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No. 63228-1-I

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

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In re the Marriage of

TRACIE LINN LANG  
Respondent

and

BROOK WEST LANG  
Respondent.

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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BRIEF OF RESPONDENT AND  
OPENING BRIEF OF CROSS-APPELLANT

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FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2009 FEB 2 AM 10:37

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## I. INTRODUCTION

The trial court in this case found that Brook Lang had committed domestic violence and that his marriage to Tracie Lang was based on intimidation and control, findings that are supported by substantial evidence. For the sake of their children, and because Brook had no insight into the effect of his conduct on others, the trial court conditioned additional residential time on Brook's completion of domestic violence treatment.

The court placed this limitation on Brook's residential time on the authority of the discretionary provision in RCW 26.09.191(3)(g), which authorizes the court to limit "any provisions of the parenting plan" on the basis of factors or conduct "the court expressly finds adverse to the best interests of the child."<sup>1</sup> The court also ordered sole decision-making to Tracie, pursuant to RCW 26.09.187.2(b) because Brook "is not capable of agreeing with anybody else about anything ..." XIII VRP 1616; see, also, CP 963.

Both of these restrictions, on residential time and decision-making, are mandatory on a finding of domestic violence. RCW 26.09.191(1) ("shall not require mutual decision-making") and (2) (residential time "shall be limited"). Here, the trial court did what the

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<sup>1</sup> The entire statute is attached as an appendix.

statute requires, but in the exercise of its discretion. RCW 26.09.191(3) (court “may preclude or limit any provisions of the parenting plan”).

Brook claims an inconsistency in the failure of the court to use the mandatory provisions of RCW 26.09.191, using, instead, the discretionary provision. This failure actually was error, as Tracie argues in her cross-appeal. Once a court has found domestic violence, the statute mandates the restrictions imposed by the court here, as well as a restriction on dispute resolution processes (i.e., no non-judicial dispute resolution may be ordered where domestic violence is found under RCW 26.09.191(1)). In short, the trial court, exercising its discretion, did most of what the statute requires, but also should not have ordered dispute resolution through mediation. CP 963. Thus, correcting this error requires striking the mediation requirement, but otherwise affirming the parenting plan.

Tracie cross-appeals one additional issue pertaining to the property distribution. The trial court failed to value the main community property asset, roughly two million shares of stock in a publicly traded corporation. However, based on undisputed evidence, the court found the asset’s value to be in a range of 60¢

to 80¢ per share. Because the value is not disputed, this error may be corrected by this Court valuing the stock at the midpoint in this range and remanding for entry of judgment in that amount.

## II. RESTATEMENT OF ISSUES

1. Did the court abuse its discretion when, having found domestic violence, it made additional residential time for the father contingent on his successful completion of domestic violence treatment?

2. Was the court actually required to impose restrictions on the father's residential time, because of the domestic violence?

3. Are the court's domestic violence findings express, found in the Findings of Fact and Conclusions of Law under the section entitled "Parenting Plan" and in the Order on Reconsideration?

4. Are the court's domestic violence findings supported by substantial evidence?

5. Because there is no actual or apparent evidence of bias, is there any basis to order a change of judge in the event of any remand?

### III. STATEMENT OF ISSUES FOR CROSS APPEAL

1. Did the trial court err by failing to apply the mandatory provisions of RCW 26.09.191, having found domestic violence?
2. Because there was domestic violence, did the trial court err by ordering dispute resolution through mediation, contrary to the provisions of RCW 26.09.191(1)?
3. Did the court err by failing to value precisely the community's principal asset, instead entering a range of value?
4. Can and should this Court correct that error by entering a value on the undisputed evidence of value?

### IV. RESTATEMENT OF THE CASE

#### A. BROOK AND TRACIE ENTERED INTO A "TRADITIONAL" MARRIAGE.

Brook and Tracie met in September 1999 and married in May 2000. I VRP 51-52. With Brook's encouragement, Tracie quit her administrative assistant job prior to the wedding. CP 976; 1 VRP 53-54. They had three children, born in 2001, 2003, and 2005. I VRP 49-50. During the marriage, by mutual agreement, Tracie did not work outside the home, but concentrated on homemaking and childrearing. CP 976. She performed "virtually all" of the parenting functions. CP 980 (#5).

Brook, an entrepreneur and self-described senior corporate executive, worked intensely in various businesses. CP 976; Exhibit 549 (résumé); VRP 1195-1209. In pursuit of “the big hit,” he worked around-the-clock. I VRP 62; see, also, CP 980 (#6). His focus on work was at the expense of building a relationship with his children. CP 980 (#6).

**B. THE MARRIAGE WAS TROUBLED AND, AFTER SEVEN YEARS, THE PARTIES SEPARATED.**

The marriage was troubled from the start. I VRP 56-57. Immediately after the wedding, after an intense courtship, Brook shifted his focus from Tracie to his work, threatening there would be no honeymoon if he did not close a deal. Id. During the first week of their married life, while driving, Brook flew into a rage when cut off by another driver and responded by cutting that driver off, stopping the vehicles on the road, and confronting the other driver. I VRP 57-58. Tracie was scared and horrified. Id. During the honeymoon, Brook ignored Tracie and worked the whole time. I VRP 58-59. Later that year, when Tracie was late returning from a trip taken with her mother and sister, Brook became “livid” and ordered her home. II VRP 154

Determined to have five children, Brook organized and directed the parties’ childbearing efforts, which included dominating

the OB/GYN appointments. I VRP 59-61; II VRP 131-142, 150, 152, 156-157; XIV VRP 1148-1156. He restricted sexual intimacy to these procreative efforts. I VRP 70-72; II VRP 156. He exercised complete control over the family finances, giving Tracie a monthly allowance. II VRP 155, 204-206; see, also CP 982-985 (making Brook responsible for tax liabilities because Tracie “did not have access to or control of information and decisions relating to payment of income taxes”). In the exercise of that control, he made sure their property was titled solely in his name, later claiming it was his separate property. I VRP 118-120; V VRP 584-588; VII 914-915; XI VRP 1325-1326; XIII 1523-1526.<sup>2</sup> He also monitored Tracie’s email. II VRP 167-168; V VRP 575-576. He made her schedule all events with him through email. I VRP 116. Once, when she was pregnant, Brook became angry with Tracie and kicked her out of the car. II VRP 171.

After the second child, Tracie was frustrated and exhausted. I VRP 70-72. She resisted having a third child, recognizing the

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<sup>2</sup>Brook explained the house was titled in his name alone because it was his separate property, even having Tracie sign a quit claim deed. VI VRP 800-802. He did not tell Tracie that was the purpose or effect of what she signed. XIII 1526-1527. Later, he claimed, he titled as he did to protect Tracie’s credit, though he was, at the same time, running up her credit cards. VI VRP 810-811. In later testimony, he denied claiming that he held sole title in an effort to protect Tracie. VRP 1316-1322.

marriage was not good, but Brook pressured her relentlessly, as if “brainwashing” her. II VRP 156-157. He would pace and yell at her for hours at a time. II VRP 157. “You promised, Tracie,” he would repeat over and over. “You told me, you said every two years.” Id. He would follow her to bed, close the door, pace back and forth, yelling at her, flickering the lights, and shaking the bed. II VRP 156. Finally, to avoid Brook’s rage, Tracie relented and became pregnant a third time. II VRP 158-159. As she observed, “Brook has a way of beating you down.” IV VRP 543-544.

After the birth of their third child, Brook took Tracie to a marriage counselor. II VRP 160-162. At first, Tracie was excited to go, having endured in isolation and embarrassment. Id. But soon she could see “there was no hope ... [Brook] didn’t care to hear [her] voice.” Id. As she put it, “[h]e just invaded me, financially, physically, emotionally.” II VRP 162. When the subject of separation came up in counseling, Brook became livid and stormed out. II VRP 162-163.

Brook encouraged Tracie to go to individual counseling to work on her problems and to get medicated. II VRP 166-167. Tracie saw a psychiatrist (Einspahr), who said her problem was the marriage and that she did not need to be on medication. IV VRP

434, 546. Beginning January 2007, she saw a therapist. IV VRP 548-550. Her therapy helped her to develop boundaries in the marriage. II VRP 168-169. As she did, Brook became more controlling. Id. For example, he made the entire family accompany him and sit in the car while he conducted business. Id. "The car became a place of fighting." II VRP 170-171. Brook would trap the family in the car, then speed down the freeway at 100 m.p.h. yelling at Tracie and ignoring her pleas to slow down. Id.

