

No. 66572-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

VIKAS LUTHRA,

Appellant,

vs.

ARADHNA LUTHRA,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE DEBORAH D. FLECK

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court went beyond “clarifying” the parenting plan and decree of dissolution when it effectively entered a protection order against the father that prohibited him from being in the “presence” of his son outside of court-sanctioned residential time and restrained him from being within 500 feet of the mother when no such restraints had been previously imposed in the original parenting plan and decree of dissolution that were entered after a five-day trial. In doing so, the trial court modified orders without following the requirements of RCW 26.09.060 for the parenting plan, or of RCW 26.50.130 for the existing restraining order in the decree of dissolution. As a result of the trial court’s order, the father’s right to move freely is infringed because he is prevented from being in any location where the child or mother might be present, without any finding that such restraints are necessary to prevent harm. This court should vacate the trial court’s order.

II. REPLY TO STATEMENT OF FACTS

The mother quotes extensively from the 2009 parenting evaluation detailing the father’s struggles with his diagnosed Obsessive Compulsive Disorder (OCD) asserting that this was the basis for the trial court’s RCW 26.09.191 findings in the parenting

plan. But nothing in this 25-page single-spaced report supports, or suggests, that a restriction on the father volunteering at the son's school or being in the child's "presence" outside of court-ordered residential time is warranted, and in the child's best interests.

It is not disputed that the evaluator expressed "significant concern[]" about how the father's OCD would affect the child in the long-term, but this was largely due to the father's purported "cleaning rituals" in the family home. (CP 219-20) The evaluator also expressed concern about what she found were "negative and prejudicial" comments allegedly made by the father to the son. (CP 219) However, despite these concerns, the evaluator did not recommend that the father's contact with the child be limited. (See CP 224-25) Instead, she concluded the father and son had "a strong, close, emotional bond," she hoped "this bond continues unbroken," and she had "no concerns about [the father]'s basic instrumental parenting skills." (CP 209, 219)

Thus, while the mother spends an inordinate amount of time in her brief re-hashing the alleged manifestations of the father's OCD and his alleged controlling behavior as described in the parenting evaluation, (Resp. Br. 3-8, 12-15), the fact is that the only

“limitation” that the evaluator recommended on the father was to eliminate his mid-week evening visit with the child. (See CP 224) The elimination of the mid-week visit was due to concerns that the visits mainly took place at the YMCA, instead of the father’s home, which the evaluator posited was due to the father’s “contamination compulsions.” (CP 220) The evaluator expressed concern that these mid-week visits outside the father’s house in the evening were “too disruptive and exhausting for the child,” and recommended the end of these visits. (CP 224) Otherwise, the parenting evaluator recommended (and the trial court largely adopted) a residential schedule that allowed the child unsupervised overnight residential time in the father’s home during alternating weekends, and with additional liberal residential time during school breaks. (CP 224-25)

Based on the concerns expressed by the evaluator regarding the father’s OCD and his expressed anger at the mother, the trial court made RCW 26.09.191 findings. (CP 10, 48-50) The trial court largely adopted the evaluator’s recommendations, but it did not completely eliminate the mid-week evening visit. (See CP 10) Instead, it ordered that the visit be suspended until the father

undergoes intensive therapy for his OCD. (CP 10)¹ Recognizing the evaluator's concerns about the mid-week visits, the trial court ordered that once the mid-week visits resume, the visitation must occur closer to the mother's house to "reduce the level of exhaustion" for the child, "while giving him an opportunity to spend time with his father." (CP 10)

The trial court was clearly aware of all of the allegations regarding the father's OCD and his purported controlling behavior when it entered its parenting plan. Nevertheless, it imposed no restraints like the ones at issue here that would prevent the father from volunteering at the child's school, or from otherwise being in the child's presence outside of court-ordered residential time. Therefore, while the mother relies almost entirely on the parenting evaluation to paint a picture of the father as a "very troubled man," (Resp. Br. 35), the fact is this "old" parenting evaluation cannot be a basis to modify the parenting plan to add in new restrictions without a pending petition for modification. Had the mother wished to

¹ As described in the Opening Brief (at 10), the father did not "refuse" intensive therapy. (Resp. Br. 1) The father explained that he had had difficulty locating affordable private insurance that would provide the appropriate coverage for the "intensive therapy" required by the parenting plan since his health insurance through the mother's employer terminated due to the divorce. (CP 151)

pursue the restraints in the parenting plan at issue in this appeal, she should have obtained them at the time the parenting plan was originally entered – not five months later.

