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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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**NO. 40513-0 -II**

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**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

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**THOMAS BENNER,**

**Appellant,**

**v.**

**ASHLEY BENNER,**

**Respondent.**

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**BRIEF OF APPELLANT**

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Scott A. Campbell  
Olson, Zabriskie & Campbell, Inc.  
104 West Marcy Avenue  
Montesano, WA 98563  
(360) 249-6174

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## **I. ASSIGNMENTS OF ERROR**

### ***Assignments of Error***

No. 1: The trial court erred when it granted residential placement of the parties' minor children to the Respondent. (Final Parenting Plan, paragraph 3.13.1; Findings of Fact and Conclusion of Law paragraph 2.19; Decree of Dissolution, paragraph 3.11).

No. 2: The trial court erred in prohibiting residential time to the Mr. Benner unless the GAL initiates a request to the court. (Final Parenting Plan, paragraphs 2.1, 2.2, 3.13.2; Findings of Fact and Conclusions of Law paragraph 2.19; Decree of Dissolution, paragraph 3.11).

No. 3: The trial court erred by prohibiting the Mr. Benner from submitting evidence in support of a Final Parenting Plan at the trial in this matter. (Findings of Fact and Conclusions of Law, paragraph 2.21).

No. 4: The trial court erred by incorporating its Memorandum Decision on Temporary Orders when making its Final Parenting. (Findings of Fact and Conclusions of Law 2.21).

No. 5: The trial court erred by not providing notice to the Petitioner that the September 24, 2009 hearing was a hearing to determine a Final Parenting Plan. (Findings of Fact and Conclusions of Law 2.15).

No. 6: The trial court erred in ordering a continuing restraining order and protection order. (Decree of Dissolution, paragraphs 3.8 and 3.9; Findings of Fact and Conclusions of Law 2.13, 2.21, 3.5 and 3.6).

No. 7: The trial court erred in finding that Ashley Benner was a de facto parent to her step-son, Peter Benner. (Findings of Fact and Conclusions of Law, paragraphs 2.21, 2.17 and 3.8; Final Parenting Plan, paragraph 3.13.1; Decree of Dissolution, paragraph 3.11)

***Issues Pertaining to Assignments of Error***

No. 1: Do the Findings of Fact and Conclusions of Law support the trial court's entry of the Final Parenting Plan? (Assignments of Error No. 1 and 2).

No. 2: Does the record support the trial court's order prohibiting any residential time with the Petitioner's children? (Assignment of Error Nos. 1,2 and 3).

No. 3: Did the ruling on temporary orders for a basis for collateral estoppel against the Petitioner at the trial this matter? (Assignment of Error Nos. 3 and 4).

No. 5: Is a litigant in a domestic case entitled to written notice of a hearing or trial that is to decide a final issues of the case? (Assignment of Error No. 5).

No. 6: Was there a factual basis at trial for the trial court to issue a continuing restraining order and a protective order? (Assignments of Error No. 6).

No. 7: Was there a factual basis at trial for the trial court to find that Ashley Benner is a de facto parent of Peter Benner? (Assignments of Error No. 7).

## **II. STATEMENT OF THE CASE**

Thomas Benner and Ashley Benner were married on October 6, 1999 in Cody, Wyoming. CP at p. 78. The parties separated on or about June 10, 2009. CP at p. 78. The parties had three children together, Tristan, Mary and Thomason. CP at p. 80. Mr. Benner also had a son, Peter from another relationship, but was included in the final parenting plan. CP at p. 80. On July 2, 2009, the petition for dissolution was filed in the Pacific County Court. On September 24, 2009, the court convened to hold a hearing concerning temporary orders. RP (September 24, 2009) at p.4, ll.10-15; CP at p. 107. The Notice of Hearing provided by the court stated in part “This matter has been set for a TESTIMONIAL HEARING”. CP at p. 12.

On September 24, 2009, Mr. Benner’s counsel moved for continuance of the hearing on temporary orders because “of the voluminous declarations and affidavits that had been received with the

allegations that have been received” that he requested an opportunity to rebut those allegations. RP (September 24, 2009) at p. 8, ll.18-22.

