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NO. 75368-1-I

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

In re Parentage of A.F.M.B.

LESLIE MACKENZIE,

Appellant,

and

JACK BLAKE,

Respondent.

AMICUS CURIAE BRIEF OF LEGAL VOICE

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I. INTRODUCTION

Far too often, family law cases result in extraordinarily protracted litigation, especially in cases involving children. This is particularly common when one parent has a history of controlling behavior toward the other parent. Unfortunately, our legal system provides a highly effective way for a parent to continue to attempt to control the other parent long after their relationship has ended, a problem that can be even more acute where one parent has superior resources. The best interests of the child become subsumed in a cycle of litigation and ongoing conflict.

This case presents an important opportunity for this Court to provide guidance to trial courts about recognizing and addressing abusive use of litigation in family law cases. As an organization that has long engaged in advocacy to improve our state's family law system, Legal Voice urges this Court to recognize that abusive use of conflict through litigation is a form of control that one parent may use against another – and to help ensure that trial courts take appropriate steps when entering and modifying parenting plans to address and curb this practice.

This case also raises important questions about several other issues where there is little, if any, published Washington case law, including:

- Whether it is an abuse of discretion for a trial court modifying a parenting plan to remove a prior finding from the original parenting plan that a parent has a history of abusive use of conflict under RCW 26.09.191(3)(e), without making specific findings to justify removal

of such a prior finding and any accompanying restrictions.

- Whether it is an abuse of discretion for a trial court to include a broad "first right of refusal" clause in a contested "minor modification" of a parenting plan, particularly where there is a history of abusive use of conflict and one parent has been a victim of stalking.

- The importance of recognizing that stalking by a former intimate partner is a form of domestic violence under Washington law, and providing guidance to trial courts on recognizing how stalkers commonly operate and how stalking may be proved.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

Legal Voice incorporates by reference the statement of interest set forth in its Motion for Leave to File *Amicus Curiae* Brief, filed herewith.

III. STATEMENT OF THE CASE

Legal Voice adopts Appellant Leslie Mackenzie's Statement of the Case. However, several points merit emphasis.

First, it is important to recognize that Mr. Blake was specifically found to have engaged in abusive use of conflict in this matter, a finding that was directly related to his misuse of litigation. In 2011, when entering the original parenting plan after a six-day trial, Judge Deborah Fleck found:

> The attorneys' fees and expert fees in this case are staggering; approximately $150,000 on the part of the father, and approximately $60,000 on the part of the mother who ultimately represented herself at trial because **she had been financially ruined because of this litigation**. There is **a history of**

> **controlling behavior by the father toward the mother**, as well as **abusive use of conflict including extraordinary litigation** over the period of a year and a half up to trial. The **father's extensive litigation during the pendency of this action constituted the abusive use of conflict as well as intransigence** . . .

CP 84-85 (emphasis added).[1]

Accordingly, Judge Fleck found there was a basis for including restrictions against Mr. Blake in the parenting plan under RCW 26.09.191(3)(e), based on abusive use of conflict through litigation. CP 31 ("[t]he father's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the abusive use of conflict.").[2] However, while noting this limiting factor under .191(3), Judge Fleck decided to include "no restrictions on the father's residential time with the child because this parenting plan should eliminate most or all of the historical bases for conflict." CP 34. Although Judge Fleck's hopes that the 2011 parenting plan would eliminate conflict have not proven to be true, this statement indicates that Judge Fleck crafted the original parenting plan with the specific intention and goal of addressing Mr. Blake's abusive use of conflict, consistent with 26.09.191(3)(e).

Judge Fleck also ordered Mr. Blake in 2011 to pay $40,000 of Ms.

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[1] Judge Fleck also found that "given their personalities and skills, [these parents] are less likely than many parents to be able to work well together in the future." CP 52. She further found that Ms. Mackenzie "has been and continues to be supportive of the father's relationship with the child" and found "little credible evidence that she has been manipulative." CP 81. By contrast, Judge Fleck found Mr. Blake to be "more demanding and less cooperative" and "somewhat manipulative." *Id.*

[2] Judge Fleck also cited Mr. Blake's neglect and nonperformance of parenting functions for the first half of the child's life before trial as another basis for a .191(3) finding. *Id.*

Mackenzie's attorney's fees. CP 85. It appears from the parties' briefing that Mr. Blake has failed to comply with Judge Fleck's order regarding payment of attorney's fees to Ms. Mackenzie after nearly six years – while at the same time continuing to pursue repeated efforts to modify the parenting plan entered by Judge Fleck.

