Reconsideration, CP 473). Ms. Vaughan then saw a social worker and considered calling the police, but she told the court that she did not do so because "I was still very much afraid. I didn't know if Nathaniel Caylor was going to return to the house. I didn't know what his state of mind was. I didn't know if he was going to be violent. And I was also concerned about protecting Mr. Caylor." 1 RP 126. She explained, "I knew that if I called the police it would hurt his case. I didn't know if Mr. Caylor would retaliate.. And I -- I was scared and didn't know what to do basically." 1 RP 127.

The next day, Ms. Vaughan told the court, "I called the police ... after I had some time to think about it. Because I wanted something on record, but I didn't want Mr. Caylor to get arrested." 1 RP 128. She then gave the police a "sanitized" version of what happened that denied she had any injuries. 1 RP 130.

Ms. Vaughan did not return to live in their home. 1 RP 132. Later in January, 2013, when Ms. Vaughan was cleaning up the home, she found a one page letter in Mr. Caylor's handwriting addressed to her saying that he was sorry for causing her pain, he was crushing her, he had been selfish, toxic and immature and "I sure aren't [sic] making the greatest choices." 1 RP 103; Exhibit 30. Ms. Vaughan filed for divorce. 1 RP 136. She entered the Eastside Domestic Violence program, Lifewire, within 5 days of the incident. 1RP 137. Mr. Caylor moved in with his parents in Port Townsend. 3 RP 307.

She later found out that Mr. Caylor's attorneys had been trying to serve her a notice of deposition at that house and could not find her. 1 RP 132. In early February, her deposition was taken and she "glossed over" the bad things about their relationship. 1 RP 132. She left out his drug use, violence, drinking, and what he had told her about the shooting. 1 RP 132-33. She was afraid of retaliation from Mr. Caylor. 1 RP 133.

Ms. Vaughan gave birth to the parties' daughter on August 17, 2013 and Mr. Caylor visited her once in the hospital. 1 RP 135. As of trial, although he had been granted supervised visits, Mr. Caylor had not requested a second visit with the child. 1 RP 140-41, 144.

Ms. Vaughan received a default Decree of Dissolution in January 2014 providing for Mr. Caylor to have supervised visitation with the child. CP 11, CP 21. This dissolution was subsequently vacated. CP 447. Mr. Caylor never exercised his supervised visitation time. 1 RP 135, CP 461.

Ms. Vaughan testified that she received strange "heavy breathing" phone calls for several months. 1 RP 140. In early August, 2014, Ms. Vaughan contacted the Seattle City Attorney and began giving them more information about Mr. Caylor. 1 RP 141. Then on August 20th Ms. Vaughan received a phone call from the father in which he told her that "If I f--- with his Seattle PI case he was going to kill me." 1 RP 141.

Neither of the parties provided complete documentation in response to discovery requests. Mr. Caylor did not provide complete bank statements or pay statements. 5 RP 634-35. Ms. Vaughan did not provide timely documentation of her American Express savings account and was subject to a pretrial order finding that she had not answered interrogatories and requests for production, failed to appear for a deposition, provided a false daycare provider name, and had been intransigent. CP 142-45.

At trial, Ms. Vaughan was unable to substantiate some of her claimed daycare expenses. 2 RP 54-74. She also agreed that she had submitted rent receipts for reimbursement from Mr. Caylor based on her having paid the full amount, but in reality she only paid half. 2 RP 182-83. Ms Vaughan told the court that she had transferred up to \$65,000 of her separate property funds from her American Express Savings account in the last months of 2013, for legal and medical bills, but she could not break down exactly what dollars went for which bills. 5 RP 667-73.

Ms. Vaughan told the court at trial and again on Reconsideration that she works full time, and provided corroborating pay stubs 1 RP 154, Exhibit 41, CP 473-74.

Christie Thompson, the mother of Augustus, with whom Mr. Caylor has almost no contact, testified that Mr. Caylor had sometimes been suicidal, he was aggressive with the police, addicted to drugs, he stole, and was erratic and frightening. 3 RP 14-16. In 2013 when she took Augustus to visit Mr. Caylor for a day in Port Townsend where he lives with his parents, she saw him drinking and smoking pot even though he was on prescription medications. 3 RP 209-10.

Larkspur Vanstone, the FCS domestic violence evaluator, explained that while Ms. Vaughan may have exaggerated small details of tangential matters, her reporting in general was consistent, reasonable, and

aligned with the police reports. 3 RP 232. In Ms. Vanstone's opinion, a domestic violence protection order was warranted and a reasonable person in Ms. Vaughan's position would be fearful. She recommended Mr. Caylor participate in a state certified DV batterer's program and have supervised visits. 3 RP 234-5. She noted that while Mr. Caylor's therapist recommended that he continue therapy, he had not done so. 3 RP 248-49. The trial court reviewed but did not admit the report. 3 RP 235.

