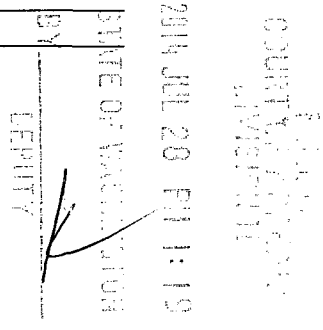
No. 44484-4-II
No. 44614-6-II

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



In re the Marriage of

BECKY DEVELLE
Appellant

and

MARC DEVELLE
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

The parties, who were married for 24 years, have eight children, four of whom are still minors. After litigious pretrial proceedings and after several witnesses had testified at trial, including the guardian ad litem and the parenting evaluator, the parties settled, a record of which was made in open court. The parenting plan entered pursuant to this agreement included a review provision, reflecting the court's concerns about the children when in the residential care of the mother. At the review, the court took testimony again from the guardian ad litem, who also made another report, and testimony from the parties. The court amended the parenting plan, ordering a residential schedule designed to better protect and provide for the children, meaning, with limited time in their mother's care.

The mother appeals various aspects of the final orders, including ones to which she agreed. She does not always make clear the nature of her challenges, nor does she provide an adequate record for review. She frequently asserts facts not found in the record and otherwise ignores the rules. In short, she continues her intransigent conduct. The father endeavors to do his best to set the record straight and address the mother's arguments.

II. ISSUES IN RESPONSE

1. The parties' settlement agreement is valid and the mother's challenges to the agreement are frivolous.

2. The mother fails to demonstrate any bias, or appearance of unfairness, on the part of the court.

3. The parties agreed to an interim parenting plan with a review provision, and the court has the authority to act on that basis.

4. Washington law does not require a trial court to maintain the "continuity" of care (i.e., there is no primary caretaker presumption), especially where a caretaker fails to meet the children's needs for education, nutrition, safety, etc.

5. There is no award of maintenance because the mother did not request one and the parties' agreement did not include an award of maintenance, which, in any case, the husband cannot afford.

6. The mother has been intransigent and this appeal is frivolous, warranting an award of fees to the father, who had to seek legal assistance to respond to the mother's appeal.

III. RESTATEMENT OF THE CASE

A. BACKGROUND RE MARRIAGE AND EMPLOYMENT.

The parties were married 24 years and have eight children. CP 8-9. At the time these proceedings began, three of the children were adults; by the time they concluded, four of the children were adults. CP 116.

During the marriage, Becky stayed home with the children, whom she homeschooled, while Marc worked outside the home and was the sole financial supporter of the family. RP 4-5.

B. PRETRIAL LITIGATION.

Becky filed for legal separation in Clark County on March 10, 2011. CP 229-233. She had previously filed, in 2007, in Skamania County, despite a lack of venue, and gave no notice to the father of the initial or subsequent proceedings. Nonetheless, she procured a default judgment, which ultimately was vacated. See Appendix.[1]

The matter proceeded in Clark County, where the family lives. At the initial temporary orders hearing Marc asked for custody of the children with a plan to enroll them in public school.

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[1] The cause number is Skamania County is 07-3-00066-1. The father moves this Court to take judicial notice of these proceedings, which are pertinent to the mother's credibility and litigation tactics and Marc's motion for attorney fees. ER 201(b)(2), (d), and (f) authorize the court to take judicial notice of adjudicative facts. *State v. Royal,* 122 Wn.2d 413, 418, 858 P.2d 259 (1993); *see also CLEAN v. State,* 130 Wn.2d 782, 928 P.2d 1054 (1996).

CP 234-308. This request was denied. CP 310-312. Marc also requested that a bilateral custody evaluation be completed. Dr. Landon Poppleton was appointed as a bilateral custody evaluator. CP 313-314. Dr. Poppleton worked extensively with the family throughout the pendency of this case. He issued an initial report and several addendums as facts have changed and additional information has been provided. See, e.g., CP 314-346, 347-348, 363-367. Dr. Poppleton tested both parties and interviewed the four (4) younger children (all dependent children except for Sara, who has not visited with Becky in over a year). Id.; RP 245.

