

NO. 73508-0-I

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

ERIC R. SHIBLEY,

Appellant,

v.

TINA M. SHIBLEY,

Respondent.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

This case is an appeal brought by Eric Shibley of the final orders entered after a trial on the dissolution of his marriage to Tina Shibley. He appeals the final parenting plan including designation of Tina as the primary residential parent, imposition of RCW 26.09.191(3) restrictions for neglect of parenting functions and abusive use of conflict, and decision-making. He appeals the property division of precious metals acquired during the marriage. He appeals trial court's decision to enter child support in excess of the standard calculation. He also appeals the trial court's award of attorney's fees.

Tina argues that the trial court properly exercised its discretion in all aspects of its decision and that it entered clear findings which are amply supported by the record. She asks this court to affirm the trial court's decision.

II. STATEMENT OF ISSUES

- A. Whether the trial court properly exercised its discretion when it made Tina the primary residential parent and limited Eric's residential time and decision making under RCW 26.09.191(3) due to neglect of parenting functions and abusive use of conflict.
- B. Whether the trial court was permitted to disregard the parties' stipulation regarding precious metals purchased during the marriage.
- C. Whether the trial court properly exercised its discretion when it ordered child support in excess of the standard

calculation when it made specific findings to support that decision.

- D. Whether the trial court properly awarded attorney's fees at trial when Tina received legal services at no cost to her.
- E. Whether the trial court should award Tina attorney's fees in the appeal.

III. STATEMENT OF FACTS

A. Procedural History.

This case comes before the Washington Court of Appeals from an appeal of final orders entered after a dissolution of marriage trial in Snohomish County Superior Court, over which the Honorable Millie Judge presided. OD 1-18.

Tina and Eric were married on May 6, 2008, in Nashville, Tennessee. They separated on April 26, 2013, when Tina left with their three year old son Ryan and sought safety in a domestic violence shelter. RP 1240-1241, CP 21. Eric filed for dissolution of marriage on June 27, 2013. CP 786. On August 14, 2013, a Temporary Restraining Order was entered prohibiting the parties from disposing of assets and the parties stipulated to Dr. Marnee Milner as the guardian ad litem for Ryan. Exs. 40 and 11.

On April 1, 2014, Eric requested Tina undergo a CR 35 psychiatric exam. CP 797. Dr. Olsen, retained by Eric, completed his interview of

Tina on June 14, 2014. Eric's counsel, Eric and Eric's expert, Dr. Natalie Novick-Brown, inserted themselves into Dr. Olsen's evaluation process, delaying the report. RP 100, Ex. 1, 103 and 105. The court found Eric, Eric's counsel, and Dr. Novick-Brown improperly inserted themselves into the evaluation process by suggesting rewrites to the report, causing it to not be independent. OD 7, RP 57-58.

Trial began on March 16, 2015, and ended on March 25, 2015. RP Vols. I-VIII. The court issued its oral ruling on April 1, 2015, and entered the parenting plan and order setting child support at that time. OD 9, 17. The court entered the Decree of Dissolution and Findings of Fact and Conclusions of Law and an amended Parenting Plan on May 1, 2015. Tr. 5/1/15. The court ruled on attorney's fees on May 15, 2015 finding that Eric had engaged in intransigence. Tr. 5/15/15. Eric appealed the final orders on May 29, 2015.

B. Parenting.

Eric and Tina met through Yahoo!'s dating website. RP 1171. Two years after Tina and Eric married, they relocated to Washington for Eric to pursue employment at hospitals in this area. RP 1198. Not long afterward,

Tina gave birth to their only child, Eric “Ryan” Shibley, Jr., on November 28, 2010. RP 120.

Tina has a diagnosis of a traumatic brain injury (TBI) from a serious car accident in 1998. RP 1158. Tina was diagnosed with depression at age 13. RP 1153. Eric, a medical doctor, was aware of Tina’s medical and mental health issues prior to the marriage. RP 767, 925-926. Eric claimed he wanted to “rescue” her. RP 926. However, during the marriage, Eric denied Tina financial resources to continue her mental health care. RP 1199. He also refused to let her see a TBI doctor or receive mental health care because he did not feel she needed it. RP 1199. Eric belittled Tina telling her that she was stupid, lazy, messy, that she was a burden on him, and a liability. RP 1195.

When Ryan was born Eric worked for Snoqualmie Valley Hospital, which is part of King County Hospital District No. 4. RP 1212. In March 2011 Eric’s employer terminated him for unprofessional conduct related to falsifying patient records, and his medical license was suspended. RP 1117-1118, Ex. 52.

After leaving Snoqualmie Valley Hospital Eric went to work for Sound Physicians. RP 1227. Sound Physicians provided Eric with a nearby hotel for him to stay when not working. RP 1227. Eric insisted Tina and Ryan stay in the hotel with him instead of staying in their home.

RP 1227. Tina spent her days in the hotel, they ordered food in, or Tina cooked on a small hotplate. Ex. 13, pg. 17. Eric's employment with Snoqualmie Valley Hospital ended in the fall of 2011 and he received severance pay until January 2012. RP 1229.

Eric next worked briefly in South Dakota and Wyoming, again insisting Tina and Ryan travel with him and spend long hours in a hotel room. RP 1228, 1231-1232. Tina wanted to stay at home with Ryan but Eric insisted they accompany him. RP 1234-1235, Ex. 13, pg. 2, 17. When Eric was not working he was with Tina at all times and controlled her movements. RP 1230. During this time Eric still would not allow Tina to see a neurologist for her TBI nor receive any mental health therapy. RP 1199.