After the original parenting plan was entered in 2011, Mr. Blake filed three motions or petitions to modify the parenting plan over the next two years. CP 68-77 (motion to modify), 253-59 (first petition to modify), 331-38 (second petition to modify). In addition, after the final parenting plan was entered, Ms. Mackenzie was granted a domestic violence protection order (DVPO) against Mr. Blake in January 2012 under case number 11-2-41028-5, and the DVPO was renewed in 2013.[3] The same month that Ms. Mackenzie obtained the DVPO, Mr. Blake filed a petition to modify the parenting plan in which he alleged that Ms. Mackenzie had a "mental health impairment" impacting her parenting and had committed domestic violence herself. CP 256.

For many years, *amicus* Legal Voice has received reports from attorneys, judicial officers, domestic violence advocates, and domestic violence survivors that controlling intimate partners were using the legal system as a tool to continue to maintain power and control over survivors.

[3] *Amicus* have been unable to locate copies of the DVPOs entered under case number 11-2-41028-5 in the record on appeal. It appears that Judge Eadie (who was also the modification judge for the parenting plan) declined to renew the DVPO in 2014, suggesting that concerns related to the DVPO were "inherently tied to the parenting plan" and placing weight on "the absence of clear violations" of the DVPO. RP 75-76.

As a result, Legal Voice established a workgroup several years ago to examine the problem and to identify steps that courts can take to curb abusive litigation. Based on this work, the Washington Supreme Court's Gender and Justice Commission included information about abusive litigation in its recently updated Domestic Violence Bench Guide for Judicial Officers. *See* Legal Voice Violence Against Women Workgroup, *Abusive Litigation and Domestic Violence Survivors*, in Washington State Supreme Court Gender & Justice Comm'n, *Domestic Violence Bench Guide for Judicial Officers,* App. H (2015).[4] In addition, interviews from survivors and their attorneys by this workgroup formed the basis for an article in the *Seattle Journal for Social Justice* on this issue. *See* David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 Seattle J. Soc. Just., 429 (2015).

In this case, Judge Fleck already specifically recognized in 2011 that Mr. Blake has used abusive litigation against Ms. Mackenzie, while also noting his history of controlling behavior. CP 84-85. Unfortunately, the record in this case raises serious concerns that Mr. Blake has continued to engage in tactics that are reported by domestic violence survivors and their advocates as common abusive litigation tactics. These include, but are not limited to, filing repeated motions to modify a parenting plan, bringing repeated contempt motions against a survivor, seeking sole or primary custody when a survivor seeks a protection order, portraying the

[4] *Available at www.courts.wa.gov/content/manuals/domViol/Complete%20Manual%202015.pdf*

survivor as an unfit and incompetent parent and mentally unstable, and refusing to comply with court orders, such as fee awards. *See Domestic Violence Bench Guide for Judicial Officers* at H2-3.

Amicus recognize that Mr. Blake also expressed concerns in his response brief about Ms. Mackenzie's litigation practices and that she apparently filed a bar complaint against his lawyer. *See* Resp. Br. at 14. However, unlike Mr. Blake, it does not appear from the record that there has ever been a finding that Ms. Mackenzie has engaged in abusive use of conflict through litigation, nor does it appear there has been a finding in this litigation that she has a history of controlling behaviors.

IV. ARGUMENT

A. The Trial Court Abused Its Discretion By Removing Judge Fleck's Prior Finding That Mr. Blake Engaged in Abusive Use of Conflict Under RCW 26.09.191(3)

As discussed above, Judge Fleck entered a final parenting plan in 2011 which included an explicit finding that Mr. Blake had engaged in abusive use of conflict, which warranted restrictions in the parenting plan under RCW 26.09.191(3)(e). By contrast, the modification court (Judge Richard Eadie) failed to include a .191(3) finding in the modified parenting plan, and included no restrictions on Mr. Blake based on abusive use of conflict. This unexplained "erasure" of Judge Fleck's .191(3) finding regarding Mr. Blake's abusive use of conflict in the modified parenting plan is not supported by Washington law and should be considered an abuse of discretion.