One evening, in an effort to avoid an escalating argument, Tracie left the kitchen to go to bed. II VRP 169-170. Brook turned off the power in the house except for the room where he was watching television. Their daughter who is afraid of the dark became distraught when her nightlight went out. Despite having frightened the child, all Brook had to say to Tracie was "[d]on't ever walk away from me." II VRP 170.

Tensions escalated until, in April 2007, they erupted in a physical altercation, with both parties claiming assaults and injuries. CP 980 (#7); II VRP 171-176; Exhibit 80. The couple separated for good.

C. TRACIE FILED FOR DIVORCE, BUT BROOK REPEATEDLY DELAYED THE LEGAL PROCEEDINGS.

Tracie filed for divorce, then voluntarily withdrew her petition pursuant to an agreement with Brook regarding financial matters, including the refinance of the family residence (Montreux) in Sammamish to provide needed cash. II VRP 192-194. Their agreement provided that Brook would cooperate to re-file the petition, but he did not. *Id.*; II VRP 199; Exhibit 9, at 3-4. At trial, Brook blamed Tracie's re-filing of the petition, despite his agreement, for his difficulty finding a job, saying he made a "mistake" when he signed the agreement. XII VRP 1470-1473.

Brook refused to comply with other provisions of this agreement, which resolved a number of disputes between the parties. Exhibit 9. For example, Tracie did not think they could afford the approximately \$10,000-12,000 monthly expense of Montreux. See II VRP 210; X VRP 1246-1248; XIII VRP 1503-1508. She wanted to sell the residence and move into a rental property they owned ("Tam O'Shanter"), also on the Eastside, but Brook wanted to sell the rental property and keep Montreux. II VRP

197-198, 213; IV VRP 508; VI VRP 742-747; X VRP 1210-1213.<sup>3</sup>

As the court observed after all was said and done, and Brook had his way, Tracie's plan was the better one. XIII VRP 1625-1626.

Despite having gotten his way, Brook obstructed implementation of the agreement, which provided for the proceeds from the refinance and sale to go into blocked accounts controlled by Tracie's attorney, from where specified expenses would be paid. Exhibit 9; X VRP 1210-1234. Tracie had to move to compel Brook to agree to release of the funds from escrow. *Id.*; CP 227-230. Even then, Brook violated the agreement by facilitating the release of \$2,000 to the IRS, bypassing the procedures outlined in the agreement. XI VRP 1335-1352. The fault, he claimed, was Tracie's attorney's, for "not getting back" to Brook. *Id.*, at 1350.<sup>4</sup>

Brook also put the kibosh to the children's participation in therapy, because the children were seeing the psychiatrist Tracie had seen twice the previous year. III VRP 300-304; IV VRP 547. He would not let Tracie take one of the children to sensory

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<sup>3</sup> Brook also claimed he wanted Tracie to live at Tam O'Shanter, but that did not happen because Tracie's attorney "did not get back to him." X VRP 1233; XI VRP 1352-1354. He also wanted Tracie to live in Montreux. VI VRP 746-747.

<sup>4</sup> At various points, Brook explained that he blocked the transfer because the parties had not arranged in their agreement for the payment of taxes on the sale. X VRP 1210-1234. However, throughout the marriage, Brook had been much more casual about tax liabilities. XI VRP 1329-1354

integration therapy without getting a second opinion, despite that the therapy would do no harm and might do some good. IV VRP 459-466; V VRP 610-611. Brook even attempted to cancel medical appointments Tracie had made for the children, prompting the court to modify its temporary order to put Tracie in charge of routine medical care for the children. IV VRP 460-463.

Among other things, and not including the efforts to get Brook to cooperate with the parenting evaluation (see below), Brook forced a continuance while representing himself because he refused to accept service of pleadings. CP 1296-1297, 1432-1442. He refused to participate in mediation. CP 1489-1492, 1443-1488, 1493-1495. He also resisted discovery, forcing Tracie to bring another motion to compel. CP 874-892, 1496-1497, 1498-1521, 1522-1525, 1526-1531. See, also, CP 1808-1812.

**D. BROOK REFUSED TO COOPERATE IN THE PARENTING EVALUATION UNTIL THE EVALUATOR HE CHOSE WAS APPOINTED.**

Early in the proceedings, the court appointed Pam Edgar to perform a parenting evaluation. CP 296-301. When Tracie's attorney quickly discovered Edgar was unavailable, the parties agreed to substitute Andrew Benjamin and the Parenting Evaluation Treatment Program (PETP) at the University of

Washington. CP 1253-1255. Brook then sought a continuance, stating the parenting evaluation would be delayed because he could not participate due to work and travel. CP 1257-1261. Then he raised objections to the PETP procedures, mainly that he wanted more time devoted to his case, which the program attempted to accommodate. CP 545-548, 1264-1278. Still, claiming he was acting to protect his children, Brook objected to any "cap" at all on the time the parenting evaluator spent on the case and, further, he wanted to choose the evaluator. CP 549-613; 670-676. He told the judge he wanted an evaluation only as the product of a "professionally planned out process," which involved ordering Tracie to participate in "co-parenting therapy." He also decided he wanted a different evaluator altogether. CP 1279-1285.

Tracie moved to compel Brook's cooperation with the parenting evaluator the parties had agreed to use. CP 303-374, 375-544, 1264-1278, 1283-1284. On May 9, 2008, the court ordered Brook to cooperate with the PETP requirements. CP 677-679. Brook did not. He failed to meet with the evaluator and PETP withdrew. Exhibit 546. Trial was pushed further back. CP 1091-1092.

When the parties appeared before Judge North for a pretrial conference, Brook asked for another continuance and for a parenting evaluation, explaining that PETP did not work out because the evaluator wanted to meet on Memorial Day, “one of our most precious holidays ... [when] we celebrate our veterans’ greatest sacrifice ...” VRP May 30, 2008 at 5-8. Brook wanted to spare the evaluator from having to work on the holiday. *Id.* Tracie’s attorney called this a “bunch of hooey.” *Id.*, at 11. Nonetheless, the court allowed Brook to look for a parenting evaluator who could complete an evaluation by the end of July, the new trial date. *Id.*, at 52.

Brook found Lynn Tuttle to do the evaluation, having interviewed her at the very start of the process, and, on June 10, the court appointed her to do a parenting evaluation. CP 869-873: III VRP 233-237. Trial was continued again.

Tuttle produced her report on September 1, after spending nearly 57 hours reviewing documents and interviewing contacts. Exhibit 518. She concluded that Brook committed domestic violence in April 2007 and that he “exhibited a pattern of abusive and controlling behaviors toward [Tracie] that are consistent with those of domestic violence perpetrators.” *Id.*, 22; III VRP 330. She

recommended domestic violence treatment for Brook “to facilitate change” and to “reduce risk to the children from abusive behaviors.”  
Id. Moreover, in light of Tracie’s history of primary caregiving and Brook’s intense work schedule, she recommended the children reside primarily with Tracie; because of the difficulty the parents have making decision and because of the domestic violence concerns, she recommended Tracie have sole decision making. Exhibit 518, at 25-26.

E. BROOK CLAIMED TUTTLE SHOULD NOT HAVE CONSIDERED DOMESTIC VIOLENCE ALLEGATIONS.

Brook was unhappy with the parenting evaluation and critical of Tuttle. CP 1033-1034, 1067-1075. On the eve of trial, and more than a month after Tuttle issued her report, he sought permission to put on additional witnesses at trial, including three experts. CP 1035-1037. Only one of these, Charlotte Svenson, would “rebut the domestic violence conclusions and recommendations of Ms. Tuttle.” CP 1036; see, also CP 1034.<sup>5</sup> The others would testify to parenting (the neighbors) and evaluation methodologies (Drs. Hutchins-Cook and Dunne). CP 1033-1034, 1036.

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<sup>5</sup> In his brief, Brook does not state that he identified Svenson as an expert witness. Br. Appellant, at 20.

Brook acknowledged missing the deadline for identifying witnesses. CP 1035. He offered that he was pro se at the time. Id. He also claimed the witnesses were not designated earlier because he did not know he would need witnesses to rebut Tuttle's report and it took time to identify and retain those witnesses. CP 1036.