Dr. Poppleton spent significant time on the issue of homeschooling. In his initial report, Dr. Poppleton conducted educational testing for the four (4) younger children. Id. The test results were staggering, not only in how poorly the children tested, but also in how poorly Becky had assessed whether the children's educational needs were being met. The children all tested within normal ranges for IQ and Dr. Poppleton did not diagnose any special needs or learning disabilities. He notes that there is nothing preventing the children from being at grade level except, presumably, for Becky's home schooling. Dr. Poppleton

recommended that the children be enrolled in formal schooling and that Marc be primary residential parent. CP 366-67.

Since the initial bilateral reports, there have been significant reports of neglect by Becky to the children. CP 431-445, 449-454. Reports surfaced of no food in the home, Becky not being home and an allegation that Becky's boyfriend's son solicited sex from eleven (11) year old Hanna. These reports were confirmed by the doctor and the guardian ad litem. CP 363-366, 450-451. In June, 2012, the court appointed a guardian ad litem. CP 417-421.

C. TRIAL.

The parties proceeded to trial on August 20, 2012 before the Honorable Gregory Gonzales. CP 1. (The judge had presided over some of the pretrial motions and has presided over most of the post-trial proceedings. See, e.g., Superior Court Docket). The guardian ad litem testified, as did the court-appointed parenting evaluator. CP 1. Both testified in support of placement of all the children primarily with the father. RP 221. Apparently both recommended against overnights with the mother. RP 307, 341. Neither their reports nor their testimony have been provided by Becky.[2]

[2] The father has designated these.

On the trial's second day, the parties notified the court they had reached an agreement, which they put on the record. CP 2; RP 35-68. Becky's attorney announced the parties "reached a global agreement on all of the issues at this time." RP 35. Becky engaged actively in the "fine-tuning" of the agreement as it was entered into the record, through counsel and directly. RP 35-68. She affirmed the agreement under oath. RP 58-64. When the court asked Becky if she "firmly believed" they had an agreement, she answered "yes." RP 60. The clerk's minutes reflect Becky's testimony affirming the agreement. CP 4.

On September 12, in open court, final orders were entered. CP 6, 7-14, 15-18, 22-31, 32-39. The findings include the finding that it "is the result of an agreement of the parties." CP 10.[3] The residential schedule split the children between the parents' residences and provided for more or less equal time with both parents. CP 23-26. One child, aged 18, was allowed to declined any time with her mother, and another child, aged 14, was allowed some flexibility in declining to spend time with his mother. CP 27. Under the plan, the children are to attend public school, the father

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[3] Becky was present, with her attorney, but refused to sign the orders. CP 11, 18, 31; RP 182.

was awarded sole decision-making regarding education, and the mother is prohibited from homeschooling the children or involving herself in their education. CP 27.

The plan included a provision for two subsequent reviews, with input from the guardian ad litem, "to detail if the parent schedule is working for the children and the family, including a review of custody if necessary." CP 27. One cause for the court's continuing concern was contact between the 11-year-old daughter and "DJ," the son of the mother's boyfriend, and contact between DJ and the 7-year-old son. The plan includes an order that DJ "be supervised by an adult at all times and Mother shall take appropriate steps to insure overnight safety of the children if DJ is present ..." Id. CP 27; RP 62.

D. THE FATHER MOVED FOR CONTEMPT

Several weeks after entry of the final orders, the father moved for contempt based on concerns about the 11-year-old daughter, specifically that the mother's boyfriend's son was again propositioning her for sex. RP 214-216; CP 59-61, 429-430. At this point, the father requested the children reside primarily with him. CP 64. He also complained that Becky trashed the family home when she vacated it on September 22. CP 40-58, 62. The

court expressed surprise at the lack of cooperation on the move-out and noted the home was left filthy as a "pigsty." RP 158-159. The court was reluctant even to put the facts on the record, because of their embarrassing content. RP 158-160. The court also warned against the mother further undermining her credibility by raising allegations against the father. RP 161-162. The court noted the mother "minimized everything" when it came to dangers to which the children were exposed in her residence. RP 163.

At the October 12, 2012 review hearing, in receipt of the guardian ad litem's report (CP 449-454), the court expressed grave concerns about the mother's conduct and apparent disobedience of the court's orders. RP 168-169. The court temporarily placed all the children in the father's home, scheduled an evidentiary hearing, at which to take testimony from the parties and the guardian ad litem. CP 68, 69-70, 71-74 62.

