102373-1

COA No. 83271-9-I

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

CHRISTIAN T. METCALFE,

Appellant/Cross-Respondent

and

DONNA M. COCHENER,

Respondent/Cross-Appellant

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Pursuant to Washington Rule of Appellate Procedure 13.4, Christian T. Metcalfe respectfully requests review of the decision of the Washington State Court of Appeals, Division I, more specifically identified in Section II of this Motion.

II. DECISION

On August 14, 2023, the Division I Court of Appeals issued its unpublished opinion in ***In re Marriage of Donna M. Cochener and Christian T. Metcalfe***, Case No. 83271-9-I, affirming the trial court's grant of sole decision-making to Respondent Donna Cochener, among other things, and reversing the trial court's ***sua sponte*** inclusion in the parenting plan of a provision prohibiting either party from "put[ting] down" Christianity.

III. ISSUES PRESENTED FOR REVIEW

1. Did the court of appeals err by concluding that state and federal law do not prohibit the trial court from limiting a parent's decision-making authority due, at

least in part, to that parent's protected advocacy on behalf of his disabled children?

2. Did the trial court err by limiting Mr. Metcalfe's parental decision-making without determining whether any of his actions constituted protected advocacy under state or federal law?

3. Did the trial court err by rejecting the only expert testimony regarding L.'s level of special needs in reaching its conclusion that Mr. Metcalfe exhibited "poor behavior" by advocating for a particular accommodation for L.?

IV. INTRODUCTION

This Court may accept review of petitions that involve an issue of substantial public interest that should be determined by the Court. Although this dispute arises in the context of a parenting plan modification case, it presents questions of law with the potential to impact all parents in Washington—namely, what role do federal and

state antidiscrimination and anti-retaliation laws play in a trial court's reasoning regarding whether to limit a parent's decision-making authority?

Christian Metcalfe and Donna Cochener divorced by agreement in 2016. In 2019, they filed cross-petitions to amend the parenting plan for their two sons, L. and E. In the time since Mr. Metcalfe and Ms. Cochener had divorced, both boys had been diagnosed with increasingly complicated medical and educational needs, requiring extensive support from outside providers. Both parties agreed that the co-parenting dynamic had become untenable.

Mr. Metcalfe, an entrepreneur and instructor at the University of Washington, argued that Ms. Cochener denied the extent of the children's needs and failed to ensure they received proper treatment and prioritized pleasing with providers over advocating for the boys. Ms. Cochener argued that Mr. Metcalfe engaged in excessive

conflict and made unreasonable demands of providers.

Over the course of the trial, numerous witnesses testified, including several providers against whom Mr. Metcalfe had raised formal or informal complaints. These providers generally characterized Mr. Metcalfe as oversensitive and overreactive in his efforts to advocate for his sons. However, Dr. Wheeler, the court-appointed parenting evaluator, acknowledged that Mr. Metcalfe's concerns regarding these providers were "reasonable" and "logical." Indeed, Dr. Wheeler recommended the trial court award Mr. Metcalfe sole medical decision-making. Mr. Metcalfe also produced the expert testimony of Dr. Mandelkorn and Dr. Marlowe, who both testified about the boys' various medical needs.

Following trial, the trial court awarded sole medical and educational decision-making to Ms. Cochener, reasoning that split decision-making was unworkable because the boys' medical and educational decisions were

so closely intertwined.

The trial court did not make any findings as to whether Mr. Metcalfe had engaged in protected advocacy on behalf of his children. It did, however, cite to numerous instances of Mr. Metcalfe's advocacy as evidence of his alleged "poor behavior" and actions.

Research shows that parents of students with disabilities are more likely to be considered problematic as a result of their efforts to advocate on behalf of their disabled students. *See* Disability Rights Education and Defense Fund Br. at 9. However, the trial court made no effort to determine whether Mr. Metcalfe's alleged conflict with providers—which it cited as a basis for awarding sole educational and medical decision-making to Ms. Cochener—arose from Mr. Metcalfe's protected advocacy on behalf of his sons.

In reaching its conclusion that Mr. Metcalfe engaged in "poor behavior," the trial court specifically relied on an

instance in which Mr. Metcalfe had advocated for the use of a calculator as an accommodation for L. but rejected expert testimony regarding L.'s level of special needs—including dyslexia, autism, and working memory deficits—and how that level impacted his need for this accommodation.

The court of appeals compounded the trial court's errors by concluding that (1) the trial court did not err by limiting Mr. Metcalfe's decision-making as a result of his advocacy efforts because federal law imposes no substantive duty on courts in parenting plan modification actions, (2) the trial court did not consider any of Mr. Metcalfe's protected advocacy efforts in reaching its decision to limit his decision-making authority, and (3) that Dr. Wheeler's testimony qualified as contrary "expert testimony" upon which the trial court properly relied in rejecting the testimony of Dr. Marlowe as to the level of L.'s special needs and what accommodations were necessary

for his education.

These conclusions not only are legally and factually incorrect, they threaten to undermine the important rights protected under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203; 28 C.F.R. § 35.130(b), Section 504 of the Rehabilitation Act, and the Washington Law Against Discrimination (WLAD), RCW 49.60.010 *et seq.*

Parents of students with disabilities should enjoy the same protections afforded to all Washingtonians. They should not be limited in their advocacy for their children due to fear that such advocacy may be used against them one day in a family law proceeding. It is fundamental to the rights afforded to all Washington citizens that protected advocacy cannot form the basis for a trial court's conclusion that an individual exhibits "poor behavior" or has communication "deficits." The trial court here failed to properly account for the protected nature of Mr. Metcalfe's advocacy efforts and instead pointed to them as instances

of Mr. Metcalfe's shortcomings as a parent. The issues presented for review substantially affect the public interest and warrant the discretionary review of this Court. *See* RAP 13.4(b)(4).

V. STATEMENT OF THE CASE

Christian Metcalfe and Donna Cochener divorced in 2016 during mediation out of court and entered into an agreed parenting plan for their two sons, L. and E. CP 1226. Since then, the boys have been diagnosed with an increasing number of disabilities, resulting in increasingly complex medical and educational needs. *Id.* In March 2020, both parties filed petitions to change the parenting plan, each arguing they should be granted sole decision-making authority. The cross petitions were presented over a six-day trial from June 28 to July 9, 2021.

At trial, evidence was presented regarding Mr. Metcalfe's "conflicts" with various service providers, including Seattle Infant Development Center (SIDC),

Magnolia Behavioral Therapy, Ryther, Spruce Street School, math tutor, Eliza Furmansky, and Carla Hershman. Notably, this is only a small number of the providers—59 total—who have worked with the parties' sons over the years. The following will briefly outline the facts surrounding these purported conflicts, which each arose from Mr. Metcalfe's advocacy on behalf of his children.

Seattle Infant Development Center

Seattle Infant Development Center ("SIDC") is a daycare that both L. and E. attended. Following an incident regarding SIDC's failure to communicate with Mr. Metcalfe and Ms. Cochener regarding a medical condition E. experienced, Mr. Metcalfe filed a complaint with the Department of Children, Youth, and Families ("DCYF"). DCYF then issued a citation to SIDC for, among other things, violation of WAC 110-300A-0070(1), which requires that the facility "be able to furnish the child in care

with a healthy, safe, nurturing, respectful, supportive, and responsive environment." Ex. 117.