Mr. Caylor told the court that he has been unemployed since 2011 and does not expect to work again. 3 RP154. As of trial, he had been on L&I disability since 2011. Id. He admitted that the morphine he was taking made him moody and irritable. 3 RP 354-55. Mr. Caylor told the court in detail about his parenting of Wyatt, the son who is allowed to live with him. 3 RP 309-326.

The trial court found that there was no domestic violence, and that while the mother "may have suffered a bruised arm," her "claim that she was in fear of the father is not supported by the evidence." CP 460 (Exh. PP to parenting plan, p.1). The trial court found "[t]he mother did not call the police at that time and did not even call 911; she called her father and they went to coffee. This is not consistent with the requirements necessary to prove domestic violence. The mother's claim now that she was in fear of the father is not supported by the evidence." Id. The trial court

continued, noting that Ms. Vaughan did not request a restraining or protection order when she filed for divorce the next month or bring up her fear when questioned in Mr. Caylor's City of Seattle lawsuit two weeks after the alleged assault. Id.

The trial court also found that the parties have no real or personal community property and found that "[g]iven the short term of this marriage, little, if any, of the funds in such an account (Ms. Vaughan's American Express Savings Account) can be fairly said to be community property. The court concludes that if any (of this account) remains, distribution to the wife is fair and equitable." CP 437, 448.

The trial court entered a parenting plan which allowed Mr. Caylor visits at his home during Ms. Caylor's work hours, no summer vacation, and prohibited Ms. Vaughan from making any negative statements about Mr. Caylor to daycare or school officials. CP 449-461.

E. ARGUMENT

- 1. THE UNCONSTITUTIONAL PRIOR RESTRAINT PROHIBITING THE MOTHER FROM COMMUNICATING "NEGATIVE INFORMATION ABOUT THE FATHER" IN THE PARENTING PLAN AND ORDER OF CHILD SUPPORT SHOULD BE REVERSED**

a. **Standard of Review.** This Court reviews constitutional challenges de novo. In re the Marriage of Suggs, 152 Wn.2d 74, 79, 93 P.3d 161 (2004).

b. **The First Amendment of the United States Constitution prohibits the prior restraint the trial court ordered.** The First Amendment of the United States Constitution prohibits the government from interfering with a person's 'freedom of speech' and 'right... to petition the Government for a redress of grievances.' In re Marriage of Meredith, 148 Wn.App. 887, 896, 201 P.3d 1056 (2009). The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. Bering v. SHARE, 106 Wn.2d 212, 222, 721 P.2d 918 (1986). The right of free speech is not absolute, and the State may punish its abuse. Id. at 226. Washington courts have the authority to prohibit dissemination of abusive speech, including defamation and harassment. Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 237, 654 P.2d 673 (1982), affirmed, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

Prior restraints on speech are disfavored because such restraints burden the exercise of the right to speak before any abuse of the right is shown. Seattle v. Bittner, 81 Wn.2d 747, 756, 505 P.2d 126 (1973). Prior restraints are official restrictions imposed upon speech or other forms of

expression in advance of actual publication. State v. Coe, 101 Wn.2d 364, 372, 679 P.2d 353 (1984). Temporary restraining orders and permanent injunctions-i.e., court orders that actually forbid speech activities-are classic examples of prior restraints. Suggs, 152 Wn.2d 74. Prior restraints "carry a heavy presumption of unconstitutionality. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). Prior restraints are presumptively unconstitutional unless they deal with non-protected speech. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.1031 (1942). Examples of non-protected speech are obscenity, incitements to acts of violence and the overthrow by force of orderly government,, and libelous speech. Id.

According to the Washington Supreme Court, an order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential ends of the public order. Suggs, 152 Wn.2d at 83. In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case. Suggs, 152 Wn.2d at 83. Prior restraints on speech are especially disfavored because such

restraints burden the exercise of the right to speak before any abuse of the right is shown. Bittner, 81 Wn.2d at 756.

In Suggs, the trial court found that Suggs harassed her former husband and permanently restrained her from "knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming [her former husband] and for no lawful purpose." 152 Wn.2d at 78. The Supreme Court determined the order prohibited some speech that might be unprotected speech, but the order also prohibited protected speech. Id. at 84. Because the order was drafted too broadly, it chilled Suggs from making constitutionally protected communications. Id. The court vacated the order as an unconstitutional prior restraint on speech. Id.

The trial court's order in this case is even more broad than the Sugg order. Here, the court has forbidden Ms. Vaughan from communicating "negative information" about Mr. Caylor. This order is overly broad because it restricts dissemination of all negative information about Mr. Caylor, whether or not it is factually accurate or relevant to the child's welfare. As written, the order would prohibit Ms. Vaughan from informing a daycare provider if, for instance, Mr. Caylor had engaged in

another armed standoff with police or had once again succumbed to illegal drug use.

