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DIVISION II

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COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION TWO

THURSTON COUNTY SUPERIOR COURT NO. 09-3-00985-7

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SCOTT E. CRUMP,  
Appellant,

and

MARIA R. CRUMP,  
Respondent.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Petitioner Scott E. Crump (“Scott”) brings the following Reply memorandum to respond to specific points contained in Respondent Maria R. Crump’s (“Maria”) Brief of Respondent.

## II. ARGUMENT

A. Maria’s Brief Contains Misstatements Of the Record and Uncited Assertions Based On Evidence Excluded By the Trial Court That Should Not Be Considered By the Court Of Appeals.

Scott objects to the following evidentiary misstatements and uncited assertions that are based on evidence excluded by the trial court:

(1) Page 1, paragraph 2: *“The Permanent Parenting Plan entered by agreement in Tennessee placed serious and permanent restrictions on Scott Crump. CP 54, lines 1 to 2.”* Although the citation provided by Maria (trial court’s Findings of Fact) states that “serious and permanent restrictions” were placed on Scott’s contact with his prior family, there was no indication of the source of those restrictions.

(2) Pages 2-3: *List of specific bases of restrictions in 2002 Tennessee parenting plan; assertion that mother had sole decision-making in Tennessee parenting plan.* There is no citation supporting these

assertions, and in fact, the documents from the 10-year-old Tennessee dissolution case were excluded by the trial court. CP 27 (items 72-80). This entire section of Maria's brief should be stricken.

(3) Page 3-4: "*However, the court found that these acts by Maria Crump were not acts of domestic violence. CP page 56 line 25 to page 57 line 1.*" This misstates the record cited by omitting important verbiage. The court's conclusion of law was that the acts referred to "were not acts of domestic violence *that involved coercion or control* but were unreasonable acts of anger." CP 56-57 (emphasis added). Thus, read in context, the court's conclusion of law was targeted toward the *motivation* behind the acts rather than the characterization of the acts as domestic violence.

B. The Court's Construction Of RCW 26.09.191 Is Reviewed *De Novo*.

The issues in this appeal are broader than as characterized by Maria. Maria argues that the only issue for appeal is whether "conduct rises to the level of domestic violence that requires RCW 26.09.191 restrictions be included in the parenting plan." (Brief of Resp. at 7.) But this is only one of the issues before the Court. Scott's appeal also raises issues regarding the trial court's failure to consider the factors in RCW

26.09.187, and whether a reversal of .191 restrictions would require Bobby to placed with Scott based on the statutory construction of RCW

26.09.191. “[I]ssues of statutory construction are questions of law which [the appeals] court reviews de novo.” *In re: Marriage of Caven*, 136 Wn. 2d 800, 806, 966 P.2d 1247 (1998).

C. Scott Has Never Argued That the Court May Not Enter an Order That Is Against the Findings Of the GAL.

It is unclear why this issue is addressed by Maria and it will not be further discussed in this Reply.

D. The Trial Court Abused Its Discretion In Ordering .191 Restrictions Against Scott.

*1. The Trial Court Confused Behavioral Domestic Violence With Legal Domestic Violence*

Maria’s brief argues that .191 restrictions against Scott were appropriate based on, among other things, “a pattern of coercive control in the relationship” and “a similar pattern of behavior in his prior marriage.” (Brief of Resp. at 9.) “A pattern of coercive control,” however, does not satisfy any of the elements of legal domestic violence as defined by RCW 26.50.010. Consequently, a “similar pattern” in a prior relationship 10 years earlier is similarly irrelevant to the court’s determination regarding .191 restrictions.

Maria is quite correct, however, in pointing out that the trial court relied heavily on this evidence of “coercion and control” in its decision to impose .191 restrictions — Judge Casey stated so explicitly: “I think Jennifer Goodwin’s testimony helped clarify for everyone in the courtroom the distinction between acts of domestic violence that are motivated by coercion and control and acts of violence that are perpetrated in moments of frustration and uncontrolled anger.” 2RP 9. And as to Maria’s August 13, 2009 acts of domestic violence against Scott, the Court further stated: “To me this did not seem to be acts of domestic violence that would involve coercion and control but rather seemed to be unreasonable acts of anger being displayed.” 2RP 9-10.