The court, then, faced with the mother's objections, agreed to take testimony from her. Becky testified she had never failed to leave the daughter alone with her boyfriend's son (the focus of the sexual abuse concerns). The court interrupted and called the parties into chambers, after which Becky recanted her testimony and recalled one time when she "forgot" the court's orders and left

the daughter alone. RP 171-174. By way of explaining why she let one of the children sleep in the room with the boyfriend's son, though the plan required supervision of all contact between then, she claimed never to have read the parenting plan because she was not given a copy of it. RP 183. Based on the mother's failure to adequately supervise the children and her denial that the boyfriend's son represented a danger, and with the GAL's agreement, the court temporarily transferred custody to the father. RP 191-193.

On December 12, 2012, the guardian ad litem testified at length regarding the children's welfare. RP 208-235. In light of numerous concerns for the children when in their mother's care, including the children's fears that the mother would hit them for talking to the GAL, the guardian ad litem recommended no overnights. RP 231. Both parents also testified. The court analyzed under RCW 26.09.187. RP 301-307. The court expressed substantial concerns about the mother's ability to meet the children's needs and to exercise good judgment in terms of protecting them. Id. The court ordered the children to reside primarily with the father on a permanent basis and imposed restrictions on the mother's time, principally that the children are not

to spend any overnights with her. RP 307-308. At presentation, the court noted the mother does not "get it" in terms of protecting her daughter. RP 326.

On January 4, 2013, the court entered an amended parenting plan conditioning any additional time with the mother on her compliance with the court's condition. CP 77, 78-87. The court included a prohibition against the boyfriend's son being present during visitation. CP 75-76

E. MOTHER CONTINUES LITIGIOUS CONDUCT.

The mother filed a motion for reconsideration claiming the children had been coached to lie. RP 336; CP 456.[4] Her motion was consolidated with her motion for contempt related to property issues. CP 463-465, 510. The court carefully reprised the entire history of the proceedings, including some background on what trial testimony occurred before the parties settled. RP 341-349. The court reiterated its findings that the mother failed to provide the basic needs of the children, including for education, nutrition and safety. Id. The court denied Becky's motion for reconsideration as lacking any basis in law or fact. CP 113-114. The court found the mother in contempt for violating the order to leave the house in

[4] The mother had three attorneys and eventually represented herself. CP 415, 446, 448, 460, 462.

good condition. The court resolved property issues with specific orders to the mother and set over family support issues. RP 352-353.

On February 8, 2103, the court entered the order on contempt against Becky and ordered her to pay attorney fees. CP 108-112. The court also entered an order of child support obligating Becky at minimum wage given her income is unknown and that she is voluntarily unemployed and underemployed. CP 115-122. The court addressed the maintenance issue after allowing Becky to continue the matter, since she had not provided the father with her financial information in advance. The father argued the matter had been decided. RP 384; CP 464, 466-470.

Becky again moved for reconsideration, for order to show cause re contempt, and for family support (i.e., maintenance). CP 463-465.

On March 7, the court heard these motions and at length recited the procedural history. CP 146-147. (Becky did not arrange for this proceeding to be transcribed.) The court noted the case had been resolved by agreement and that the wife had not even pled maintenance. CP 146. The court addressed numerous other issues as well on parenting and financial issues. CP 146-148.

On March 28, the court again heard argument as to arrearages and settled that matter. RP 388-391.

On May 3 and June 21, the court held additional hearings. CP 170, 171. The court also entered an order denying contempt, family support, and reconsideration. CP 171-173. Clerk's minutes reflect additional orders directed at the mother at two subsequent hearings in June and the father's requests for offsets against his property distribution based on sanctions against the mother, damage to the house, and attorney's fees. CP 180, 181, 227. The docket reflects ongoing litigation. Additional facts are addressed in the argument section below.

IV. ARGUMENT IN RESPONSE

A. THE SCOPE OF REVIEW IS LIMITED BECAUSE THE FINAL ORDERS WERE ENTERED BY AGREEMENT.

The mother appeals from final orders entered by agreement of the parties, recorded in open court on August 21, 2012. CP 2-4; RP 35-68. Specific aspects of the agreement, about which the mother now seems to argue, are addressed separately in sections below, as is the court's decision on review of the parenting plan. The validity of the settlement agreement itself is addressed here.