Tracie objected, claiming prejudice to her ability to prepare for trial on grounds of time and money. CP 1799-1802. She observed that Tuttle was appointed at Brook's insistence after he refused to cooperate with the previous parenting evaluator. CP 1800-1801. Brook replied that it was not his "fault" that the parenting evaluation was submitted "months after the witness designation deadline ...." CP 1805. He also denied selecting Tuttle as the evaluator. CP 1806.

The court allowed Brook his fact witnesses on parenting (the neighbors) and the expert he proffered on the domestic violence issue, Charlotte Svenson. CP 1038-1040. The court did not allow the other two experts because of prejudice to Tracie's ability to prepare for trial. CP 1039.

F. AT TRIAL, BROOK CLAIMED TUTTLE HAD AGREED NOT TO CONSIDER THE DOMESTIC VIOLENCE ALLEGATIONS.

At trial, for the first time, Brook claimed Tuttle had agreed not to discuss the domestic violence allegations. VI VRP 789-792. He had told her that he could not discuss the April 2007 incident because of his pending criminal case until a protective order was entered. *Id.* No such order was entered, which Brook blamed on Tracie's attorney and on Tuttle, who was supposed to pursue that. XII VRP 1399-1402. Consequently, Brook declined to tell his side of the story, then complained that Tuttle should have avoided the topic altogether. IX VRP 1083-1088. Brook was not able to substantiate his claim that a protective order regarding the domestic violence had even been discussed with Tracie or her attorney, let alone ever entered. XII VRP 1401-1405, 1493-1494.

On appeal, Brook claims he "had every reason to believe that domestic violence would not be an issue at trial," based on various representations made by Tracie. *Br. Appellant*, at 9, 11-14, 18-19. In fact, Brook was told repeatedly in the appropriate legal pleadings that domestic violence was on the menu. See, e.g., CP 6 (Petition for Dissolution, at 4: requesting domestic violence protection order); CP 1119 (Confirmation of Issues: "Is there an

allegation of domestic violence in this case?” – “Yes”).<sup>6</sup> Brook had this information on what he could expect at trial during the period of time when he was required to compile his witness list. Supp. CP \_\_\_ (Sub 2: Order Setting Case Schedule: disclosure of “Possible Primary Witnesses” due on 03/03/08).<sup>7</sup> Most of the purported assurances to the contrary, on which Brook claims to rely, occurred after the date by which he should have disclosed his witnesses.<sup>8</sup>

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<sup>6</sup> Brook had more notice than this, since the petition cited above was the second one filed, the first one, filed in April (under #07-3-03124-7 SEA and including the request for a Domestic Violence Protection Order), having been dismissed pursuant to an agreement of the parties in order to facilitate refinancing.

<sup>7</sup> Brook acknowledges this deadline but claims that the court extended to April 28, 2008, the deadline for possible additional witnesses. Br. Appellant, at 19-20 n. 8. However, “additional witnesses” means only “all persons whose knowledge did not appear relevant until the primary witnesses were disclosed and whom the party reserves the option to call as witnesses at trial.” KCLCR 26(b)(2).

<sup>8</sup> The only exceptions relate to the entry of temporary parenting plans, first in the dismissed dissolution action, in May 2007. Tracie filed her second petition for dissolution subsequently, in August 2007, in which she requested a domestic violence protection order. CP 6. The second temporary parenting plan was entered in September 2007. CP 1054-1060. More than a month later, in the Confirmation of Issues, Tracie alleged domestic violence was an issue for trial. CP 1117-1120.

G. THE COURT ENTERED A PARENTING PLAN LARGELY IN AGREEMENT WITH THE EVALUATOR'S RECOMMENDATIONS.<sup>9</sup>

The trial court heard both parties describe the events of April 2007 and, because it could not resolve the conflicting versions, decided not give any weight to the incident. CP 980 (#7). Still, the court found that Tuttle "largely got it right" in her evaluation of the parties' parenting (VIII VRP 1616) and largely adopted Tuttle's recommendations when entering the parenting plan.

The residential schedule reflects the fact that Tracie had performed virtually all the parenting functions, while Brook concentrated on his career. Generally, the children spend two overnights a month with Brook (Saturday, 10 a.m. to Sunday, 6:00 p.m.) and Sundays (noon to 6:00 p.m.) on the other two weekends. CP 954-955. The children also spend roughly half their break times with Brook and two weeks of summer vacation. CP 955-958.

The court provided further that Brook could increase his routine residential and summer time with the children by completing

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<sup>9</sup> Tracie has sought modification of this plan alleging that Brook provides a "detrimental environment" for the children; a commissioner has found adequate cause to proceed with modification. CP 1041-1046, 2017-2023, 2081-2082. The parenting plan has been temporarily amended to reduce Brook's residential time and require supervision. CP 2083-2086. Brook has been found in contempt of the plan. Supp. CP \_\_ (sub 275: Order on Contempt, 09/24/09).

a domestic violence treatment program. CP 954-956, 959-960.

The court found RCW 26.09.191(3)(g) applicable: "Father's residential time set forth below in this parenting plan is conditioned on his satisfactory participation in and completion of the treatment set forth in Section 3.13." CP 954. And referred to the findings of fact and conclusions of law. Id. As the court observed, "if [Brook] is going to be a good dad to the girls, he needs to get some insight into his behavior." VIII VRP 1619.

Of major concern to the court was the impact on the children of Brook's way of conducting his personal relationships. Even without considering the events of April 2007, the court concluded [the marriage] presents a clear domestic violence relationship ... based on intimidation and control ..." CP 987. The court described Brook as "one of the most controlling people this court has ever observed" and noted that he is not capable of agreeing with anybody else about anything unless they simply agree to whatever his position is." CP 986. Brook uses "his ability to bully people to drive his personal relationships." XIII VRP 1618.

When Brook sought reconsideration on the domestic violence issue, the court made clear it was finding domestic violence had occurred.

Ms. Lang testified at trial to several incidents between the parties that meet the statutory definition of Domestic Violence as set forth in RCW 26.50.010(1): "... assault or the infliction of fear of imminent physical harm, bodily injury or assault, ..."

CP 1024. Indeed, as set forth above, Tracie described Brook's rages, his trapping her in the car while driving too fast, turning off power in the house, haranguing her while shaking the bed and flickering the lights, his hacking into her personal email, etc.

Brook's own therapist, Charlotte Svenson, knowing nothing more than what Brook has told her or what she's observed (VIII VRP 967), described how Brook's extreme anxiety manifests in hyperactive behavior and excessive thoughts and how he defends against the anxiety by being overbearing. VIII VRP 944-945. She confirmed he has traits of narcissistic personality disorder (e.g., being self-absorbed, certain of the correctness of his views, very strongly tending to see things his way and to push in terms of boundaries and limitations). She did not see Brook as a domestic violence threat, but conceded that was not her specialty. Id., at 958. However, she agreed his forcefulness would not be desirable in a family situation. Id., at 968-969. She opined that Brook needs help on a deep level with anxiety and with skills. Id., at 959. However, she thought Brook should see someone other than her.

Id., at 965-966. She saw in him a potential to learn. Id. Even she thought the Langs could not engage in joint decision-making without the assistance of a third party professional. Id., at 964.

Brook demonstrated some of these traits in his trial testimony. Not counting colloquies or statements of counsel in opening and closing, Brook's testimony consumed nearly half of the long trial and was twice the length of Tracie's (678 of 1500 pages, 45%, as compared to Tracie's 356 pages, 24%). He was persistently evasive in his answers, frustrating opposing counsel and even his own attorney, as well as the court, so that the court was led to observe "I'm not sure Mr. Lang is capable of giving you a simple answer to a question." XII VRP 1401; see, e.g., XI VRP 1267-1269 (Tracie's attorney complaining how many questions it took to get a "straight answer" from Brook). His testimony was often inconsistent (e.g., wanted the children with him because of his flexible work schedule, but also worked so much he could not comply with court orders, etc.). He frequently blamed others for the failure of something to happen (e.g., others "did not get back" to him) or attributed his actions to the advice of "professionals." He claimed repeatedly to have been misquoted. Ultimately, the court found him lacking in credibility on many issues. See, e.g., XIII VRP

1619 (re Montavo having little value); 1624-25 (re Montavo being his separate property), 1626 (re Montreux being his separate property); Id. (re Tracie owing Brook \$49,000).<sup>10</sup>

H. THE COURT ENTERED A DECREE DISTRIBUTING THE PROPERTY AND LIABILITIES AND AWARDING MAINTENANCE.

When distributing property and addressing the issue of maintenance, the court had before it a heavily encumbered family residence, a publicly-traded corporation (Montavo), miscellaneous smaller assets and liabilities, and two spouses with very disparate earning potentials. CP 970-975. Brook had left a job with earning potential of \$200,000 annually to work fulltime at Montavo, while Tracie had, before the marriage, left a low-paying job to devote herself to the family full-time. CP 976. Brook's contract with Montavo provided for a salary to him of \$168,000 annually. CP 976. Tracie, on the other hand, with primary responsibility for the children, and with a need to complete her education in order to

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<sup>10</sup> Even Brook's trial attorney grasped the court's difficulty in believing some of Brook's testimony, as illustrated by this exchange:

THE COURT: Well, I specifically found some of his testimony was incredible.