Such an overly restrictive restraint violates the First Amendment because it is not couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate; instead, it paints with a broad brush and restricts all negative information without regard for Ms. Vaughan's fundamental personal liberties. Suggs, 152 Wn.2d at 83. Accordingly, Ms. Vaughan respectfully requests this Court find that the prior restraints in both the parenting plan and order of child support are unconstitutional, and vacate the orders.

2. THE TRIAL COURT'S ORDER THAT THE CHILD MUST SPEND APPROXIMATELY TEN HOURS PER WEEK IN TRANSIT TO FACILITATE VISITS WITH THE FATHER AT THIS HOME IS NOT IN THE CHILD'S BEST INTEREST; THIS COURT SHOULD REMAND FOR ENTRY OF A PLAN REQUIRING THE FATHER TO VISIT THE CHILD WITHIN FIVE MILES OF HER HOME UNLESS THE VISIT IS OF AT LEAST TWO NIGHTS' DURATION

a. Standard of review. This court reviews the trial court's ruling on a residential schedule for an abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). It must not be based on untenable reasons or grounds or be manifestly unreasonable. *Id.*

b. Requiring a small child to spend a minimum of ten hours of transit per week to facilitate visitation with the father does not satisfy RCW 26.09.184(1)(g)'s requirement that the trial court protect the best interests of the child. The parenting plan imposed by the trial court requires that the child travel from Redmond to Port Townsend every Wednesday and back again the same day. With no traffic or stops, the trip from Redmond to Port Townsend takes approximately two and a half hours, including the ferry trip. This means that on Wednesdays, the child will spend a minimum of five hours in transit to facilitate an eight hour visit with her father.

By way of comparison, this court has characterized a trip of four hours and twenty minutes as "long-distance" travel for a child, appropriate for monthly visits. In re Yeamans, 72 P.3d 775, 117 Wn. App. 593, 597 (2003). While the trips here are somewhat less, two and a half hours with no traffic, they still represent a significant hardship for the child.

The father never attempted to avail himself of the court-ordered supervised visits he was previously granted with the child. He met the child in the hospital shortly after she was born, and the second time he met her was after the trial at issue here. He had never contacted Ms. Vaughan to arrange any of his court-ordered time with the child. The father thus had formed no bond or relationship whatsoever with his child. Under these

circumstances, ordering the child to endure extensive weekly commuting hours to facilitate visits with a parent who had never bothered to visit her before is not in the child's best interests.

The father is unemployed and presented no evidence at trial that his ability to travel was limited in any way. The trial court noted that there is no indication that the father will be able to work at any time in the foreseeable future. He has ample free time to travel to a place near where the child lives to have his midweek visitation with her. Under these circumstances, it is manifestly unreasonable to require this very young child to travel all the way from Redmond to Port Townsend for daytime visits or visits of less than two nights' duration. Ms. Vaughan respectfully requests that, in the best interests of the child, this Court remand for entry of a plan that requires the father to exercise his visits within 5 miles of the child's residence unless the visit is of at least two nights' duration.

3. **BECAUSE THE PARENTS ARE GEOGRAPHICALLY SEPARATED SUCH THAT IT TAKES 2-1/2 HOURS TO TRAVEL BETWEEN THEM, THIS COURT SHOULD VACATE THE WEEK ON/WEEK OFF SUMMER SCHEDULE AND REMAND WITH INSTRUCTIONS TO ENTER A PLAN IN WHICH THE SUMMER SCHEDULE IS THE SAME AS THE SCHOOL YEAR SCHEDULE, PURSUANT TO RCW 26.09.187(3)(a)(v) AND RCW 26.09.187(3)(b)**

a. **Standard of Review.** This court reviews the trial court's ruling on a residential schedule for an abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). It must not be based on untenable reasons or grounds or be manifestly unreasonable. Id.

b. **The trial court abused its discretion by entering a school age summer schedule that will prevent the child from participating in normal childhood summer activities.** RCW 26.09.187(3)(a)(v) requires the court to consider the following factors: "the child's involvement with his or her physical surroundings, school, or other significant activities." (Emphasis added.) RCW 26.09.187(3)(b) specifically encourages the trial court to "consider the parties' geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions."

Here, the court has ordered that the child spend her school-age summers alternating week on/week off between parents who live two and a half hours away (with no traffic) from one another. This schedule is not in the child's best interest because the child will be unable to participate in regular summer activities like sports leagues, music, arts, theater, or other activities that require her attend throughout the summer. While she is a toddler now, those activities will likely be important to her in her school

years. It for this reason that the RCW 26.09.187(3)(a)(v) requires the trial court to protect the child's involvement with such activities.