The omission of Judge Fleck's abusive use of conflict finding is all the more difficult to understand because Judge Eadie specifically recognized earlier in the proceedings that Judge Fleck's findings about abusive use of conflict were "not changeable":

> **Ms. Mackenzie's counsel**: Also, Mr. Blake is asking this Court to get rid of some of Judge Fleck's findings. In his proposed parenting plan, he requests that you don't include the abusive use of conflict against him, that you don't include the neglect and abandonment –
>
> **The Court**: Well, excuse me. The, what Judge Fleck ordered in her findings are there. They are not changeable. We can modify them and say that they don't, that they, a parenting plan, a new parenting plan, should be admitted and determine what goes in that. But nobody is taking and removing Judge Fleck's findings.

RP at 140 (March 16, 2015).

Trial courts hearing modification actions should not have discretion to remove prior findings and restrictions about abusive use of conflict under .191(3)(e) that were made in a prior parenting plan, absent a specific finding by the modification court to justify the decision. Permitting such findings to be essentially "erased" without explanation in parenting plan modifications would amount to a collateral attack on a prior court ruling. It would be inconsistent with the general rule of finality of judgments and the limited grounds for modifying parenting plans set forth in RCW 26.09.260, which are generally focused on requiring the moving party to show a substantial change in circumstances to warrant modifications to the original parenting plan.

As Mr. Blake acknowledges, RCW 26.09.260 "sets out the procedures and criteria to modify a parenting plan and *limits the court's range of discretion*." Resp. Br. at 27 (emphasis added). The Court here should hold that in modifying a parenting plan, a trial court abuses its discretion by removing findings and accompanying restrictions entered pursuant to RCW 26.09.191(3) (or pursuant to any other .191 finding), without specifically finding that there is no longer a basis for such a finding and restrictions due to a substantial change in circumstances.

Here, Judge Eadie did not indicate that Mr. Blake had substantially changed his abusive use of conflict against Ms. Mackenzie. Instead, as discussed in Section III above, the record raises serious concerns that Mr. Blake has continued after Judge Fleck's entry of the original 2011 parenting plan to engage in abusive litigation tactics against Ms. Mackenzie.

Other authorities recognize that abusive use of conflict through litigation is a means of control that abusive parents frequently employ in family law cases involving children. As the National Council of Juvenile and Family Court Judges has observed:

> A parent who uses tactics of coercive control may find litigation to be an effective means of controlling the other parent. Contact with the at-risk parent is critical to effectuating control strategies, and family court processes allow many opportunities for contact. . . . When the abusive parent has legal representation, frequent court hearings reinforce the imbalance of power for unrepresented, at-risk parents and run up legal costs for at-risk parents who have retained counsel. . . . Pretrial restrictions on custody and visitation are an especially powerful trigger for abusive behavior. Very often, abusive parents make multiple appearances seeking to undo

> orders that they perceive to be unfavorable to them, even in the absence of any change in circumstance between hearings.

Hon. Jerry J. Bowles *et al.*, *National Council of Juvenile and Family Court Judges: A Judicial Guide to Child Safety in Custody Cases,* at 22 (2008).[5]

As such, it is highly important for family law courts to recognize and attempt to curb abusive use of conflict through litigation, as Judge Fleck did when she entered the .191(3)(e) finding in the original parenting plan. As noted above, while Judge Fleck did not include residential time restrictions based on Mr. Blake's abusive use of conflict, she made clear that she attempted to fashion the parenting plan in a way to avoid abusive use of conflict in the future. It should be considered an abuse of discretion for the modification court to remove an abusive use of conflict finding by a prior court without making specific findings that abusive use of conflict is no longer a reason for concern.

B. The "First Right of Refusal" Clause in the Modified Final Parenting Plan Was an Abuse of Discretion.

The final parenting plan entered by the modification court included a "first right of refusal clause," which provides:

> 6.1.19: First Right of Refusal. At any time that either parent is unable to care for A.F.M.B. during his or her regularly scheduled residential time, the opportunity to care for A.F.M.B. shall be offered to the other parent before the child is enrolled in child care

[5] *Available at* http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf.

or placed in the care of another third party.

CP 665-66. *Amicus* agree with Ms. Mackenzie that including this clause in the modified final parenting plan should be considered an abuse of discretion, particularly under the facts of this case.