When they were not traveling for Eric's work, the family moved to a mobile home in Marysville, purchased the summer of 2011. RP 1223. While living there, Ryan left the house on several occasions and wandered the neighborhood. Ex. 13, pgs. 10, 18. These elopements happened while Tina was watching him and while Eric was watching him. RP 1277-1278. They put child locks on the door to keep Ryan from wandering however Eric removed the locks. RP 1278. After separation Ryan ran away on two occasions while in Tina's care. RP 1272, 1276. Tina worked with Wendy Beagle on parenting strategies to keep Ryan from eloping. RP872-873.

Eric and Tina began taking Ryan to Dr. Shushan in 2012 for his well-child checkups. RP 568. After the dissolution was filed, they agreed to continue using Dr. Shushan as Ryan's primary pediatrician. Ex. 122, 122A. They also began to find help for Ryan's sleep issues and had Ryan enrolled a sleep study at Seattle Children's Hospital, where he was diagnosed with severe behavioral insomnia. Ex. 13, pg. 23. Tina wanted to continue taking Ryan for treatment; however, Eric did not believe it was necessary. RP 1279.

In January 2013 Tina told Eric she was going to leave him. RP 979. By January 2012 Eric's physical assaults on Tina had increased. RP 1236. Tina felt trapped. RP 1236. She was not able to take care of herself given Eric's control and limitations and knew she needed to leave so that she could get help. RP 1236.

Tina planned leaving Eric in advance and discussed her plans with Heidi Roy at the Domestic Violence and Sexual Assault Services (DVSAS) in Mt. Vernon. RP 910. Four months after she first mentioned it to Eric she left with Ryan. RP 1242. She took one of the parties' two cars and a few belongings. RP 1242-1243. Eric initially had daily telephone contact with Tina and Ryan beginning the day she left. RP 980. His contact with Ryan ceased after he tracked her down at the shelter. RP 1248, 1257.

When Tina left, she and Ryan initially moved between three domestic violence shelters. CP 787. She was forced to move when Eric found her at two different confidential shelters. RP 1248, 1255. The first shelter, located in Mount Vernon, had a policy where a domestic violence victim was not allowed to stay if her perpetrator learned the confidential location of the shelter. RP 916-917. Tina was asked to leave after Eric called the shelter looking for her. RP 1247. The second shelter Tina stayed in was in Oak Harbor and the shelter had a policy that Tina was to have no contact, including telephone, with Eric if she wanted to continue staying there. RP 1257. Tina was asked to leave the shelter after a man showed up at the shelter to serve her divorce paperwork. RP 1260. Tina and Ryan then went to the Anacortes Family Shelter Center. RP 1261.

Once separated from Eric, Tina promptly sought out mental health treatment. RP 1243. She also started seeing a TBI doctor again, who is currently working with her to treat the migraine headaches she has suffered since the 1998 accident. RP 1159-1160.

In addition to seeking mental health help, Tina actively engaged in parenting skills education. RP 1250. Tina regularly met with an early childhood specialist, Ms. Wendy Beagle, to help her with parenting. RP 1250. Additionally, she enrolled Ryan in Head Start and daycare through the YMCA to help Ryan develop his social and early childhood skills and

create more community for the two of them. RP 1151-1152. Ryan regularly attended Head Start and the YMCA during the time he was with Tina. RP 1151-1152.

Pursuant to the Temporary Order entered on August 14, 2013, custody of Ryan was evenly divided with the child residing one week with Tina and one week with Eric, and the parties had joint decision-making. Ex. 13, pg. 2. The parties also executed a December 10, 2013, Stipulated Order in which they agreed to follow all recommendations of the child's healthcare providers. Ex. 116.

Shortly after separation and throughout the pending dissolution Tina tried to get Ryan play therapy, parent child interaction therapy (PCIT), and counseling due to concerns raised by the GAL, YMCA, Head Start, and issues she noticed. RP 1279-1280. Ryan's behavioral problems included acting out aggressively towards other children and staff at daycare. RP 1271-1272. When Tina tried to arrange play therapy and PCIT, Eric refused to cooperate. RP 1280-1281. Eric denied Ryan had any behavioral problems. RP 1123. When Head Start and the YMCA recommended that Ryan receive a developmental screening so that they could better attend to Ryan's needs, Eric refused to allow the screening. Ex. 135. He went so far as to ask the court to suspend the temporary order

requiring cooperation with regard to Ryan's mental health and medical needs. CP 798.

Ryan's pediatrician, Dr. Denise Shushan, also recommended psychological therapy for Ryan. RP 577. On September 27, 2014, Eric showed up with Ryan unannounced at Dr. Shushan's office. RP 583. Eric made such a scene yelling at Dr. Shushan that security intervened. RP 585. Eric threatened to get her medical license suspended and said he would declare a "personal jihad" against her, unless she retracted her recommendation regarding psychological counseling. RP 584. Ryan witnessed the entire altercation. RP 583. Shortly thereafter, Eric requested Ryan's medical records because he claimed to be moving "far away." RP 1109.

Eric also made threats to Ryan's daycare workers after learning what they reported to the GAL. Ex. 17, pgs. 20-21. Eric maintained that Ryan never exhibited aggressive behaviors during the weeks that Ryan stayed with him. RP 1123. However, testimony from a daycare center in Marysville showed that Ryan was not allowed to return after twelve days because of his continued, aggressive behaviors that the daycare discussed with Eric. RP 784. Ryan acted out at different day care, located in Puyallup. Ex. 17, pgs. 20-21. Eric enrolled Ryan in a day care center in Port Orchard where it took several weeks for Ryan's behavior to settle

down. RP 655. Ryan's severe behavioral insomnia and elopement problems were not new; Eric was aware of Ryan's behavior prior the parties' separation. Ex. 13, pg. 10, 23, 18.