Counsel for Mr. Benner also explained that Mr. Benner has a disability that made it difficult for him to hear witnesses. RP (September 24, 2009) at p. 11, ll.14 – 23. A court report was put under oath as an interpreter. CP at p. 106.

The court stated: *“I’m going to deny the motion at this stage, listen to the testimony and make a determination if additional testimony should be allowed. That’s not foreclosing your client from producing additional evidence, but he would need to make an offer of proof at the end of the testimony of what he – who he expected to call and what their anticipated testimony would be”*. RP (September 24, 2009) at p. 13, ll .4 - 10.

The record indicates that on August 17, 2009 the Petitioner’s counsel filed a Note for Docket, setting the matter for Motion for entry of Mr. Benner’s proposed parenting plan for August 20, 2009. CP at p. 98. That hearing was continued to September 24, 2009. RP (September 24, 2009) at 7, ll. 1-3.

At testimonial hearing on September 24, 2009, Respondent Ashley Benner testified first. RP (September 24, 2009) at p. 16, l.6.

Next, the sister of Thomas Benner, Theresa Benner, testified on behalf of the respondent. RP (September 24, 2009) at p. 40, ll.18-24.

Michael Benner, Ashley Benner's brother, also testified. RP (September 24, 2009) at p. 54, l.5.

Counsel for Thomas Benner called Ken Miller to testify. The testimony was taken via telephone. RP (September 24, 2009) p. 74, ll.6-13. Thomas Benner also testified at the hearing. RP (September 24, 2009) at p. 95.

The court also interviewed Mr. Benner's son, Peter, in chambers. RP (September 24, 2009) at p. 128, ll.10-11.

The court concluded that Peter Benner was a *de facto* child of Ashley Benner. RP (September 24, 2009) at p. 133, ll.18-19. The court also concluded at the September 24, 2009 hearing on temporary orders that "*I am not going to make a ruling here because I really do need to think about the case ... and I want to see what [the Guardian ad Litem] Jacot has to say before I do a temporary plan so I want to continue the orders that are currently in place*". RP (September 24, 2009) at p. 36, ll.9-16. However, a Temporary Order was entered continuing restraints against Mr. Benner, awarding residential placement to Mrs. Benner and placing Mr. Benner's son, Peter, in he custody of Mrs. Benner because Peter "is a de facto child of the mother." CP at 100-101.

On November 9, 2009, a memorandum decision was filed at Pacific County Superior Court. CP at 110-114. The court indicated that

this case came before the court upon motion for temporary orders, including a temporary parenting plan. The court indicated it considered the testimony parties, the witnesses and a report of the guardian ad litem. CP at 110. The court awarded residential placement to Ashley Benner. The court found that there were acts of physical violence on behalf of Thomas Benner. CP at 111. The court further found that Thomas Benner engaged in the sexual abuse of a child. CP at 113. The court found that Mr. Benner's son, Peter, to be the *de facto* son of Ashley Benner. The court directed the respondent to prepare Findings of Fact and Conclusions of Law consistent with the Memorandum Decision. CP at 113. On December 17, 2009, the trial court signed "Findings of Fact and Conclusions of Law (Temporary Parenting Plan)(FNFCL)" CP at 115-118.

The matter was later set for a final hearing on February 22, 2010. Mr. Benner appeared pro se. RP (February 22, 2010) 4 at p.16. At the hearing, the court stated:

*I think at this stage, we should address an issue which I think clarifies where the court is going with this case. The court previously, on September 24<sup>th</sup>, heard testimony ... extensive testimony regarding certain facts that may be at issue here. The court's position after significant research that those issues are res judicata or collaterally precluded from being challenged. To that end, the findings of fact and conclusions of law, certified, along with the memoranda decision that I*

*have already filed, I am going to make exhibit 1 and they will be admitted into evidence, and this is a copy – this is a copy for Mr. Benner and I will make one for you.*