The trial court should have considered the parents' geographic proximity pursuant to RCW 26.09.187(3)(b), since the significant distance between the parents' homes will detrimentally impact the performance of parenting functions in a week on/week off setting. It is unreasonable to assume that each parent will be able to get the child to daily summer activities near the other parent's home, since the parents live two and a half hours away from each other on opposite sides of Puget Sound. In the summer, the ferries are very busy, and typical delays can add an hour or more to travel across Puget Sound.

Additionally, RCW 26.09.184(1)(c) directs the trial court to provide for the child's changing needs as she grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan. Here, the child is very young and her needs will change as she gets older, goes to school, and wants to participate in the same summer activities her classmates will be participating in. But the parenting schedule as fashioned by the trial court will not allow her to participate in these activities, so her changing needs will have to be provided for by modifying the parenting plan in the future. The parenting plan therefore does not fulfill the mandate of RCW 26.09.184(1)(c).

For these reasons, Ms. Vaughan respectfully requests that this Court vacate the week on/week off summer schedule and remand with instructions to enter a plan in which the summer schedule is the same as the school year schedule.

4. THIS COURT SHOULD REMAND AND DIRECT THE TRIAL COURT TO ENTER A PARENTING PLAN THAT PROVIDES FOR THE CHILD TO HAVE SUMMER VACATION WITH EACH PARENT AS REQUIRED BY RCW 26.09.184(6) and RCW 26.09.187(3)

a. Standard of Review. This court reviews the trial court's ruling on a residential schedule for an abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). It must not be based on untenable reasons or grounds or be manifestly unreasonable. Id.

b. The trial court failed to provide for the child to have a summer vacation with each parent pursuant to RCW 26.09.184(6) and RCW 26.09.187(3)(a). When the trial court enters a parenting plan, the plan "shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria in RCW 26.09.187 and 26.09.191." (Emphases added.) Further, RCW 26.09.187(3)(a) states

"[t]he court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances." (Emphasis added.)

Here, the trial court provided for the child to spend winter, mid-winter and spring breaks with her parents. Yet Section 3.6 **Vacation With Parents** reads "[d]oes not apply."

Ms. Vaughan asked the trial court to provide for vacations in the proposed orders her attorney emailed to the trial court near the end of trial. And in her Motion For Reconsideration, she explicitly pointed out to the trial court that no provision had been made in the parenting plan for summer vacation with the child. CP 473-75. Even after being made aware of this omission, the trial court failed to provide for summer vacation for the child. CP 962.

Providing vacation for the child is not discretionary with the court; it is mandatory, since the statute uses the language "shall." The trial court abused its discretion because it did not follow the statute's requirement to provide the child vacation with each parent. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993) (a court abuses its discretion when it bases a decision on untenable grounds or reasons). Ms. Vaughan therefore respectfully requests that this Court vacate Section 3.6 of the

parenting plan and remand for imposition of a plan that provides the child an opportunity to have summer vacation with her parents each year.

5. THIS COURT SHOULD REMAND AND DIRECT THE TRIAL COURT TO ENTER A PARENTING PLAN THAT ACCOMMODATES THE MOTHER'S EMPLOYMENT SCHEDULE AS REQUIRED BY RCW 26.09.187(3)(a)(vii) AND DOES NOT REQUIRE THE MOTHER TO TRANSPORT THE CHILD DURING NORMAL DAYTIME WORKING HOURS

a. **Standard of Review.** This court reviews the trial court's ruling on a residential schedule for an abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). It must not be based on untenable reasons or grounds or be manifestly unreasonable. Id.

b. **The trial court failed to consider and accommodate Ms. Vaughan's work schedule pursuant to RCW 26.09.187(3)(a)(vii).**
When fashioning a parenting plan, the trial court must consider the factors listed in RCW 26.09.187, read in light of the objectives listed in RCW 26.09.184, the policy stated in RCW 26.09.006, and any limitations mandated in RCW 16.09.191. In re Marriage of Littlefield, 133 Wn.2d 39, 51-52, 940 P.2d 1362 (1997), superseded on other grounds by RCW 26.09.520(2).

RCW 26.09.187(3)(a)(vii) explicitly requires that "the court shall consider the following factors" ... (vii) Each parent's employment

schedule, and shall make accommodations consistent with those schedules." Accommodating parents' work schedules is not discretionary; it is mandatory.

Here, it was undisputed that Ms. Vaughan works full time during normal daytime working hours, from Monday-Friday. It was also undisputed that Mr. Caylor is unemployed and has no particular restrictions on his schedule. Yet the plan imposed by the court requires the mother to transport the child from Redmond to Edmonds on Wednesday mornings and back again later Wednesday; the total distance she must travel during this work day to facilitate the visit with the father is 140 miles. CP 477. She must also transport the child to Edmonds on Fridays during work hours, a distance of 70 miles. The court was made aware of these facts. CP 477.