Since separation Eric repeatedly violated the Temporary Parenting Plan. OD 4, 8. Eric took Ryan to two new primary physicians and a dentist without notifying Tina. RP 1107-1108. He interfered with Ryan's medical care by refusing to tell Tina what vaccinations Ryan received. RP 1113-1115. He did not cooperate with obtaining services recommended by health care and educational professionals for Ryan because he did not believe Ryan needed services. RP 1123.

In December 2014 Tina started therapy for Ryan through Catholic Community Services. RP 1284. Eric was ordered to provide medical insurance for Ryan but chose not to provide it because he knew Ryan was covered by the State. Ex. 113. Tina chose Catholic Community Services after informing Eric and receiving no response. RP 1284-85.

Shortly before trial the GAL learned that Eric was taking Ryan to Dr. Herman Gil¹, an unlicensed therapist. RP 419. Eric took Ryan to Dr. Gil for a year without notifying Tina. RP 1109. During trial Tina learned he also took Ryan to two additional counselors, Reid Stahl and Donald

¹ In his brief, Eric refers to this therapist as Dr. Homs. Brief of Appellant, pg. 23-24. Dr. Homs was the physician from whom Eric purchased a medical practice treating methadone patients. RP 1053.

Brown. RP 1127-1130, 1294. Since August 2013 Eric used multiple daycare facilities, none of which were used for an extended time period, or were used to drop off Ryan for a day. OD 8, RP 1013. During trial Eric had two babysitters who watched Ryan on a few occasions. RP 1102-1103. The court found Eric dropped Ryan “into multiple day cares for a short period of time in a disruptive manner for the child.” CP 26.

The afternoon of May 1, 2014, Eric was criminally cited for leaving Ryan in his car unattended. Ex. 112. The temperature was in the 80s, the car was parked in direct sunlight, the windows were rolled up, and Ryan was left alone in the car. RP 339-340. When Eric returned to the car an officer asked if it was Eric’s car and asked that he unlock it. RP 339-340. When the officer removed Ryan from the car Ryan was sweaty and had been crying. RP 342. Eric threw himself to his knees and pled for mercy. RP 342. Ryan could see him. RP 342. He would not stop his behavior after being asked several times by the officer and would not cooperate with the officers until an officer placed his hand on Eric’s elbow. RP 342. Not once did Eric express concern for the welfare of his son. RP 344. Eric was criminally charged and placed on a deferred disposition in Marysville Municipal Court. Ex. 112. Child Protective Services issued a finding of neglect against Eric. RP 1067.

The GAL provided an initial report with five addendums. Exs. 13, 15, 17, 66, 132, 152. During her initial home visit with Eric she had to ask him repeatedly to stop talking negatively about Tina in front of the child. Ex. 13, pg. 21. She also noticed his home was messy and there were electrical cords lying on the floor. Ex. 13, pg. 21. The trial court found the GAL to be thorough and unbiased. CP 26-27. The trial court adopted the recommendations of the GAL, except that it also found there should be limitations under RCW 26.09.191(3) for neglect of parenting functions and abusive use of conflict. CP 27.

The court found Tina was best suited to care for Ryan's future needs. OD 3. The court found Tina to be aware of Ryan's emotional and developmental needs and that she was open to continually learning and improving her parenting skills. OD 3. The court found Eric was not best suited to care for Ryan due to his rigid thinking toward Ryan's mental health issues, acts that demonstrated a lack of judgment including leaving Ryan in the car unattended on a hot day, allowing Ryan to be treated by an unlicensed therapist, and refusing to cooperate with Tina about Ryan's medical care. OD 4. In addition, the court found that Eric engages in angry and emotional outbursts in front of Ryan and that they impact Ryan. OD 4.

C. Property: Precious Metals.

After he was terminated from Snoqualmie Valley Hospital Eric and Tina began investing in precious metals so that they would have a nest egg for their family. RP 1213. They purchased these metals both together and individually. RP 1214. Precious metal purchases in the amount of \$177,061.39 were made between February 28, 2011, and May 30, 2012. RP 1407, Ex. 143. Receipts indicate that some precious metals were purchased in Eric's name, some were purchased in Tina's name, but the majority of the receipts either did not identify a party or were otherwise ambiguous. RP 1214, 1407, Ex. 143. Eric retained possession of these metals and at trial claimed to have liquidated the majority of them at a discounted rate of 42.9 percent of their market value. RP 1407. This was in violation of the Temporary Restraining Order. RP 1407.

The court awarded Eric \$62,846.35 in precious metals as his separate property, using the purchase price value². OD 10. The court awarded ninety percent of the community precious metals to Tina. OD 12. Eric was ordered to pay the full purchase price value in the amount of \$102,301.46 to Tina. CP 22, OD 12. In using the purchase price rather

² The parties entered into a prenuptial agreement before their marriage. That agreement provided that all property in a party's name would be awarded to that party in the event of divorce. Ex. 46. The court treated the precious metals as separate where the receipts were in one name only, and treated them as community where the receipts were in both names or had no name. OD 9-10, 12.

than the discounted sale price the court noted it was doing so because Eric willfully violated the court's restraining order. OD 12.

