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No. 714961

COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION ONE

In re Marriage of:

Jennifer Lauren Brunson,  
Respondent,  
And  
Neil Francis Brunson,  
Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

Neil Francis Brunson's  
Reply Brief

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## **I. Reply to Respondent's Introduction**

As cited in her introduction, Jennifer Brunson has a Domestic Violence Protection Order against Neil Brunson. The Protection Order was initiated on October 2, 2012 and is the same one issued prior to the dissolution trial. She failed to state it includes his minor children; therefore, Mr. Brunson has motioned this court to combine the cases.

## **II. Argument In Reply**

Substantial evidence to support a parenting plan that eliminated all contact with the minor children unless and until Mr. Brunson enrolled in a domestic violence treatment program required a thoughtful evaluation of the parents and children to ascertain the effect said limiting factors in relation to the best interests of the children. In the Brunson case, there was no evaluation of children or father to determine the impact of the limiting factors requested by the mother.

Further, the mother was the moving party who filed for the dissolution on October 26, 2012 and then waited until March 19, 2013 to note for trial. And only after the commissioner ordered the trial to be set immediately during his February 25, 2013 ruling. Jennifer Brunson waited only because she obtained a protection

order that prevented the father, Neil Brunson from having ANY contact with his minor children, even supervised, by using an incomplete, non-court ordered domestic violence assessment that labeled Mr. Brunson an “intimate terrorist.” Despite evidence presented at trial clearly showed Mr. Stan Woody was not authorized, nor did Mr. Brunson ever consent to treatment or evaluation by Mr. Woody. *(Exhibit 59. RP at 328)*

The response brief argues the actions taken by the commissioner on February 25, 2013 are not part of this review. Mr. Brunson disagrees. The actions taken on February 25, 2013 banned Mr. Brunson from filing any motions in this case, including motions to compel discovery. Mr. Brunson believes the entire dissolution proceedings are before the appellate court for review. Even if he misunderstands, he believes *RAP 2.4 (b)* applies. *Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.*

Jennifer Brunson’s response brief attempts to shift the argument from the parenting plan which prohibits contact to the

children's residential placement. Her brief states, "residential placement under *RCW 26.09* does not infringe upon parental rights as severely as does a dependency adjudication or termination of parental rights under *RCW 13*. Comparing residential restrictions to a complete denial of any visitation, even by phone, without substantial evidence that contact would have a detrimental effect on the children is unprecedented. In fact, it is an infringement on Mr. Brunson's and the children's constitutional rights. One merely needs to look at the parenting plan to realize Mr. Brunson is not afforded any time with children, residential or otherwise. The record fails to support the complete elimination of contact or visitation between the father and his minor children unless and until he enrolls in domestic violence treatment program. Further the court ignored all requests for a reunification plan. The current parenting plan in place is a failure plan for the minor children to reconnect with their father.

Next, her brief opines there is no legal requirement that the court appoint counsel or a GAL for the children. This is incorrect. The court is required to appoint a GAL when allegations of child abuse or neglect are made under *Chapter 26.44* or *Chapter 13.34*.

*Washington Family Law Deskbook, Second Edition and 1012  
Cumulative Supplement. Section 21.2(4).*

The response brief further states, “It simply was not expeditious, economical, or necessary to appoint a GAL. The court exercised its discretion under *RCW 26.12.175(1)(a)*, and properly declined to appoint a GAL.” Again, this is unsupported by the record. In fact, Neil Brunson was never denied a GAL for his minor children; the court ignored his motions to appoint a GAL. To argue that it was not “expeditious” is insincere at best when the moving party waited four months to note for trial. Respondent’s response cites *Dugger v. Lopez, 142 Wn.App. 110, 121, 173 P.3d 967 (2007)* to support the court’s failure to appoint a GAL. *Dugger v. Lopez* clearly states: We hold that, absent circumstances raising concern for the child’s welfare and safety, the trial court is not required to appoint a GAL for the child in the action under chapter 26.26 *RCW* solely to establish a parenting plan between acknowledged, legal parents.

In the Brunson case, both parties raised concerns for the children’s welfare and safety, therefore a GAL was not discretionary. Further, both *Dugger* and *Lopez* decline to pay for a GAL. For Ms. Robertson to say it was not “economical” to appoint

a GAL is also an error, given Mr. Brunson was never given the opportunity to pay for a GAL. In Dugger, the trial court considered testimony from both parents and required Dugger to provide SML's medical and psychological evaluations for its review before it made a decision on the parenting plan. Mr. Brunson was banned from filing motions to gain discovery by the February 25, 2013 order therefore he could not have the children assessed nor could he gain access to their medical records. Further, in Dugger, there were no restrictions on either parents contact with the child.

The response brief argues that substantial evidence exists to support the trial courts final orders citing the testimony from both parents, as well as a CPS social worker, and a domestic violence expert. There has never been an objective third party assessment of the children best interests. In fact, Mr. Brunson was restrained from any and all contact from his children in the dissolution, first through temporary orders and now through final orders.