RP (February 22, 2010) at p. 9, ll. 13 - 21. The court told Mr. Benner: “*I don’t believe the law allows you then to retry those cases or put people again through that type of testimony*”. RP (February 22, 2010) at p.10, ll. 6-9. The court concluded that it would not allow Mr. Benner to “*re-litigate*” the issues from the temporary hearing. RP (February 22, 2010) at p.10, l.19. Counsel for the Ashley Benner agreed that the September 24, 2009 hearing was not a hearing on final orders. RP (February 22, 2010) at p. 11, l. 11. The trial proceeded on the issue of property division. RP (February 22, 2010) at p. 18, ll. 1-3. Mr. Benner testified that the parties purchased a boat in 2007. RP (February 22, 2010) at p. 32, ll. 4 - 6. The boat is called the *Wanderin’ Star*. RP (February 22, 2010) at p. 32, l. 12. The parties paid \$150,000. RP (February 22, 2010) at p. 32, ll. 16 - 17. Mr. Benner testified that he believed the value of the boat was between \$60-\$80,000. RP (February 22, 2010) at p. 32, ll. 18 - 20.

The court asked Mr. Benner how he wanted to deal with the parenting plan and about his specific proposal. RP (February 22, 2010) at p. 39, ll. 17 - 18. After Mr. Benner said that he wanted access to his children, the court said: “*In light of the court’s findings, how do you*

*propose that be initiated? And I know you don't agree with the court's initial findings, but it's the hand you're dealt".* RP (February 22, 2010) at p. 40, ll. 7 - 10.

As to the boat, Mr. Benner testified upon cross-examination that the boat was placed in his son, Peter's name because the parties feared that the asset was vulnerable to collection. RP (February 22, 2010) at p. 50, ll.11-18.

Ashley Benner testified at the trial. RP (February 22, 2010) at p. 63. Ashley Benner testified that she believed the boat was placed into Peter's name because there was a potential tax bill. RP (February 22, 2010) at p. 59, ll. 21 - 23. Ashley Benner called the guardian ad litem, Scott Jacot to testify. RP (February 22, 2010) at p.131. Mr. Jacot testified he did not believe it was in the best interest of the children to have any sort of in-person visitation with Mr. Benner. RP (February 22, 2010) at p. 134, ll. 21 - 24. In addition, he was not even recommending email contact. RP (February 22, 2010) at p. 135, ll. 6 - 14. The court made an oral decision and on February 25, 2010, final orders were entered.

### **III. SUMMARY OF ARGUMENT**

The trial court erroneously concluded that Mr. Benner could not put in evidence of the trial on any issues that were decided at the September 24, 2009 temporary motions hearing. Mr. Benner was limited

to comment on visitation; residential placement was decided prior to the trial. The court improperly ruled that issues from the temporary hearing were res judicata. Therefore he was improperly prohibited from presenting his case at trial. The court should reverse all orders contained in the Decree of Dissolution entered in this case, and remand for a new trial on all issues.

#### **IV. ARGUMENT**

##### **1. A temporary order does not prejudice the rights of a party at trial.**

Appellate review of a trial court's rulings in regard to final parenting plan provisions is abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). Abuse of discretion generally means that the "decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Id.* at 46 – 47.

RCW 26.09.060(10)(a) states that "A temporary order, temporary restraining order, or preliminary injunction: (a) Does not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding". A temporary hearing was held on September 24, 2009 and a Memorandum Decision was later issued by the trial court. The Temporary Parenting Plan was clearly a temporary order within the meaning of RCW 26.09.060(10)(a). The court erred when it admitted the

November 9, 2009 Findings of Fact and Conclusions of Law at the trial. Because the hearing on September 24, 2009 was a motion hearing, Findings of Fact and Conclusions were unnecessary. CR 52 (a)(5)(B).

In the case of *In re Combs*, 105 Wn.App. 168, 19 P.3d 469 (2001), the court found that any presumption in favor of a parent's performance under a temporary parenting plan "...clearly was not based on tenable reasons and was an abuse of discretion." *Id.* at p. 176. (citing *In Re the Marriage of Kovacs*, 121 Wn.2d 795, 809, 854 P.2d 629 (1993)). A temporary parenting plan simply is not a factor in determining what is in a child's best interests under a final parenting plan.

