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ARGUMENT

Mr. Nichols files this Reply Brief to Respondent Gloria Nichols' Response Brief.

At the outset, Mr. Nichols notes that the Response Brief is nearly devoid of any citations to the record. In fact, there are only a total of five record citations, and only one of those five (on page 6 of the Response) does the Respondent cite to just one page. Otherwise, Respondent cites to five pages (on page 8), or to a total of 67 pages (on pages 1, 3 and 7).

This failure of citation has not stopped Respondent from making assertions about what the record allegedly contains, however. We submit that the bulk of these recitations are inaccurate and ask that this Court strike assertions without citation as improperly before this Court.

For example, Respondent asserts that "most troublesome to the court was Petitioner's complete and utter lack of insight into his role in conflicts with previous wives girlfriends and even his own mother." There is no citation to this assertion. Moreover, we are unaware of what part of the record would be cited for this proposition. We do point out (and did so in the opening brief – *with* citation) that the trial court adopted the GAL's finding that Mr. Nichols' home was "free of conflict." *CP 530*. We also note that the trial court expressed significant concern about Ms. Nichols' temper and inappropriate treatment of her children. Specifically, the trial

court found that that Ms. Nichols “admitted to her anger” and that she “agreed she has unresolved issues from her past,” CP 527; that “the GAL expressed Gloria Nichols’ need for a DV Perpetrator Evaluation and her need for classes on dealing with the anger” (with anger management classes a substitute for the formal evaluation) CP 530; that the “important factor for the GAL’s recommendation [that Ms. Nichols have custody] was that Ms. Nichols recognized her need to change her behaviors,” and that “*this also became an important factor to the Court.*” CP 530 (*emphasis added*). This, we submit, was the most important factor for the court – that Ms. Nichols change her angry ways. As the trial court noted:

After several years working as a judge *in the domestic violence court*, it might enlighten Ms. Nichols on her understanding as to what triggers her anger and conflict. However, the individual counseling from the YWCA seems to be making her aware as to the *need for change*.

CP 530 (*emphasis added*). The same observations were *not* made about Mr. Nichols – according to the court, it was *Ms. Nichols* who needed the perpetrator assessment and management, not Mr. Nichols. The court’s observations show that the court found Ms. Nichols to be a perpetrator in the past. It also signaled the trial court’s erroneous application of the law. This is so because the trial court accepted Ms. Nichols’ stated recognition of the need to change her behavior to be an adequate basis for granting her primary custody. To the contrary, however, RCW 26.09.191 *requires*

restrictions unless the trial court “expressly finds” that extra contact “will not cause physical ... or emotional abuse or harm to the child” and that “the probability” of the parent’s “harmful or abusive conduct will recur is so remote that it would not be in the child’s best interests to apply the limitations...” *RCW 26.09.191(n)(2)*. The trial court made no such findings. In these circumstances, anything other than limited residential time for Ms. Nichols was error.

It comes as no surprise that the trial court made findings of Ms. Nichols’ past abuse, for it was Ms. Nichols who admitted to her past abusive behavior, making it an undisputed fact. As noted in the Opening Brief, Ms. Nichols admitted that she struck her son Nicholas (then called it a slap), *RP 226*; spanked Natalia, *RP 199*; and was addressing her “anger at Natalia” and “losing control” with Natalia (asked by her lawyer) by “attending some classes” – including a Women and Anger class – that had given her “coping mechanisms” such as “knowing what your triggers are, knowing that there’s a physical and psychological, physiological change that takes change and how to recognize that...” *RP 197-198*.

In addition, Ms. Nichols never denied that she pushed Natalia (as Mr. Nichols testified – i.e., that she angrily pushed Natalia’s head back on the high chair and angrily threw Natalia off the bed at other times, *see RP 37, 49-51*). This made Mr. Nichols’ testimony on these points undisputed.

In sum, Ms. Nichols' theory of the case was *not* that she was not abusive. It was that she had recognized she had to change her abusive ways. Any other theory would not have been credible. Unfortunately, on this record, such a theory requires restrictions.

Ms. Nichols incredulously *now* argues that she did not commit domestic violence, and that her behavior towards her children (including the one slap of Nicholas that she admitted, *RP 226*) was not abusive. *See Response Brief at 3; CP 461 (son's report of abuse to GAL)*. Ms. Nichols argues that she did not commit any domestic violence against Mr. Nichols (even though the court found she was currently on probation and attending mandatory counseling as a way to possibly get charges dismissed, *CP 527*). Ms. Nichols also argues that "having a temper is much different than having an impairment," *Response Brief at 3*, but this belies her admissions, and the court's findings, that she needed domestic violence and anger management counseling, *RP 207*, even though she claimed abused-spouse status, *CP 30*; her tacit agreement that she was "losing control," *RP 197*, her admitted striking of Nicholas, *RP 227*, her near-admission that she raised her hand to strike her daughter, *RP 227*, etc. In fact, it is insulting to this Court for her to assert – as she does – that none of this adds up to a pattern of emotional abuse of a child, and – further – that striking her son Nicholas in the face is not physical abuse of a child.

