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By Tanya Goodman
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MEMORANDUM

TO: Vice Chairman Stephen Gilchrist, U.S. Commission on Civil Rights

FROM: Tanya Goodman / WASPLC

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RE: Family Court, Fundamental Rights, and the Administration of Justice: A Request for Federal Civil-Rights Leadership

Purpose

Family court is generally treated as a matter of state law. The civil rights exercised, restricted, and sometimes effectively extinguished within those proceedings are not.

Washington's family-court framework presents a question squarely within the Commission's mandate to study denials of equal protection “in the administration of justice” (42 U.S.C. § 1975a(a)(2)): what safeguards should exist when government uses civil proceedings to substantially restrict the parent-child relationship, relies on court-appointed private professionals to influence those decisions, and then limits the mechanisms available to correct the resulting deprivation?

This is not a request for the Commission to review any individual custody decision, and it is not a request for another general study of whether family courts have problems. The concerns below are structural. Several are confirmed directly in current statutory text and controlling Washington case law. Each is paired with a specific, realistic action, identified separately as belonging to the Commission, to Congress, or to the Washington Legislature, because these are not interchangeable, and treating them as interchangeable is what makes a request like this easy to set aside.

A Note on Federal Jurisdiction

Two doctrines are sometimes invoked to argue that no federal institution has any proper role in family court matters. Neither applies to what this memorandum asks.

The Rooker-Feldman doctrine bars federal district courts from functioning as a de facto appellate court over a final state-court judgment. *Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The domestic relations exception, a separate and older doctrine grounded in diversity jurisdiction, bars federal courts from issuing divorce, alimony, or child custody decrees. *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). Both doctrines close off one specific avenue: a federal court sitting in judgment of, or in place of, a state court on an individual case.

Neither doctrine constrains an institution that does not sit in judgment of anything. The Commission does not adjudicate. It investigates, studies, reports, and recommends. 42 U.S.C. § 1975a(a). Congress's own power to investigate rests on the same distinction and is settled law: it is inherent in the legislative function and does not depend on having already identified specific legislation to pass. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

Every action requested in this memorandum, whether a Washington State Advisory Committee hearing, inclusion in the Commission's annual report, or a recommendation that Congress direct a GAO study, is fact-finding or advisory, not adjudicative. Rooker-Feldman and the domestic relations exception explain why federal courts are not the right venue to correct an individual custody decision. They are also exactly why Congress and this Commission, neither of which sits in appellate review of anything, are among the few institutions positioned to examine the systemic pattern instead.

A Note on the Evidentiary Record

This memorandum relies on statutory text, controlling case law, and, where disclosed, specific documented examples. It does not rely on, and cannot rely on, population-level data showing how often “abusive use of conflict,” restrictive gatekeeping, parental alienation, or comparable findings are made in Washington family courts, or how those findings are treated in later modification proceedings. **That data does not exist.** No state or federal agency maintains a registry tracking outcomes by finding-type across Washington's family courts, and family-court records are not indexed in a way that would let even a well-resourced researcher assemble that picture from public dockets at meaningful scale.

Whether that gap reflects a deliberate choice or simple neglect, its effect is the same: it makes it functionally impossible for a parent, an advocate, a legislator, or this Commission to distinguish an isolated error from a documented pattern without independent fact-finding authority. That is not incidental to the case for federal involvement; it is part of it. The Commission's own statutory function includes serving “as a national clearinghouse for information” relating to denials of equal protection in the administration of justice. 42 U.S.C. § 1975a(a)(2)(C). Building the baseline record that presently does not exist is not a stretch of that function; it is close to its core.

1. Fundamental Rights Should Not Be Easier to Restrict Than to Restore

RCW 26.09.191 governs restrictions on residential time and decision-making in parenting plans, proceedings that reach a fundamental liberty interest the Supreme Court has recognized

repeatedly, including in a case arising from this state's own law: in *Troxel v. Granville,* 530 U.S. 57 (2000), the Court struck down Washington's third-party visitation statute as applied because it failed to give a fit parent's decisions the constitutional deference due process requires.