As a preliminary matter, it should be noted that there does not appear to be any published Washington cases addressing the appropriateness of including a "first right of refusal" provision in a parenting plan – much less including such a provision for the first time in a contested parenting plan modification. *Amicus* have also been unable to locate any legal journal articles, practice guides, or judicial manuals that directly discuss this kind of provision.

Amicus recognizes that it may not be uncommon in practice for Washington State courts to include a "first right of refusal" clause in a parenting plan, particularly where the parties agree to such a provision and/or have a history of working cooperatively. However, there appears to be little if any analysis by courts, practice manuals, or legal scholars about such provisions. As a result, this Court's decision will provide important guidance to other courts and attorneys in the state about the inclusion and appropriate bounds of "first right of refusal" clauses in parenting plans in our state.

Amicus urges that including a broad "first right of refusal" clause such as the one entered by the modification court is contrary to the limitations for a "minor modification" to a parenting plan under RCW

26.09.260(5)(c). Such a clause, unless very narrowly worded and limited, cannot be considered a "minor modification" to a parenting plan. Instead, it creates an entirely unpredictable residential schedule for the child. It is particularly inappropriate to include a broad "first right of refusal" clause in a modified parenting plan entered pursuant to RCW 26.09.260(5)(a), which only authorizes trial courts to enter modifications that do "not exceed twenty-four full days in a calendar year." It is impossible to know how much additional residential time one parent will gain as a result of a "first right of refusal" clause. Including such a clause renders the 24-day limitation of RCW 26.09.260(5)(a) largely meaningless, at least without a specific provision that the clause cannot be applied past a limited number of days.

It should also be noted that this is a case where the parent who is not the primary residential parent is retired and has a highly flexible schedule, while the primary residential parent works. Under these circumstances, a "first right of refusal" clause is a largely one-sided provision. It is virtually certain to result in substantial but unpredictable gains in residential time for one parent only – Mr. Blake.

As a result, there is no certainty that this provision will not result in a change in A.F.M.B.'s residential schedule that exceeds the 24-day limit of RCW 26.09.260(5) – even putting aside the parties' disagreements about how many full days the modified parenting plan already changes in A.F.M.B.'s residential schedule.

In addition, *amicus* submits that when one parent has been found to

have engaged in abusive use of conflict, a broad "first right of refusal" clause should constitute an abuse of discretion. This is particularly true given the extremely broad scope of the clause entered in this case. By its terms, this clause creates considerable uncertainty. May Ms. Mackenzie have the child's maternal relatives care for A.F.M.B. during her residential time, even for an hour, without first asking Mr. Blake? Can she send A.F.M.B. to spend time in the care of a friend's parents for a birthday party or play date during her residential time, without first calling Mr. Blake to offer him the "first right of refusal" to care for the child instead? The provision is entirely uncertain in that regard. And given the history of abusive use of conflict by Mr. Blake, it provides a powerful weapon against Ms. Mackenzie.

In cases where a parent has a history of abusive use of conflict, particularly related to litigation, such a "first right of refusal" clause provides multiple opportunities for continued conflict, monitoring, and ongoing disputes. Given the litigation history of this case, it could well result in continued efforts by Mr. Blake to have Ms. Mackenzie held in contempt of court for alleged violations of the provision. Inclusion of this clause is particularly inappropriate given the stated goal of the modification court to address its concerns about the "vagueness and ambiguity of the original parenting plan which resulted in conflict and disagreement" between the parents. CP 623.

Finally, a "first right of refusal" clause should also be considered an abuse of discretion in cases where the court finds that one parent has

experienced stalking. *See* CP 621 (trial court finds sufficient evidence that stalking has taken place against the mother, while expressing its view that there was insufficient evidence to find the father "complicit" in such stalking). Such a clause creates a strong incentive for closely monitoring the other parent in an attempt to "catch" them in a purported violation of the requirement.

For these reasons and those expressed by Ms. Mackenzie, *amicus* urge the Court to find that it was an abuse of discretion for the trial court to include this "first right of refusal" clause in the modified parenting plan.

C. The Trial Court Should Have Included a Finding of a History of Domestic Violence Under RCW 26.09.191(2) and Entered Appropriate Restrictions.