The exact exchange at trial regarding Ms. Nichols striking her son Nicholas went as follows:

Q (by Mr. Nichols' counsel): Have you ever struck [Nicholas]?

A: (by Ms. Nichols): Mm-hmm. Yes, I did.

Q: You have struck him?

A: I slapped him in the face one time.

Q: You slapped your son in the face?

A: Yes, I did.

RP 227. Ms. Nichols now asserts that a “slap” (which she agreed was a “strike” during testimony) does not rise to the level of child abuse or neglect, *Response Brief at 6*. But that is not the law. See *Feis v. King County Sheriff's Department*, 165 *Wn. App.* 525, 534, 267 *P.3d* 1022 (2011) (slight red mark on face, “consistent with a slap,” assisted deputy in fourth degree assault arrest of alleged perpetrator); *State v. Koch*, 157 *Wn. App.* 20, 25, 237 *P.3d* 287 (2010) (single slap by son of his father resulted in son's fourth degree assault conviction). And when it comes to the care of children, that should *not* be the law.

It is the courts' obligation to ensure that statutes are followed and that any deviation from the standard statute be done according to the law. That has not happened here. We ask for relief.

To the extent that Ms. Nichols asserts that the trial court did not make a finding about whether she abused her children emotionally and physically, we submit that such a lack of finding would be error by the court. *See e.g., In re Marriage of Wold, 7 Wn. App. 872, 875, 503 P.2d 118 (1972) (CR 52 requires that in all actions tried upon facts without a jury, the trial court shall find facts specially and state separately its conclusions of law, including findings of fact concerning all ultimate facts and material issues).* Here we submit that the trial court actually did make proper findings regarding abuse – that the trial court’s various references all were done in acknowledgement of Ms. Nichols’ own admissions of abusing her children physically and emotionally, and were the trial court’s findings of that abuse. However, if this Court determines that the trial court did not make findings about abuse one way or the other, we ask that the Court remand the matter for further review. *See Wold, supra, at 875 (one option when findings are not made is to remand to trial court for findings).*

But it absolutely is false that the court made any findings that there was *not* abuse (as the non-cited Response Brief would ask this Court to believe). (Again, we ask that the Court refuse to accept representations in the Response Brief regarding the record below if there is no citation to the allegation – which would be virtually the entire brief).

Respondent claims that “Petitioner wishes he proved his case at trial.” *Response Brief at 6*. It is the Respondent, through her admissions, who assisted greatly in proving Mr. Nichols’ case. Unfortunately the trial court stopped short of applying proper law to the necessary findings of fact and that is the issue that we ask this Court to correct.

In reality, what this case shows is that the trial court decided to follow the GAL’s recommendation (even though that recommendation was legally insufficient) and grant custody to Ms. Nichols because of the hope that Ms. Nichols’ abusive ways were over.

With that hope, the trial court committed reversible error. Having acknowledged Ms. Nichols’ abusive past, the trial court was required to limit (i.e., “shall limit”) Ms. Nichols’ time with the child pursuant to RCW 26.09.191. See, e.g., *Mansour v. Mansour*, 126 Wn. App. 1, 9-10, 106 P.3d 768 (2004). The trial court can moderate that requirement only by specific findings, *Mansour, supra*, at 10, including that the court must “expressly find” that the extra contact “will not cause physical ... or emotional abuse or harm to the child” and that “the probability” of the parent’s “harmful or abusive conduct will recur is so remote that it would not be in the child’s best interests to apply the limitations...” RCW 26.09.191(n)(2).

These findings make inaccurate Ms. Nichols' allegations at the bottom of page 1 and top of page 2 (all without citation) as to whether Petitioner's testimony "was unconvincing" regarding Ms. Nichols' abusive behaviors. Mr. Nichols testified to them, as did Ms. Nichols – and the trial court found them. It is the law that was not applied. This is error.

If it is Ms. Nichols' allegation that the trial court failed to resolve factual matters for purposes of appeal, then that is error as well (as noted above). Ms. Nichols put before the trial court undisputed facts regarding her behavior that by definition triggered RCW 26.09.191 consideration. The court did not consider the statute. This was error.¹ And while the court commented that Mr. Nichols engaged with protective orders more than it preferred (in the context of other divorce proceedings and not as recited by Respondent), it still found no abuse by him that triggered restrictions. In sum, this is about Ms. Nichols, not the other way around.