The mother claims the settlement was coerced. Br. Appellant, at 5 (Assignment of Error 4).[5] She acknowledges the settlement provides the basis for the court's authority, but claims it was "invalid due to duress, illegality and shocking unfairness." Br. Appellant, at 35. She fails to prove these claims.

First, Becky's bare assertions of fact are improper. Appeals are decided on the record made at trial. RAP 9.1(a); *State v. Stockton,* 97 Wn.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal). She claims, for example, that she had "a reasonable and legitimate fear of losing everything if she did not participate in the settlement." Br. Appellant, at 35. She provides no citation to the record for this assertion of fact. There is no evidence she was afraid of anything; inferentially, her disregard for the court's orders suggest the opposite. In any case, RAP 10.3(a)(5) requires that "[r]eference to the record must be included for each factual statement." Becky persistently ignores this requirement. For example, she claims she "was told by her counsel, off the record, that the court was angry..." Br. Appellant, at 36. She concedes

[5] This brief uses the pagination used in the mother's brief, which begins at the table of contents. RAP 10.4(b). In addition to this irregularity, the mother fails to use a 12 point font; rather, she uses 11.5, in an apparent effort to evade the page limit and in violation of the rules. RAP 10.4(a)(2).

this and other facts are "off the record and cannot be proven" (Id.), but includes them nonetheless.

Essentially, Becky suggests she settled because she thought she might lose at trial. Her concern appears justified, given the evidence of her harmful parenting practices.[6] However, the risk of an adverse outcome hardly invalidates the settlement, or else most settlements would likewise be invalid. Having a motive to settle a case is not coercion.

Becky also claims the settlement is invalid as an illusory promise because it included a review period. Br. Appellant, at 36. Becky ignores that she bargained for this review period out of apparent concern that the court might, at the trial's conclusion, "take away Becky's children and property." Br. Appellant, at 35. In other words, by means of the settlement, which included the review period, Becky gained a chance to prove she could protect her children. There was nothing illusory about this. It is not the court's fault that Becky blew this chance. In any case, the agreement in no way satisfies the definition of "illusory promise," i.e., a promise or contract that is so indefinite that it cannot be enforced, or by its

[6] Presumably, the guardian ad litem and parenting evaluator testified consistent with their reports, which have been designated by the father. Additional references to the content of their testimony are included in the report of proceedings and identified in subsequent sections of this brief.

terms makes performance optional or entirely discretionary on the part of the promisor. *Lane v. Wahl*, 101 Wn. App. 878, 882, 6 P.3d 621, 624 (2000). Marc's performance of the agreement's terms is fully enforceable; moreover, he has behaved accordingly. See, e.g., RP 389-390 (court commending him for paying his child support).

Becky seems to say she did not know what the court required of her during the period between settlement and review. Br. Appellant, at 36-37. She claims, as "an ordinary citizen, [she] did not know what the law required." Br. Appellant, at 37. This is disingenuous, at best. The parenting plan, entered by agreement, is quite specific in terms of the parents' conduct. CP 26-27, 29-30. Indeed, throughout these proceedings, the trial court endeavored to be as specific as possible, a kind of micro-managing necessitated by Becky's conduct. For example, at a post-trial hearing, where questions were raised about her compliance with the parenting plan, Becky claimed not to have read it. RP 182. It is not fair for Becky to complain the court was not specific when she failed even to read the court's order. Regardless, the court had told her orally these same requirements.

THE COURT: With respect to Ben and Hannah, you

16 will supervise or make sure that D.J. is not left
17 in their presence --
18 MS. DEVELLE: Yes.

RP 62; compare RP 183 ("I never heard that there was not to be any unsupervised time with Ben and D.J...."). Becky simply cannot disclaim knowledge of the court's orders.

The settlement agreement is valid. *Morris v. Maks,* 69 Wn. App. 865, 850 P.2d 1357 (1993) (settlement found where parties reached agreement on all points under negotiation). Becky fails in any way to dispute the agreement's existence and its material terms. *In re Marriage of Ferree,* 71 Wn.App. 35, 41, 856 P.2d 706 (1993) (agreement where there is no genuine dispute regarding the agreement's existence and material terms). Becky does not dispute the terms of the agreement; she claims she was coerced into making the agreement. This claim is unsupported. Becky endorsed the agreement, and specific aspects of it, in open court. Her challenge to its validity on appeal is meritless, if not unconscionable.