In this case, there was substantial evidence that Mr. Blake had a history of stalking Ms. McKenzie, both on his own and through third parties. Under these circumstances, *amicus* agree with Ms. Mackenzie that it was an abuse of discretion for the court to fail to find under RCW 26.09.191(2) that Mr. Blake had a history of domestic violence and to impose appropriate restrictions.[6]

RCW 26.09.191(2)(a) provides that a "parent's residential time with the child shall be limited if it is found that the parent has engaged in

[6] Ms. Mackenzie also raises this issue in her Opening Brief under Assignment of Error #2, where she asserts that "the trial court erred in modifying the parenting plan to remove the RCW 26.09.191 restrictions against the father contrary to the prior un-appealed domestic violence protection order, the court findings regarding the father stalking the mother, court findings regarding abusive use of conflict; and additional stalking evidence admitted at the modification trial." Opening Br. at 1.

. . . a history of acts of domestic violence as defined in RCW 26.50.010(1)." In turn, RCW 26.50.010 defines "domestic violence" to include stalking when committed by a former intimate partner. Our law's recognition that stalking is a form of domestic violence is consistent with a substantial body of research linking stalking to domestic violence, even though stalking may not involve an act or even an explicit threat of violence. *See, e.g.*, Violence Against Women Grants Office, U.S. Dept. of Justice, *Stalking and Domestic Violence: The Third Annual Report to Congress Under the Violence Against Women Act*, at 2 (1998) ("there is a strong link between stalking and abusive behavior in intimate relationships"); National Coalition Against Domestic Violence, *Facts About Domestic Violence and Stalking*, at 14 (2015)[7], ("stalkers do not always threaten their victim verbally or in writing; more often they engage in a course of conduct that, taken in context, causes a reasonable person to feel fearful.").

Stalking is linked to domestic violence because of the fear that it causes victims, which can be every bit as devastating as an actual act or explicit threat of violence. "Stalking is a serious, prevalent crime that wreaks havoc on its victims. The mental health effects of stalking are staggering. Victims report fear, nervousness, anger, substance abuse, depression, and anxiety. . . . Physical health effects include somatization, chronic sleep disturbance, excessive tiredness or weakness, appetite

[7] *Available at* https://ncadv.org/files/Domestic%20Violence%20and%20Stalking%20NCADV.pdf

disturbance, frequent headaches, and persistent nausea. Stalking can escalate to physical violence." Angela Frederick Amar & Eileen M. Alexy, *Coping with Stalking, Issues in Mental Health Nursing,* Vol. 31:8–14 (2010) (citations omitted). That stalking impacts victims in much the same way as physical violence or threats of physical violence, and thus constitutes domestic violence, is particularly important for courts to understand because "research shows that partner stalking is a relatively common form of violence against women." TK Logan, *Research on Partner Stalking: Putting the Pieces Together*, Nat'l. Inst. Of Justice, 3 (2010).[8]

Despite the prevalence of stalking and the substantial harm that it causes victims, courts often fail to treat stalking as a serious form of domestic violence or to recognize this type of behavior as abuse. As the National Council of Juvenile and Family Court Judges has noted:

> Domestic violence is not limited to physical violence against a parent . . . . The abusive parent may employ an array of other tactics, many of which may be more difficult to quantify for evidentiary purposes than physical or sexual assault. Abusive behaviors within a parenting relationship are complex and often go unrecognized or unidentified in legal proceedings.

Bowles, *supra*, *National Council of Juvenile and Family Court Judges: A Judicial Guide to Child Safety in Custody Cases*, at 7-8..

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[8] *Available at* https://www.nij.gov/topics/crime/intimate-partner-violence/stalking/documents/research-on-partner-stalking.pdf

Given the challenges in recognizing when a pattern of behavior constitutes stalking, it is also critical to understand that stalkers often rely on third parties to act on their behalf. According to the National Institute of Justice:

> [A]pproximately half or just over half of cases of partner stalking involve some kind of proxy stalking. The proxies may include friends and relatives, unidentified persons, professionals (e.g., private investigator), and the stalker's new intimate partner.

Intimate Partner Stalking, National Institute of Justice (April 20, 2012).[9] It is well-recognized that "'enlisting other family and friends to report on one's behavior allows an abuser to extend his or her surveillance far beyond that which one could reasonably conduct alone.'" Joanne Belknap *et al.*, *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J. Gender L. & Pol'y 373, 377-378 (2012), *quoting* Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 Sex Roles 743, 750 (2005).