Magnolia Behavioral Therapy

Magnolia Behavioral Therapy ("MBT") MBT is an independent medical provider contracted by Ms. Cochener and Mr. Metcalfe that provided Applied Behavioral Analysis (ABA) therapy to L. from December 2015–November 2018. In the fall of 2018, Mr. Metcalfe and Ms. Cochener jointly decided to terminate MBT's services. *See* Ex. 680. During the time it provided care, MBT provided an Applied Behavioral Analysis technician directly supervised by a Board Certified Behavioral Analyst for L. 2-3 days a week on-site at Spruce Street School.

In the fall of 2018, Mr. Metcalfe terminated MBT's services one week prior to the parties' planned termination date because MBT had implemented an unauthorized behavior tracking system for L. Mr. Metcalfe requested an explanation regarding the pros and cons of the new

behavior tracking system. He wrote, "Whether well intentioned or not I believe your actions and approach to be flawed and not in the best long term interests of my son . . . Please be advised that as of end of day tomorrow, Fri 10, 26, I withdraw my consent for you, your firm and your providers to work with my son, [L.]."

Ryther

Ryther is an independent medical and social skills classes provider contracted by Mr. Metcalfe and Ms. Cochener. L. attended, and continues to attend Ryther's Aspiring Youth social skills classes.

Between November 2018–June 2019 Ryther provided a paraprofessional for L 2-3 days a week on-site at Spruce Street School. Between September 2019 - March 2020 Ryther was contracted to provide an ABA technician to be directly supervised by a Board Certified Behavioral Analyst for L 2-3 days a week.

Between Sept 2019–November 2019 Ryther

provided an ABA technician who was not, as required by law, licensed to practice in Washington State. From September 2019–March 2020, also contrary to Washington law, Ryther's Board Certified Behavioral Analyst never directly supervised L's behavioral technician. Ryther's CEO admitted during trial that Ryther had violated WAC 246-805-330 5(d) and 5(e). 4 RP 1634–35; Exs. 680, 683.

Carla Hershman

Carla Hershman is a clinical social worker that L. saw from Sept 2019 - April 2020. L. stopped seeing Ms. Hershman because, as she admitted at trial, she had not been licensed to work in Washington State the entire time that she was L's provider despite having represented herself as licensed during this time. 3 RP 1332.

Eliza Furmansky

Ms. Furmansky is a tutor who has worked with (and continues to work with) L. In November 2019, Mr. Metcalfe

and Ms. Furmansky had a disagreement over L.'s use of a calculator on certain math worksheets. Ms. Furmansky had instructed L. not to use a calculator, but during the course of a tutoring session, L.'s brother, E., entered the room and told Ms. Furmansky that L. had used a calculator. 3 RP 1300. Ms. Furmansky started erasing L.'s answers, which caused L. to become upset. *Id.*

Following this interaction, Mr. Metcalfe emailed Ms. Furmansky to inform her that L.'s IEP team—which included Mr. Metcalfe and Ms. Cochener—had agreed to a draft IEP that provided for the use of a calculator in *all settings*. *See* Ex. 191; Ex. 106. Mr. Metcalfe requested that Ms. Furmansky honor that accommodation. *Id.*

Ms. Furmansky responded to the email by explaining her rationale for instructing L. not to use a calculator. *Id.* Mr. Metcalfe responded, "I understand your opinion, but you misunderstand your role with my and [Ms. Cochener's] son. You are not the decision maker. If you'll neither honor

[L.'s] legal rights under his IEP or my co-equal decision making authority as his parent, I wonder if you want to continue working with [L.]?" *Id.* In the final email, Mr. Metcalfe said, "I also suspect that per Title III of the ADA/ADAAA that your business can not legally deny this reasonable accommodation to my son—and that to do so would constitute discrimination. . . So to be clear if you are to continue to work with [L.], you need to follow the IEP and allow him to use a calculator—even for simple math. If you can't follow that guideline then I do not believe you should continue to work with [L.]." *Id.* Mr. Metcalfe also attached two calculators to L.'s binder and taped over Ms. Furmansky's directions not to use a calculator. 3 RP 1302.

Ms. Furmansky testified that she had not had any other conflicts with Mr. Metcalfe since that incident. 3 RP 1307.

Spruce Street School

Spruce Street School is a private school that provides

education for grades K-5. L. attended Spruce Street School from 2014–2020, and E. entered his final year in 2023. Ms. Cochener sits on Spruce Street School's Board of Trustees and is a major financial donor to the school. *See* Ex. 660.

Mr. Metcalfe and Spruce Street School worked effectively together to support L. for many years. Spruce Street School's Head of School, Briel Schmitz, testified that L. was "probably the most complicated kid we've had go through the school." 3 RP 1213.

In 2019, Mr. Metcalfe requested that Spruce Street School resume use of daily behavior charts to support L.—an accommodation which the school was also offering to E. at the time. After back-and-forth over the effectiveness of implementing this accommodation, Mr. Metcalfe presented Spruce Street School with a letter from L.'s behavioral specialist, Dr. Mandelkorn, M.D., recommending the use of a daily behavioral chart. 3 RP 1220; Ex. 165.

A few days later, Spruce Street School informed Mr. Metcalfe and Ms. Cochener that L.'s reenrollment for his sixth and final school year would be conditioned on both parents being subject to a restrictive communication plan that limited the nature and frequency of their communication with Spruce Street School teachers and administrators regarding only L., and not E. (even though E. was also an enrolled student). *See* Ex. 600.

In August 2019, Mr. Metcalfe contacted the Washington Human Rights Commission ("HRC") regarding Spruce Street School's conduct. Mr. Metcalfe contacted the HRC again in December 2019 regarding Spruce Street School's continued failure to provide L. with accommodations. *See* Ex. 122.

In February 2020, Spruce Street School denied E. a reenrollment contract unless something could be done about Mr. Metcalfe. This prompted Ms. Cochener to seek a pre-trial temporary order prohibiting Mr. Metcalfe from

initiating any communication with E.'s teachers. *See* Ex. 511. Those temporary restrictions were ultimately vacated by the trial court after the parenting plan modification trial.

Dr. Wheeler, PhD., the court-appointed parenting evaluator, testified that Mr. Metcalfe's complaints were "based in logic" and "reason" and that the content and topics about which Mr. Metcalfe was raising concerns were reasonable and rational issues to address. 2 RP 597–98, 600–02. Dr. Wheeler further testified that Ms. Cochener had become increasingly dismissive and avoidant of Mr. Metcalfe's efforts to communicate and co-parent, instead resorting to her skills as an attorney to litigate rather than co-parent. Ex. 1. Dr. Wheeler recommended that the trial court award educational decision-making to Ms. Cochener and medical decision-making to Mr. Metcalfe. 2 RP 618–19.

The trial court awarded sole medical and educational

decision making to Ms. Cochener, concluding that split decision making was not a possibility because the boys' medical and educational issues were so closely intertwined and that "[Ms. Cochener] has ***less*** deficits than [Mr. Metcalfe] in the area of interpersonal communication." CP 1233.

V. ARGUMENT

A. State and federal law prohibits a trial court from using a parent's protected advocacy against them in a parenting plan modification proceeding.

As Mr. Metcalfe explained in his brief on appeal, the trial court erred by basing its decision to award Ms. Cochener sole medical and educational decision-making on instances in which he had engaged in federally- and state-protected advocacy on behalf of the parties' children. Metcalfe Br. at 55. The court of appeals rejected this argument, reasoning that there was no authority "holding that any federal law imposes any substantive requirements on a state court deciding the issue of decision-making in a

parenting plan according to state law." Op. at 19. This reasoning misstates Mr. Metcalfe's position on appeal and misapplies state and federal law.