As the response brief cites, "Therefore, in proceedings where the potential consequence is termination of parental rights, the abridgement of parental constitutional rights rightly necessitates an extremely substantial justification." Since Ms. Brunson was the moving party who sought to restrict all contact with the minor

children, she was obligated to present evidence of how the restrictions served the best interest of the children. Ms. Brunson's failure meant the court was required to order the evaluation before restricting Mr. Brunson from his children.

Mr. Brunson agrees a dissolution proceeding is a private civil dispute, initiated by and involving private parties to resolve their relative legal rights regarding their children. *King v. King*, 162 Wash.2d 378, 385, 174 P.3d 659 (2007). But the case at bar involves actions taken by the state. First, by eliminating all contact between Mr. Brunson and his children, then, in an unprecedented prosecution, Mr. Brunson was convicted of spanking LTB, then age 2 ½, without the child ever being examined by a medical professional or represented by counsel or given a GAL as required by RCW 26.44. The conviction was not felony child abuse; instead it was a misdemeanor assault IV, DV; which never rose to the level required to impose restrictions under RCW 29.09.191(3).

The response brief asserts full disclosure was made by the trial court relating to facts that would have led to the appearance of bias. This is not true. The Honorable George F.B. Appel failed to disclose Nathaniel Sugg, Snohomish County Deputy Prosecutor, was his law clerk from September 2011 until November 2012. Mr.

Sugg was the prosecutor in the spanking case of LTB. Mr. Sugg appeared in the courtroom during the dissolution proceedings. The judge was bound by the *Code of Judicial Conduct 2.11* to recuse himself.

In addition, the trial court's three-month delay in providing the transcript of its oral ruling due to the court reporter having to provide a trial transcript in a criminal case is simply not justifiable. It exemplifies the judge's prejudice toward Mr. Brunson and total disregard for Mr. Brunson's relationship with his children and the rights of all parties concerned.

The response brief also stated: "The court did not draw any presumptions from the temporary parenting plan and entered the final parenting plan based on evidence presented at trial." However the record is clear:

COURT: What does the temporary order say now about what sort of visitation you can have? Can you have supervised visitation now if you don't have - -" RP at 619.

In an action that deprives the children from any and all contact with the parent should not have been taken without evaluation of the impact on the children. Failure to order evaluations or appoint a GAL for the children while denying any access to the child is a manifest abuse of discretion. A trial court's

decision is “manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *In re Marriage of Littlefield*, 133 Wash.2d. at 47.

Mr. Brunson does not wish to waste the time of this court or increase the costs to Jennifer Brunson on appeal therefore, he will not belabor his response to the response brief by restating arguments made in his initial brief. However, the response brief of Jennifer Brunson makes several contentions that must be answered. First, the response brief contends Mr. Brunson did not object to the testimony of Stan Woody. The record indicates Mr. Brunson did object at the onset of the trial. (*RP at 6-11*) Further, Ms. Robertson called him an expert witness, yet she used him as a fact witness.

Likewise, Ms. Robertson contends the testimony of Ms. Berger, CPS worker was proper under *RCW 13.50.100* and “relevant to the determination of custody.” (*Respondent’s Brief at 36*) Ms. Berger was not under court order to testify as required by the statute. The record clearly shows Ms. Robertson intentionally deceived the court by representing Ms. Berger’s testimony was court ordered.

Ms. Robertson Q: You are here - - you have receive a subpoena to be her today?

Ms. Berger A: Yes, I have.  
(*RP at 97*)

The subpoena in question was not ordered by the court, it was merely an attorney subpoena, and certainly never court ordered.

Further, Ms. Berger's findings were limited by *RCW 26.12.170*, which reads in part: The findings shall be restricted to the issue of abuse and neglect and shall not be considered custody investigations.

Counsel for Jennifer Brunson, Ms. Laurie Robertson, labels Mr. Brunson's appeal as "frivolous and filed in bad faith." Ms. Robertson is seeking attorney fees. This court should note Ms. Robertson failed to advise her client that she was under judge's orders not to take a loan from the 401(k) without court permission.

JENNIFER BRUNSON: Well, when I was considering the options, I consulted counsel and asked; and she told me to do what I thought was appropriate. (*RP at 253*)

Ms. Robertson also submitted her response brief in excess of the 50-page limit along with a motion to exceed the page limit. This court granted her motion and allowed a three-week extension

so she could rework and shorten her brief. Her own actions are increasing her fees for her client and she should not be rewarded for such behavior. Given the fact attorney fees were not awarded at trial she has no basis to request them on appeal. Her own brief states, "If attorney fees are recoverable at trial, then the prevailing party may recover on appeal." The judge clearly ruled Mr. Brunson was not found to be intransigent at trial, but Ms. Robertson continues to assert that Mr. Brunson should be sanctioned. (*RP at 651*)

The facts are clear, Ms. Robertson did not motion for a pre-trial or discovery conference nor did she ever ask Mr. Brunson for any documents, nor did she ask for interrogatories. She signed a notice of non-arbitration. Yet she still contends it was Mr. Brunson who engaged in abusive litigation causing Jennifer Brunson to incur unnecessary legal expenses.