B. BECKY FAILS TO DEMONSTRATE JUDICIAL BIAS.

The other global challenge the mother makes to the proceedings comes in the form of a challenge to the judicial officer. Br. Appellant, at 5-6 (Assignment of Error 5). Essentially, she tasks

the judge for doing his job. Br. Appellant, at 39-46. Moreover, she fails to provide an adequate record to support her arguments. Both substantively and procedurally, this argument lacks merit.

"Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." *State v. Post,* 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). Becky provides no evidence pertinent to her bias claim. Rather, she complains the court did not credit her evidence. Br. Appellant, at 41-47. Her challenge fails for a number of reasons.

First, the parties settled their case, so those aspects of the orders covered exclusively by the settlement (e.g., maintenance) do not rest on the court deciding anything. Second, pertinent to the findings in support of the amended parenting plan (entered after the review hearing), it is not bias for the court to make findings of fact. Rather, it is the trial court's job to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of witnesses. *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *accord Thompson v. Hanson,* 142 Wn. App. 53, 60, 174 P.3d 120 (2007), *aff'd,* 167 Wn.2d 414, 219 P.3d 659 (2009) (appellate court defers to the trier of fact on issues involving conflicting testimony, the credibility of the witnesses, and the

persuasiveness of the evidence). It appears the court had considerable problems with Becky's credibility. RP 78.[7] This is not bias, but the court doing its job (i.e., figuring out what to believe). This Court defers to those factual findings. *In re Parentage of G.W.-F.*, 170 Wn. App. 631, 637, 285 P.3d 208 (2012) (appellate court defers to the trier of fact on issues involving conflicting testimony, the credibility of the witnesses, and the persuasiveness of the evidence).

Becky did not lose custody "of her children due to bias," as she claims (Br. Appellant, at 45), but because (1) she settled the case and agreed to a parenting plan with a review provision, (2) then failed to protect her children and comply with the court's orders in the time between the settlement and the review hearing, and (3) because the court analyzed the proper statutory factors and found primary residential placement with the father served the children's best interests.

Finally, to the extent the court's factual findings are engaged by this appeal, any challenge by an appellant to them requires the appellant provide an adequate record for review. *Hyatt v. Sellen*

[7] At the presentation of the orders, the court addressed Becky's mother: "I will tell you quite clearly on the record that your client's credibility with this particular Court has not been up to par, so to speak." RP 78.

Constr. Co., 40 Wn. App. 893, 895, 700 P.2d 1164 (1985) (where appellant fails to provide adequate record for review, appellate court must affirm trial court's ruling). Not only do the mother's bias claims amount to nothing but a disagreement with how the court viewed the evidence, she fails to provide all of the evidence the judge heard. This Court does not take a party's word for what the evidence showed.

The mother also complains that the court demonstrated bias when it retained the case for review. Br. Appellant, at 45. But this is not bias; it is efficiency, and it is permitted (as discussed below). Moreover, the mother did not raise this issue at trial; rather, she agreed to it. RAP 2.5(a) (scope of review limited where party raises issue for first time on appeal). In any case, this Court has approved retention of jurisdiction by a judge "for a limited period of time" to review a *contingent or temporary* order. *In re Marriage of Ochsner,* 47 Wn. App. 520, 527, 736 P.2d 292 (1987); *see In re Marriage of Adler,* 131 Wn. App. 717, 726, 129 P.3d 293 (2006) (review of parenting plan built in at time of dissolution); *In re Marriage of True,* 104 Wn. App. 291, 298, 16 P.3d 646 (2000) (review agreed to by parties for period of time before plan became final). That is what happened here.

In short, Becky fails to demonstrate any bias or appearance of bias.

C. THE COURT PROPERLY RESERVED REVIEW AND ENTERED AN AMENDED PARENTING PLAN.

Becky also argues the review itself was improper. Br. Appellant, at 26-34. This is incorrect. As indicated above, a court may reserve to review the efficacy of its orders. *See, also, In re Marriage of Possinger*, 105 Wn. App. 326, 333-37, 19 P.3d 1109 (2001) (permitting interim parenting plan). Here, this review served the children's best interests because it allowed the court to test whether the mother would obey the court's orders and act to protect and provide for her children. She did not. Accordingly, the court properly analyzed the parenting factors and amended the parenting plan. RP 301-309.