In fact, in one study of survivors of intimate partner violence, over half of the women "reported 'proxy stalkers' - individuals who kept tabs on the victims when the abuser was in jail, had a restraining order, was at work, or was otherwise engaged (and thus unable to stalk). Proxy stalkers were usually the abusers' friends and family members who followed and phoned the victim at his request." Belknap, *supra.*, *citing* Heather C.

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[9] *Available at* https://www.nij.gov/topics/crime/intimate-partner-violence/stalking/Pages/tactics.aspx.

Melton, *Stalking in the Context of Intimate Partner Abuse: In the Victims' Words*, 2 Feminist Criminology 347, 349 (2007).

Consistent with the research cited above, the Washington Supreme Court has held that "[t]he crime of stalking under RCW 9A.46.110 . . . encompasses the act of directing third parties to follow and intimidate a victim. The plain language and legislative history of the statute suggest that the definition of conduct amounting to harassment is very broad and could include the manipulation or direction of third parties to achieve the intended emotional distress." *State v. Becklin,* 163 Wn.2d 519, 521, 182 P.3d 944 (2008).

Nonetheless, in its order to modify the parenting plan, the trial court declined to restrict Mr. Baker's residential time pursuant to RCW 26.09.191(2)(a), finding that although there was sufficient evidence of stalking of Ms. Mackenzie and her attorney by unidentified persons ("including following [Ms. McKenzie] and her attorney after court hearings"), there was insufficient evidence that Mr. Baker was "complicit" in this stalking. CP 621. The court reached this conclusion despite also questioning Mr. Blake's veracity in other areas of his testimony, as well as finding that a "close confidant" of Mr. Blake's had misled the court about being involved in investigating Ms. Mackenzie. CP 622.

In finding that there was no basis for restrictions pursuant to RCW 26.09.191(2)(a), the Court also appeared to have entirely discounted the domestic violence protection orders that Ms. Maczenkie had obtained against Mr. Blake, as well as the findings of the trial court in 2011 that Mr.

Baker had engaged in abusive use of conflict and had a history of controlling behavior. Contrary to Mr. Blake's assertion, a trial court may accord weight to a domestic violence protection order in making .191 findings. *See* RCW 26.09.191(2)(n) ("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").

Findings by a trial court constitute an abuse of discretion where no reasonable person would take the view adopted by the trial court. *State v. Sisouvanh,* 175 Wn.2d 607, 623, 290 P.3d 942 (2012). With all respect to the modification court, it should be considered unreasonable to conclude on this record that Ms. Mackenzie experienced stalking, but there was "insufficient evidence to conclude that [Mr. Blake] was complicit" in it. CP 621. This finding is contrary to research that shows that stalkers often work through friends and other "proxies." More to the point, the court's finding that Mr. Blake was not "complicit" in stalking strains credulity, particularly when viewed against the backdrop of the domestic violence protection orders, a prior finding of abusive use of conflict and controlling behavior by Mr. Blake, and the court's own finding relating to Mr. Blake's potentially intentional misstatements to the court.

A trial court has the discretion to determine whether the evidence presented in a parenting proceeding establishes that a parent has a history of domestic violence. However, a trial court abuses that discretion if, despite the existence of substantial evidence in the record, it does not find that a parent has a history of domestic violence, particularly if the court's

purpose for not entering such a finding is to protect the parent. *In re Parenting & Support of L.H.*, 197 Wn. App. 1025, 2016 Wash. App. LEXIS 3099 (Dec. 28, 2016), *publication ordered* 2017 Wash. App. LEXIS 681 (Mar. 21, 2017).

Here, the court's order appears to be more concerned with Mr. Blake's interests than addressing the stalking that the court acknowledges took place:

> The court is convinced that the father understands the consequences of committing or allowing such stalking to occur with his knowledge. Father should insure that no supposed friends of his are engaging in any such activity, as it would likely be attributed to him, and he would suffer the consequences if such stalking were established to occur at any time in the future.