MR. HALL: I understand. Incredible in a lot of ways, I suppose.

III VRP 1625-1626.

command a decent living in the marketplace, demonstrated a need for maintenance, which the court awarded in the amount of \$3,000 monthly. CP 933-934, 976-977.

As he requested, Brook received the family residence, which has no net value, being heavily encumbered. CP 930-931, 969.<sup>11</sup> The other principal asset consists of 1,911,397 shares of stock in Montavo, Inc., a Delaware corporation formed by Brook during the marriage. CP 970. During Brook's testimony, on November 12, 2008, he testified to a share value that day of 65¢ and, on December 2, 2009, to a share value of 79¢. VIII VRP 988, XI VRP 1309. Tracie thought the stock was worth 80¢ a share. V VRP 601-604. The court valued the stock in the range of 60¢ to 80¢ per share. CP 972. Thus, the asset was worth \$1,146,838.20 to 1,529,117.60.<sup>12</sup> The court expressly rejected as incredible Brook's testimony of lesser values. XIII VRP 1619.

The court awarded 55% of the asset to Tracie (a value of \$630,760.98 to \$841,014.64) and 45% to Brook. CP 930-931.

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<sup>11</sup> The court described the residence as "an enormous disaster." XIII VRP 1625-1626. In 2005, the parties financed the entire purchase price of the house they called "Montreux." XI VRP 1316-1328. In October 2007, the house was valued at \$1.2 million, though at trial it was valued at \$1,040,000, with debt of \$1,165,000. XI VRP 1326-1328; XIII VRP 1536-1543.

<sup>12</sup>Post-trial, Brook revealed he had more shares than previously disclosed. Supp. CP \_\_\_\_ (sub 305: Declaration of Brook Lang re Montavo, at 2).

Tracie received 5% more than half in lieu of an attorney fees award because “[i]t’s the only thing she’s ever going to be able to realize anything out of.” XIII VRP 1619-1620, 1629-1630; CP 987.

The court made the maintenance award of \$3,000 monthly contingent on Brook’s payment to Tracie of “monies” representing the value of the stock awarded to her.

Maintenance shall continue until Mrs. Lang has received 100% the monies resulting from the sale of 1,051,268 shares of Montavo Inc. (representing her award of 55% of the shares of the 1,911,397 in Montavo stock held by Mr. Lang).

CP 933. The court provided for a graduated reduction in maintenance tied to payment of monies to Tracie.

As Mr. Lang is able to sell and then provide the resulting monies to Mrs. Lang from the 1,051,268 shares of Montavo, Inc. awarded to her, he may reduce his monthly spousal support payment by the percentage of the total stock award he is able to cash out for Mrs. Lang ...

CP 933, 934 (maintenance to terminate when Tracie receives “100% of the cash resulting from the liquidation” of her interest).

Otherwise, the court did not place a deadline on Brook’s obligation to pay Tracie or provide for interest on the unpaid balance.

The structure of the award accomplished two goals. First, the court wanted to protect the value of the asset. Brook had testified about “certain practical and legal realities that bear upon

the market price/value of the MTVO shares and restrict his ability to trade his shares.” CP 972; see XII RP 1449-1454 (Brook testifying about restrictions on ability to transfer or sell). The court made no finding as to the truth of Brook’s assertions, but granted him the leeway to deal with these “realities” as he wished, so that the price of the stock would not suffer. CP 972 (regarding Brook’s testimony that offering large number of shares “likely would negatively impact the price”).

At the same time, the court wanted “the fastest way to put actual cash in [Tracie’s] hands.” XIII VRP 1621. Linking payment of the Montavo interest to maintenance ensured her of needed support and provided an incentive to Brook. XIII VRP 1620. “[T]he maintenance basically lasts as long as it takes to get the money out of Montavo to her.” XIII VRP 1620.

#### I. ATTORNEY FEES AND OTHER OUTSTANDING JUDGMENTS

The court created a further incentive for payment to Tracie of her share in Montavo by providing for the “sunsetting” of other awards to her upon satisfaction of the Montavo award.

Tracie had no means to pay the high costs of the dissolution litigation. During the course of the litigation, the court ordered Brook to pay Tracie \$21,940.00 in temporary fees and costs, but he

did not pay her. CP 935. In the year leading up to trial, the trial court twice granted motions to compel brought by Tracie against Brook and awarded fees totaling \$1415.00. Id. Brook did not pay them. Id.

At the conclusion of trial, the court ordered interest on these judgments at 12 per cent per annum, but also provided that these judgments would be satisfied upon transfer to Tracie of her interest in Montavo. CP 935.

Likewise, the court found Brook to be \$5,000 in arrears in payment of temporary family support. CP 977. The court provided this obligation of Brook's likewise would be satisfied upon payment to Tracie of her interest in Montavo. CP 977.

Brook appealed and Tracie cross-appealed. CP 1853-1916, 1920-2010. Additional facts are addressed in the argument section below.

## V. ARGUMENT IN RESPONSE

### A. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT ENTERED THE PARENTING PLAN.

A trial court has broad discretion when fashioning the provisions of a parenting plan. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). It exercises that discretion guided by the best interests of the children and upon consideration

of the factors listed in RCW 26.09.184(5), RCW 26.09.187(3). See, also, RCW 26.09.002 (best interests is standard for court's parenting decisions). Such decisions are reviewed by this Court for an abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

Here the court placed the children primarily with Tracie, who "performed virtually all of the past parenting functions for the children." CP 979-980. On the simplest level, the children are with Tracie as much as they are because Brook did not develop his relationship with them during the marriage, choosing instead to pursue his business interests. CP 980 (FOF 2.18, #6). Understandably, given these facts, Brook raises no challenge to Tracie being made the primary residential parent.

Instead, Brook takes issue with the domestic violence treatment ordered by the court, on the authority of RCW 26.09.191(3)(g), as a predicate to increasing his residential time with the children. CP 954 ("Father's residential time set forth below in this parenting plan is conditioned on his satisfactory participation in and completion of the treatment set forth in Section 3.13.). The court described this as an incentive. XIII VRP 1623-1624 (the schedule "gives him some incentive to get the DV treatment

done.”). As discussed below, this order is well within the court’s discretion. Indeed, the limitation on Brook’s residential time is mandatory.

1) RCW 26.09.191 has discretionary and mandatory provisions.

Here, the trial court based its residential time limitation pursuant to RCW 26.09.191(3)(g), which authorizes the court to limit “any provisions of the parenting plan” on the basis of factors or conduct “the court expressly finds adverse to the best interests of the child.”<sup>13</sup> At the outset, it is necessary to acknowledge the breadth of the court’s discretion under this provision, which arguably merely restates the general authority – and duty – of the trial court to act in the best interests of children when structuring a parenting plan. *Littlefield*, 133 Wn.2d at 51-52; see, also *In re Marriage of Katare*, 125 Wn. App. 813, 105 P.3d 44 (2004) (risk the father might abduct the children, in light of the dire consequences, would justify travel limitations).

While this section is discretionary, Sections 1 and 2 in the statute are mandatory. See *Katare*, 125 Wn. App. at 825 (describing statute). Under Section 1, the court may not require

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<sup>13</sup> The relevant statutes are included as an appendix.

joint decision-making or non-judicial decision-making mechanisms if it finds certain, specific conduct to have occurred (e.g., abuse, abandonment, domestic violence). Similarly, under Section 2, the court must limit a parent's residential time if it finds any of this same kind of conduct.