III. REPLY ARGUMENT

A. **The Order Restraining The Father From Any Contact With The Child Outside Of His Scheduled Residential Time Is An Impermissible Modification Of The Parenting Plan.**

A “substantial change in circumstances” to warrant modifying a parenting plan must be based on “facts unknown to the court at the time of the prior decree or plan.” *Marriage of Tomsovic*, 118 Wn. App. 96, 105, 74 P.3d 692 (2003). “[U]nknown facts include those facts that were not anticipated by the court at the time of the prior decree or plan.” *Tomsovic*, 118 Wn. App. at 105. Therefore, the mother’s recitation of all of the father’s alleged flaws described in the parenting evaluation (Resp. Br. 3-8, 12-15), cannot be a basis to modify the parenting plan to add in *new* restrictions five months after trial. These allegations regarding the father were already known to the trial court when the parenting plan was originally entered, and it had the opportunity, but apparently declined, to impose the restrictions at issue in this appeal.

In fact, aside from the suspended mid-week evening visitation, the trial court placed no limitations on the father's contact with the child and instead awarded the father unsupervised overnight visitation with the child every other weekend, and liberal residential time during school breaks. (CP 10-11) By entering an order, five months after it entered the final parenting plan, that restrains the father from having *any* contact with the child, anywhere and at anytime outside of court-ordered residential time, the trial court improperly modified the parenting plan without complying with the stringent requirements of RCW 26.09.260, and without finding that there has been a substantial change in circumstances.

A "modification" occurs when a party's rights are either extended beyond or reduced from those originally intended in the parenting plan. ***Marriage of Christel and Blanchard***, 101 Wn. App. 13, 22, 1 P.3d 600 (2000). The trial court's order "imposes new limits" on the rights of the father by placing restraints that never previously existed. ***Christel and Blanchard***, 101 Wn. App. at 23. As addressed in the opening brief, the order as written requires the father to immediately vacate any location if the child

also happens to be there and it is not the father's residential time. If the child were to perform in a recital or participate in a sporting event, the father would be prohibited from attending. Worse yet, the father would be prevented from visiting the son in the hospital in the unfortunate event that the son is ever injured or sick if such visit occurred outside of the father's residential time. Such restrictions were not part of the original parenting plan (nor recommended by the evaluator), was not found to be in the child's best interests, and its imposition now is an improper modification of the parenting plan. **Custody of Halls**, 126 Wn. App. 599, 109 P.3d 15 (2005).

In **Halls**, Division Two held that both a "second modified parenting plan" and a "temporary order" were impermissible modifications of the parenting plan because they were entered without following the requirements of RCW 26.09.260. 126 Wn. App. at 608-09, ¶¶ 26-27. The **Halls** court held that the "second modified parenting plan" was an impermissible modification because it changed the children's primary residence without a finding that such a change was in the children's best interests. **Halls**, 126 Wn. App. at 609, ¶ 26. The court also held that the "temporary order" was an improper modification because it

restricted the mother's "right to travel with her children outside of Jefferson County and prohibit[ed] her from going to the children's residence or schools for ten years." *Halls*, 126 Wn. App. at 609, ¶¶ 28, 29. The court vacated the temporary order, holding that it was improper because those restraints were not part of the original parenting plan, and the father had "submitted no petition to modify and no adequate cause affidavits, and the court did not find facts sufficient to modify the parenting plan." *Halls*, 126 Wn. App. at 609, ¶ 29.

The order here is even more egregious than the temporary order in *Halls*, because it restrains the father not just from the child's residence and school, but from being in the child's "presence" outside of court-ordered residential time. Further, there is nothing "temporary" about this order. While the mother ties the new restraints with the suspension of the father's mid-week evening residential time, unlike the parenting plan, there is no provision in this new order to lift these restraints once the father satisfies the therapy requirement.

The father's challenge to the trial court's order is not, as the mother claims, an attempt to increase his "visitation" with the child

beyond what was provided in the parenting plan. (Resp. Br. 26)

Instead, his challenge is to the fact that the trial court's order goes far beyond just limiting his "visitation" with the child to the time allowed in the parenting plan. The trial court's order imposes new restraints that never previously existed, by restraining the father from volunteering at the school – even if he is not in direct contact with the child – and restraining the father from being in the child's "presence." (CP 147) The father's ability to move freely is limited by this new order, as he will be required to leave any area where the child is present outside of court-ordered residential time – including libraries, museums, movie theaters, and coffee shops. **State v. J.D.**, 86 Wn. App. 501, 506, 937 P.2d 630 (1997) ("Adults' right to freely move about and stand still has been recognized as fundamental to a free society") (citing **Papachristou v. City of Jacksonville**, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)). Thus, the father's rights are "reduced from those originally intended in the parenting plan," and the trial court's new order is an impermissible modification of the parenting plan. **Christel and Blanchard**, 101 Wn. App. at 22.