As to other issues in the Response Brief:

(a) Discovery – Ms. Nichols cites to no authority for various propositions. She also mischaracterizes arguments. We submit that the Opening Brief is clear, and ask the Court to refer to it for any Reply.

¹ Ms. Nichols asserts at page 2 of her Response that Mr. Nichols alleges no abuse of discretion. Allegations in that regard are found at page 22 of the Opening Brief.

(b) Witnesses – Ms. Nichols asserts that Mr. Nichols could have called witnesses in rebuttal. But the witnesses were available for the case in chief. The record reflects that some witnesses were only present for the first day of trial. *See e.g., SRP 37*. The trial court cut off consideration, in part by stating that the testimony would be impermissible hearsay (even though there was no testimony to evaluate), and Mr. Nichols believed the court. Moreover, the evidence was of great importance, given that it involved the safety of a child. *See Atkinson v. Atkinson, 38 Wn. 2d 769, 771, 231 P.2d 641 (1951)* (“[I]t seems to us that in this most difficult of all problems, the custody of children, the trial court should seek all the light available”) The trial court erred by shutting down witness avenues, by asserting that the witnesses had only hearsay to offer (without allowing for proffers), and remedies were ultimately unavailable at a later time. This was error.

(c) Respondent asserts that Mr. Nichols “placed his wife’s name on a series of joint accounts,” but makes no citation to the record. This does not comport with the evidence. *See Opening Brief at 13 and 19, and record cited therein*. It is unclear what Respondent means by saying that the trial court’s ruling was in line with *In re Estate of Borghi, 167 Wn. 2d 480, 484, 219 P.3d 932 (2009)*. However, that case is fully briefed in the Opening Brief at 36-37, and we rely on original briefing for Reply.

We note that Ms. Nichols speaks of evidence produced at trial but makes no citations to the record. It is unclear which holdings she asserts were in “joint” bank accounts that did not exist at the time of separation (other than one savings account that had less than \$1,000.00 on any given month, *see CP 547-608*). We also note Ms. Nichols’ testimony on this matter. As she stated, she would be unable to assist in the understanding of the parties’ finances, and brought in no income. *RP 177*. She did use as an exhibit a document from an account but did not know the origin of that document. *Id.* Mr. Nichols had already testified that this document was a red herring as it was with regard to an account that was closed in 2009 and only related to his separate property. *RP 88*. Thus, it is unclear where Ms. Nichols presumes to get her current information. Whatever she is attempting to claim – without citation – she errs as to the facts. And if there were no joint accounts, then there was no commingling or failure to trace separate property. On the details of this argument, we rely upon the Opening Brief. *See Opening Brief at 36-39*. We do note, however, that while it is true that the trial court is vested with the responsibility of dividing assets regardless of label, it is also the trial court’s responsibility to label the property properly in the first place. *See RCW 26.09.080 (first the court is to label property as separate or community before determining division)*. This did not occur here, and is error.

It is also odd for Ms. Nichols to throw around numbers (such as \$70,000) without any citation whatsoever and with incorrect assumptions as to whether the accounts were separate or joint (they were separate), and with full knowledge that funds from his separate homes were traceable (as he traces them) to accounts that were separate accounts. Again, we point to the Opening Brief for full argument, but note confusion with regard to what Respondent is even trying to say, without a single citation to the record.

CONCLUSION

For the foregoing reasons, we ask that this Court grant the relief as requested in the Conclusion in the Opening Brief (i.e., reversal of the custody order, or for a new trial, and for a reversal of the trial court's rulings regarding property).

Respectfully submitted this 11th day of December, 2012.

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Kenneth Nichols,)
)
 Appellant,) Court of Appeals No. 304523
)
 vs.) Sup. Ct. No. 10-3-03142-0
)
 Gloria Nichols,)
) CERTIFICATE OF SERVICE
 Respondent.)
)
)
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I, Karen Lindholdt, do hereby certify, swear and affirm that the following is true and correct:

1. On Tuesday, December 11, 2012, I had delivered by hand delivery the original and one copy of Appellant's Opening Brief to the Court of Appeals, Division III, 500 North Cedar Street, Spokane, 99201.
2. Also on Tuesday, December 11, 2012, I served a copy of this Opening Brief by having a copy delivered by hand to Gina Costello, 430 West Indiana, Spokane, Washington 99205.
3. I certify that the foregoing is true and correct.

DATED: 12/11/12 Karen S. Lindholdt
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