Here, Brook tries to manufacture an issue from the fact that the court found the mandatory sections (1 and 2) did not apply but that the discretionary section (3) did. CP 954; Br. Appellant, at 28, 33. He complains this is an inconsistency that cannot be reconciled. *Id.* Even if true, the remedy is not what Brook wants.

Since the court *chose* to limit residential time under the discretionary provision, the mandate to limit under Section 2 is redundant (i.e., the court did what the statute mandates). Similarly, though Section 1 prohibits the court from requiring mutual decision-making where there is domestic violence, the court awarded Tracie sole decision-making under another provision, RCW 26.09.184.4(a). CP 963, 963-964. Again, the court did what the statute requires, though arriving there by another route.<sup>14</sup>

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<sup>14</sup>Section 1 also prohibits non-judicial dispute resolution, and the court did here order private mediation. CP 963-964. Tracie challenges this on her cross-appeal.

Certainly, if there is a problem at all with the court's doing under the discretionary provision what is mandated by the other provisions, it is not the kind of problem encountered in *Katara*, where the court entered restrictions without finding any "191" basis at all. 125 Wn. App. at 829. There, the problem was that the trial court said one thing (no basis for 191 restrictions) and did another (entered restrictions). *Id.*, at 830. The remedy for this ambiguity was remand for clarification of the legal basis for the restrictions. *Id.*, at 830-831.

We do not have those problems in this case. Here, the court's intention is quite clear and the legal basis is quite clear: At minimum, Brook's conduct is adverse to the children and he needs treatment if he wants more residential time with his children, for the sake of those children. Whether ordered under the mandate of Section 2 or under the discretion of Section 3, the result is the same. Both address (1) the fact of Brook's conduct, (2) the fact of his conduct being adverse to the children, and (3) the fact that he needs treatment for that conduct so that his children are not made to suffer for it.

2) The court's findings are express, clear and adequate.

Brook argues that the trial court failed to support its "191" restriction with findings, necessitating a "best guess" and a "treasure hunt" for the reasons the court limited Brook's time with his children. Br. Appellant, at 31-32. In fact, the court's findings offer numerous bases for the "191" restriction under the discretionary provision of RCW 26.09.191(3)(g), and they can be found precisely where they should be. CP 979-982; see, also CP 1024.

Repeatedly, in a section of the Findings of Fact and Conclusions of Law entitled "Parenting Plan," the court found Brook to be a bully, who engages with his family as if they were business adversaries and who cannot agree with anyone unwilling to accede to his viewpoint. CP 979-981. Brook is "one of the most controlling people this court has ever observed," and his marriage to Tracie, based on intimidation and control, was abusive, what the court described as "a clear domestic violence relationship." CP 980; see also XIII VRP 1618-1619. And the court expressly found, on reconsideration, that Brook had committed domestic violence as

defined by the statute.<sup>15</sup> CP 1024. These findings may be displeasing to Brook, but they are easily found, are well supported by the evidence, and are compelling reasons to condition additional residential time on Brook getting treatment for the behavior.

- 3) The trial court's domestic violence finding, and findings of other conduct adverse to the children's best interest, are supported by substantial evidence.

The trial court found Brook committed domestic violence as defined by the statute. CP 1024. In this, Brook complains the court abused its discretion. Br. Appellant, at 37-39.

This Court defers to the trial court's finding if supported by substantial evidence. *Thompson v. Hanson*, 142 Wn. App. 53, 60, 174 P.3d 120 (2007), *aff'd*, 167 Wn.2d 414, 219 P.3d 659 (2009) (appellate court defers to the trier of fact on issues involving conflicting testimony, the credibility of the witnesses, and the persuasiveness of the evidence). "Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded

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<sup>15</sup> RCW 26.50.010(1) defines domestic violence as:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

person that the premise is true.” *Id.*, citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Here, the court’s finding of domestic violence is supported by substantial evidence, including Tracie’s description of how Brook would trap her and the children in the car, speed down the highway at 100 m.p.h. while screaming at her and ignoring her pleas to slow down. II VRP 170-171. These acts, alone, comprise “the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members,” a form of domestic violence. RCW 26.50.010(1)(a).

Domestic violence also means stalking (RCW 26.50.010(1)(c)), and stalking is defined as intentionally and repeatedly harassing another person, placing that person in reasonable fear of injury, with the intent either to frighten, intimidate, or harass the person, or knowing that these actions would have that effect. RCW 9A.46.110. Tracie described Brook pursuing her through the house as he harangued her. Though she might try to escape to her room, Brook would follow. He would shut her in the room with him and rage at her, flickering lights, shaking the bed. II VRP 157. In one instance, when she withdrew from an argument by going to bed, Brook turned off power to all the rooms

in the house but the one he was in, terrifying one of his daughters. II VRP 169-170. He pressured and pressured her to have intercourse, to produce another child on his schedule, until she relented just to get some relief from him. IV VRP 544. Once, he turned off the power to the rooms occupied by his wife and his children, angry that Tracie had dared to withdraw from an argument. Id.

Nevertheless, Brook complains that the trial court used the wrong legal test when it agreed with the parenting evaluator that domestic violence can occur even in the absence of physical violence. Br. Appellant, at 36. Of course, the statute makes plain that the court was correct. Both the infliction of fear and stalking constitute domestic violence, though they are not physical forms of violence. Just because the court recognized that domestic violence, in Brook's case, as in many others, is "based on intimidation and control," does not mean the court ignored the statutory definition. See *Luis Fernandez v. Ashcroft*, 345 F.3d 824, 836-837 (9<sup>th</sup> Cir. 2003) (recognizing that dynamics of power and control pervade domestic violence relationships). In any case, this conduct is adverse to the children and, therefore, supports limiting Brook's residential time on the authority of RCW 26.09.191(3)(g).

On appeal, Brook minimizes his conduct, selectively ignores evidence, and misrepresents the court's findings. See, e.g., Br. Appellant at, 38. Brook was not proved to be merely a bully, but a perpetrator of domestic violence. Untreated, lacking all insight into his behavior, he poses a risk to his children. See, e.g., III VRP 279, 282-283. Washington law not only permits, but requires the court to protect the children against this risk.

**B. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO ALLOW BROOK TO CALL EXPERT WITNESSES HE HAD NOT TIMELY IDENTIFIED AND WHO WERE, IN ANY CASE, IRRELEVANT TO THE DOMESTIC VIOLENCE ISSUE.**

Brook complains he did not receive a fair trial on the issue of domestic violence when he was not allowed late-disclosed expert witnesses, claiming he had not listed such witnesses because "he had been repeatedly told that domestic violence would not be an issue at trial." Br. Appellant, at 39-46.

First, it must be noted that Brook claimed a great many conversations that no one else remembered having with him. See, e.g., III VRP 292-293; VI VRP 816-817; 1339-1345; X VRP 1475-1480.

Second, the court allowed Brook to call the one witness he identified as an expert on domestic violence and for the purpose of

rebutting the allegations. CP 1036; see, also CP 1034. This witness, Charlotte Svenson, testified, though she abstained on the subject of domestic violence, since it is not her specialty. VII VRP 959, 966. In any case, it is irrelevant that the court excluded Brook's other expert witnesses, since he did not offer them for the purpose of addressing domestic violence but for the purpose of addressing parenting evaluation methodology.<sup>16</sup> Brook got the witness he wanted on the issue he now complains about.

Third, Brook had actual notice, in the pleadings, that domestic violence was an issue for trial. CP 6, 1119. He was not "blind-sid[ed]" (Br. Appellant, at 40); rather, his perception of reality was highly selective. Thus, Brook's authority regarding new theories (Br. Appellant, at 42) falls completely wide of the mark. Domestic violence was not a new theory. Rather, these legal proceedings began with an allegation of domestic violence.

Fourth, neither Brook nor Tracie had the power to take off the agenda an issue of such central importance to the court's determination of the children's best interests. See, *Bay v. Jensen*,

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<sup>16</sup> For what it's worth, as with the domestic violence issue, Brook knew early on that a parenting evaluation would happen. In fact, in the end, it only happened because he insisted. Early in the case, he interviewed just about every parenting evaluator in town. He could easily have named one or more for the purpose of evaluating the eventual evaluator.

147 Wn. App. 641, 657, 196 P.3d 753 (2008) (court cannot withhold inquiry into best interests of children as a sanction for a party's failure to comply with a court order). Tracie's representations notwithstanding, the parenting evaluator and the court could not simply ignore Brook's conduct. Indeed, Brook acknowledges that the parenting evaluator placed the issue front and center, rather than Tracie (Br. Appellant, at 43), but fails to acknowledge that doing otherwise would have been a dereliction of her duty. CP 870 (court ordering evaluator to "make recommendations based upon a full and independent investigation").