This was not a modification, as Becky argues. Br. Appellant, at 26 and 32. The parenting plan specifically provided for review, one merely a month after entry of the plan (45 days after the August hearing). CP 26 (specifying actions to occur before specified review dates). Rather, here, as in *Possinger,* the plan was made for a specified interim after the decree and made for the purpose of serving the children's best interests. 105 Wn. App. at 336. Becky agreed to the review provision as discussed repeatedly

in open court. See, e.g., RP 38 (45 day review), 39 (purpose of review is for court to decide about residential schedule); 46, 51, 52, 58, 61. At the review, Becky received a full and fair hearing, represented by competent counsel (RP 355), with testimony and cross-examination. Her arguments to the contrary are specious, including her constitutional arguments. Worst of all, Becky ignores the most important fact: the court acted to protect the children because the mother refused to do so. This is the court's duty. *In re Parentage of Schroeder,* 106 Wn. App. 343, 351, 22 P.3d 1280, 1285 (2001) (court's primary duty is to decide parenting issues with the best interests of the child in mind).

D. THE MOTHER'S CHALLENGE TO THE PARENTING ARRANGEMENT IS FRIVOLOUS.

Becky also argues the court had to leave the children in her primary care because she had been the parent to stay home with them. Br. Appellant, at 19-25. Actually, this is not the law in Washington. Rather, in Washington, there is no presumption in favor of the primary caregiver and using such a presumption is impermissible under the statute. *In re Marriage of Kovacs*, 121 Wn.2d 795, 800, 854 P.2d 629 (1993). Indeed, where, as here, the primary residential parent is shown to be actively undermining the

children's education and depriving them of their basic needs, the court would err if it did not remove the children from this parent.

Becky fails to show an abuse of discretion. "A trial court wields broad discretion when fashioning a permanent parenting plan." *In re Marriage of Katare,* 175 Wn.2d 23, 35, 283 P.3d 546 (2012) at ¶ 22, *citing Marriage of Kovacs,* 121 Wn.2d at 801.

Moreover, as earlier mentioned, she fails to produce a record necessary to support her claims. She ordered a partial report of proceedings, from which is omitted key testimony relevant to the best interests of the children, specifically, the testimony of the guardian ad litem and the psychologist. This Court cannot review the court's findings for substantial evidence if the mother fails to provide an adequate record. As appellant, it is her responsibility to do so. RAP 9.2. "An insufficient record on appeal precludes review of the alleged errors." *Bulzomi v. Dep't of Labor & Indus.,* 72 Wn. App. 522, 525, 864 P.2d 996 (1994). Moreover, she fails to assign error to the court's findings. Unchallenged findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 808, 828 P.2d 549 (1992). She fails to cite to evidence in the record to support her assertions of fact. This court is not obligated to search the record for evidence supporting a party's claim of error.

See Heilman v. Wentworth, 18 Wn. App. 751, 754, 571 P.2d 963 (1977). Likewise, her challenges to the court's decision are conspicuously lacking pertinent argument and authority. This court does not consider arguments that are not supported by any reference to the record or by any citation to authority. *Cowiche Canyon,* 118 Wn.2d at 809.

Because of these defects alone, the trial court's orders should be affirmed. *Hyatt v. Sellen Constr. Co.,* 40 Wn. App. 893, 895, 700 P.2d 1164 (1985) (where appellant fails to provide adequate record for review, appellate court must affirm trial court's ruling). The court had the authority under the review provision of the agreed parenting plan to enter an amended parenting plan, and did so within the proper exercise of its discretion.

E. THE MAINTENANCE AWARD IS PROPER.

Becky argues she should have been awarded maintenance. Br. Appellant, at 16-19. She claims the court was biased because she was not granted maintenance. Br. Appellant, at 46. But she did not even plead for maintenance. CP 146. Moreover, Becky agreed to forego maintenance "with the thought that she was getting the 1,000 in child support..." RP 119. And the court specifically advised her at settlement that the $1,000 was

contingent and would not "create some type of fixture for maintenance or child support..." RP 45-46. Becky expressly agreed when the court further advised that the $1,000 "will not be fixed; that we'll continue to review that number based upon the residential schedule of the children? MS. DEVELLE: Yes." RP 59.