**2. A ruling from a temporary hearing is not a final judgment on the merits.**

On its own initiative, the trial court ruled in part that that Mr. Benner was prohibited from introducing evidence at the trial because of the doctrine of collateral estoppel. RP (February 22, 2010) at p. 12, ll. 2 – 9. However, before the doctrine of collateral estoppel may be applied, the party asserting the doctrine must prove:

- (1) the issue decided in the prior adjudication is identical with the one presented in the second action;
- (2) the prior adjudication must have ended in a final judgment on the merits;
- (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication;
- and (4) application of the doctrine does not work an injustice.

*Thompson v. State, Dept. of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999). Since there was not a final judgment on the merits at the trial court, it cannot be said that there was final judgment on the merits. The second prong was therefore not met, and collateral estoppel does not apply.

The trial court also suggested that Mr. Benner could not present evidence at trial because the issues were res judicata.

Res judicata:

Refers to the 'preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.' It is designed to 'prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts'. For the doctrine to apply, a prior judgment must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, *and* (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.

*Loveridge v. Fred Meyer, Inc.* 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

Here there was no prior action that had to be relitigated. Res judicata also does not apply. A temporary custody order is not a final judgment because it leaves open the question of permanent legal custody. *Greenlaw v. Smith*, 67 Wa.App. 755, 759, 840 P.2d 223 (1992). Thus, a temporary

custody order is not appealable as a matter of right, although it is subject to a Motion for Discretionary Review under RAP 2.3. *Id.* at 760.

**3. The court failed to consider RCW 26.09.187 when it set forth a final parenting plan.**

The trial court's inquiry at the trial was limited on the basis of Exhibit 1, the Memorandum Decision and Findings of Fact and Conclusions of Law that arose from the Temporary hearing. RP (February 22, 2010) at p. 9, ll. 16 -21. The court also stated in that regard, "I've decided issues that have not been appealed and, within this case, I think are the law of the case and, in this case, the facts of this case." RP (February 22, 2010) at p. 9, l. 25 to p. 10, l.1.

As stated herein, the court did not take any new evidence on the issue of residential placement at the trial. In *Kovacs*, the court stated:

In enacting these temporary parenting plan provisions, the Legislature recognized "the importance to the child's emotional stability of maintaining established patterns of care during what is generally a highly chaotic and emotionally stressful time." 1987 Proposed Parenting Act Commentary and Text, at 18 (available at Wash.State Archives). These same two considerations are not among the factors to be considered when developing the residential provisions of a *permanent* parenting plan.

The Act further states:

In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

*Kovacs* at 808. The court is to consider the seven factors outlined in RCW 26.09.187(3) *Id.* There is no proof that the court considered these factors at the trial; rather, the court considered the evidence taken a temporary motion hearing.

It should be noted that the Guardian Ad Litem, Scott Jacot did testify at the trial. Counsel for Ashley Benner pointed out to Mr. Jacot that the court had made its decision on residential placement, and that “what was up in the air here is visitation”. RP (February 22, 2010) at p. 131, l. 24 to p. 131, l. 3. Mr. Jacot recommended that there be no contact with Mr. Benner. RP (February 22, 2010) at p. 138, l. 5.

**4. The court did not provide adequate notice to Mr. Benner if the September 24, 2009 hearing was properly litigated as a final hearing.**

If the court concludes that the hearing on September 24, 2009 was legitimately a hearing on final order, this court should consider the notice provided for that hearing. The record indicates that the dissolution matter was on for temporary orders. Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *In re Marriage of McLean*, 132 Wn.2d 301, 308, 937 P.2d 602

(1997). Mr. Benner had a due process right to be given notice that the September 22, 2009 hearing was a final hearing. The notice in this case only suggested that it was a testimonial hearing.