Finally, at the risk of beating a dead horse, the trial court's decision not to delay trial again was not only well within its discretion but, arguably, mandated by the court rules, which require the exclusion of witnesses not disclosed by the case schedule deadline in the absence of "good cause." KCLCR 26(4).<sup>17</sup> Brook did not offer good cause for his failure to comply with the case

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<sup>17</sup>The rule provides as follows:

(4) Exclusion of Testimony. Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.)

schedule.<sup>18</sup> Moreover, trial courts have broad discretion to exclude witnesses who were not disclosed in a timely manner. *Blair v. TA-Seattle East #176*, 150 Wn. App. 904, 210 P.3d 326 (2009) (failure to disclose witnesses by deadline required exclusions); *Allied Financial Services v. Mangum*, 72 Wn. App. 164, 168-169, 864 P.2d 1 (1993) (witnesses excluded due to party's failure to submit a witness list as required by pretrial order). The trial court's decision on such matters will not be reversed absent a manifest abuse of discretion. *Blair*, 150 Wn. App. at 909.

The court did not abuse its discretion by declining to delay trial again to allow witnesses Brook could and should have identified by the mandatory deadline and who were, in any case, not relevant to the issue about which he now complains.

#### C. BROOK FAILS TO DEMONSTRATE JUDICIAL BIAS.

Brook complains that Judge North is biased against him. Br. Appellant, at 47. Brook mistakes knowledge for bias. Judge North sat through, and read through, a lot in this case. To do his job, he had to form some ideas of what was happening. He tolerated many

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<sup>18</sup> Brook explained he was pro se when the deadline for disclosing witnesses fell. CP 1034. However, pro se litigants are required to comply with the rules just as are litigants represented by counsel. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

delays in the trial, caused by Brook, and allowed Brook an extraordinary amount of time for testimony at trial, even though Brook seemed unable to answer a question directly. See, e.g., XI VRP 1267-1269, 1302-1308, 1310-1316; XIII VRP 1401. When, for example, the judge observed that “there’s pretty good evidence that there’s something weird with the way you’re communicating with people” ( VRP 05/30/08 11), he was merely calling a spade a spade, which is not bias.

In fact, Judge North was even-handed, which Brook neglects to mention. He disallowed witnesses Tracie offered late, just as he had for Brook. I VRP 4-11. He took Tracie to task for moving the children to another school district, unfairly, she might argue. XIII VRP 1617. He commented on her spendthrift nature. Despite finding Brook incredible in many other instances, the judge felt unable to resolve the conflict in the parties’ testimony regarding the events of April 2007. CP 980. Brook looks everywhere, except to his own conduct, for explanations of adversity. Just as he wanted to handpick the parenting evaluator, and handpick future

mediators,<sup>19</sup> he now wants to handpick his judge. The law does not allow this. "Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992).

This case is not like the one Brook cited, where the judge expressed anger at the litigant and did not allow her a reasonable period of time to prepare her proof. *In Re Custody of R.*, 88 Wn.2d 746, 947 P.2d 745 (1997). Rather, this case is like *In re Guardianship of Wells*, 150 Wn. App. 491, 208 P.3d 1126 (2009), where the trial court also had its patience tested by delays and irregularities in the proceedings due to conduct of one of the parties. At one point, the trial court cautioned counsel, "Your client is not going to scam this Court" and threatened the litigant with incarceration and other sanctions. 150 Wn. App. at 496-497. On review, this Court did not mistake the trial court's "understandable frustration" for bias. *Id.*, at 503. The court here was even more restrained in the face of similar behavior.

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<sup>19</sup> Brook did not want Larry Besk for future dispute resolution because Besk arbitrated matters pretrial and his knowledge of the case might taint his views on future disputes. IX VRP 1191-1192.

Simply, the record reveals no evidence of judicial bias, actual or potential. In any case, Brook should beware what he asks for, since it is entirely possible that another judge might be less forgiving of him, though the cost in judicial resources would be huge.

#### CROSS APPEAL

##### D. THE COURT SHOULD NOT HAVE ORDERED DISPUTE RESOLUTION THROUGH MEDIATION.

Where domestic violence is present, a court may not order in a parenting plan a non-judicial dispute resolution process. RCW 26.09.191(1). Because the court found domestic violence in this case, this provision applies. Notably, the court exempted the parties from a pretrial mediation requirement, recognizing that it was “a useless act.” CP 1494. By trial’s end, the court understood that Brook is “not capable of agreeing with anybody else about anything unless they simply agree to his -- whatever his position is.” XIII VRP 1616-1617. See, also, CP 981 (#11). Mediation would merely provide Brook with another opportunity to bully and abuse Tracie. For that reason, and because the statute requires it, the dispute resolution provision should be vacated.

E. THE TRIAL COURT MUST VALUE THE MONTAVO STOCK.

Value is a material and ultimate fact, without which this Court cannot review the overall distribution. *Wold v. Wold*, 7 Wn. App. 872, 503 P.2d 118 (1972).

The trial court entered a range of value, from 60¢ to 80¢ per share, as traded on the OTC BBB exchange. CP 972. Brook testified on two specific dates to a value of 65¢ per share and 79¢ per share. VIII VRP 988, XI VRP 1309. Tracie thought the stock was worth 80¢ a share. V VRP 601-604. Where the evidence of value is undisputed, the appellate court may determine the value from examination of the record. *Greene v. Greene*, 97 Wn. App. 708, 712, 986 P.2d 144 (1999).

It is necessary for this Court to do that here for three reasons, and desirable for yet another reason.

First, there can be no review of the fairness of the award unless the value is determined. *In re Marriage of Hadley*, 88 Wn.2d 649, 657, 565 P.2d 790 (1977). Valuing the stock at any less than the evidence at trial calls into question distribution of the other property and calls into question the adequacy and duration of the maintenance award. Clearly, the trial court viewed the property award as an eventual substitute for family support in the form of

maintenance. With her share of the asset, Tracie would be able to pursue her education and career plans and support her children, goals Brook himself supported. CP 933-934 (terminating maintenance upon receipt of all the “cash” owed her); 977 (her need and Brook’s support of her goals). Without her share, Tracie’s need for maintenance would be greater. Moreover, the court addressed Tracie’s need for attorney fees through an award of an additional 5% (above half) of the Montavo stock value.<sup>20</sup> XIII VRP 1619-1620. And the court provided that unpaid (interest-bearing) judgments owing to her for attorney fees and past family support (approximately \$28,000) be satisfied upon payment to her of all the value from her share of the Montavo stock. CP 934. All miscellaneous other aspects of the property distribution are likewise rendered uncertain absent a value for the main asset.

Second, there is no need for additional fact-finding because the range of value found by the trial court was undisputed. Both parties agreed the value was within the range found by the court. Thus, settling on the midpoint within the range of value found by the

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<sup>20</sup> Tracie has had to fund her litigation expense, an amount exceeding \$100,000 during the *early* part of trial, entirely through loans made to her by her retired parents. VRP 471, 492-494. Brook estimated the trial cost the parties \$300,000. VRP 1350-1352.

trial court is both a value undisputed and supported by the evidence.

Third, entry of judgment would simplify enforcement of the decree, which has proven very difficult post-trial. See, e.g., CP 1917-1919, 2028-2080. See, e.g., also, Supp. CP \_\_\_\_ (actions re enforcement of family support) (subs 304, 348: Orders of 10/22/09 and 12/24/09).

Finally, Tracie has no money to spend on additional proceedings. She has three children to support and marketable job skills to gain. Every dollar spent on litigation is a dollar that could be better spent on those causes.

Accordingly, this Court should remand for amendment of the decree to reflect a stock value of \$.70 per share and entry of judgment thereon. Alternatively, this Court must reverse and remand to the trial court to value the asset and for whatever other proceedings might ensue.<sup>21</sup>

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<sup>21</sup>The *Wold* court identified three courses of action available where the appellate court could not assign a value to the asset: (1) Remand without reversal, giving the parties an opportunity to file additional arguments after the necessary finding has been supplied. (2) Reverse and remand with instructions to the trial judge to make and enter the necessary findings and conclusions and judgment thereon from which either party may appeal. (3) Reverse and remand for a new trial. *Wold*, 7 Wn. App. at 877.

