

No. 66551-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of

KAREN LYNN MADDEN

Respondent,

v.

MARR PAUL MADDEN

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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I. INTRODUCTION

The father appeals the trial court's discretionary decisions based on factual findings that he challenges, but that are all supported by substantial evidence. (Appendix) The success of the father's appeal hinges on this court accepting his one-sided, exaggerated "Statement of Facts." But the trial court rejected the father's portrayal of the parties' marriage, the mother, and the procedural posture of the case, finding the father not "credible," and his testimony "self-serving." The parenting plan, its evidentiary rulings, and its award of attorney fees were well within the trial court's discretion and supported by substantial evidence. This court should affirm and award attorney fees to the mother.

II. RESTATEMENT OF ISSUES

1. The trial court did not find that the mother was domestically violent as alleged by the father. (RP 743) Instead, the trial court found that the father's testimony was "self-serving and demonstrated a lack of understanding of his [own] abusive behavior." (Finding of Fact (FF) 2.19, CP 1044, *unchallenged*) Having rejected the father's allegations of domestic violence, did the trial court abuse its discretion in designating the mother as the

primary residential parent, and in refusing to impose RCW 26.09.191 limitations on her? (Assignments of Error 1, 2)

2. Substantial evidence, including testimony from the mother, who the trial court found was a “credible, open, and honest witness” (FF 2.19, CP 1044, *unchallenged*), supports the trial court’s findings that the mother “has a reasonable fear of harm [by] the husband based upon a history of controlling behavior, an abusive use of conflict, and an inability to control his anger,” that the father was “emotionally abusive throughout the marriage,” that the father “was verbally abusive toward [the mother] and sexually humiliated her in front of her family and others,” that the father “continued to send verbally abusive emails to [the mother]” during the dissolution proceeding, that the father “repeatedly and wrongfully removed [the mother] from the community bank account,” that the father “abusively used conflict as a weapon in this divorce to the detriment of the children,” and that the father’s “abusive use of conflict has negatively impacted the boys and creates a serious risk of ongoing psychological harm.” (FF 2.13, 2.19, CP 1042, 1047-48) Did the trial court err in making these findings based on the credible evidence presented, and based on

these findings, did the trial court abuse its discretion in entering a continuing restraining order and in imposing RCW 26.09.191 limitations on the father in the parenting plan? (Assignments of Error 6, 8, 9, 10, 11, 13, 14, 15)

3. The mother and other witnesses testified that the father publicly complained about the mother's refusal to engage in "regular sex" with the father. The father also testified that he pursued a line of questions in his *pro se* deposition of the mother inquiring into her "gynecological issues" because of his claimed concern that the mother was "repressing her sexuality," and because in counseling she denied ever masturbating. The father testified that these questions were relevant because the parties "have little boys and they are developing sexually and I fear for their sexuality by her repressive [] actions." (RP 647) Did substantial evidence support the trial court's finding that the father had claimed at trial that the mother's "gynecological health impacts her ability to provide appropriate care for the boys and that her refusal to have sex with him or engage in sexual activity with him at his preferred frequency will impact their sons' sexual development?" (Assignment of Error 12)

4. Did the trial court abuse its discretion in refusing to admit handwritten family calendars from which the father sought to argue that he was the primary parent based on his “interpretation” of the calendars when there were questions as to the calendars’ authenticity, the trial court stated that the calendars were not a “factor that sways me one way or another,” and in any event, the trial court found, based on other evidence, that the mother’s activities “did not detract from [her] role as the children’s primary caregiver” (FF 2.19, CP 1045, *unchallenged*)? (Assignment of Error 4)

5. Substantial evidence supports the trial court’s order finding that the father’s *pro se* discovery requests, which included over 800 interrogatories, 85 requests for production, and that sought financial documents as far back as 10-15 years, (in the dissolution of a marriage of 12 years) were “overburdensome and an inappropriate use of the discovery process.” (CP 764) Did the trial court abuse its discretion in ordering the father to propound less onerous discovery requests? (Assignment of Error 3)

6. The mother denied the father’s allegation that her individual counselor also provided joint counseling to the parties.