In any case, the father does not have the means to support his ex-wife. Marc works at The Oregonian Newspaper as a printer, netting only a little over $4,000 monthly. RP 4, 236-238; CP 123. Because the newspaper industry has declined over the past years Marc has lost 30% of the pay he once had. CP 123; CP 493-503. He has four children in his home for whom he is the sole support. CP 118; RP 335; see, also, CP 141-145. He expended huge resources in the trial litigation. RP 352 ("... my client's bleeding money here"). The court divided minimal assets between the parties, pursuant to their settlement. RP 44-49, 207. Further, Becky fails to prove her need for maintenance. There is no record that she cannot support herself, apart from her self-serving and unsubstantiated declaration. CP 131 (where she also disclaims any responsibility for contributing to the support of the children). Spousal maintenance is not a matter of right. *In re Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797 (1992). Rather,

maintenance is awarded "in such amounts and for such periods of time as the court deems just." RCW 26.09.090(1). One of the considerations for the court is the financial resources of the party from whom maintenance is sought. RCW 26.09.090(1). Here, the parties were left after 24 years without much in the way of financial resources. The court recognized the father's income was stretched thing. RP 389-390. The father has his job, though in a declining industry, and he has also to make the house payment, pay the utilities, and otherwise provide for all four children. Their needs are clear. Becky's are definitely not.

As to the mother's many constitutional challenges, to maintenance and other aspects of the court's orders, they are both inapposite (i.e., this is not a criminal proceeding) and are raised for the first time on appeal.

F. MOTION FOR ATTORNEY FEES ON APPEAL

The mother made the trial proceedings costly and protracted and frustrating. She has conducted the appeal in the same way, causing delay and confusion and substantially hindering Marc's ability to respond and, likewise, posing substantial obstacles to this Court's review. She failed to provide an adequate record. She inadequately identifies claimed errors. Her arguments are

numerous, disorganized, and sometimes nonsensical. She makes assertions of fact without record support, and those assertions are often misleading. Moreover, she effectively appeals from orders entered pursuant to a settlement. Despite her agreement in open court, she has fought the provisions of that settlement tooth and nail, rendering it valueless to Marc and to the court system. Whereas settlements usually save costs for everyone, Becky's refusal to abide by her agreement has driven the costs of the proceedings beyond what a trial would have cost.

For these two reasons, fees should be awarded here to Marc, who has had to obtain some legal assistance to meet the challenge Becky brings to the trial court's orders. As this Court has held, an award of attorney fees is justified where the conduct of one of the parties causes the other "to incur unnecessary and significant attorney fees." *Burrill v. Burrill,* 113 Wn. App. 863, 873, 56 P.3d 993, 998 (2002). Similarly, attorney fees are justified when an appeal is frivolous. RAP 18.9 permits this Court to sanction a party who files a frivolous appeal, one where there are no debatable issues upon which reasonable minds could differ and which is so totally devoid of merit that there is no possibility of reversal.

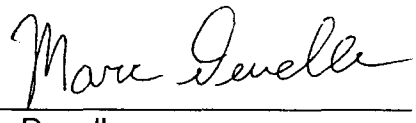
Mahoney v. Shinpoch, 107 Wn.2d 679, 732 P.2d 510 (1987). This appeal meets that definition.

V. CONCLUSION

For the foregoing reasons, Marc Develle respectfully asks this Court to affirm the trial court's decision and to award him attorney's fees and costs on appeal.

Dated this 29 day of July 2014.

RESPECTFULLY SUBMITTED,



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

In re the Marriage of: BECKY C. DEVELLE Appellant and MARC G. DEVELLE Respondent	NOS. 44484-4-II & 44614-6-II DECLARATION OF SERVICE

Marc Develle certifies as follows:

On July __29__, 2014, I served upon the following true and correct copies of the Brief of Respondent and this Declaration, by email.

Becky Develle
9314 NE Alpine
Vancouver, WA 98664
rubies31@comcast.net

I certify under penalty of perjury that the foregoing is true and correct.

Marc Develle

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

In re the Marriage of: BECKY C. DEVELLE Appellant and MARC G. DEVELLE Respondent	NOS. 44484-4-II & 44614-6-II DECLARATION OF SERVICE

Marc Develle certifies as follows:

On July 27, 2014, I served upon the following true and correct copies of the Brief of Respondent and this Declaration, by email.

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