Effective July 27, 2025, HB 1620 added a new evidentiary structure to RCW 26.09.191. Subsection (4)(a) allows a court to impose mandatory limitations on a parent's residential time or decision-making authority upon a finding of specified conduct, such as a history of domestic violence, sexual assault, or similar harm, without specifying a heightened evidentiary standard for that finding; under the statute's own instruction to apply ordinary rules of evidence and civil procedure, that finding is made by a preponderance of the evidence. Subsection (6), by contrast, permits a court to decline to impose that same mandatory limitation only on “express written findings based on clear and convincing evidence” that contact is safe and recurrence of harm is remote. Practitioners describe this clear-and-convincing requirement as a new feature of the 2025 reorganization, not a longstanding one.

The result is exactly the asymmetry it appears to be: **the evidentiary bar to avoid or lift a restriction on a fundamental liberty interest is categorically higher than the bar used to impose it.** That is not how due process ordinarily allocates risk. In *Santosky v. Kramer,* 455 U.S. 745 (1982), the Supreme Court held that when government moves to terminate parental rights, due process requires the government, not the parent, to carry at least a clear-and-convincing burden, precisely because the risk of erroneous deprivation of a fundamental liberty interest should fall on the party seeking the deprivation. RCW 26.09.191 does not involve termination, and no court has extended *Santosky's* specific holding to lesser residential-time restrictions. But the structure *Santosky* condemns, placing the heavier evidentiary burden on the side of preserving the relationship rather than the side restricting it, is what subsections (4) and (6) do here. Washington's own Domestic Violence Manual for Judges (Ch. 10, Dec. 2025) independently acknowledges “disparate evidentiary standards and procedure in protection order and parenting plan proceedings” as a structural feature of the current system.

A separate, related question is not yet fully answered by the statutory text: what standard governs a later petition to modify or remove a restriction already in place? RCW 26.09.260 requires a “substantial change in circumstances… specifically related to the basis for the limitation” to expand time once a §191 restriction exists; that provision does not itself use “clear and convincing” language, though it may function that way in practice if courts apply §191(6)'s substantive standard once the §260 threshold is cleared. That question deserves a direct answer, not an assumption in either direction, and it is the one piece of this section that would benefit from Commission-directed fact-finding rather than further advocacy.

At the state level, Washington should establish a coherent restoration procedure that does not require a parent to overcome an evidentiary burden disproportionate to the burden supporting the original restriction, and should clarify how §191(6) and §260 interact when a restriction is challenged after the fact.

At the federal level: should states receiving federal funding connected to courts, child welfare, or family services be expected to maintain minimum procedural safeguards when government action substantially interferes with a fundamental family relationship? The Commission is

positioned to elevate that question through its own reporting function and by recommending that Congress consider it under Spending Clause authority already used in this domain (Title IV-D of the Social Security Act; the Adoption and Safe Families Act), a recommendation the Commission can make, though the funding condition itself is Congress's tool, not the Commission's.

2. Protective Parenting Must Be Distinguished From Obstructive Parenting, and Old Labels Must Not Outlive the Standard That Produced Them

Washington has already taken a step here. HB 1620 added an objective definition to RCW 26.09.191(3): "protective actions," including reports to protective agencies or law enforcement, seeking a change in residential time, and petitioning for a protection order, are enumerated by statute and expressly "shall not constitute a basis for a finding of abusive use of conflict." As of July 2025, the definitional gap that once allowed protective conduct to be relabeled as obstruction has been substantially narrowed by the Legislature itself.

That does not resolve the underlying problem, for a reason the statute does not address: **the new definition operates prospectively.** Nothing in HB 1620 creates a mechanism to reassess a finding of "abusive use of conflict," or the functionally equivalent, undefined determinations courts made before July 2025, under the new, narrower definition. A parent found to have engaged in "abusive use of conflict" under the prior, standardless version of the statute has no statutory path to have that finding reevaluated against the objective criteria the Legislature has now adopted. That finding remains part of the record and may continue to be weighed as "history" in a later RCW 26.09.260 modification proceeding, which asks whether a parent can show a substantial change in circumstances, not whether the original finding would hold up under current law. A reform that only looks forward leaves every parent labeled before it took effect exactly where they were.