D. Child Support and Maintenance.

The parties stipulated to a monthly income of \$30,000 gross (\$20,592 net) for Eric, and \$410 gross (\$379 net) for Tina. RP 1444. Eric testified his current earnings were approximately \$30,000 per month. RP 1043. Tina's income is from TANF and approximately \$300 per month earnings from her part-time job. RP 1444. For purposes of future child support the court used a net income of \$15,581 for Eric, and \$331 for Tina, an amount \$5000 less for Eric than the parties previous stipulation. CP 894. The court also specifically stated that maintenance would not be considered for calculating income. OD 18. The court ordered a transfer payment in excess of the presumptive amount of \$3000 a month, because the parties' income exceeded \$12,000 a month. CP 887. In doing so the court entered specific findings that Tina was unable to work full time, that Eric's income was sufficient to afford a higher standard of living, and that Ryan was in need of ongoing counseling and behavioral therapy as well as educational support. CP 887. The court also made findings supporting the deviation, highlighting the child's special medical, psychological and educational needs. CP 888. The court ordered a monthly maintenance payment of \$4000 for a period of three years. CP 23-24.

E. Attorney Fees.

Tina's private counsel was paid through NJP's Contract Attorney Program. NJP incurs the cost of this representation. The court found Eric intransigent. Tr. 5/15/15, pg. 12. The court admonished Eric's attorney's behavior several times during trial and sanctioned him prior to the start of trial for discovery violations. Tr. 5/15/15, pg. 4. The court found that Eric used "scorched earth tactics" which drove up the cost of litigation. Tr. 5/15/15, pg. 11-13. The court awarded attorney fees in the amount of \$123,907.60 against Eric. Tr. 5/15/15, pg. 14.

IV. AUTHORITY AND ARGUMENT

A. The trial court properly exercised its discretion when it awarded primary custody to the mother and imposed RCW 26.09.191 restrictions against the father in the parenting plan.

A trial court's parenting plan decision is reviewed for abuse of discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). A trial court abuses its discretion only if its decision is manifestly unreasonable, based on untenable grounds, or untenable reasons. Littlefield at 46-47. A court's decision is unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are

unsupported by the record; it is based on untenable reasons if an incorrect standard is applied or if the facts do not fall within the correct standard. Littlefield at 47. In this case, the trial court did not abuse its discretion because it applied the appropriate legal standards and its factual findings are thoroughly supported by the record.

- 1. The trial court properly considered the statutory criteria for entry of a permanent parenting plan and its findings were amply supported by the record.**

The court explicitly considered the factors enumerated in RCW 26.09.187 in its Oral Decision. OD 2-5. It then detailed its analysis under RCW 26.09.191. OD 6-9. The trial court made findings in the Findings of Fact and Conclusions of Law. CP 26-27. The court weighed evidence about the conduct of both parents and carefully considered the statutory guidelines. OD 6-9.

Eric asks this court to reevaluate the trial court record and to reach a different conclusion; a conclusion consistent with his position. His request is improper because:

An appellate court may not substitute its findings for those of the trial court where there is ample evidence in the record to support the trial court's determination. While the evidence in this case is contradictory, there is ample evidence to support the trial judge's findings of fact.

In re Marriage of Kovacs, 121 Wn.2d 795, 810, 854 P.2d 629, 637 (1993).

RCW 26.09.191(3) sets forth standards for the court to consider when entering discretionary restrictions. Unlike the mandatory restrictions of RCW 26.09.191 subsections (1) and (2), findings under subsection (3) are discretionary; they **may** limit or completely preclude provisions of the parenting plan.

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

...

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

...or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

RCW 26.09.191

The trial court properly placed limits on Eric's residential time in accordance with its discretionary power under RCW 26.09.191(3)(a)(c) and (g). The court also properly limited Eric's involvement in decision-making as it has discretion to limit "any" provision of the parenting plan. RCW 26.09.191(3). Tina did not argue and the court did not find a substantial non-performance of parenting functions by Eric. Rather the court found Eric's parenting should be limited based on neglect of

parenting functions and abusive use of conflict. CP 5-6, RCW

26.09.191(3). The court made specific findings in the Parenting Plan and the Findings of Fact and Conclusions of Law. CP 5-6, 26-27.

Eric advocates for a tort law definition of neglect that is not found in the governing family law statute. He cites case law pertaining to neglect as tortious conduct. This is not the standard guiding the court in family law matters. To understand the term “neglect” within the context of the statutes governing parenting plans it is necessary to look at the definition at RCW 26.44.020 and the definition of “parenting functions” as set forth in RCW 26.09.004(2).

"Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:

- (a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;
- (b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
- (c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
- (d) Assisting the child in developing and maintaining appropriate interpersonal relationships;
- (e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and

(f) Providing for the financial support of the child.

RCW 26.09.004(2).

A trial court is not obligated to rule in favor of one party just because there is evidence to support that parties' argument. Rather the trial court must review all the evidence, assess credibility and weight of the evidence and rule accordingly. The court found the CR 35 examination was flawed and not credible and the GAL report was a thorough and unbiased. CP 5-6, 26-27.

Eric's argument that the trial court should have adopted his interpretation of the facts, awarded him custody and entered restrictions against Tina is unsupported by legal authority. He is arguing what the facts should mean and how they should be weighed. Assessing the credibility of the witnesses and evidence and weighing that evidence is the purview of the trial court.

Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. An appellate court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility."

Wilson v. Wilson, 165 Wn. App. 333, 340, 267 P.3d 485, 488-89 (2011). (Internal citations omitted.)