B. The New Restraints Imposed On The Father Are Not Reasonably Related To The Trial Court's Concerns Regarding The Father's Diagnosed Obsessive-Compulsive Disorder.

Even if the trial court's order restraining the father from any contact with the child was merely a "clarification" of the parenting plan and not a "modification," the trial court still erred, because the reasons for the restrictions on the father's mid-week evening visits do not carry over as a basis to impose a restriction on the father's right to volunteer at the child's school or be in the child's presence outside of the court-ordered residential time. "[A]ny limitations or restrictions imposed [under RCW 26.09.191] must be reasonably calculated to address the identified harm." *Katare v. Katare*, 125 Wn. App. 813, 826, 105 P.3d 44 (2004), *rev. denied*, 155 Wn.2d 1005 (2005); 20 Kenneth W. Weber, *Washington Practice: Family and Community Property Law* § 33.25, at 100 (Pocket Part, 2010) (any limitation or restriction placed on a parent's conduct or contact with their child must be "specifically tailored to the presenting problem"); *see also* RCW 26.09.191(2)(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.”).

Contrary to the mother’s argument, the father’s challenge to the trial court’s recent order is not a “collateral attack” on the parenting plan. (Resp. Br. 29) In fact, it is the mother who is collaterally attacking the parenting plan by seeking greater restraints than previously ordered by the trial court, without first filing a petition to modify. In this appeal, the father does not challenge the suspension of his mid-week evening visits, and does not challenge the trial court’s RCW 26.09.191 findings. Instead, he challenges the new restraints that prevent him from volunteering at the child’s school or being in the child’s “presence” outside of court-ordered residential time, when no such restraints previously existed. The trial court’s absolute prohibition of contact between the father and child beyond their residential time is not “reasonably calculated” to address the basis for the RCW 26.09.191 findings – the father’s OCD and his alleged abusive use of conflict. *Katare*, 125 Wn. App. at 826.

The mother asserts that the child must be protected from the “father’s questioning and disparaging comments” about the mother.

(Resp. Br. 31) But the mother fails to explain how this goal is related to a court order restraining the father from being in the child's presence or volunteering at the school where he is monitored by school personnel, or how such an order furthers this goal. Leaving aside the father's prior visits to the school during the lunch period, which the mother describes as both "abnormal" and "not volunteering," (Resp. Br. 18, 33), there is no evidence that the father has disparaged, or even had the opportunity to disparage, the mother during his volunteer work at the school, where he is monitored by staff, or that he could do so simply by being in the child's "presence."

The mother claims that the father is "apparently unsupervised" when he is at the school, but her citation to the record does not support this claim. (Resp. Br. 19, *citing* CP 20: emails between mother and school detailing dates that the father was present at the school) Instead, there is overwhelming evidence that the father is in fact supervised while volunteering, and the teachers and principals saw no concern from his volunteering, and in fact, spoke highly of his efforts. The father "proactively" disclosed his diagnosed OCD to the school's principal,

and she asserted that she has “observed no manifestation of his OCD in his volunteer work.” (CP 73; see also CP 76: “I have never observed anything that would cause me to be concern[ed] about the appropriateness of him being around Akshay or any of the other kids in the school.”) The teachers indicated that during the father’s volunteer work, he is engaged with *all* of the students and not just the parties’ child:

Since October 2010, Mr. Luthra has routinely volunteered in my classroom to help the kids with reading, or writing, and playground activity. Akshay and Mr. Luthra also shared the traditions of the East Indian Diwali Festival with our class with a presentation and art project... When at the school, he systematically works with all the kids per my direction, and seems to have a great rapport with them.

(CP 76, Declaration from the son’s current school teacher)

Mr. Luthra volunteered in the classroom of Ms. Ayoubi, one of our first grade teachers. He spent his time helping the children in the class with their reading and math skills. His assistance was appreciated and encouraged by Ms. Ayoubi. He also accompanied the class on field trips, attended class parties and otherwise was an active and helpful participant at the school.

(CP 79, Declaration from the principal of the son’s former school)

An absolute restraint on the father being in the “presence” of the child – by volunteering or otherwise – is not “reasonably calculated” to protect the child from “exposure to [the father]’s irrational fears” related to his OCD. (Resp. Br. 31) This is why the trial court’s order, which was entered under the guise of “clarification,” goes too far. Because there was no finding (nor even an allegation) that the child was not safe in the father’s presence, the trial court erred in imposing a restraint that effectively limits the father’s freedom of movement. **State v. J.D.**, 86 Wn. App. at 508 (freedom of travel and movement is a fundamental right and any limitation must be narrowly tailored to promote a compelling state interest).