## VI. MOTION FOR ATTORNEY FEES

Because of the disparity in financial resources, Tracie seeks attorney fees on the authority of RAP 18.1 and RCW 26.09.140.

The statute provides that:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

The parties' financial circumstances, including their very disparate earning capacities, are described in the Statement of Facts above.

Those facts establish here, as they did at the trial level, Tracie's need for fees relative to Brook's ability to pay fees. Her need is exacerbated by the failure of Brook to pay child support, maintenance, and the monies owed her under the Decree. See Supp. CP \_\_ (sub 244: Declaration of Tracie Lang).

To the extent Brook complains of an inability to pay Tracie's fees, the court should disregard that Brook voluntarily insists on continued ownership of a large, expensive home, which he cannot afford. See CP 227-230 (commissioner ruling for temporary orders that the expense of maintaining ownership of the home shall not be

considered in calculating family support). Brook earns at least \$168,000 in his executive capacity. Until Tracie can complete her education and obtain a decent job, she and the children remain dependent. Accordingly, Tracie asks this Court to award her attorney fees on appeal.

#### VII. CONCLUSION

The limitations imposed on Brook in the parenting plan fall well within the court's discretionary authority under RCW 26.09.191(3)(g). In fact, they are mandatory under RCW 26.09.191(1) and (2) and should be affirmed. However, because these same provisions mandate a limitation on dispute resolution, the court's order that the parties mediate disputes under the parenting plan should be vacated. Moreover, because the trial court failed to value the Montavo stock precisely and because there is undisputed evidence of its value, this Court should remand for entry of the value and entry of a money judgment accordingly. Finally, Tracie asks for her attorney fees on appeal.

Dated this 1st day of February 2009.

RESPECTFULLY SUBMITTED,



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PATRICIA NOVOTNY #13604  
Attorney for Respondent/  
Cross-Appellant

## **APPENDIX: RELEVANT STATUTES**

### **RCW 26.09.002. Policy**

Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

### **RCW 26.09.170. Modification of decree for maintenance or support, property disposition--Termination of maintenance obligation and child support--Grounds**

(1) Except as otherwise provided in subsection (7) of RCW 26.09.070, the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in subsections (5), (6), (9), and (10) of this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(2) Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.

(3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent obligated to support the child.

(4) Unless expressly provided by an order of the superior court or a court of comparable jurisdiction, the support provisions of the order are terminated upon the marriage or registration of a domestic partnership to each other of parties to a paternity order, or upon remarriage or registration of a domestic partnership to each other of parties to a decree of dissolution. The remaining provisions of the order, including provisions establishing paternity, remain in effect.

(5) An order of child support may be modified one year or more after it has been entered without showing a substantial change of circumstances:

(a) If the order in practice works a severe economic hardship on either party or the child;

(b) If a party requests an adjustment in an order for child support which was based on guidelines which determined the amount of support according to the child's age, and the child is no longer in the age category on which the current support amount was based;

(c) If a child is still in high school, upon a finding that there is a need to extend support beyond the eighteenth birthday to complete high school; or

(d) To add an automatic adjustment of support provision consistent with RCW 26.09.100.

(6) An order or decree entered prior to June 7, 1984, may be modified without showing a substantial change of circumstances if the requested modification is to:

(a) Require health insurance coverage for a child named therein; or

(b) Modify an existing order for health insurance coverage.

(7) An obligor's voluntary unemployment or voluntary underemployment, by itself, is not a substantial change of circumstances.

(8) The department of social and health services may file an action to modify an order of child support if public assistance money is being paid to or for the benefit of the child and the child support order is twenty-five percent or more below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011 and reasons for the deviation are not set forth in the findings of fact or order. The determination of twenty-five percent or more shall be based on the current income of the parties and the department shall not be required to show a substantial change of circumstances if the reasons for the deviations were not set forth in the findings of fact or order.

(9)(a) All child support decrees may be adjusted once every twenty-four months based upon changes in the income of the parents without a showing of substantially changed circumstances. Either party may initiate the adjustment by filing a motion and child support worksheets.

(b) A party may petition for modification in cases of substantially changed circumstances under subsection (1) of this section at any time. However, if relief is granted under subsection (1) of this section, twenty-four months must pass before a motion for an adjustment under (a) of this subsection may be filed.

(c) If, pursuant to (a) of this subsection or subsection (10) of this section, the court adjusts or modifies a child support obligation by more than thirty percent and the change would cause significant hardship, the court may implement the change in two equal increments, one at the time of the entry of the order and the second six months from the entry of the order. Twenty-four months must pass following the second change before a motion for an adjustment under (a) of this subsection may be filed.

(d) A parent who is receiving transfer payments who receives a wage or salary increase may not bring a modification action pursuant to subsection (1) of this section alleging that increase constitutes a substantial change of circumstances.

(e) The department of social and health services may file an action at any

time to modify an order of child support in cases of substantially changed circumstances if public assistance money is being paid to or for the benefit of the child. The determination of the existence of substantially changed circumstances by the department that lead to the filing of an action to modify the order of child support is not binding upon the court.

(10) An order of child support may be adjusted twenty-four months from the date of the entry of the decree or the last adjustment or modification, whichever is later, based upon changes in the economic table or standards in chapter 26.19 RCW.

#### **RCW 26.09.184. Permanent parenting plan**

(1) OBJECTIVES. The objectives of the permanent parenting plan are to:

- (a) Provide for the child's physical care;
- (b) Maintain the child's emotional stability;
- (c) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;
- (d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;
- (e) Minimize the child's exposure to harmful parental conflict;
- (f) Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and
- (g) To otherwise protect the best interests of the child consistent with RCW 26.09.002.

(2) CONTENTS OF THE PERMANENT PARENTING PLAN. The permanent parenting plan shall contain provisions for resolution of future disputes between the parents, allocation of decision-making

authority, and residential provisions for the child.

**(3) CONSIDERATION IN ESTABLISHING THE PERMANENT PARENTING PLAN.** In establishing a permanent parenting plan, the court may consider the cultural heritage and religious beliefs of a child.

**(4) DISPUTE RESOLUTION.** A process for resolving disputes, other than court action, shall be provided unless precluded or limited by RCW 26.09.187 or 26.09.191. A dispute resolution process may include counseling, mediation, or arbitration by a specified individual or agency, or court action. In the dispute resolution process:

- (a) Preference shall be given to carrying out the parenting plan;
- (b) The parents shall use the designated process to resolve disputes relating to implementation of the plan, except those related to financial support, unless an emergency exists;
- (c) A written record shall be prepared of any agreement reached in counseling or mediation and of each arbitration award and shall be provided to each party;
- (d) If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court shall award attorneys' fees and financial sanctions to the prevailing parent;
- (e) The parties have the right of review from the dispute resolution process to the superior court; and
- (f) The provisions of (a) through (e) of this subsection shall be set forth in the decree.

**(5) ALLOCATION OF DECISION-MAKING AUTHORITY.**

(a) The plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in RCW 26.09.187 and 26.09.191. Regardless of the allocation of decision-making in the parenting plan, either parent may make emergency decisions affecting the health or safety of the child.

(b) Each parent may make decisions regarding the day-to-day care and control of the child while the child is residing with that parent.

(c) When mutual decision making is designated but cannot be achieved, the parties shall make a good-faith effort to resolve the issue through the dispute resolution process.

(6) **RESIDENTIAL PROVISIONS FOR THE CHILD.** 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.

(7) **PARENTS' OBLIGATION UNAFFECTED.** If a parent fails to comply with a provision of a parenting plan or a child support order, the other parent's obligations under the parenting plan or the child support order are not affected. Failure to comply with a provision in a parenting plan or a child support order may result in a finding of contempt of court, under RCW 26.09.160.

(8) **PROVISIONS TO BE SET FORTH IN PERMANENT PARENTING PLAN.** The permanent parenting plan shall set forth the provisions of subsections (4)(a) through (c), (5)(b) and (c), and (7) of this section.

**RCW 26.09.187. Criteria for establishing permanent parenting plan**

(1) **DISPUTE RESOLUTION PROCESS.** The court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW 26.09.191 applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process. If a dispute resolution process is not precluded or limited, then in designating such a process the court shall consider all relevant factors, including:

(a) Differences between the parents that would substantially inhibit their effective participation in any designated process;

(b) The parents' wishes or agreements and, if the parents have entered into agreements, whether the agreements were made

knowingly and voluntarily; and

(c) Differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process.