The court considered extensive testimony and evidence about Tina's parenting abilities. Dustin Johnson, the director of the Anacortes Family Center testified about Tina's participation in the life skills program at their agency. RP 789, 796. Tina volunteered and eventually began working part time for the agency. RP 790, 800. He observed her parenting Ryan. RP 797. Tina exhibits good parenting skills. RP 814-815. Wendy Beagle worked with Tina directly as parent educator. RP 862. She observed Tina parenting Ryan and assisted her with addressing Ryan's challenging behaviors. RP 866. She helped Tina develop strategies to address Ryan's elopements. RP 873. Tina is eager to learn and open to new ideas. RP 874. Heidi Roy testified about Tina's strengths as a parent. RP 915-916. Tina testified about her challenges as a parent, and about what she is doing to be the best parent she can be. RP 1251-1252, 1280, 1283. The GAL said Tina was open to learning as a parent, and had made good progress since separation. RP 209-210. She also testified about Tina's strengths as a parent despite her disability. RP 198-199. Tina testified about the help she has sought out for her TBI and her depression since separation. The GAL spoke at length about the challenges Tina faces as she continues to address her TBI and the ongoing headaches associated with it, and her periodic depression. RP 198-199.

The court also considered evidence about Eric's parenting abilities. Several day care providers testified about Ryan's ongoing behavioral problems. RP 655, 784. Dr. Shushan testified about Eric's angry tirades' towards her that took place in front of Ryan. RP 583-584. The GAL testified about Eric's angry and abusive outburst against Kelly Malone, in front of Ryan. RP 211. He left Ryan in a hot car alone for which he received a criminal citation and a CPS finding of abuse. Ex. 112, RP 1067. He failed to adequately supervise Ryan at his workplace. CP 5. Eric failed to communicate regarding health care issues and undermined Tina's efforts to find proper therapy for Ryan. RP 1282-1284. Eric took Ryan to three different therapists without telling Tina as required by the temporary orders, and frustrated Tina's ability to get Ryan proper therapy. RP 1282-1284. The GAL spoke at length regarding Eric's parenting. CP 210-211, 224. The GAL noted that when she conducted a home visit Eric repeatedly spoke negatively about Tina in front of Ryan. Ex. 13, pg. 21. The GAL testified at length about her concerns regarding Eric's behavior and its effect on the child. RP 209-211.

The trial court noted in its oral ruling that Eric frustrated the process of finding appropriate help for Ryan. OD 4. He repeatedly placed Ryan in situations where he witnessed his father's explosive anger toward women. OD 4. He placed Ryan in danger when he left him in a hot car

while he went into the post office. OD 4. He failed to adequately supervise Ryan at work. OD 4. He placed Ryan into multiple day cares. OD 8-9. He exposed Ryan to his angry outbursts against his mother, and other women. OD 4. He failed to provide financial support even after the temporary child support order was entered. OD 5. The GAL noted, and the court found that Tina was taking demonstrable steps to responsibly take care of her own needs and those of Ryan. OD 2-9. Tina is self-reflective, eagerly seeks out help, and is not afraid to acknowledge her shortcomings. OD 3. Tina is open and aware of Ryan's emotional and developmental needs, she has a mature support system, and she has shown that she can and will use positive parenting techniques. OD 3.

Eric argues the court did not properly weigh the statutory factors under RCW 26.09.187 for entry of a permanent parenting plan. In re Marriage of Kovacs, 121 Wn.2d 795, 854 P.2d 629 (1993). Specifically, he points to subsection "(i) the relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for parenting functions relating to the child's daily needs" and subsection "(iii) each parents potential for the future performance of parenting functions." He again reargues the facts of the case, finding facts to support his argument, but he fails to show why the court, in considering the facts it did, erred.

The court made clear findings to support its decision in the final Parenting Plan and the Findings of Fact and Conclusions of Law. CP 5, 26. The court considered numerous factors in its decision, including the past performance of parenting functions and each parent's potential for future performance of parenting functions.

The court found Tina best suited to be the primary residential parent for Ryan. CP 26. The court found Eric neglected parenting functions and engaged in abusive use of conflict. CP 5-6.

2. The trial court acted within its discretion when it identified specific areas of sole decision making.

The court added several areas of sole decision making to the three major decision making categories: non-emergency medical, education, and religion. Generally, as Eric points out, a court cannot, absent agreement of the parties, designate decision making for areas other than those three categories. However, under RCW 26.09.191(3) the court may "preclude or limit any provisions of the parenting plan" if it finds a basis for limitations under that section. The court found that Eric neglected parenting functions and engaged in abusive use of conflict. CP 5. Eric himself testified that the parties could not communicate. RP 928. He refused to communicate with Tina about Ryan's health care or therapy. RP 1108-1116. Therefore, it was an appropriate exercise of the court's discretion to limit Eric's

involvement in other areas of decision making beyond the standard major decisions.

B. The trial court properly exercised its discretion when it awarded the wife 90% of the value of the precious metals.

A property division made during the dissolution of a marriage will be reversed on appeal only if there is a manifest abuse of discretion. In re Marriage of Kraft, 119 Wn.2d 438, 450, 832 P.2d 871 (1992). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” In re Marriage of Littlefield, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). In re Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779, 783 (2005). The overarching concern of appellate review is whether the property division was fair and equitable. RCW 26.09.080 requires the trial court to make a “just and equitable” distribution of the parties’ property and liabilities. In re Marriage of Wright, 78 Wn. App. 230, 234, 896 P.2d 735 (1995).³

The appellant asserts that the court’s decision must reflect all the statutory factors set forth in RCW 26.09.080. In contrast to his position, the statute sets forth a **non-exclusive** list of factors to be considered, including the nature and extent of the community property, the nature and

³ See also, Lucker v. Lucker, 71 Wn.2d 165, 426 P.2d 981 (1967) and Mayo v. Mayo, 75 Wn.2d 36, 38, 448 P.2d 926, 927-28 (1968).

extent of the separate property, duration of the marriage and the resulting economic circumstances of the parties when the property is divided. RCW 26.09.080, In re Marriage of Crosetto, 82 Wn. App. 545, 556, 918 P.2d 954 (1996). The trial court in this case explicitly considered the nature and extent of the separate property and community property in its oral decision when discussing the property division. OD 10-11. It made findings with respect to the distribution of property. CP 22-23. While not enumerated specifically in its findings, the trial court clearly considered the circumstances of the marriage, both past and present, and evaluated the future needs of the parties in its oral ruling not only when discussing the property division but also with respect to child support and maintenance. OD 13-17. It also considered Eric's financial intransigence when he sold, or claimed to have sold, the precious metals at a discounted rate in violation of the temporary order. OD 12, CP 22. The court found the value to be the purchase price rather than the discounted sales price. CP 22.