The schedule imposed by the trial court is completely unworkable for the mother. Neither the parenting plan entered by the trial court nor the court' oral comments indicate that the court considered Ms. Vaughan's work schedule or accommodated it in any way. The trial court's schedule demonstrates a complete failure to recognize and apply the requirements of RCW 26.09.187(3)(a)(vii). For this reason, the visit location and transportation provisions of the parenting plan constitute an abuse of discretion. Kovacs, 121 Wn.2d at 801 (a court abuses its discretion when it

bases its decision on untenable grounds or reasons). Ms. Vaughan therefore respectfully requests that this Court vacate those provisions and remand for imposition of a schedule that accommodates her employment as required by RCW 26.09.187(3)(a)(vii).

6. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED A LETTER FROM MS. VAUGHAN'S OBSTETRICIAN DESCRIBING STATEMENTS MADE TO HER BY MS. VAUGHAN DURING THE EMERGENCY VISIT ON THE SAME DAY AS THE ALLEGED ASSAULT ON MS. VAUGHAN BY MR. CAYLOR; THE CONTENTS ARE ADMISSIBLE UNDER ER 803(a)(4) AS A STATEMENT MADE FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

a. Standard of review. This court reviews the trial court's ruling on evidentiary matters for an abuse of discretion. State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

b. The hearsay exception for medical treatment is a firmly rooted hearsay exception. White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). The U.S. Supreme Court held: "[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony." White, 502 U.S. at 356, 112 S.Ct. at 743.

Two factors are critical to the application of ER 803(a)(4). First, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985). These two factors reflect the rationale for the medical purpose exception to the hearsay rule: The declarant has a strong motive to speak truthfully and accurately because his successful treatment depends upon it. Renville, 779 F.2d at 436. It is this strong self-interest that makes ER 803(a)(4) a "firmly rooted" hearsay exception. Ring v. Erickson, 983 F.2d 818, 820 (8th Cir.1992) (quoting Idaho v. Wright, 497 U.S. 805, 815, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638 (1990)). As such, it comes with its own "particularized guarantees of trustworthiness." ' ' Ring, 983 F.2d at 820 (quoting Wright, 497 U.S. at 816, 110 S.Ct. at 3147). Statements that satisfy its criteria need no other " 'indicia of reliability" ' ' for the court to admit them into evidence. Ring, 983 F.2d at 820 (quoting Wright, 497 U.S. at 815, 110 S.Ct. at 3146).

Washington State recognizes the reasoning of White and Wright, holding that "[t]he hearsay exception for medical treatment is a firmly rooted hearsay exception and hearsay statements admitted under it do not violate the confrontation clause." In re Personal Restraint of Grasso, 84

P.3d 859, 151 Wn.2d 1, 20 (2004). A statement admitted under a firmly rooted hearsay exception "is so trustworthy that adversarial testing can be expected to add little to its reliability. White, 502 U.S. 346, 357.

c. **This statement was made for the purposes of medical diagnosis and treatment.** The statement at issue was made during an emergency obstetric visit later on the same day as the assault Ms. Vaughan alleged Mr. Caylor committed against her. The letter offered by Ms. Vaughan from her obstetrician validated Ms. Vaughan's ongoing and pre-existing domestic violence concerns, as well as her concern for her baby's well-being on that particular day as a result of what had occurred. The trial court excluded the letter as "inadmissible hearsay." 1 RP 125.

State v. Woods, 23 P.3d 1046, 143 Wn.2d 561 (Wash. 2001) provides guidance in analyzing such statements. In Woods, an assault victim made statements in the emergency room saying that the defendant had assaulted another woman and threatened her, among other statements. Id. While the defendant contended that these statements were not reasonably pertinent to the speaker's diagnosis or treatment, our Supreme Court disagreed, noting that the definition of "medical treatment" is not limited to a medical lexicon involving only physical injuries and observing that psychological treatment also falls within the definition of the medical treatment exception. Woods, 143 Wn.2d 602. According to Woods, it was

"reasonably pertinent to the victim's treatment that her medical providers be apprised of the physical position she was in at the time when her attack occurred. Id. at 603. In sum, Woods concluded that application of the medical hearsay exception includes statements pertinent to either immediate physical or eventual psychological treatment.

d. Statements attributing fault to an abuser in a domestic violence case are admissible. ER 803(a)(4) provides an exception to the general prohibition of hearsay testimony for statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Because ER 803(a)(4) pertains to statements "reasonably pertinent to diagnosis or treatment, " it allows statements regarding causation of injury, but generally not statements attributing fault. State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003) (citing State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001)).

But while statements attributing fault are generally not relevant to diagnosis or treatment, Washington has specifically determined that statements attributing fault to an abuser in a domestic violence case are an exception to this general rule because the identity of the abuser is pertinent

and necessary to the victim's treatment. State v. Moses, 129 Wn.App. 718, 729, 119 P.3d 906 (2005).