All entities that receive federal financial assistance from the Department of Justice, including state judicial systems, are prohibited from discrimination on the basis of disability under Section 504 of the Rehabilitation Act. *Penn. Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998). State courts are likewise prohibited from retaliating against an individual for engaging in advocacy on behalf of disabled persons. *See* 42 U.S.C. 12203. Mr. Metcalfe's advocacy on behalf of his children's known disabilities is protected advocacy, for which retaliation is prohibited under federal law.

RCW 49.60.210 provides similar protections:

> It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a

> charge, testified, or assisted in any proceeding under this chapter.

The court of appeals cited *Taylor v. Vermont Department of Education*, 313 F.3d 786, 772 (2d Cir. 2002), for the proposition that the Individuals with Disabilities Education Act (IDEA) cannot supersede a state court's authority to grant sole educational decision-making to the other parent. Op. at 19–20. However, the court's reliance on this opinion is misplaced. In that case, the appellant, Pam Taylor, was the natural mother of L.D. Taylor obtained a divorce from L.D.'s father and her decision-making authority was terminated in a subsequent custody proceeding.

L.D. was diagnosed with an emotional-behavioral disability and was given an Individualized Education Program ("IEP"). The IEP team did not include Taylor.

Taylor demanded an Independent Educational Evaluation under 20 U.S.C. § 1415(b)(1), which permits "a parent" who disagrees with a public agency's evaluation

either to initiate a hearing in which the agency must show that its initial evaluation was appropriate or to obtain a second evaluation at public expense. This request was denied, and Taylor was not included in further discussions about L.D.'s education. Taylor brought suit, seeking, among other things, injunctive relief and damages under the IDEA.

On appeal, the court considered whether Taylor had standing to exercise parental rights under IDEA. Taylor argued that natural parents retain their rights under IDEA unless the state brings a proceeding to terminate their parental status. The court concluded that it must "look to state law" to "establish which potential parent has authority to make special education decisions for the child." *Id.* at 779. Because Vermont's Board of Education Rules looks to domestic law, the court concluded that Taylor did not have standing under the ADA. *Id.* at 781–82. ("Vermont [] does not allow natural parents whose legal

authority to make educational decisions on behalf of a child has been terminated by operation of local domestic law to challenge an IEP determination.").

The Second Circuit's decision in *Taylor* does not stand for the proposition that family law courts can use protected advocacy as a factor in limiting a parent's decision-making. That case holds only that, after a parent's decision-making has been terminated in a state domestic proceeding, that parent may lose standing to seek remedies under IDEA.

The court of appeals also cited *Navin v. Park Ridge School District 64*, 270 F.3d 1147 (7th Cir. 2001) for the proposition that "nothing in the IDEA overrides states' allocation of authority as part of a custody determination." But this, again, gets the argument backwards. Mr. Metcalfe did not argue that he had independent rights under IDEA that could not be abrogated by a state family court. Instead, he argued that his protected rights—as recognized in the

IDEA, ADA, Section 504 of the Rehabilitation Act, and WLAD—prohibited the court from using his specifically protected activities against him when determining whether to limit his parental decision-making.

That a parent's right to advocate on behalf of their disabled child should not be used against them in a parenting plan modification proceeding is fundamental to the right itself. If the rule were otherwise, parents would be forced to temper their advocacy for fear of potential consequences of their actions down the line. As the Disability Rights Education and Defense Fund ("DREDF") noted in its amicus brief, research shows that parents who engage in advocacy regarding the educational services received by their disabled children face unwarranted discrimination and retaliation and are often falsely stereotyped as "difficult." DREDF Br. at 9. It is therefore imperative that parents be able to advocate for their children without the possibility that retaliation may later

surface in the context of a family law proceeding.

B. The trial court failed in its duty to ensure that Mr. Metcalfe's protected advocacy did not subject him to retaliation in the parties' family law case.

Mr. Metcalfe apprised the trial court of its duty to ensure his protected advocacy did not subject him to retaliation in the parties' family law case, yet the trial court refused to acknowledge this obligation. The court of appeals replicated this error. The trial court made no attempt to determine whether Mr. Metcalfe's actions were protected advocacy before relying on them as a basis for finding Mr. Metcalfe had interpersonal communication deficits that negatively impacted his children. This is particularly troubling here, where the record shows—and the trial court acknowledged—Mr. Metcalfe did not yell, use profanity, or display physical intimidation. Mr. Metcalfe's advocacy was consistent with the systems, procedures, and service plans that were in place with the various providers.

The record is replete with instances of Mr. Metcalfe's advocacy. For example, in November 2019, Mr. Metcalfe and Eliza Furmansky—L.'s tutor—came into conflict over L.'s use of a calculator. Mr. Metcalfe informed Ms. Furmansky that her denial of L.'s use of a calculator conflicted with an accommodation in L.'s draft IEP and informed her that he believed her denial of the accommodation contravened federal disability laws. The trial court specifically cited to this interaction in supporting its finding that Mr. Metcalfe engaged in "poor behavior," characterizing Mr. Metcalfe's conduct as "outrageous." CP 1234.

The trial court also concluded that Mr. Metcalfe's "interpersonal communication has alienated important people in [L.] and [E.]'s lives." In support of this finding, the court of appeals noted that "[e]vidence showed that in fall 2018, Mr. Metcalfe abruptly and unilaterally terminated L.'s ABA therapy services with Magnolia

Behavioral Therapy (MBT) because he disagreed with changes to how L.'s behavior was tracked day to day." However, this conclusion ignores the evidence presented at trial that Mr. Metcalfe and Ms. Cochener had jointly agreed to terminate MBT. 2 RP 522. Mr. Metcalfe's termination of MBT preceded the parties' planned termination date by only one week. But the impact this decision had on L. would have transpired either way, and the parties had already arranged a replacement provider. The court's singular focus on Mr. Metcalfe's advocacy vis-à-vis MBT is therefore troublesome.

Mr. Metcalfe also argued that L's former and E's current Seattle based elementary school, Spruce Street School, had retaliated against him for advocating on behalf of L. Specifically, he presented evidence that Spruce Street School conditioned L.'s reenrollment on both his and Ms. Cochener's acquiescence to a restrictive "communications plan" just seven days after being presented with a letter

from a medical provider recommending an accommodation the school had previously used for L. He also presented evidence that he had made complaints to the HRC regarding the school's conduct, and that the school's efforts to cut him out of L. and E.'s educations intensified on the heels of him filing complaints with the HRC.

Mr. Metcalfe presented evidence at trial that the school held his protected advocacy against him. Ms. Schmitz, Spruce Street School's Head of School, testified that she believed Mr. Metcalfe was a "threat" and that if she disagreed with him "he would sue them." 3 RP 1177. She testified that she did not believe that Mr. Metcalfe's request for daily information was reasonable, even though Spruce Street School had never had a student with more issues than L. 3 RP 1212. Ms. Schmitz also told Dr. Wheeler that there were "5,000 emails to/from the dad" over an 18 month period, which contributed to the school's desire to

place Mr. Metcalfe on a communications plan. However, at trial, Ms. Schmitz testified that there were only 500 emails over the entire course of both his children's enrollment at Spruce Street from Sept 2014–June 2021—the majority of which addressed routine matters related to L. and E.'s known disabilities. 3 RP 1209.

Ms. Furmansky, L.'s tutor, testified that Spruce Street's head of school, Briel Schmitz, once derisively told her that her staff was upstairs at a meeting and to let her know if Mr. Metcalfe arrived and she "need[ed] help with some drama or something." 3 RP 1302.