### **III. CONCLUSION**

There was no finding under *RCW 26.09.191(3)* that would preclude Mr. Brunson from having contact with his children. (*Exhibit 118*) Nor was there any evidence presented Mr. Brunson's contact with the children would be detrimental to the children, nor

does record support the court engaged in an analysis of limiting factors in any meaningful way.

The Supreme Court recently clarified the interplay of *RCW 26.09.191* and *26.09.187* *In re Marriage of Chandola* stating:

There is some overlap between the trial court's authority under *RCW 26.09.187*, to establish the terms of the parenting plan, and its authority under *RCW 26.09.191(3)*, to "preclude or limit any provisions of the parenting plan." Practically speaking, a court can substantially restrict a parent's contact with his or her child simply by establishing a residential schedule pursuant to its discretion under *RCW 26.09.187*.

Instead, it proceeded under *RCW 26.09.191(3)*. The "limitations" in that statute are fundamentally different from the provisions necessary to every parenting plan under *RCW 26.09.187*. Restrictions on a parent's geographic location, for example, are not authorized as typical parenting plan provisions under *RCW 26.09.187*. See *Littlefield*, 133 Wn.2d at 54-55; LAWS OF 2000, ch. 21. They are instead imposed under *RCW 26.09.191(3)*. Similarly, restrictions on a parent's travel or conduct can be imposed only under *RCW*

26.09.191-not as features of the parenting plan under RCW 26.09.187. *Katare*, 175 Wn.2d at 35-37; *In re Marriage of Wicklund*, 84 Wn. App. 763,770-72, 932 P.2d 652 (1996). Before imposing RCW 26.09.191(3)(g) restrictions, a trial court must find "more than the normal ... hardships which predictably result from a dissolution of marriage." *Katare*, 175 Wn.2dat36 (alteration in original) (quoting *Littlefield*, 133 Wn.2d at 55). While the court "need not wait for actual harm to accrue before imposing restrictions," it may impose restrictions only where substantial evidence shows "that a danger of ... *damage* exists." *Id.* at 35-36 (emphasis added) (alteration in original) (quoting and citing *In re Marriage of Burrill*, 113 Wn. App.863, 872, 56 P.3d 993 (2002)).

The ruling further states: But RCW 26.09.191(3)(g) does require a particularized finding of a specific level of harm before restrictions may be imposed. Two principles of statutory interpretation compel this conclusion. First, the disputed catchall provision, RCW 26.09.191(3)(g), follows a list of specific "factors" that "may have an adverse effect on the child's best interests," justifying restrictions on parent-child contact. RCW 26.09.191(3)(a)-(f). When a statute

employs such a general catchall term in conjunction with specific terms, the general term is "deemed only to incorporate those things similar in nature or 'comparable to' the specific terms." *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139,151,3 P.3d 741 (2000) (quoting *John H. Sellen Canst. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883-84, 558 P.2d 1342 (1976)). In RCW 26.09.191(3), all of the factors specifically listed concern either the lack of any meaningful parent- child relationship whatsoever or conduct by the parent that seriously endangers the child's physical or emotional well-being:

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.

Consistent with the nature of these specific terms, trial courts typically invoke the catchall provision in RCW 26.09.191(3)(g) only after identifying a specific, and fairly severe, harm to the child.

Second, statutory language is to be interpreted in context, considering "related provisions, and the statutory scheme as a whole." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). Thus, RCW 26.09.191(3)(g) must be read in light of chapter 26.09 RCW's statement of policy, codified at RCW

26.09.002. It provides that "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 26.09.002 (emphasis added).

In light of this policy, as well as the nature of the specific grounds for parenting plan restrictions listed RCW 26.09.191(3)(a)-(f), we conclude that the legislature intended RCW 26.09.191(3) restrictions to apply only where necessary to "protect the child from physical, mental, or emotional harm," RCW 26.09.002, similar in severity to the harms posed by the "factors" specifically listed in RCW 26.09.191 (3)(a)-(f). A trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent such a harm. *In re Marriage of Chandola, Supreme Court of Washington 6/19/2014.*

In light of the court order banning Mr. Brunson from filing motions thus eliminating his ability to engage in discovery and the manifest abuse of discretion throughout this case, Mr. Brunson respectfully requests the court vacate the orders of the trial court

and remand for new trial and approve his Motions of Merits filed  
with his response brief.

*October 20, 2014*

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'NB', written over a horizontal line.

Signature

*Neil Brunson*  
Pro Se