**(2) ALLOCATION OF DECISION-MAKING AUTHORITY.**

**(a) AGREEMENTS BETWEEN THE PARTIES.** The court shall approve agreements of the parties allocating decision-making authority, or specifying rules in the areas listed in RCW 26.09.184(5)(a), when it finds that:

(i) The agreement is consistent with any limitations on a parent's decision-making authority mandated by RCW 26.09.191; and

(ii) The agreement is knowing and voluntary.

**(b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:**

(i) A limitation on the other parent's decision-making authority is mandated by RCW 26.09.191;

(ii) Both parents are opposed to mutual decision making;

**(iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection.**

**(c) MUTUAL DECISION-MAKING AUTHORITY.** Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:

(i) The existence of a limitation under RCW 26.09.191;

**(ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(5)(a);**

**(iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a); and**

(iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

**(3) RESIDENTIAL PROVISIONS.**

**(a) The 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. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:**

- (i) The relative strength, nature, and stability of the child's relationship with each parent;**
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;**
- (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;**
- (iv) The emotional needs and developmental level of the child;**
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;**
- (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and**
- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.**

**Factor (i) shall be given the greatest weight.**

**(b) Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the**

ability to share performance of the parenting functions.

(c) For any child, residential provisions may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of residential time by a parent, including but not limited to requirements of reasonable notice when residential time will not occur.

**RCW 26.09.191** (the most pertinent sections are in bold)

**(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.**

**(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or (iv) the parent has been convicted as an adult of a sex offense under:**

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (a)(iv)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (a)(iv)(A) through (H) of this subsection.

This subsection (2)(a) shall not apply when (c) or (d) of this subsection applies.

(b) The parent's residential time with the child shall be limited if it is found that the parent resides with a person who has engaged in any of the following conduct: (i) Physical, sexual, or a pattern of emotional abuse of a child; (ii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm; or (iii) the person has been convicted as an adult or as a juvenile has been adjudicated of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under

(e) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (b)(iii)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (b)(iii)(A) through (H) of this subsection.

This subsection (2)(b) shall not apply when (c) or (e) of this subsection applies.

(c) If a parent has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter. If a parent resides with an adult or a juvenile who has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with the parent's child except contact that occurs outside that person's presence.

(d) There is a rebuttable presumption that a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection poses a present danger to a child. Unless the parent rebuts this presumption, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter:

(i) RCW 9A.64.020 (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW 9A.44.073;

(vii) RCW 9A.44.100;

(viii) Any predecessor or antecedent statute for the offenses listed in (e)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (e)(i) through (vii) of this subsection.

(f) The presumption established in (d) of this subsection may be rebutted only after a written finding that:

(i) If the child was not the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, and (B) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the offending parent is in the child's best interest, and (C) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child.

(g) The presumption established in (e) of this subsection may be rebutted only after a written finding that:

(i) If the child was not the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent residing with the convicted or adjudicated person is appropriate and that parent is able to protect the child in the presence of the convicted or adjudicated person, and (B) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is

engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the parent residing with the convicted or adjudicated person in the presence of the convicted or adjudicated person is in the child's best interest, and (C) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes contact between the parent and child in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child.

(h) If the court finds that the parent has met the burden of rebutting the presumption under (f) of this subsection, the court may allow a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection to have residential time with the child supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(i) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who has been adjudicated as a juvenile of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the person adjudicated as a juvenile, supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor

for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(j) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who, as an adult, has been convicted of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the convicted person supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(k) A court shall not order unsupervised contact between the offending parent and a child of the offending parent who was sexually abused by that parent. A court may order unsupervised contact between the offending parent and a child who was not sexually abused by the parent after the presumption under (d) of this subsection has been rebutted and supervised residential time has occurred for at least two years with no further arrests or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW and (i) the sex offense of the offending parent was not committed against a child of the offending parent, and (ii) the court finds that unsupervised contact between the child and the offending parent is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treating child sexual abuse victims who has supervised at least one period of residential time between the parent and the child, and after consideration of evidence of the offending parent's compliance with community supervision requirements, if any. If the offending parent was not ordered by a court to participate in treatment for sex offenders, then the parent

shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the offender has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child.

(l) A court may order unsupervised contact between the parent and a child which may occur in the presence of a juvenile adjudicated of a sex offense listed in (e)(i) through (ix) of this subsection who resides with the parent after the presumption under (e) of this subsection has been rebutted and supervised residential time has occurred for at least two years during which time the adjudicated juvenile has had no further arrests, adjudications, or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW, and (i) the court finds that unsupervised contact between the child and the parent that may occur in the presence of the adjudicated juvenile is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treatment of child sexual abuse victims who has supervised at least one period of residential time between the parent and the child in the presence of the adjudicated juvenile, and after consideration of evidence of the adjudicated juvenile's compliance with community supervision or parole requirements, if any. If the adjudicated juvenile was not ordered by a court to participate in treatment for sex offenders, then the adjudicated juvenile shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the adjudicated juvenile has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child which may occur in the presence of the adjudicated juvenile who is residing with the parent.

(m)(i) The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional abuse or harm that could result if the parent has contact with the parent requesting residential time. The limitations the court

may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

(ii) The court shall not enter an order under (a) of this subsection allowing a parent to have contact with a child if the parent has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused the child, except upon recommendation by an evaluator or therapist for the child that the child is ready for contact with the parent and will not be harmed by the contact. The court shall not enter an order allowing a parent to have contact with the child in the offender's presence if the parent resides with a person who has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused a child, unless the court finds that the parent accepts that the person engaged in the harmful conduct and the parent is willing to and capable of protecting the child from harm from the person.

(iii) If the court limits residential time under (a) or (b) of this subsection to require supervised contact between the child and the parent, the court shall not approve of a supervisor for contact between a child and a parent who has engaged in physical, sexual, or a pattern of emotional abuse of the child unless the court finds based upon the evidence that the supervisor accepts that the harmful conduct occurred and is willing to and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing to or capable of protecting the child.

(n) If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's or other person'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 of (a), (b), and (m)(i) and (iii) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection. The weight given to the existence of a protection order issued under chapter 26.50 RCW as to domestic violence is within the discretion of the court. This subsection shall not apply when (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (m)(ii) of this subsection apply.

**(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:**

- (a) A parent's neglect or substantial nonperformance of parenting functions;
- (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
- (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
- (d) The absence or substantial impairment of emotional ties between the parent and the child;
- (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
- (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
- (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.**

(4) In cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties.

(5) In entering a permanent parenting plan, the court shall not draw

any presumptions from the provisions of the temporary parenting plan.

(6) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

(7) For the purposes of this section, a parent's child means that parent's natural child, adopted child, or stepchild.

#### **RCW 9A.46.110. Stalking**

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(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 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.

(2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and

(b) It is not a defense to the crime of stalking under subsection

(1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

(3) It shall be a defense to the crime of stalking that the defendant is a licensed private investigator acting within the capacity of his or her license as provided by chapter 18.165 RCW.

(4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes, in addition to any other form of contact or communication, the sending of an electronic communication to the person.

(5)(a) Except as provided in (b) of this subsection, a person who stalks another person is guilty of a gross misdemeanor.

(b) A person who stalks another is guilty of a class C felony if any of the following applies: (i) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective order; (ii) the stalking violates any protective order protecting the person being stalked; (iii) the stalker has previously been convicted of a gross misdemeanor or felony stalking offense under this section for stalking another person; (iv) the stalker was armed with a deadly weapon, as defined in RCW 9.94A.602, while stalking the person; (v)(A) the stalker's victim is or was a law enforcement officer; judge; juror; attorney; victim advocate; legislator; community corrections' officer; an employee, contract staff person, or volunteer of a correctional agency; or an employee of the child protective, child welfare, or adult protective services division within the department of social and health services; and (B) the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or (vi) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

(6) As used in this section:

(a) "Correctional agency" means a person working for the department of natural resources in a correctional setting or any state, county, or municipally operated agency with the authority to direct the release of a person serving a sentence or term of confinement and includes but is not limited to the department of corrections, the indeterminate sentence review board, and the department of social and health services.

(b) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

(c) "Harasses" means unlawful harassment as defined in RCW 10.14.020.

(d) "Protective order" means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person.

(e) "Repeatedly" means on two or more separate occasions.