The trial court made no findings regarding whether Spruce Street School had retaliated against Mr. Metcalfe or whether it had otherwise violated state or federal antidiscrimination or antiretaliation laws and failed in its duty to determine whether such violations occurred. It did, however, use the difficulties Mr. Metcalfe experienced with the school after it had refused medically recommended

accommodation requests as a basis for limiting his decision-making authority for his children. This is, again, troubling where the record contains indicia of retaliatory animus by the same witnesses the trial court credited in finding Mr. Metcalfe should not be awarded full, or even partial, medical and educational decision-making for his children.

Most troubling of all is the trial court's unspecified conclusion that "[i]ntent cannot be an excuse for poor behaviors and actions; particularly when the result negatively impacts [L.] and [E.]." The trial court did not elaborate on this cryptic finding, but the first half of the sentence suggests that the court was including in its categorization of "poor behaviors" protected activities that Mr. Metcalfe had taken to advocate on behalf of his sons. CP 1234.

The trial court failed in its duty to ensure that any adverse impact on Mr. Metcalfe's parental decision-

making was not based, at least in part, on advocacy protected by state and federal law. That alone is error. More troublesome here, the trial court's language and examples strongly suggest that it did, in fact, rely upon protected advocacy and held that advocacy against Mr. Metcalfe when deciding to award sole educational and medical decision-making authority to Ms. Cochener.

C. The trial court contradicted Washington case law by rejecting the only expert testimony presented as to L.'s level of special needs and concluding that Mr. Metcalfe's advocacy for an accommodation was "poor behavior."

At trial, Mr. Metcalfe presented testimony of neurologist, speech pathologist and special education expert, Dr. Wendy Marlowe, Ph.D., ABPP, who conducted an extensive review of L.'s medical, psychological, educational and testing records, and provided her recommendations regarding accommodations, specially designed instruction (SDI), and educational programming. 1 RP 190. The Washington Court of Appeals recently held

that it is a manifest abuse of discretion to adopt an untrained lay opinion over that of qualified experts. *See In re Marriage of Leaver*, 20 Wn. App. 2d 228, 499 P.2d 222 (2021). In that case, the husband presented uncontroverted expert testimony that his longstanding mental health conditions significantly impaired his ability to join the workforce and gain financial independence. The trial court rejected this testimony, crediting the wife's personal opinion that he could do more if he put his mind to it. *Id.* at 223. The court of appeals held this was an abuse of discretion and the finding was unsupported by substantial evidence. *Id.* at 224.

Here, the trial court found that Mr. Metcalfe's request for private tutor Eliza Furmansky that L. use a calculator on certain math worksheets was "outrageous" and "poor behavior" that negatively impacted L. CP 952. However, the only expert testimony regarding L.'s level of special needs and how that level impacted his need for a

calculator was supplied by Dr. Marlowe, who has training in neurology, child development, autism spectrum disorder, dyslexia, attention deficit and hyperactivity disorder, executive functioning, and speech pathology. 1 RP 114. Dr. Marlowe

No other expert evidence contradicted Dr. Marlowe's testimony that due to his disabilities L. must use a calculator in all settings Instead, the trial court relied upon the lay opinion of Ms. Furmansky, a private "learning specialist" certified as a Montessori teacher, to hold that Mr. Metcalfe's request that L. use a calculator was "outrageous."

The court of appeals reasoned that the trial court did not run afoul of ***In re Marriage of Leaver*** because it relied upon the opinion of Dr. Wheeler, who is also an expert witness. Op. at 17–18. However, Dr. Wheeler did not provide expert testimony regarding whether L.'s disabilities supported the all-settings calculator

accommodation that both Mr. Metcalf and Ms. Cochener had agreed to, nor did she opine as to whether Ms. Furmansky had not followed state or federal law by denying L. an accommodation set out in his draft IEP.

The trial court's rejection of Dr. Marlowe's expert testimony in favor of Ms. Furmansky's lay opinion is contrary to Washington law, creating a circuit split warranting review under RAP 13.4(b)(2). It also warrants review under RAP 13.4(b)(4) because all Washington citizens should be able to rely upon the courts to make decisions based on competent expert testimony—especially when they involve a child with disabilities as complex as L.'s. This is particularly important in the family law context, where courts are charged, above all else, with doing what's in children's best interest.

VI. CONCLUSION

For the reasons set forth herein, this Court should grant review of decision of the Court of Appeals, Division

I.

VII. CERTIFICATION

I certify that this document is in 14-point Georgia font and contains 4886 words, in compliance with the Rules of Appellate Procedure. RAP 18.7(b).

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of DONNA M. COCHENER (f/k/a DONNA COCHENER-METCALFE), Respondent/Cross Appellant, and CHRISTIAN T. METCALFE, Appellant/Cross Respondent.	No. 83271-9-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Donna Cochener and Christian Metcalfe filed cross petitions to modify the parenting plan for their two children, each seeking sole decision-making for the children's educational and health care needs. The trial court generally granted sole decision-making to Cochener, including for educational and medical decisions. Metcalfe appeals, asserting several errors. We affirm the trial court's grant of sole decision-making to Cochener among other rulings, we reverse in part, and we remand as further described below.

I

Donna Cochener and Christian Metcalfe were previously married. Together they share two sons, L. and E. Both children have complex special medical and educational needs. Cochener and Metcalfe's original parenting plan was entered in 2016 and directed joint decision-making. In March 2020, both parties filed petitions to change the parenting plan, each arguing they should be granted sole

decision-making authority. The cross petitions were presented over a six day trial from June 28 to July 9, 2021.

Metcalfe argued, generally, that Cochener was resistant to acknowledging and had downplayed the extent of the special needs and mental health issues of the children, did not advocate for the children, and did not cooperate with Metcalfe in decision-making. Cochener argued, generally, that Metcalfe engaged in excessive conflict, made unreasonable demands of providers, and distorted information between the parties and providers. Eighteen witnesses testified at trial. Metcalfe called among others experts Wendy Marlowe, PhD, whom Metcalfe hired to conduct a records review and prepare a report, and Theodore Mandelkorn, MD, a behavioral medicine physician who had treated L.

Metcalfe also called Jennifer Wheeler, PhD, who served as a court-appointed parenting evaluator. Dr. Wheeler was appointed as an agreed, court appointed expert and provided a report and testimony concerning her evaluation of the parents' respective parenting skills and their interactions with medical and educational providers. Among other things, Dr. Wheeler based her report on interviews with Metcalfe and Cochener, as well as 18 third party professionals familiar with L.'s and E.'s educational and health needs. Dr. Wheeler reviewed L.'s and E.'s educational and health care records. Without objection, the trial court admitted Dr. Wheeler's report and notes from her interviews with the various witnesses. Dr. Wheeler recommended the court implement sole decision-making, suggesting that Metcalfe be responsible for health care decision-making and that Cochener be responsible for educational decision-making.

The trial court found joint decision-making was no longer feasible and "splitting decision-making" was not appropriate because "education and healthcare decisions for these children are so intertwined as to be inseparable." This finding is unchallenged and is accepted as true on appeal. In re Marriage of Magnuson, 141 Wn. App. 347, 351, 170 P.3d 65 (2007). After granting a motion for reconsideration in part which clarified the language of several provisions, the trial court entered the amended final order and findings on petition to change a parenting plan, and the amended parenting plan granting sole decision-making authority to Cochener in all areas except religious upbringing.

II

We address first Metcalfe's challenge to the trial court's granting Cochener sole decision-making authority. Metcalfe assigns error to several findings of fact, and the trial court's legal conclusions flowing from them. Metcalfe argues the trial court "abused its discretion by ordering sole decisionmaking to [Cochener] for all decisions except religious upbringing." Metcalfe assigns error to the trial court's decisions that Cochener may make any major decision 14 days after notifying Metcalfe, that Cochener may schedule all of the children's appointments, and that the parenting plan is in the best interests of the children. Metcalfe further argues the trial court abused its discretion by finding any harm caused to the children by changes to the parenting plan is outweighed by the benefits.