Unfortunately, RCW 26.09.191 incorporates a “legal” definition of DV from RCW 26.50.010, and limits it to physical harm or infliction of fear of imminent physical harm, sexual assault, or stalking as defined in RCW 9A.46.110. It does not include “patterns of coercion and control.” For this reason, the trial court’s imposition of .191 restrictions against Scott was in error.

*2. The Trial Court Specifically Refused To Find That the One Incident Of Alleged Physical Violence By Scott That Would Have Satisfied RCW 26.50.010 Occurred*

The one incident of physical violence alluded to by Jennifer Goodwin and Maria was not found to have occurred by the trial court: “At trial Ms. Crump reported that she had actually been knocked out and had a black eye once during the course of the parties’ relationship. *I don’t know if that happened or not.*” 2RP 9 (emphasis added). The incident was not relied on in any way in the court’s Findings or Conclusions regarding acts of “legal” DV by Scott. CP 53-57.

Additionally, Ms. Goodwin (and Maria’s brief) made reference to an unexplained incident of “sexual violence,” which may relate to an offer of money to Maria by Scott for sex. RP 342. There is no description of any such incident in Ms. Goodwin’s report. Exhibit 101. Despite Ms. Goodwin’s use of the term “violence” with respect to this incident (RP 94), nothing in the record suggests that it was an act that might arguably satisfy the definition of domestic violence contained in RCW 26.50.010.

*3. The Trial Court Made No Findings Regarding Stalking As Defined In RCW 26.50.010 and 9A.46.110*

The applicable definition of stalking for purposes of 26.09.191 refers to 26.50.010, which in turn incorporates the definition of stalking in

RCW 9A.46.110. This is the criminal statute on stalking, with a number of very specific elements:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or the property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either: (i) intends to frighten, intimidate, or harass the person; or (ii) knows or reasonably should know that the person is afraid, intimidated or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110(1).

Although there was a finding by the Court that Scott “began keeping track of Ms. Crump’s activities,” “attempted to exert control over Ms. Crump,” and “was also obsessed with phone to calls to Ms. Crump’s workplace” (CP 54), there was no argument, evidence, or findings that Scott: (1) repeatedly harassed or followed Maria; (2) placed Maria in fear that she or her property would be injured; or (3) intended to frighten, intimidate or harass Maria (or should have known he did) by these actions. These are all predicate elements of .191 restrictions based on stalking. RCW 26.09.191(2); RCW 26.50.010(1)(c). Thus, stalking cannot be the basis for the trial court’s imposition of .191 restrictions against Scott.

Indeed, the court was clear in its Conclusions of Law that the .191 restrictions were not based on stalking: “The parenting plan that is entered must contain RCW 26.09.190(1) [sic] limitations on Mr. Crump because he displays characteristics of a domestic violence perpetrator.” CP 57. Moreover, in the entirety of its oral ruling, the court never once said the word “stalking” or analyzed any of the elements of stalking under RCW 9A.46.110. 2RP 3-30. Stalking as defined by RCW 26.50.010 and 9A.46.110, therefore, was never established and does not provide a basis for parenting-plan restrictions against Scott.

*4. The Court’s Findings Do Not Support a History Of Acts Of Domestic Violence By Scott*

Nothing in the court’s Findings supports mandatory .191 restrictions. The trial court confused “behavioral DV” — a broad concept utilized by DV treatment providers and taught to judges at DV trainings — with legal DV (a distinction not challenged or addressed in any way in Maria’s brief), and thus the imposition of .191 restrictions against Scott was manifestly unreasonable and an abuse of discretion. Further, even assuming *arguendo* the court *had* found that Maria’s allegation of being struck by Scott had occurred, it would not satisfy the requirement of RCW 26.09.191(2)(a)(iii) of a *history* of *acts* of domestic violence because only

a solitary qualifying act was alleged.

E. The Trial Court Abused Its Discretion In Not Ordering .191 Restrictions Against Maria.

Maria fails to address another core part of Scott's argument on appeal — that *Maria's* violent acts outlined in the court's Findings of Fact mandate .191 restrictions against her. Alternatively, if the findings were not adequately stated to support a finding of legal domestic violence under RCW 26.50.191, then those findings as worded were not supported by the record and the court's orders were based on untenable grounds.