The trial court’s original RCW 26.09.191 findings are not a basis for the trial court to restrain the father from volunteering at the child’s school, or to restrain the father from being in the child’s presence outside of court-ordered residential time. This is especially true when it is evident that the father is no real risk to the child as he is allowed liberal overnight residential time during school breaks and on weekends. The trial court erred in imposing

new restrictions on the father when it purportedly clarified the parenting plan.

C. By Adding A New Provision To The Mother's Restraining Order Against The Father, The Trial Court Improperly Entered A Protection Order Without Giving The Father An Opportunity To Be Heard.

As with the restraint on the father from being in the “presence” of the child, the trial court’s order prohibiting the father from being within 500 feet of the mother was an impermissible modification of the decree of dissolution, and wrongly infringes on the father’s freedom of movement without an associated compelling interest. See *Marriage of Thompson*, 97 Wn. App. 873, 878, 988 P.2d 499 (1999) (App. Br. 26); *State v. J.D.*, 86 Wn. App. at 506, 508. The original restraining order set forth in the parties’ decree of dissolution provides only that the father is “restrained from knowingly coming within or knowingly remaining within 500 feet of the home or the workplace of Aradhna Luthra.” (CP 200) The trial court’s new order modifies the decree by adding a new restraint, ordering the father to “remain at least 500 feet from the [mother] with the exception of the residential transfers.” (CP 147) This new provision restricts the father’s rights significantly, as it places an

even greater burden on him to avoid non-compliance with the decree.

Under the terms of the decree of dissolution, the father could easily prevent any potential violation of the restraining order by simply avoiding the two locations from which he was restrained. Now, the father could be at risk of violating the terms of the decree anywhere. For example, if he is already in a location, such as a restaurant, and the mother appears, the father would have to leave, possibly mid-meal, to avoid being within 500 feet of the mother, since any violation would be a criminal offense. (See CP 200)

That the parenting plan limited communications between the parties to email only does not equate to an order restraining the father from being in the mother's presence. (Resp. Br. 35) This provision in the parenting plan was mutual, and intended to deter conflict between the parties. (CP 13) This limitation was not related to the restraining order in the decree. In any event, as with the terms of the decree, the father can easily avoid any potential violation by avoiding communicating with the mother except as necessary, and by email. But the new order requires the father to

be extra vigilant to avoid any place where the mother might also be present, for fear of a potential violation.

The trial court impermissibly transformed the restraining order that was entered under RCW ch. 26.09 into a protection order under RCW ch. 26.50. Whereas a RCW ch. 26.09 restraining order can prohibit a party from coming within a specified location (not person) (RCW 26.09.060(2)(d)), a RCW ch. 26.50 protection order can prohibit a party's contact with the other party. RCW 26.50.060(1)(h). There was no finding of domestic violence as defined by RCW 26.50.010(1) in either the decree or the court's recent order to warrant the court's new restriction. Further, the trial court's order imposing this new restraint was especially egregious because the mother never sought such a restraint in her motion to enforce the parenting plan (See CP 1), and the father did not have the opportunity to be heard on the issue except in his motion for reconsideration, which was denied. (CP 145) RCW 26.50.060 (5) ("no order for protection shall grant relief to any party except upon notice to the respondent and hearing."). The trial court erred in modifying the decree by adding this new provision without either a hearing to determine whether there are conditions justifying the

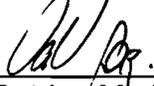
reopening of the decree, *Marriage of Thompson*, 97 Wn. App. at 878, or a hearing to determine whether modification is appropriate. RCW 26.50.130(1) (“upon application with notice to all parties and after a hearing, the court may modify the terms of an existing order for protection”). This court should vacate this newly imposed protection order.

IV. CONCLUSION

By imposing new restraints on the father, the trial court impermissibly modified the parenting plan and decree of dissolution without following the requirements of RCW 26.09.060 or RCW 26.50.130. This court should reverse, and vacate the trial court’s order, which prohibits him from being in the mother and child’s presence, and restrains the father from volunteering at the child’s school.

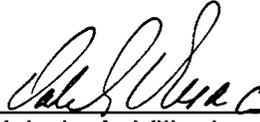
Dated this 29th day of August, 2011.

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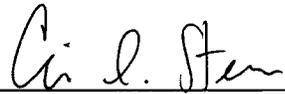
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 29, 2011, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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