**5. The court erred in concluding that Ashley Benner was a de facto parent to Peter Benner.**

As already stated herein, there was no litigation of the issues at the trial in this case. The court concluded that Ashley Benner was a de facto parent of Peter Benner. This was another issue that was set forth in the November 9, 2009 Findings of Fact and Conclusions of Law. CP at 117.

First, counsel for Ashley Benner argued that she could not legally be found to be a de facto parent. RP (February 22, 2010) at p. 181, ll. 15 - 20. Counsel for Ashley Benner pointed to the case of *In Re the Parentage of MF*, 141 Wn.App 558, 170 P.3d 601 (2007) held that a de facto parent analysis did not apply to step-parents. Since the trial in Benner, the Washington Supreme Court affirmed the Court of Appeals, Division I. *In Re the Parentage of MF*, 168 Wn.2d 528, 228 P.3d 1270 (2010). The Supreme Court held that the de facto analysis set forth in *In Re Parentage of LB*, 155 Wn.2d 679, 122 P.3d 161 (2005) could not be applied to a stepparent context in a meaningful way. *Id.* at pg. 534. Therefore, the court declined to extend de facto parentage to the stepparent factual scenario presented. *Id.* at 535.

The trial court therefore erroneously applied the doctrine of collateral estoppel to Mr. Benner in its conclusion that Ashley Benner, a stepparent to Peter Benner, was a de facto parent. Since the law of de facto parentage does not apply to stepparents, the trial court was also in error by applying the doctrine to this case.

**6. The court erred in ordering a continuing restraining order against Mr. Benner.**

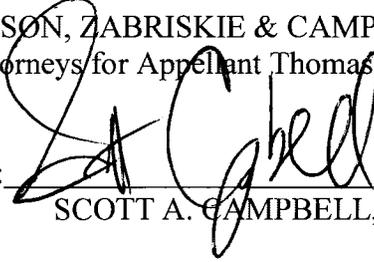
As stated above, the issue of a restraining order was considered in the temporary motion hearing of September 24, 2009. The issue does not appear to be litigated at the trial. Therefore, there is not factual basis for the court to make any findings as a result of the evidence produced at trial.

**V. CONCLUSION**

The trial court improperly converted rulings on issues of the temporary motion hearing to the trial. The law does not allow a court to make final factual determinations at a temporary motion hearing; a litigant is entitled to due process protection by receiving appropriate notice that such a hearing would have that kind of an impact on a case. Because the trial court prohibited Mr. Benner from presenting any testimony on residential placement, it erred. All matters contained in Ex 1 at trial were not proper. The trial court abused its discretion. This case should be reversed and remanded for a new trial.

RESPECTFULLY SUBMITTED this 5th day of October, 2010.

OLSON, ZABRISKIE & CAMPBELL, INC.  
Attorneys for Appellant Thomas J. Benner

By:  \_\_\_\_\_  
SCOTT A. CAMPBELL, WSBA #19595

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THOMAS BENNER,	)	
	)	
Appellant,	)	
	)	COA No. 40513-0-II
v.	)	
	)	DECLARATION OF
ASHLEY BENNER,	)	MAILING
	)	
Respondent.	)	

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I DECLARE that my name is Scott Campbell. I am the attorney for the Appellant.

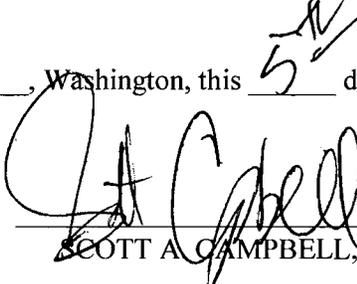
I declare that on 10/5, I deposited in the United States First Class Mail, proper postage prepaid and affixed thereto, a true and correct copy of Appellant's Brief to:

Jennifer Ammons  
218 North Broadway Suite 1  
Aberdeen WA 98520

Thomas Benner  
9 Halsey Rd #3  
Astoria, OR 97103 U.S.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Montecino, Washington, this 5<sup>th</sup> day of October, 2010.

  
\_\_\_\_\_  
SCOTT A. CAMPBELL, WSBA #19595