Dear Shira Cole:

We, the Superior Court Judges' Association (SCJA), received your message inquiring into the work done to draft proposed substitute Senate Bill (SSB) 5205. We thank you for your interest in this work and hope the following will provide some history and clarity to the work done to prepare this draft bill.

About a year ago, the SCJA began the task of looking to improve RCW 26.09.191 (herein referred to as ".191" or the statute). The initial intention of this group was to streamline the statute, so it was more understandable to people who are not represented by attorneys. It is the SCJA's experience that a large percentage of parents in family law cases are not represented by an attorney, and the lack of clarity in the law often creates unnecessary confusion and frustration for parents who are presenting their own case before a judicial officer. Since decisions in parenting plans are some of the most important decisions that the courts make, we believe this lack of clarity is an access to justice issue.

As part of the group's work, they met with various stakeholders. From Domestic Violence (DV) advocacy groups, the representatives were from Northwest Justice Project (NJP) and the Family Violence Appellate Project. We also included attorney stakeholders from the Domestic Relations Attorneys of Washington (DRAW) and the Washington State Bar Association (WSBA) Family Law Executive Committee (FLEC). A core hope of the group was to have varying voices at the table who could help craft a revised statute that would bring clarity to the process. Along the way, the stakeholder group identified a number of other concerns about the statute. Some of those issues were too difficult to tackle in the short period of time the group had to convene. Therefore, the work group decided to reserve those larger issues for a later date. Instead, the group focused on a couple of issues that we believed could be more easily addressed. These issues are, I assume, the substantive issues you are asking about in your message.

For clarity, the substantive changes proposed by the group were intended to address a number of scenarios where the court is often left with no good options under the current law. These scenarios can be briefly described as follows: 1) when both parents are subject to mandatory or discretionary .191 conditions; and 2) when judicial discretion is needed to safeguard the child's best interests. Here are some examples:

- Scenario 1: When the parent with whom the child has lived with the majority of the time becomes unable to care for the child and the child is then placed with the other parent, who may have prior domestic violence (DV) history.
    - When might Scenario 1 occur?
        - When a child has been removed from the home due to an active Child Protective Services (CPS) investigation and/or a dependency case is filed. In such a case, the court may need to place the child with a parent who may have some prior DV history but is the parent the dependency court has determined is currently able to safely parent the child. The dependency court is required by law to place a child with a parent if one is available to safely care for the child. When this happens, the parent with whom the child has been placed will typically seek a

parenting plan under Chapter 26.09 RCW in order to close out the dependency matter.
    - This scenario might also occur outside of the dependency process. The courts are regularly brought petitions for parenting plans where parents are struggling with mental illness or other limiting factors that impair their ability to safely care for their child. In this scenario, the child may be placed in the primary care of a parent with a domestic violence history when it is the only viable option.

  Court's options in Scenario 1: In both of these situations, .191 requires the court to order no mutual decision making between parents. That means, the court has no other option but to exclude the parent from any role in decision-making who, in these scenarios, is a domestic violence survivor and who previously was the majority-time parent. This absence of judicial discretion may impact the court's ability to do what is in the best interest of the child and may be harmful to the parent-child relationship of the non-custodial parent who may have been a victim of DV.

- Scenario 2: When courts conduct trials, judicial officers often gain a better insight into the family dynamics that a criminal court may ever see. Sometimes, it becomes apparent that the parent with the DV history *is actually the victim of DV* (e.g. where the other parent has used the system as a tool to control). Sadly, it is not unusual for DV victims to get arrested after an incident or to be the respondent on a protection order – a reality of which I imagine you are acutely aware. As a result, the lack of judicial discretion in .191 requires a judicial officer to place .191 restrictions on a parent that is actually the victim – again limiting a domestic violence victim from participating in decision making about their child.

- Scenario 3: Where *both* parents have DV history, the statute provides no guidance to the court about how to handle this scenario. This leaves the court with no methodology of determining which parent ought to have decision making or whether both ought to be able to participate.

- Scenario 4: Where the parents *want* mutual decision making even where there has been prior DV. Parents in an individual case may not have concerns about prior DV history of another parent, for example: when the DV history is older, the result of a treated mental health condition, or does not involve the co-parent (e.g. DV history against a parent or sibling). Parents may also have an amicable separation with a long history of joint participation in their children's lives. Under the current statute, the court is required to not order mutual decision making when one or both parents have a finding of DV. The courts strive to respect the rights of parents to mutually agree on how to parent their children; but arguably, under current case law, judicial officers lack discretion to order mutual decision making even if the parents agree to mutual decision making.

Under all of these scenarios, the family law judge is required to implement the overarching purpose of Chapter 29.06 RCW, which is to issue a parenting plan that is in the best interest of the child. These cases are complex, and each presents its own unique facts and challenges. "One-size-fits-all" is rarely a reality in family law matters, and in family law as a whole is generally and deliberately flexible to allow courts to respect individual family situations. Families and children should not be placed in situations where the justice system cannot fulfill the obligation of doing what is in the best interest of a child. Our proposed changes were intended to allow for judicial discretion in order to facilitate this purpose, while still ensuring that children and domestic violence survivors were also protected.

The work-product from this group is not a report. Rather, the group's work is reflected in the initial draft of Senate Bill (SB) 5205. We subsequently worked with NJP to change some of the draft language, which resulted in the current version of the bill SSB 5205.

As President as the SCJA and a member of this group, I want to stress that the SCJA and the stakeholder group put a lot of thought into the draft language - but we realize that it is often difficult to foresee concerns that others might have. We have advised Senator Dhingra and Representative Taylor that we would be happy to meet with anyone who has concerns with SSB 5205. As with NJP, we are very willing to propose modifications to the bill so that we are not inadvertently impacting families in a negative way. You have indicated that your network has concerns. We welcome hearing those concerns in detail and encourage you to share those concerns with us.

To continue this conversation, please do not hesitate to email Allison Lee Muller (Allison.LeeMuller@courts.wa.gov).

Sincerely,

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