Properly applying ER 803(a)(4) here, it is apparent that Ms. Vaughan's statements to her obstetrician as contained in her obstetrician's letter were admissible pursuant to the medical records exception. The trial court abused its discretion when it excluded the obstetrician's letter.

e. The court's erroneous exclusion of the obstetrician's letter had a significant impact on the outcome of the case.

i. The letter provides significant support for Ms. Vaughan's claim of domestic violence. In finding -- contrary to the commissioner's determinations and the Family Court Services report -- that there was no domestic violence, the trial court found that while the mother "may have suffered a bruised arm," her "claim that she was in fear of the father is not supported by the evidence." CP 460 (Exh. PP to parenting plan, p.1). The trial court found "[t]he mother did not call the police at that time and did not even call 911; she called her father and they went to coffee. This is not consistent with the requirements necessary to prove domestic violence. The mother's claim now that she was in fear of the father is not supported by the evidence." Id. The trial court continued, noting that Ms. Vaughan did not request a restraining or protection order when she filed for divorce the next month and did not bring up her fear

when questioned in Mr. Caylor's City of Seattle lawsuit two weeks after the alleged assault. Id.

While this court does not generally substitute its own credibility determinations for those of the trial court, it is worth noting that the Family Court Services Domestic Violence Assessment verified that Ms. Vaughan has been receiving domestic violence victim services at Lifewire since 5 days after the claimed assault occurred and she and Mr. Caylor separated. Had the trial court correctly determined that the obstetrician's letter was admissible, it would have been much more difficult for the trial court to find that Ms. Vaughan's behavior after the claimed assault was not "consistent with the requirements necessary to prove domestic violence."

The trial court found that "the wife's position in this case was not supported by the evidence." While Ms. Vaughan did claim that she had paid rent which she in reality still owed, and while she could not produce receipts verifying several months of daycare, these shortcomings on fairly minor financial matters are distinct from the corroboration provided by a medical professional and a domestic violence professional. Although some of Ms. Vaughan's positions regarding financial matters were not supported by the evidence, her domestic violence claims had a much firmer basis. The court's erroneous exclusion of the letter had a significant impact on the outcome of the case.

ii. The letter provided objective professional corroboration of Ms. Vaughan's version of events. While the trial court found that Ms. Vaughan "provided inconsistent versions of events, with such descriptions getting more and more dramatic," this finding is unsupported when viewed in light of Ms. Vaughan's early and consistent attendance at Lifewire and the statements she provided to her obstetrician. It is important to note that the obstetrician said that throughout her pregnancy up to the day of the assault, "[s]he reported to me several times being afraid for her and her baby's safety given his reckless and irrational behavior." This statement corroborates what Ms. Vaughan told the court regarding her continuing fear of her husband and her concern about his behavior during their marriage.

Similarly, the obstetrician's letter supports the statements Ms. Vaughan made to the Family Court Services domestic violence evaluator. While the trial court found that the information Ms. Vaughan provided to FCS was "exaggerated, incomplete, deceptive and, at times, outright false" and that "[m]any more hours of trial preparation and trial were necessitated by her statements," the obstetrician's letter directly undercuts this finding. Exclusion of the letter had a significant impact on the outcome of this case.

iii. Admission of the letter would have lent weight to Ms. Vaughan's claim of domestic violence, thus depriving the trial court of any basis for finding that the father was unable to build a relationship with the child due to the parties' relationship. Ms.

Vaughan explained to the court that the father never made any attempt to visit their daughter. The father agreed that he never made any such attempt. Though the father was court-ordered to exercise supervised visitation, he completely failed to do so. The trial court overlooked this fact when it blamed Ms. Vaughan for the father's failure to initiate or maintain a relationship with his daughter. Yet viewed properly, through the lens of domestic violence, it becomes clear that the reason the father did not build a relationship with his child is not because of Ms. Vaughan, but because he simply did not bestir himself to do so.

iv. Admission of the letter would reasonably likely lead to a finding that the father had committed domestic violence, necessitating limitations under RCW 26.09.191. The trial court should have found that the father committed domestic violence, and should have continued domestic violence protection for Ms. Vaughan and their child. But since the trial court erroneously excluded the letter, all protection was terminated and no RCW 26.09.191 limitations were imposed. Admitting the obstetrician's letter would lead a reasonable judge to continue the

previous domestic violence protection, necessitating limitations under RCW 26.09.191. Should this Court or the trial court on remand determine that the father committed domestic violence, Ms. Vaughan respectfully requests the imposition of RCW 26.09.191 limitations.