This is a concrete, answerable question, not a request for further general study: **does Washington law provide any mechanism to reassess a pre-2025 "abusive use of conflict" or comparable finding against the current statutory definition, and if not, how are courts currently treating such findings in post-2025 modification proceedings?** That is squarely the kind of factual record a Washington State Advisory Committee fact-finding hearing is built to develop, and it is narrower than asking the Commission to evaluate whether the 2025 reform was adequate on its face.

This is not a hypothetical concern. In *Parsons v. Goodman*, a King County matter dating to 2015, a 2019 finding that a parent had engaged in "abusive use of conflict," entered under a version of RCW 26.09.191 that supplied no definition of that term and no protective-action carve-out, continued to carry decisive weight when that parent petitioned to modify the plan in 2024. The trial court denied a hearing at the "adequate cause" stage; Division I of the Court of Appeals affirmed; the Washington Supreme Court denied review, and the matter is now final. (The author of this memorandum was the parent in that matter; the underlying proceedings are a matter of public record. This memorandum does not address the child's specific needs or diagnoses, which are not relevant to the procedural point and are not this Commission's

concern.) No statute or procedure required any court in that proceeding to test the 2019 finding against the definition the Legislature adopted six years later.

Washington's own appellate courts have reached a related conclusion independently of the 2025 reform. In *In re Matter of Yorks*, No. 84480-6-I (Wash. Ct. App. Feb. 26, 2024) (unpublished, citable as non-binding authority under GR 14.1(c)), Division One held that a parenting-plan restriction barring a parent from filing reports with Child Protective Services and law enforcement was an unconstitutional restraint on her right to free speech, and separately held that the trial court had erred by awarding the other parent majority residential time without the domestic-violence safety findings the statute requires. That decision confirms, independent of any legislative definition, that restricting the specific category of conduct RCW 26.09.191(3)(e) now calls a “protective action” can itself violate the First Amendment, which makes the definitional carve-out the Legislature added in 2025 a codification of a constitutional principle Washington's own courts had already recognized, not a novel policy experiment.

For federal civil-rights purposes, the question is not whether the Commission should draft Washington's parenting statutes; it should not, and the Legislature has already acted once. The question is whether a state's own definitional reform can be meaningfully undermined by the absence of any mechanism to apply it to findings made before the reform existed, and whether that gap is a pattern worth documenting.

3. Government Cannot Delegate Responsibility and Then Lose Accountability

Washington courts have extended quasi-judicial immunity, a doctrine built for judges, to family court investigators and evaluators performing court-ordered parenting evaluations, on the reasoning that they act “as an arm of the court.” *Reddy v. Karr,* 102 Wn. App. 742, 9 P.3d 927 (2000); *Barr v. Day*, 124 Wn.2d 318, 879 P.2d 912 (1994) (guardians ad litem in related proceedings). Where quasi-judicial immunity forecloses the primary federal remedy for constitutional violations in the fact-finding process (42 U.S.C. § 1983), it raises a question squarely within the Commission's function of monitoring federal civil-rights enforcement: whether that remedy functions as intended for this category of state action.

The immunity is not absolute under Washington law: courts have denied quasi-judicial immunity to a guardian ad litem where the record showed the GAL had acted outside the scope of the court's appointment, confirming that Washington already recognizes a scope-of-appointment limit on the doctrine. What is not yet documented, and what the absence of any outcome-tracking system described above makes difficult to document, is how often that exception is actually available to litigants in practice, versus how often immunity forecloses review regardless of whether the professional exceeded their appointed role.

Delegation should not create an accountability vacuum. Where a state immunity doctrine, applied to non-judicial actors exercising state-authorized functions, forecloses a federal enforcement remedy for a defined category of claims, the Commission should examine whether Washington's existing scope-of-appointment exception functions as a meaningful check in practice, and recommend changes, through its annual federal civil rights enforcement report or a referred GAO study, where it does not.