CP 622. This reasoning reads as though the court is striving to give Mr. Blake a second chance, despite his history. Indeed, the statement that Mr. Blake's friends' behavior "would likely be attributed to him" and that there would be consequences should "such stalking" occur in the future suggests that the court itself had serious doubts about Mr. Blake's behavior, but concluded that a simple admonishment was enough to deter that behavior going forward. Simply telling a stalker to watch his (and his friends') behavior, however, is not enough under RCW 26.09.191(2)(a).

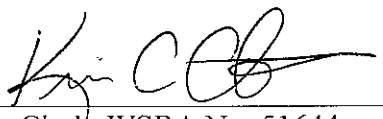
RCW 26.09.191(2)(a) requires that if a parent has a history of domestic violence, the court must make a finding to that effect and restrict that parent's residential time. The statute does not give the court the latitude to ignore domestic violence. *Amicus* recognize that the findings of the trial court are entitled to deference. However, where those findings are

so inconsistent with the substantial evidence before the court that a reasonable person could not reach the same conclusion, they must be set aside, particularly where the well-being of a mother and her child is at stake.

V. CONCLUSION

For the reasons set forth above, Legal Voice urges this Court to reverse the decisions of the modification court.

Respectfully submitted this 20th day of April, 2017.

By: 

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No. 92448-1

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MOTION OF LEGAL VOICE FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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Legal Voice respectfully moves pursuant to RAP 10.6 for leave to file a brief as *amicus curiae* in this matter. In support of this motion, *amicus* offers the following information:

I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Founded in 1978 as the Northwest Women's Law Center, Legal Voice is a non-profit public interest organization dedicated to protecting the rights of women and their families through litigation, legislation, and education. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country. Legal Voice's work has long included includes advocacy on family law and gender-based violence issues, both in the courts and in the Washington State Legislature. Legal Voice has a strong interest in this case because it raises a number of important family law issues where there is little if no published case law in Washington state.

II. FAMILIARITY WITH ISSUES

Amicus curiae has obtained copies of, and is familiar with, the briefing submitted thus far by the parties to this Court, the opinions of the lower courts, and the proceedings below. *Amicus curiae* are familiar with the scope of argument presented by the parties and the issues involved in this matter.

III. ISSUES TO BE ADDRESSED BY *AMICI CURIAE*

Amicus curiae's proposed brief would address: (1) the importance of courts recognizing and addressing the abusive use of litigation in family law cases; (2) whether it is an abuse of discretion for a trial court modifying a parenting plan to remove a prior finding from the original parenting plan that a parent has a history of abusive use of conflict under RCW 26.09.260(3)(e); (3) whether it is an abuse of discretion for a trial court to include a broad "first right of refusal" clause in a contested minor modification of a parenting plan; and (4) the importance of recognizing that stalking by a former intimate partner is a form of domestic violence under Washington law, and recognizing how stalkers commonly operate.

IV. WHY *AMICI CURIAE* BRIEFING WILL ASSIST THE COURT AND SHOULD BE ACCEPTED

This case raises important questions about several issues where there is little, if any, published case law in our state. For example, there appears to be no published Washington case law addressing the permissibility of including a "first right of refusal" clause in a parenting plan, much less whether such a provision may be permissible in modifying a parenting plan. In addition, there appears to be no case law in Washington addressing whether a court modifying a parenting plan may remove prior findings and restrictions based on the parent's abusive use of

conflict. There is also relatively little Washington case law concerning the abusive use of conflict through litigation in family law cases.

Amicus curiae believe that their experience, perspective, and additional arguments will assist the Court in deciding this case, particularly because of their long history of participating in cases and legislative advocacy concerning family law and gender-based violence issues in Washington State.

V. CONCLUSION

For the reasons stated above, Legal Voice respectfully requests this Court's permission to file a brief of *amicus curiae* in this matter.

Respectfully submitted this 20th day of April, 2017.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on April 20, 2017, I caused to be served as follows a true and correct copy of the motion of Legal Voice for leave to file an *amicus curiae* brief and the proposed *amicus curiae* brief in *In re Parentage of A.F.M.B.*, Washington Court of Appeals No. 75368-1-I, on the following persons:

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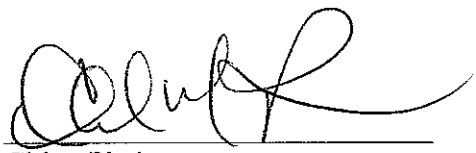

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