7. **THE \$30,000 ATTORNEY FEE AWARD IS UNREASONABLE BECAUSE THE AMOUNT OF FEES EXPENDED ON FINANCIAL DISCOVERY WAS DISPROPORTIONATE TO THIS SIX MONTH MARRIAGE CONTAINING NO COMMUNITY OR REAL PROPERTY AND BECAUSE THE TRIAL COURT INCORRECTLY FOUND THAT MS. VAUGHAN'S CLAIM OF DOMESTIC VIOLENCE WAS FALSE AND HAD INCURRED ADDITIONAL ATTORNEY'S FEES**

a. **Standard of review.** Awards of attorney fees based on intransigence are reviewed for an abuse of discretion. In re Marriage of Crosetto, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). A court abuses its discretion if its decision is "clearly untenable or manifestly unreasonable." Crosetto, 82 Wn. App. at 564.

b. **The discovery and examination on financial matters was out of proportion to the amount at issue in this six month marriage, therefore the attorney's fees expended and awarded was unreasonable.** Discovery sanctions should be proportional to the nature of the discovery violation and the surrounding circumstances of the case. Rivers v. Wash. State. Conf. of Mason Contractors, 145 Wn.2d 674, 695,

41 P.3d 1175 (2002). A seminal report specifically recommends amending court rules to narrow the scope of discovery, specifically incorporating proportionality as a limit, recommending that CR 26(b)(1) be amended to include language limiting the scope of discovery to that "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." WSBA Task Force On The Escalating Costs Of Civil Litigation, Final Report to the Board of Governors, June 15, 2015, p. 28.

Much of this language already exists in CR 26(b)(1)(C) and will be simply be moved from one part of that rule to another. The Task Force noted that the recommended language is based on language of the amendments to the federal rules that will go into effect on December 1, 2015. Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States (Sept. 2014), at 30–31.

Here, the father's attorney Nancy Hawkins demanded that Ms. Vaughan provide 10 years of financial discovery in this six month marriage. Ms. Vaughan provided the vast majority of what was demanded

and provided enough to calculate child support. Child support was the only significant financial question at issue, since the trial court found that there was no community property, and regarding the only account which might have any funds in it,"[g]iven the short term of this marriage, little, if any, of the funds in such an account (Ms. Vaughan's American Express Savings Account) can be fairly said to be community property. The court concludes that if any (of this account) remains, distribution to the wife is fair and equitable." CP 448.

Under these circumstances, it is evident that the extensive attorneys fees expended to litigate irrelevant financial details was disproportionate to the "amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Because the attorney fees expended to litigate financial details was disproportionate to the nature of the case, the trial court's award of fees was unreasonable.

c. **The trial court's finding (to the extent that it is a finding) that Ms. Vaughan's claim of domestic violence was false or greatly exaggerated and had incurred additional attorney's fees was unreasonable.** The trial court erred in excluding the obstetrician's letter substantiating Ms. Vaughan's continuing fears regarding domestic

violence. The trial court also failed to take into account Ms. Vaughan's swift and consistent attendance at Lifewire after the claimed domestic violence incident. Further, while the trial court found that "[t]he wife provided information to the court and Family Court Services that was exaggerated, incomplete, deceptive and, at times, outright false. Many more hours of trial preparation and trial were necessitated by her statements" the trial court does not specify what information it referred to. Indeed, there is no support in the record for this finding; no evidence was presented to the evaluator on cross-examination that caused her to change her opinion that a domestic violence protection order was appropriate and that Mr. Caylor needed to attend domestic violence batterer's treatment.

The trial court acknowledged that an incident occurred and that it was "regrettable." The trial court evidently did not believe the incident rose to the level of domestic violence. Yet the previous commissioners thought so and the domestic violence evaluator stood by her opinion under cross examination. While their opinions do not dictate the trial court's ultimate decision, it is worth noting that even if there was no domestic violence in this case, the incident was close enough to domestic violence to convince these professionals that a protection order should be entered.

Under these circumstances, imposing significant attorneys fees for bringing this domestic violence claim to court has a chilling effect on a

victim's right to seek redress in the court system. It lessens respect for the court and increases the burden on victims to be absolutely, completely sure that they will prevail, since the financial effect of losing a reasonable domestic violence claim is so severe. This is not the outcome contemplated by our legislature and courts. For this reason, the trial court's attorney fee award was not reasonable. Ms. Vaughan respectfully requests this Court vacate the attorney fee award.

8. THE CASE SHOULD BE REMANDED BEFORE A DIFFERENT JUDGE BECAUSE THE TRIAL JUDGE'S REPEATED ERROR IS SUFFICIENT TO QUESTION HER IMPARTIALITY, AND BECAUSE THE RECORD REFLECTS THAT THE TRIAL COURT WOULD HAVE SUBSTANTIAL DIFFICULTY OVERLOOKING ITS PREVIOUSLY STATED VIEWS AND FINDINGS ON REMAND

When remand before a different judge is requested, this Court must first determine whether the trial court has shown personal bias. Ellis v. U.S. Dist. Court, 356 F.3d 1198 (9th Cir. 2004). If not, the Court considers whether unusual circumstances support reassignment. Id. at 1211. The Court may find unusual circumstances if it appears that the trial court would have substantial difficulty overlooking its previously stated views and findings or that reassignment would preserve the appearance of justice. Id. This Court also considers "whether reassignment would entail

waste and duplication out of proportion to any gain in preserving the appearance of fairness." Id. at 1211.