4. Access to One's Child Should Not Depend Upon Purchasing a Private Court-Ordered Marketplace

A separate accountability problem arises when courts require families to purchase private evaluations, therapy, reunification services, or GAL services as a practical condition of maintaining or restoring family relationships. When the government orders participation in private services that determine whether a parent can exercise meaningful contact with a child, **ability to pay can become ability to access justice.**

This is not, and this memorandum does not claim it to be, a standalone Equal Protection violation; wealth is not a suspect classification, and the fundamental-rights branch of that doctrine has been applied to criminal appeals, not civil family-court access. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The better precedent is the Commission's own: State Advisory Committees have already studied cost-based access barriers in the justice system directly. Nevada's Advisory Committee produced an advisory memorandum on municipal fines and fees, and other Committees have examined legal financial obligations more broadly. A Washington study modeled on that precedent, examining mandated private-pay forensic and reunification costs as a justice-system access question, sits comfortably within work the Commission has already done elsewhere.

At minimum, courts should be required to consider insurance-covered and publicly available alternatives before ordering private-pay services, disclose anticipated costs, establish meaningful review of extraordinary fees, and prevent inability to purchase a particular private service from becoming, by itself, an indefinite barrier to family contact.

5. The Federal Role Should Be Corrective, Not Substitutive

None of this requires federalizing family law. Washington should remain responsible for Washington family law; courts should remain responsible for deciding individual cases. But federalism does not require federal civil-rights institutions to ignore the procedures by which states administer justice merely because those procedures operate inside family courts.

The Commission can act directly on some of this: elevating these as administration-of-justice questions, using hearings and reports for national visibility, and referring the Washington-specific items above to the Washington State Advisory Committee. Other items are Congress's to act on and the Commission's only to recommend. Minimum procedural safeguards tied to federal funding streams follow the Spending Clause model Congress has already used in this domain, not any authority the Commission holds itself. And some remedies (a state restoration procedure, a mechanism to reassess pre-2025 findings, codifying the scope-of-appointment limit on quasi-judicial immunity) belong to the Washington Legislature regardless of what the Commission does. Keeping these separate is what makes this request realistic rather than rhetorical.

Fact-finding should support these remedies where facts are genuinely missing, as they are on the §260/§191(6) interaction, on how the scope-of-appointment exception functions in practice, and on the baseline frequency and disposition of §191 findings generally, not substitute for action where the structural condition is already established, as it is for the entry/exit asymmetry

itself and for the existence of the immunity doctrine. A Washington State Advisory Committee inquiry is well positioned to begin compiling, from public dockets and appellate opinions, whatever baseline picture can currently be assembled (the first such compilation of its kind, because none exists) as a complement to the population-level federal data collection already recommended to Congress on this subject.

Requested Action

I respectfully ask Vice Chairman Gilchrist to consider helping identify the most effective federal pathway for advancing these issues, beginning with four principles:

First, governmental restrictions affecting fundamental parent-child relationships should be accompanied by coherent procedural safeguards, including a meaningful and proportionate path to restoration, one that does not simply leave pre-reform findings undisturbed by a reform enacted after the fact.

Second, state systems should distinguish evidence-based protective parenting from conduct intended to obstruct a child's relationship with another parent, using standards that reach backward far enough to correct mischaracterizations made before those standards existed, not only conduct going forward.

Third, delegation of consequential family-court functions to private actors should never eliminate meaningful standards, review, transparency, or accountability. Where Washington's own case law already recognizes a limit on that delegation, that limit should be documented and made to function in practice, not left as a theoretical exception.

Fourth, and most immediately actionable: Washington's family courts should be required, at minimum, to maintain and report aggregate data on the categories of findings entered under RCW 26.09.191 and the outcomes of subsequent modification petitions. No such requirement currently exists, and its absence is what makes every claim in this memorandum, including any the Commission itself might wish to make, harder to verify than it should be. This is the lowest-cost, least controversial step available, and it does not require resolving any of the substantive questions in Sections 1 through 3 first.

Some remedies identified here belong to Washington's Legislature. Others belong to local courts and county governments. Some may appropriately involve Congress, federal agencies, the Commission, or its State Advisory Committees.

The purpose of bringing these issues to the U.S. Commission on Civil Rights is not to ask the federal government to decide family-law cases. It is to ask a more fundamental question: when state government exercises power over one of the most fundamental relationships in American life, what civil-rights safeguards should Americans be entitled to expect? And when a state changes those safeguards, what happens to the people the old ones already failed?

Prepared for Vice Chairman Gilchrist's direct consideration. Statutory citations and case law available on request.