A

We first consider Metcalfe's challenges to certain findings of fact. "The trial court's findings of fact will be accepted as verities by the reviewing court so long

as they are supported by substantial evidence." In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). "Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted." Id.

1

Metcalfe challenges portions of finding 17, among them, that Metcalfe's "reaction to tutor Eliza Furmansky's request for [L.] not to use a calculator on certain worksheets was outrageous. [L.] experienced discomfort as a result."

In November 2019, Metcalfe came into conflict with Eliza Furmansky, L.'s tutor since 2016. Furmansky had instructed L. to complete a times table work sheet without the aid of a calculator. Metcalfe sent an e-mail that stated L.'s IEP (individualized education program) allowed use of a calculator in all school settings, and that he would be "honoring that accommodation." Furmansky explained her rationale regarding calculator use for this exercise. Metcalfe responded, "I understand your opinion, but you misunderstand your role with my and [Cochener's] son. You are not the decision maker. If you'll neither honor [L.]'s legal rights under his IEP or my co-equal decision making authority as his parent, I wonder if you want to continue working with [L.]?" In the final e-mail on the subject, Metcalfe said, "I also suspect that per Title III of the ADA / ADAAA[1] that your business can not legally deny this reasonable accommodation to my son—and that to do so would constitute discrimination." "So to be clear if you are to continue to work with [L.] you need to follow the IEP and allow him to use a calculator—even for simple math. If you can't follow that guideline then I do not

[1] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 37.

believe you should continue to work with [L.]. If you still object ask yourself if [Cochener] would succeed at getting a judge/arbitrator to go against [L.]'s Dep[artment] of Education / Federally backed IEP. (I'd think that highly unlikely)." Metcalfe took L.'s binder and attached "not one, but two calculators as well as taping over [Furmansky's directions]." Furmansky testified, "[I]t felt like he was trying to get [L.] to start a fight with me." Furmansky described Metcalfe's e-mails as "condescending, patronizing, threatening, hurtful, . . . and . . . ridiculous." While Furmansky continued to work with L. after the conflict with Metcalfe, she "would not attempt to ask for him to support [L.] in specific ways at home again . . . because that would cause more trouble than be a support."

Metcalfe's e-mail communications with Furmansky and Furmansky's testimony are substantial evidence supporting the trial court's finding that his reaction was "outrageous." As a result of the conflicting instructions, L. "expressed some embarrassment and sadness" when Furmansky began to erase answers that had been completed with a calculator. This is substantial evidence supporting the finding that L. experienced discomfort. This challenged aspect of finding of fact 17 is supported by substantial evidence.

2

Metcalfe challenges the portion of finding of fact 17 stating Metcalfe's "interpersonal communication has alienated important people in [L.] and [E.]'s lives."

Evidence showed that in fall 2018, Metcalfe abruptly and unilaterally terminated L.'s ABA therapy services with Magnolia Behavioral Therapy (MBT)

because he disagreed with changes to how L.'s behavior was tracked day to day. When he learned of the change, Metcalfe requested a "pros and cons of this approach," and stated that if he was "not comfortable with the risks," "I plan to withdraw my consent for [L.] to receive services from MBT." Metcalfe later responded, "Whether well intentioned or not I believe your actions and approach to be flawed and not in the best long term interests of my son. . . . Please be advised that as of end of day tomorrow, Fri 10/26, I withdraw my consent for you, your firm and your providers to work with my son, [L.]." When MBT outlined the discharge process, Metcalfe responded, "No need to complete the discharge steps and after today MBT does not have my consent to discuss [L.] with anyone after today. To be clear your firm and [L.'s therapist] were terminated because of her very poor actions. This is not a mutual parting of ways. I ask for less and not more additional actions by [MBT] so please clear out today." Cochener testified L. was "very upset to not say goodbye to [his therapist] and had some . . . outbursts over it and some crying over it." Dana Doering, Guardian Ad Litem (GAL) for both children, affirmed that after Metcalfe's decision to terminate MBT's services, L. was without ABA therapy for several months while the parties were in a dispute about choosing a new therapist.

Carla Hershman, L.'s mental health therapist, reported to Dr. Wheeler, " 'It appeared to me that his dad is highly sensitive. . . it felt as though any wrong word from me would potentially end the relationship. . . [L.] has not had the chance to build long-term relationships with providers, with some exceptions, because dad finds reasons that people are not good enough, and pulls him.' "

Metcalfe filed complaints against six providers. Metcalfe argues this is a limited number out of the total number of service providers. Metcalfe assembled a list of 57 providers by reviewing insurance claims. The list included providers who had never interacted with the children. The providers Metcalfe filed complaints against were closely involved with the children, including E.'s daycare, L.'s behavioral therapist, and the school both children attended for years. As discussed in section II.A.4. below, multiple providers testified that Metcalfe's manner of interaction negatively impacted their relationships with Metcalfe and affected the quality of services they were able to provide. There is substantial evidence to support the finding that Metcalfe alienated important people in the children's lives.

3

Metcalfe challenges the portion of finding of fact 17 stating "that [Metcalfe] engaged in 'poor behaviors and actions.' " The trial court's sentence reads in full: "Intent cannot be an excuse for poor behaviors and actions; particularly when the result negatively impacts [L.] and [E.]."

In January 2019, when Metcalfe felt a teacher was not providing the level of detail he wanted in a conversation, Metcalfe made a formal request for an in-person meeting, in accordance with the Spruce Street School's grievance policy. The school asked Metcalfe to clarify what his grievance was. Metcalfe responded with a lengthy e-mail further challenging the school's response to his initial complaint. Throughout the exchange, Metcalfe's e-mails were lengthy and repetitive.

In May 2019, Metcalfe requested Spruce Street implement a specific behavior log for L. Metcalfe said he was requesting the log "not because he's having significant difficulty right now, but rather to better support his success." When teachers stated that they did not think a behavior log was needed for L., Metcalfe responded, in part, "[I]f Spruce Street School is unwilling to workout [sic] a compromise to better support [L.] this year it makes me question its ability and willingness to support him next year." On May 10, 2019, Metcalfe asked Dr. Mandelkorn to provide a doctor's note recommending the specific daily feedback system for L. Dr. Mandelkorn provided such a note. The note stated L. "has been diagnosed to have Autism Spectrum Disorder and Attention Deficit Disorder." L. had not been formally diagnosed with autism at that time, and Dr. Mandelkorn testified he is not an expert in autism or special education. At a meeting on May 17, 2019, Metcalfe presented Spruce Street with Dr. Mandelkorn's letter. Cochener was not advised of the meeting beforehand, and Metcalfe did not send her a copy of the letter until after the meeting.

In June 2019, L. was formally diagnosed with autism spectrum disorder. Cochener and Metcalfe agreed to refrain from telling L. about his diagnosis until they could collaborate on how to discuss it with him. Metcalfe did not honor this agreement, and instead informed Cochener by e-mail in late August 2019 that he had shared L.'s diagnosis with him. Cochener reported this information was a source of distress for L., and that " '[i]t was hurtful to [her] that [she] wasn't allowed to be part of that conversation… it limited my ability to talk about his autism with [L.] for a while." (Some alterations in original.)

The GAL recommended the parties delay sharing the report of Metcalfe's retained litigation expert, Dr. Marlowe, with Seattle Public Schools as part of the formulation of an IEP for L. Metcalfe ignored this recommendation and sent Dr. Marlowe's report to Seattle Public Schools. Doering stated it was not reasonable to put this report into the IEP process, "or to have a non-neutral report that was conflicted between parents confound what was supposed to have been a very collaborative process."