The law requires both an impartial judge and a judge that appears impartial. State v. Madry, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972). To promote the appearance of fairness, a different superior court judge should conduct proceedings on remand where it appears that the judge who earlier made decisions in the case will have difficulty setting aside either prior knowledge of a case or previously expressed opinions about a case. See, e.g., State v. M.L., 134 Wn.2d 657, 660-61, 952 P.2d 187 (1998) (remanding for resentencing before different judge when trial judge imposed excessive sentence without evidence that such sentence was warranted).

Here, the trial court's Order of Child Support, Findings and Conclusions, and Decree of Dissolution are riddled with strong condemnation of Ms. Vaughan and the repeated conclusion that almost nothing Ms. Vaughan says is true. Most disturbingly, the trial court completely overlooked Ms. Vaughan's early and regular attendance at Lifewire, which was verified by the domestic violence assessor, and erroneously excluded the letter from Ms. Vaughan's obstetrician which corroborated the fact that Ms. Vaughan had genuine fear about the safety of her baby, since she scheduled an emergency same-day obstetric

appointment on the date of the alleged assault. The excluded letter also verified that Ms. Vaughan had expressed safety fears repeatedly before the date of the emergency visit.

Our legislature has repeatedly recognized the difficulty domestic violence victims face when reporting abuse. Danny v. Laidlaw Transit Services, Inc., 193 P.3d 128, 165 Wn.2d 200, 212 (2008). In spite of this, the trial court castigated Ms. Vaughan for failing to immediately and accurately report the domestic violence assault in full to the police, and failing to realize that she should have asked for protection when she filed for divorce. The trial court singled out Ms. Vaughan's meeting with her father instead of calling 911 on the day of the incident as further evidence that domestic violence had not occurred. "This is not consistent with the requirements necessary to prove domestic violence."

Under these particular circumstances, the trial court's errors regarding the domestic violence issue are sufficient to question her impartiality. Further, this record reflects that the trial judge would have substantial difficulty overlooking her extremely strongly stated views and findings on remand. For these reasons, Ms. Vaughan respectfully requests remand to a different judge.

F. CONCLUSION

Ms. Vaughan respectfully requests this court remand to the trial court for amendment of the parenting plan and order of child support to remove the unconstitutional prior restraint on Ms. Vaughan's speech, reversal of the order excluding her obstetrician's letter, reinstatement of the domestic violence order of protection, and amendment of the parenting plan to include appropriate RCW 26.09.191 restrictions.

Additionally, Ms. Vaughan requests that should a graduated RCW 26.09.191 plan eventually allow, the amended plan should require the father to exercise his visits within 5 miles of the child's residence unless the visit is of at least two nights' duration; should provide a summer schedule that is identical to the school year schedule and two weeks' vacation for each parent. Further, the plan should immediately be amended to accommodate Ms. Vaughan's full time employment schedule and all the unsupported findings should be stricken from the plan.

Finally, Ms. Vaughan requests the trial court vacate the disproportionate and chilling \$30,000 attorney fee award, and remand for further proceedings before a different trial judge.

DATED this 17th day of September, 2015.

Respectfully submitted:



Caroline Maria Vaughan, *pro se*

COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2015 SEP 17 PM 2:07

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

CAROLINE MARIA VAUGHAN a/k/a
Caroline Caylor

Appellant,

vs.

NATHANIEL CAYLOR,

Respondent.

No. 73404-1-I

AFFIDAVIT OF ABC

Documents: **OPENING BRIEF OF APPELLANT**

The undersigned being first duly sworn on oath deposes and says: that he/she is now, and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to or interested in the above entitled action, and competent to be a witness therein.

On September 17th, 2015, at approximately 10:55 a.m., ABC Legal Services duly delivered the above described document(s) to the office of Nancy Hawkins, at the address of 6814 Greenwood Avenue N., Seattle, WA 98103-5228.

Affiant:

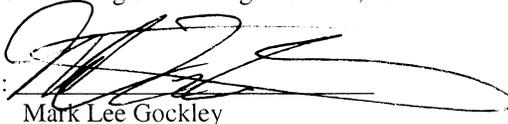


Jason Weiss, Supervisor, Seattle Messengers
ABC Legal Services, Inc.

Subscribed and sworn to before me, notary public in the state of Washington residing at Seattle, done this 17th day of September, 2015.



Notary:



Mark Lee Gockley