The parties and the court treated the precious metals as divisible property even though Eric testified that he sold part of them. RP 1407. The parties and the trial court treated the property as divisible even though it may have been sold prior to trial. Eric has not raised this issue in his appeal. An issue not raised in appeal is waived. "The failure to assign

error or to provide argument and citation of legal authority in support of an assignment of error, as required by RAP 10.3, will preclude appellate consideration of alleged error or correction of allegedly improper action.” In re Dependency of Chubb, 112 Wn.2d 719, 726, 773 P.2d 851, 854 (1989).

A dissolution requires an equitable division of property. RCW 26.09.080. “An equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances in the marriage, both past and present, and an evaluation of the future needs of the parties.” In re Marriage of Rink, 18 Wn. App. 549, 553, 571 P.2d 210 (1977) (citing In re Marriage of Clark, 13 Wn. App. 805, 538 P.2d 145(1975), review denied, 86 Wn.2d 1001 (1975)). In a dissolution proceeding, the trial court “has practically unlimited power over the property, when exercised with reference to the rights of the parties and their children.” In re Marriage of Kowalewski, 163 Wn.2d 542, 182 P.3d 959 (2008), citing Arneson v. Arneson, 38 Wn.2d 99, 102, 227 P.2d 1016 (1951).

Eric argues that the court erred when it used the purchase price for the precious metals, rather than a fair market price. Neither party provided evidence of fair market value during the trial. Eric claimed to have sold

some or all of the precious metals at a discounted price, not a fair market price RP 1407. The court found the precious metals were sold at a discounted rate. Neither Mayo nor Lucker speaks to the action the trial court took in this case: to use purchase price rather than the discounted sale price. The trial court found Eric to have sold the precious metals in violation of the restraining order.

Additionally, Eric argues the court erred because it disregarded the parties' stipulation about the precious metals. He does not assign error to the court's findings and offers only a conclusory argument that the court was bound to the parties' agreement, unsupported by authority.⁴ Appellate rules require that a party set forth assignments of error and issues pertaining to those assignments of error. RAP 10.3. Eric did not. The rules also require "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3 (a)(6). The appellate court generally does not consider argument that is unsupported by legal authority. RAP 10.3, Emmerson v. Weilep 126 Wn. App. 930, 110 P.3d 214 (2005) review

⁴ RAP 10.3(a)(3) requires that an appellant state concisely each error; however, RAP 1.2(a) calls for a liberal interpretation of the rules. Viereck v. Fibreboard Corp. 81 Wn. App. 579, 915 P.2d 581 (1996), review denied, 130 Wn.2d 1009, 928 P.2d 414. It is not the lack of an assignment of error that is objected to here, it is the lack of citation to any authority to support his contention that the court was not within its discretion to set aside the stipulation.

denied 155 Wn.2d 1026, 126 P.3d 820. The appellate court generally does not consider conclusory arguments that are unsupported by citation to be authority. Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 629, 285 P.3d 187, 194–95 (2012). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Brownfield v. City of Yakima, 178 Wn. App. 850, 875-76, 316 P.3d 520, 534 (2014).

Furthermore, the Washington Supreme Court held that a trial court is not bound by the parties' stipulation in a family law matter. Munroe v. Munroe, 27 Wn. 2d 556, 561, 178 P.2d 983, 986 (1947). The court's disposition of property will not be disturbed by the appellate court absent a manifest abuse of discretion. Mayo at 561. Eric has not shown an abuse of discretion.

The fact Eric disposed of property in violation of a restraining order is the kind of misconduct a court may consider when making a disposition of property. RCW 26.09.080 provides that the court shall dispose of the property of the parties, "without regard to misconduct." RCW 26.09.080, however, "refers to immoral or physically abusive

conduct within the marital relationship and does not encompass gross fiscal improvidence [or] the squandering of marital assets [.]” In re Marriage of Wallace, 111 Wn. App. 697, 708, 45 P.3d 1131, 1136 (2002) , citing In re Marriage of Steadman, 63 Wn. App. 523, 528, 821 P.2d 59 (1991). The authority upon which he relies has no bearing on his argument.⁵ As a result, his argument is unsupported by authority. See RAP 10.3, Joy at 629. The court found that Eric sold the precious metals in willful violation of the temporary order restraining the parties from disposing of marital assets. CP 22. The court properly exercised its discretion when it considered the financial misconduct of a party when dividing the property.

C. The trial court properly exercised its discretion when it ordered child support in excess of the standard calculation and when it made specific findings to support the decision.