Dr. Wheeler testified Metcalfe "has a very logical, rational basis for every one of his efforts to get a third party involved to resolve these disputes or dilemma. . . . [W]hat he misses . . . or fails to adequately . . . take into account is the collective impact each of those individual efforts both on people's impressions of him as . . . being this high conflict person, but also the impact it has on individuals." Dr. Wheeler stated Metcalfe's conduct is experienced by others as "overwhelming and frustrating and intense and overcommunicating," and that this negatively impacts the children.

There is substantial evidence supporting the trial court's finding that Metcalfe engaged in behaviors and actions that negatively affected the children, and were appropriately characterized as "poor" in that respect.

4

Metcalfe challenges the portion of trial court's finding 13 that states Cochener has "*less* deficits than [Metcalfe] in the area of interpersonal communication." (Boldface omitted.)

Dr. Wheeler's report indicated Cochener had difficulty seeing merit in Metcalfe's perspective because of her perception of his fomenting conflict. This led to Cochener "contribut[ing] to their ongoing high-conflict dynamic." Furmansky testified Cochener had "positive and really good, clear communication." Dr. Wheeler testified Cochener was not resistant to accepting any diagnoses of the children from medical professionals, and none of the professionals Dr. Wheeler spoke to had concerns about Cochener's decision-making in medical or educational issues for the children.

The GAL testified that Metcalfe revisited the same issues repeatedly, while Cochener rarely did.

Karen Brady, Executive Director of Ryther, which provided ABA services to L., was reported by Dr. Wheeler as stating, " 'The amount of contact I have had with [Metcalfe] is extraordinary… the number of phone calls and emails and meetings I have had with him is extraordinary. It is unlike any other interaction I have had in this job.' " (Alteration in original.) Brady stated Ryther had to implement a communication plan under which Metcalfe was allowed to e-mail only once per week because " '[h]e had a pattern of emailing a variety of people and asking for different things… it was hard to manage that.' " (Second alteration in original.) Brady stated Metcalfe " 'was okay with [a therapist] working with his son when he knew she didn't have a certification,' " but then " 'filed a complaint with [the Department of Health].' " After not receiving the outcome he sought in a meeting, Metcalfe responded, " 'I am so sorry I have to do this, but I have to file a complaint.' " Brady described Metcalfe as "extraordinary in terms of the amount of

time and demands he has," stating he stood out as "noteworthy" and "singular" in Brady's "28 years of being at Ryther." A teacher at L.'s school similarly described communicating with Metcalfe about days when L. lacked one-to-one support as "unique in my 26 years of teaching" for "how belligerent and persistent" Metcalfe could be.

Briel Schmitz, head of Spruce Street School, testified, "[Cochener] has been clear. I've never had any miscommunication." When asked about communication with Metcalfe, Schmitz said, "[O]ver time, . . . the dynamic . . . changed from the school leading the conversation and providing . . . our expertise to [Metcalfe] never being satisfied, . . . wanting to tell us how to do our work, not respecting our opinions . . . it became very challenging to work together." Spruce Street required a parent communication plan be put in place in order to allow L. to continue attendance. A court later ordered a parent communication plan to facilitate E.'s attendance as well. Schmitz said, "I feel like I was emotionally abused in this situation and taken advantage of." Schmitz said, "I've worked with a lot of kids who have different challenges and needs and this is, by far, the most extreme, the most difficult."

This testimony, as well as the evidence noted above, is substantial evidence supporting the trial court's finding that between the two parents, communication deficits manifested to a lesser extent with Cochener than with Metcalfe.

5

Metcalfe argues substantial evidence does not support a portion of the trial court's finding 10, which states, "Mother and Father have drawn other people and

their children into their conflicts, such as when Father tried to persuade Spruce Street volunteers and staff to rescind Mother's nomination to the board of directors."

In April 2019, Metcalfe contacted Spruce Street to discuss his conflict with Cochener concerning an incident that occurred at E.'s daycare in May 2018. The incident was before E. started at Spruce Street, in August 2018. Cochener served on the board of the school. Citing the conflict, Metcalfe made three requests of Spruce Street, including (1) that Cochener be precluded from serving on the compensation or governance committees or as President so long as either of the children are enrolled, (2) to "make the current and future President of the Board aware of this situation," (3) that administrators "work to maintain a strong working relationship with both [Cochener] and me and . . . be willing to offer unvarnished feedback to either or both of us that would benefit our children." On April 30, 2019, Metcalfe stated in an e-mail to Spruce Street staff: "Because of [Cochener]'s last actions and if her role and power are likely to grow at spruce street school [sic], especially if she were to have a say regarding [Schmitz's] salary, I'm not sure I'll be comfortable having either or both of my kids continue to be students there. (Regarding which I have joint decision making authority)."

This evidence demonstrates Metcalfe requested Cochener's role on the board be limited, but it does not evidence precisely an attempt to have her nomination rescinded. To that extent, the finding regarding Cochener's position on the Spruce Street board is not supported by substantial evidence precisely as drafted. However, there is substantial evidence that the parents drew others into

their conflict. Dr. Wheeler identified both parents' interactions with providers as contributing to a "high-conflict dynamic." Metcalfe met with Spruce Street to discuss an incident that did not occur there. Metcalfe asked Spruce Street to limit Cochener's role on its board. Finding of fact 10 is therefore supported by substantial evidence, except to the extent it finds Metcalfe sought specifically to have Cochener's nomination to the board rescinded.

B

We turn next to the trial court's grant of sole decision-making to Cochener, the findings that doing so is in the best interest of the children and any harm is outweighed by the benefits, and the court's decision to impose provisions allowing Cochener to make major decisions 14 days after inviting Metcalfe's input, and to schedule the children's appointments.

RCW 26.09.187(2)(b)(ii) states, "The court shall order sole decision-making to one parent when it finds that . . . [b]oth parents are opposed to mutual decision making." A trial court's decision to modify a parenting plan is reviewed for abuse of discretion. In re Marriage of Zigler, 154 Wn. App. 803, 808, 226 P.3d 202 (2010). A trial court's decision will not be reversed unless the court's reasons are untenable. In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). "A 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 Fiorito, 112 Wn. App. 657, 664, 50 P.3d 298 (2002). "A trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon

review." In re Parentage of Jannot, 149 Wn.2d 123, 127, 65 P.3d 664 (2003). When a trial court's findings of fact are partly supported by substantial evidence and partly not, we consider the extent to which the unchallenged and supported findings justify the trial court's legal conclusions. See Andren v. Dake, 14 Wn. App. 2d 296, 319, 472 P.3d 1013 (2020).

The trial court did not abuse its discretion when it granted sole decision-making to Cochener. Both Metcalfe and Cochener were opposed to mutual decision making. The trial court considered evidence and witness testimony presented over a multi-day trial, weighed that evidence, and arrived at findings of fact that are either unchallenged and accepted as true on appeal, or, as discussed above, supported by substantial evidence in the record. These findings provide a tenable basis for the trial court to conclude that Cochener is better suited to hold sole decision-making authority for L. and E.