As cited in Scott's Opening Brief, Jennifer Goodwin testified that Maria's acts of anger on August 13, 2009 were "*legally* domestic violence." RP 332 (emphasis added). She discounted them due to broader concepts of "behavioral domestic violence" on Scott's part — "it's not uncommon that you're going to see victims become frustrated and start acting out in that way" (*id.*) — but this evidence, and the corresponding Findings of Fact, *required* imposition of parenting-plan restrictions pursuant to RCW 26.09.191. Instead, the trial court side-stepped that obligation with a legally-irrelevant distinction: "Ms. Crump's violent actions were not acts of domestic violence that involved coercion and control but were unreasonable acts of anger." CP 56-57. The court

reached this conclusion despite the fact that *Maria* — not Scott — had prior documented DV history: Scott was the only party protected by a long-term DV protection order between the two, in 2009 and 2010, based on findings made by a separate judicial officer. Exhibit 6; RP 59.

Further, if .191 restrictions are placed on Maria and removed from Scott, a careful reading of the statutory scheme in this area reveals that Bobby could not be placed in the primary custody of Maria by the court absent findings under RCW 26.09.191(2)(n). (*See discussion*, Opening Brief of App. at 37-41.)

Ordinarily, the court will not consider an argument presented for the first time at oral argument, without supporting argument in the party's brief. *See, State v. Pesta*, 87 Wn. App. 515, 525, 942 P.2d 1013 (Div. I 1997). As such, Maria has waived the opportunity to present any argument on this point.

F. Scott's Appeal Is Well-Founded and Attorneys Fees May Not Be Awarded.

Maria argues that she is entitled to attorneys fees because this appeal is "frivolous," with "no underlying justification." (Brief of Resp. at 10.) She makes this contention despite the fact that as to the only act of physical violence identified by Maria, the trial court specifically refused to

find that it occurred. But yet the court imposed .191 restrictions on Scott simply because he “displays the characteristics of a domestic violence perpetrator” (CP 57), without reference to the applicable statutory definition of domestic violence in RCW 26.50.010. Further, Maria did not even address the second half of Scott’s appeal regarding mandatory .191 restrictions against Maria. As such, this appeal clearly has merit and is not frivolous.

Maria also makes passing reference to RCW 26.09.140 as a basis for awarding her fees. This statute, however, requires a “consideration of the financial resources of both parties.” RCW 26.09.140; *In re: Marriage of Spreen*, 107 Wn. App. 341, 351, 28 P.3d 769 (Div. II 2001) (“RCW 26.09.140 permits this court to award attorney fees on appeal upon a showing of financial need”). Maria has offered no facts or argument regarding relative need versus ability to pay, and thus there is no ground for a fee award under RCW 26.09.140.

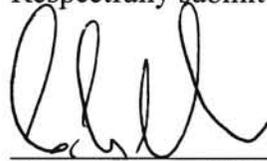
Maria’s request for attorneys fees should be rejected.

### III. CONCLUSION

For the foregoing reasons, Scott respectfully requests that this court reverse the .191 restrictions against Scott in this case, impose restrictions

on Maria based on a history of acts of domestic violence, and remand the case for re-consideration of the provisions of the parenting plan with a directive that the child must be placed in the primary care of Scott pursuant to RCW 26.09.191 and 26.09.187(3).

Respectfully submitted,

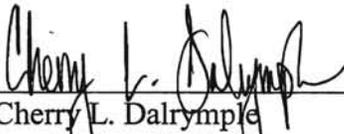
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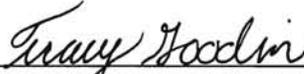
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DATED this 23<sup>rd</sup> day of August, 2012, at Olympia, Washington.

  
\_\_\_\_\_  
Cherry L. Dalrymple  
Paralegal to S. Tye Menser

SUBSCRIBED AND SWORN to before me this 23<sup>rd</sup> day of August, 2012,  
by Tracy M. Goodin.



  
\_\_\_\_\_  
Notary Public in and for the State of  
Washington, residing at Olympia, WA  
My commission expires 8/16/15