Eric argues the court erred when it entered child support in excess of the standard calculation. A trial court’s decision regarding child support is reviewed for abuse of discretion. In re Marriage of Booth, 114 Wn.2d. 772, P.2d 519 (1990). Eric’s reliance on In re the Marriage of Leslie is

⁵ In re Marriage of Ayyad, 110 Wn. App. 462, 38 P.3d 1033 (1980) is a case dealing with child support and whether among other issues converted stock options are includible as income for purposes of calculating child support. Eric does not provide a specific cite to a page of the opinion, and it is unclear whether he meant to use this case to support his argument or whether it was cited in error.

inapposite. The court's ability to order child support at an amount greater than the standard calculation is not limited when the parent's incomes exceed the standard economic schedule. In re Marriage of Leslie, 90 Wn. App. 796, 954 P.2d 330 (1998). The Leslie decision found the trial court "inappropriately narrowed the scope of inquiry and contravened legislative intent," declined to award what it considered an "upward deviation." Leslie at 804. Far from stating the court cannot order child support in excess of the standard calculation when the parties combined incomes exceed the maximum advisory level, Leslie found when a court determines that the combined monthly income exceeds the statutory economic table "a trial court is not limited to the maximum amount of support provided by the schedule. It is permitted to 'exceed' this amount upon written findings of fact." Leslie at 804.

The trial court in this case made written Findings of Fact in section 3.5 of the Order of Child Support. The Findings support the transfer payment in excess of the standard calculation because the parties' incomes exceeded \$12,000, as follows:

The court finds that the mother is unable to work full time due to a physical injury from which she is continuing to recover. The father is a physician whose income far exceeds the top threshold for support calculations, which income allows for a higher standard of living for the child

than that which would be obtained from the standard calculation. The child in this case is also in need of ongoing counseling and behavioral therapy, as well as educational support to reach the typical developmental level for his age. A transfer payment in excess of the standard calculation is just and necessary under the circumstances to assist the child in receiving that behavioral therapy and educational support. CP 887.

Additional findings specifically related to special medical, educational or psychological needs of the child were included in Section 3.7, the deviation section:

Eric Ryan Shibley is a child who has significant behavioral problems, and potentially undiagnosed ADHD and developmental delays. He has been receiving therapy from an unlicensed therapist for the past 12 months in violation of the court's orders relating to joint decision making between the parties relative to medical treatment. The child has been placed in numerous drop in day cares by the father, and several longer term day cares and pre-schools by the mother. He has been expelled from one or more of those day cares due to his violent, out of control behavior. The court finds that the lack of stability in his life, along with the high conflict of the parties during this dissolution proceeding, has exacerbated the stress on this child and that he is in need of therapy and treatment per the recommendation of his physician, Dr. Shushan. CP 888.

These findings were not cursory, and comport with the Daubert/Rusch factors addressed in McCausland when the court concluded they must be considered by a court when ordering child support in excess of the economic table. In re Marriage of McCausland, 159 Wn.2d 607, 620, 152 P.2d 1013 (2007) , citing In re Marriage of Daubert

and Johnson, 124 Wn. App. 483, 495-96, 99 P.3d 401 (2004) and Rusch v. Rusch, 124 Wn. App. 226, 233, 98 P.3d 1216 (2004). Those specific factors include, “(1) the parent’s standard of living, and (2) the children’s special medical, educational, or financial needs, when entering its written findings of fact. McCausland at 620. McCausland additionally does not limit the court’s consideration of the above factors, but sets them out as a minimum. McCausland at 621. The court in this case did not specifically use the term Daubert/Rusch, but did state clearly that it considered “the factors” in reaching its decision on child support.⁶ OD 17.

Eric argues without reference to authority, the obligation to pay special child rearing expenses, uninsured medical expenses and the “standard calculation”⁷ limit the courts ability to order child support in excess of the standard calculation. He does not explain or offer any authority to support his argument. McCausland specifically authorizes the court to order child support in excess of the standard calculation upon written findings. McCausland at 620. The trial court made those specific findings in the Order of Child Support as noted above, and those findings

⁶ While court checked the box marked “deviation” in the Order of Child Support, it did not use the term deviation in its Oral Decision rather it noted that it was ordering child support in excess of the standard calculation. The order clearly includes detailed findings. The use of the term “deviation” should be considered harmless error because the court’s ruling comports with the requirements of Leslie and McCausland.

⁷ The amount of the standard calculation is presumed to pay for basic child related expenses such as housing, food, clothing, etc.

are consistent with the Daubert/Rusch factors referenced in McCausland. These findings are further explained in the Oral Decision. OD 17.

In addition, Eric argues without reference to authority that the court erred by failing to deduct taxes in the child support calculation. He did not assign error to the court's characterization of his income. Accordingly, Tina argues the court is precluded from considering this issue. RAP 10.3, Chubb at 726. Eric stipulated at trial that his net income was \$20,592. RP 1444. He did not provide any evidence as to what taxes he paid on his gross income or if he paid taxes at all. The court calculated child support using a net figure of nearly \$5,000 less. CP 44.

D. The trial court properly exercised its discretion when it ordered Eric to pay Tina's attorney's fees.

An award of attorney fees under a statute or contract is a matter of trial court discretion, which will not be disturbed absent a clear showing of an abuse of that discretion. In re Marriage of Bobbitt, 135 Wn. App. 8, 29-30, 144 P.3d 306, 316-17 (2006), citing Fluke Capital & Mgmt. Servs. v. Richmond, 106 Wn.2d 614, 625, 724 P.2d 356 (1986).

Attorney fees in dissolution proceedings may be awarded "after considering the financial resources of both parties." RCW 26.09.140.

Intransigence is also a basis for attorney fees in dissolution proceedings. In re Marriage of Crosetto, 82 Wn. App. 545, 918 P.2d 954 (1996).

In this case the court considered the relative earning capacities of both parties. The parties stipulated to a monthly income of \$30,000 gross and \$20,592 net for Eric, and \$410 gross and \$379 net for Tina, for the purposes of entry of a back child support award. RP 1444. In addition, the court made a specific finding of intransigence against Eric as a basis for the award of fees. Tr. 5/15/15. The court was well within its discretion to award fees, and like any litigant, Tina is entitled to fees. In this case Tina was represented by attorneys through the Contract Attorney Program of the Northwest Justice Project. Legal services were provided on her behalf at no charge.