The trial court did not err when it found such a change is in the best interest of the children and any harm is outweighed by the benefits. Metcalfe argues the harm to L. and E. is that Cochener will not adequately advocate for appropriate service levels from educational and health care providers. The trial court did not enter a finding that this is true, and it was entitled to find that any risk was counter-balanced by Cochener's lesser likelihood of alienating important provider relationships. In an unchallenged finding, the court stated, "Mother and Father cannot co-parent, which is especially troubling because the special needs of their children demand frequent decision-making and information sharing." In another unchallenged finding, the trial court stated, "The intensity of the co-parenting

dynamic is so extreme that multiple expert and lay witnesses testified the children are suffering. Their children have complained. The parents themselves agreed during trial they cannot make decisions together without intervention or support from intermediators." These findings, together with the finding that Cochener has less deficit in the area of interpersonal communication, provide a tenable basis for the trial court to conclude it is in the best interests of the children that Cochener hold sole decision-making, and that any harm of such an arrangement is outweighed by the benefits. These findings also justified the ruling that Cochener may make all of the children's appointments, and may make major decisions 14 days after notifying Metcalfe.

III

Metcalfe asserts it was error for the trial court to place "great weight" on Dr. Wheeler's testimony, together with determining it would "not put great weight" on Dr. Marlowe's and Dr. Mandelkorn's opinions. Metcalfe argues the trial court erred by "rejecting the testimony of Dr. Marlowe and Dr. Mandelkorn and relying instead upon lay opinions," and challenges the finding that "Dr. Mandelkorn admitted he had very little contact with Cochener upon which to formulate his opinion." The experts' testimony provides support for the trial court's weighing of their opinions.

Metcalfe retained Dr. Marlowe as a litigation expert to conduct a records review and prepare a report. The evidence before the trial court was that Dr. Marlowe's only contacts were with Metcalfe and his attorneys, and she reviewed records that Metcalfe provided to her. Dr. Marlowe based her opinions of the children's academic performance on evaluations from 2019, and testified she did

not know where E.'s reading levels were at the time of the hearing. Nevertheless, Dr. Marlowe stated E. was not able to read at the time of the hearing, and that he would come out of Spruce Street School a nonreader. In contrast, both Cochener and the head of Spruce Street testified that at the time of trial, E. was a "voracious reader."

Metcalfe called Dr. Mandelkorn, eliciting testimony that Metcalfe was "pleasant to deal with," and that Metcalfe's e-mail communication "fell within the expectations of the issues [they] were dealing with." Dr. Mandelkorn had 14 appointments with L. Of those, Metcalfe attended "a preponderant number" and Cochener attended seven. Based on only these interactions with Cochener at L.'s appointments, in 2019, Dr. Mandelkorn stated in an e-mail to another provider that Cochener "[h]as significant mental health problems and is [in] complete denial of the issues." Dr. Mandelkorn testified he had no personal knowledge of Cochener's mental health.

Dr. Wheeler prepared a report by conducting 23.1 hours of interviews with the parents, parent-child observation sessions at both parents' homes, psychological assessments and questionnaires with both parents and both children, 12.3 hours of collateral interviews with medical and educational providers involved in the children's care, and reviewing records related to the case. Dr. Wheeler testified Dr. Mandelkorn "was clearly given the impression . . . that [Cochener] . . . suffered from . . . some kind of mental health disorder . . . and he was given that impression by Mr. Metcalfe. . . . [T]hat certainly is an example of . . . a provider being given an impression of her that . . . was inaccurate and

negative." Dr. Wheeler testified Dr. Marlowe was given mischaracterizations of Cochener, stating, "[S]he was given the impression that Ms. Cochener wasn't involved . . . as much as she is."

"The factfinder is given wide latitude in the weight to give expert opinion." In re Marriage of Sedlock, 69 Wn. App. 484, 491, 849 P.2d 1243 (1993). The trial court placed lesser weight on Dr. Marlowe's testimony based on her having "had limited interactions with Mother and the children, and her opinion is based on the records provided by Father." While Cochener does not point to a particular omission in the records Metcalfe provided to Dr. Marlowe, the context of the trial court's weighing of her testimony was in contrast to Dr. Wheeler's evaluation, which the trial court stated was "extremely thorough, and includes hours of interviews with both parents, the children, and providers." Likewise, the trial court placed lesser weight on Dr. Mandelkorn's opinion, because he "had very little contact" with Cochener upon which to form his opinion.

Metcalfe nevertheless relies on In re Marriage of Leaver, 20 Wn. App. 2d 228, 499 P.3d 222 (2021) to argue the trial court abused its discretion in making these credibility determinations. There, in the context of spousal maintenance, a spouse presented expert testimony, which was not countered by any other expert, that his long-standing mental health conditions significantly impaired his ability to join the workforce and gain financial independence. Id. at 230. However, the trial court adopted the other spouse's lay opinion that he "could do more if he would just put his mind to it." Id. This court found this was an abuse of discretion and reversed. Id. at 231. We were careful to observe that the trial court was not

necessarily required to arrive at a particular ultimate decision concerning maintenance, even though it was required to base its decision on evidence that did not violate the prohibition on lay opinion testimony. Id. at 241. Leaver is distinguishable. First, in this case Dr. Marlowe's and Dr. Mandelkorn's testimony are contrasted by Dr. Wheeler's testimony, so it is not a case in which any one expert's views were without countervailing evidence. Second, the court did not admit lay opinion testimony and credit it over qualified expert testimony. In placing greater weight on Dr. Wheeler's testimony than on Dr. Marlowe's or Dr. Mandelkorn's, the trial court made an ordinary credibility determination, which we do not revisit on appeal. See In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

IV

Metcalfe argues he was subjected to federally-prohibited retaliation by Spruce Street School for "his advocacy on behalf of his children." The Disability Rights Education and Defense Fund (DREDF) submitted an amicus brief and presented oral argument. DREDF argues "the trial court displayed a troubling lack of consideration for father's right to advocate for his son. The trial court made no attempt to determine whether appellant's advocacy was protected activity before (mis)characterizing that advocacy as a defect in appellant's parenting." At oral argument, counsel for DREDF argued their complaint is that the trial court did not specifically mention that it was being careful not to hold advocacy against Metcalfe. Wash. Court of Appeals oral argument, In re Marriage of Cochener, No. 83271-9

(Jun. 15, 2023), at 2 min., 26 sec. to 2 min., 38 sec., https://tvw.org/video/division-1-court-of-appeals-2023061201/.

In its brief, DREDF cites cases in which third parties who had advocated for disabled students sued school districts for failure to meet federal requirements. For example, in North Kitsap School District v. K.W., 130 Wn. App. 347, 352-53, 123 P.3d 469 (2005), grandparents sued a school district for failing to provide a free appropriate public education to their grandchild under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-91. DREDF also cites a case holding that advocacy on behalf of disabled students is a protected activity under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203; 28 C.F.R. § 35.130(b). Barker v. Riverside County Office of Educ., 584 F.3d 821 (9th Cir. 2009). In Barker a teacher sued a county office of education, alleging retaliation after she filed a lawsuit on behalf of disabled students. Id. at 827. However, neither Metcalfe nor DREDF cites authority holding that any federal law imposes any substantive requirements on a state court deciding the issue of decision-making in a parenting plan according to state law. Regulations under the IDEA acknowledge that state courts may limit decision-making to one parent, providing that if "a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the 'parent' of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the 'parent' for purposes of this section." 34 C.F.R. § 300.30(b)(2). A federal court has rejected a parent's argument that her federal rights under IDEA could supersede a state court's authority to grant sole

educational decision-making to the other parent. Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 772 (2nd Cir. 2002). There, the court stated, "We decline plaintiff's invitation to federalize the law of domestic relations and hold that the IDEA . . . leave[s] intact a state's authority to determine who may make educational decisions on behalf of a child." Id. Another federal court applying the IDEA stated that "nothing in the IDEA overrides states' allocation of authority as part of a custody determination," and observed that the rights granted to parents in IDEA do not supersede state courts' authority. Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147, 1149 (7th Cir. 2001).