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment....

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

RCW 26.09.140

In addition, it is well settled that “[a] trial court may consider whether additional legal fees were caused by one party's intransigence and award attorney fees on that basis.” In re Marriage of Greenlee, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). “When intransigence is established, the financial resources of the spouse seeking the award are irrelevant.” In re Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one's actions. Greenlee at 708, In re Marriage of Bobbitt, 135 Wn. App. 8, 144 P.3d 306 (2006)

Even though Tina was represented through the Contract Attorney Program of the Northwest Justice Project (NJP), and received legal services free of charge, she is entitled to recovery of attorney's fees, just like any other litigant. NJP is publicly funded and incurs costs for the representation of its clients. NJP contract attorneys are paid a modest rate for their services. Expenses related to free civil legal services include not only the cost of providing an attorney, but also the opportunity costs of reduced availability to represent other clients in a climate of scarce resources and significant demand for representation in family law cases. What NJP paid the contract attorneys is irrelevant to the understanding that legal services were provided to Tina for free.

The Northwest Justice Project, a state and federally-funded civil legal services provider, is permitted by the Legal Services Corporation and the Office of Civil Legal Aid to pursue attorney's fees in cases where such fees are authorized by statute or case law.

The plain language of RCW 26.09.140 provides for payment of costs incurred, including reasonable attorney's fees, not actual attorney's fees incurred or paid. "Reasonable attorney's fees" is a term of art and is not determined based on the amount of fees actually incurred. See Fetzer v. Weeks, 122 Wn.2d 141, 859 P.2d 1210 (1993). In awarding reasonable attorney fees, absent any expressed statutory direction, Washington courts commonly use the "lodestar" method to calculate the award. Bowers v. TransAmerica, 100 Wn.2d 581, 594, 675 P.2d 193, 202 (1983). The lodestar method first looks at the number of hours reasonably expended multiplied by a reasonable hourly rate. Bowers at 594. Indeed, the "reasonable hourly rate should be computed for each attorney, and each attorney's hourly rate may well vary with each type of work involved in the litigation." Bowers at 594.

Regardless of the method of calculation of a fee award under RCW 26.09.140 or due to intransigence, neither statute nor case law require actual payment of fees to obtain an award, only that fees were incurred.

The statute does not require that the petitioner paid attorney's fees out of her own pocket to an attorney in order to be awarded fees, nor does the statute carve out an exception for litigants who receive free legal representation. Tofte v. Department of Social and Health Services, 85 Wn.2d 161, 531 P.2d 808 (1975) is the lead case on point. In that case, the Supreme Court held that the fundamental underpinning of the statutory provision authorizing the fee award is determinative and the petitioner's representation by a non-profit legal aid program was irrelevant to whether the successful litigant was entitled to attorney's fees. Tofte, 85 Wn.2d at 165 (citing California case holding that successful fee applicant represented by legal aid program was not required to actually incur an attorney fee to be eligible for an award). Hence, the court must look to the "fundamental underpinning of the fee award provision" in order to determine whether a litigant, in this case the respondent, is entitled to a "reasonable attorney's fees" award. Tofte at 165. The trial court properly exercised its discretion when awarding Tina attorney's fees based on both intransigence and RCW 26.09.140.

E. Attorney's fees on appeal.

Eric should be ordered to pay attorney's fees to Tina under RCW 26.09.140 because she has the need and he has the ability to pay such fees. Just as she was entitled to fees in the trial court, Tina is entitled to fees in

the appeal. RCW 26.09.140 provides that “Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.” In this case the facts establish that Eric has the financial ability to pay and Tina has the financial need. She requests an award of attorney’s fees and statutory costs on appeal.

V. CONCLUSION

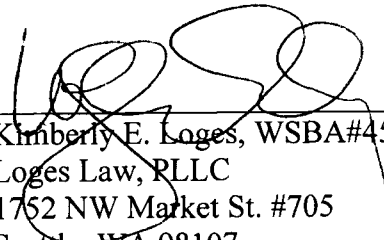
The trial court entered a final parenting plan with detailed findings to support its decision to award Tina primary custody and to find that Eric had neglected parenting functions and engaged in abusive use of conflict. The limitations imposed upon Eric under RCW 26.09.191(3) are a proper exercise of the court’s discretion under that statute.

The court did not err when it set aside the parties stipulation and awarded Tina 90% of the parties’ precious metals valued at the purchase price due to Eric’s violation of the temporary restraining order. The court properly awarded child support in an amount in excess of the standard calculation when it set forth detailed findings to support its decision. Finally, the court properly exercised its discretion when it awarded Tina attorney’s fees. Tina respectfully requests the court affirm the trial court’s orders, and to award attorney’s fees and costs on appeal.

DATED this 29th day of February, 2016.



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**COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I**

ERIC R. SHIBLEY,

Appellant,

vs.

TINA M. SHIBLEY,

Respondent.

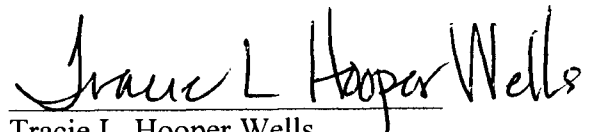
No. 73508-0-I

CERTIFICATE OF SERVICE

I certify that on the 29th day of February, 2016, I caused a true and correct copy of the Brief of Respondent to be served on the following, via ABC Legal Services, Inc.:

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