We do not agree the trial court based its determination concerning decision-making on any actions by Metcalfe characterizable as advocacy protected by federal law. The trial court focused on the manner of Metcalfe's communications with the children's educational and health care providers, which the trial court found was deleterious to the children's relationship with key providers. The trial court did not rely on the content of Metcalfe's communications nor criticize at any point his right to seek appropriate care for his children. Its findings were that his communication style was interfering with the children's ability to receive the support they needed. Federal law contemplates, and Washington law directs, that in such circumstances a state court may appoint one parent as sole decision-maker. RCW 29.09.187; Taylor, 313 F.3d at 772. Metcalfe's and DREDF's argument that the trial court's decision ran afoul of any federal protections for students with disability is meritless.

V

During a break between witnesses, while discussing the fact that testimony had taken longer than expected, the trial court noted to Cochener's counsel, "I have noticed that with the professional witnesses . . . your budget for cross-examination has been a little under," and expressed concern that Dr. Wheeler's testimony the next day would take more than the planned time. Cochener's counsel stated, "[F]or the record . . . Dr. Marlowe was very defensive and . . . I think also nonresponsive . . . she used up more time than I think was necessary. . . . And with Dr. Mandelkorn, there were a lot of objections that increased my time." After some additional discussion, the trial court stated, "[I]t's a trend and . . . I shouldn't say it's a trend with . . . all the professional witnesses. I think it's just . . . happens to be with doctors that this has happened. . . . [A]nd doctors are notoriously terrible witnesses, so I can appreciate."

Metcalfe argues this stated an opinion that doctors are "terrible witnesses" and worked to his disadvantage because he relied on Dr. Mandelkorn and Dr. Marlowe. Cochener counters that "[t]aken in context, the trial court was merely commenting on the length of time that [Cochener]'s cross-examination of both Drs. Mandelkorn and Marlowe was taking." Further, quoting the trial court's findings of fact, Cochener argues, "The trial court was clearly not biased against 'doctors' . . . because it 'placed great weight on [Dr. Wheeler's] testimony.' " The trial court's statement cannot fairly be construed either as a statement about the value of testimony by doctors or as bias. We find no error, and even if we did, any error in this isolated comment would be harmless. See State v. Gonzales, 90 Wn. App.

852, 855, 954 P.2d 360 (1998) (a harmless error is one "which is trivial, formal, or merely academic and which in no way affects the outcome of the case.").

VI

During Dr. Marlowe's testimony, the trial court asked, "[Y]ou are aware, of course, that the Seattle Public Schools have been sued any number of times for not providing meaningful education to children, right? . . . I'm just curious . . . in general we've all had the experience, I think it's common sense that Seattle Public Schools does not have a stellar reputation for providing . . . specially designed education services for children. So why do you think that they would do that for [E.] when they haven't done it for so many children?" Dr. Marlowe responded, "Well, they did a good job in [L.'s] IEP." She went on "[a]nd I know that they really care about kids and . . . I have seen . . . the services that they've provided for kids."

Metcalfe portrays this as an injection by the trial court of its own impression of events outside of the evidence. Metcalfe cites Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). Liteky states,

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id.

Even if the court's comments were read as revealing an opinion from an extrajudicial source, they do not "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Id. The main issue was not whether Spruce Street School or Seattle Public Schools would be a better fit for E. Moreover, at the time of trial, L. was attending a Seattle public school. At no time did the trial court question L.'s placement in Seattle Public Schools, and nothing in the trial court's final oral ruling or written orders suggests that its determination about decision-making was based on an expectation about whether the children would attend Seattle Public Schools, let alone an opinion by the court about the appropriateness of their doing so. Further, even if the comment was error, any error would be harmless in view of the evidence and issues in the case.

VII

Metcalfe challenges a provision of the parenting plan that reads in part: "No parent will put down Christianity to or in front of the children, or allow other members of their household to put down either parents' spirituality." Metcalfe argues the trial court's wording of the religious upbringing provision violates the First Amendment.

The provision was not discussed until a posttrial hearing. Cochener's counsel stated, "Ms. Cochener just wants to be sure that Mr. Metcalfe does not have the ability to block her from teaching the children about her religion." The Court inquired as to the parents' religious practices. Cochener identified herself as "a practicing Christian," and Metcalfe stated, "I don't identify with any particular religion." Metcalfe stated it would not be a problem for him to teach the children to

respect Cochener's religion, and "I think we should both expose the kids to different things so they can find their own way in life and be respectful to the other's views." Cochener stated, "[M]y only concern is that my children have expressed that they have been told denigrating things about Christianity in their dad's house. . . . I have no concern about raising my children with a respect for all religions and beliefs and non-beliefs." The Court responded, "So any negative comments about Christianity made to the children or in front of the children . . . will be adequate cause to change the position to sole decision-making." The trial court subsequently incorporated Metcalfe's and Cochener's agreements in the written order: "Parents have agreed to raise their children to affirm all religious traditions, appreciate the good in the practice of other faiths, and respect those who have no religious preference. No parent will put down Christianity to or in front of the children, or allow other members of their household to put down either parents' spirituality."

Parents have a fundamental right to make decisions regarding the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The parental right to determine the child's religious upbringing derives both from the parents' right to the free exercise of religion and to the care and custody of their children. See Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" in reference to universal compulsory education), overruled on other grounds by Emp't Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). A parent's right to direct the religious upbringing

of a child may be subject to limitation "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Id. at 233-34. Article 1, section 11 of the Washington State constitution is more protective of religious freedom than the First Amendment. In re Marriage of Jensen-Branch, 78 Wn. App. 482, 491, 899 P.2d 803 (1995). A Washington court may restrict a parent from teaching children about faith "only upon a substantial showing of potential or actual harm to the children as a result of the children's adverse reaction to parental conflict over the children's religious upbringing, and only to the degree necessary to prevent harm to the children." Id. at 483.

Elsewhere, Massachusetts upheld a prohibition that a parent "shall not share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry about their mother or about themselves." Kendall v. Kendall, 426 Mass. 238, 241, 250, 687 N.E.2d 1228 (1997). A Colorado court reversed a prohibition on homophobic religious teachings when the court could not "determine from the findings whether the trial court applied the correct standard in limiting [a parent's] right to determine the child's religious upbringing. In re Interest of E.L.M.C., 100 P.3d 546, 564 (Colo. App. 2004). There, though the other parent argued the restriction was a mere nondisparagement clause, the court did not uphold it on that basis "because it is not so described in the trial court's order. Nor is it mutual." Id.

As written, the challenged provision limits religious topics the parents may discuss with the children in potentially undefined and subjective ways, and is not

specific to nondisparagement of the respective parents' spirituality. The record does not show the trial court analyzed whether parental decisions on religious discussions will jeopardize the health or safety of the children. The parties agreed at oral argument that their dispute is adequately resolved as long as the parenting plan provides that neither parent shall disparage the other parent's spirituality. Wash. Court of Appeals oral argument, Cochener, No. 83271-9 (Jun. 15, 2023), at 2 min., 26 sec. to 2 min. (Cochener's Counsel) and at 21 min. 12 sec. to 21 min. 18 sec. (Metcalfe's Counsel), https://tvw.org/video/division-1-court-of-appeals-2023061201/. Such a provision would be consistent with orders concerning religious upbringing that have been upheld. We reverse the religious upbringing provision, and remand for the religious decision-making provision to be revised to reflect the parties' agreement that mutual nondisparagement of each parent's spirituality is sufficient.

We otherwise affirm. We do not reach Cochener's cross appeal. We remand on the issue of religious decision-making only.

Birk, J.

WE CONCUR:

Chung, J.

Dwyer, J.