Did the trial court abuse its discretion in denying the father's request for discovery of the mother's counseling records based on the father's claim that they were not privileged since the records were allegedly related to joint counseling, and in any event, the father later admitted that the only reason for pursuing the records was to prove the mother was lying about whether the counseling was for her individually, and not joint as the father alleged? (Assignment of Error 5)

7. The trial court found that the father "made unsubstantiated, false, and exaggerated allegations" against the mother, "pursued meritless appeals," and that the father "acted intransigently by engaging in a serious and ongoing abusive use of the court process by using litigation as a weapon in this divorce. His actions have directly caused [the mother] to incur substantial attorneys' fees over and above what she would have otherwise incurred in this divorce." (FF 2.15, CP 1042, *unchallenged*) Based on these unchallenged findings, did the trial court abuse its discretion in awarding a limited amount of attorney fees to the mother? (Assignment of Error 7)

8. Should this court award attorney fees to the mother on appeal based on her need, and the father's ability to pay, and based on his continued intransigence in bringing this meritless appeal?

III. RESTATEMENT OF FACTS

After a six-day trial, the trial court designated the mother as the primary residential parent of the parties' young sons, finding her to be the "children's primary caregiver and attachment figure." (FF 2.19, CP 1046, *unchallenged*) While still giving the father liberal residential time, the trial court imposed RCW 26.09.191 limitations on the father by requiring him to attend anger management classes and granting sole decision-making to the mother after finding that the father had assaulted the mother on one occasion, that he verbally and emotionally abused the mother, and that he "abusively used conflict as a weapon in this divorce to the detriment of the children [and] allowed his anger towards [the mother] to cloud his judgment." (FF 2.19, CP 1048, *challenged*; CP 1075-76, 1079-80, 1082)

RAP 10.3(a)(5) requires that a brief provide a "fair statement of the facts." But it clear from just the first line of the father's

“Statement of the Case,” where he claims that he was the “primary parent” of the parties’ young sons, and is a “victim of domestic violence perpetrated by his (ex)wife” (App. Br. 7), that the father’s Statement of the Case is far from a “fair” statement, and is in fact simply a recitation of his “self-serving” testimony that he presented at trial, which was rejected by the trial court as not credible. (FF 2.19, CP 1047, *unchallenged*) This Restatement of Facts provides a fair characterization of the facts presented at trial, and of the substantial evidence that the trial court relied on in making its findings – many of which the father does not challenge on appeal.

A. The Mother Was The Primary Caregiver Of The Parties’ Three Young Sons While The Father Worked Full-Time.

Respondent Karen Madden, age 43, and appellant Marr Madden, age 52, were married on October 11, 1997. (CP 1-2) Karen became pregnant with twins and stopped working outside of the home when they were born in 2000. (RP 63-64) The parties’ youngest son was born in 2004. (RP 65)

The parties had agreed when the twins were born that due to the high cost of childcare Karen would stay home and care for the children. (RP 63-64) With the exception of limited babysitting jobs for other families, Karen has not worked outside the home since

2000, and has been the children's primary caregiver. (RP 63-64, 249-50) Karen was charged with feeding the children, disciplining the children, maintaining their schedules, taking them to doctor's appointments, arranging play dates, and taking the children to their activities. (RP 65-66, 69-71, 103, 249-50) Other people testified that they witnessed Karen being primarily responsible for the care of the children. (RP 135-36, 159-60, 167-68, 186, 190-91)

Within the first year of their youngest son's birth, Marr began working from home for Boeing. (RP 72) Even then, Karen remained the children's primary caregiver, although Marr occasionally watched the children if she had to run errands. (RP 72-74, 250)

Just as he did at trial, Marr claims on appeal that he, not Karen, was the children's "primary parent." (See App. Br. 12) Marr claims that Karen "spent significant amounts of time out of the home with her personal activities." (App. Br. 12) But the trial court specifically "reject[ed] the father's testimony that the mother was routinely 'absent' from the home and that he was primarily responsible for the children's care while the mother was nowhere to be found." (FF 2.19, CP 1044-45, *unchallenged*) Instead, the court

found that the mother “was involved in parenting-related activities [] and church-related parenting activities that directly or indirectly benefitted the three boys. She took the boys with her to many of these activities.” (FF 2.19, CP 1045, *unchallenged*)

The trial court acknowledged that “[l]ike any family, Mr. Madden sometimes cared for the children while Ms. Madden went out to run errands or attend a function, but this was not any more frequent than would be expected in a family with a stay-at-home parent. It is not unusual for a primary caregiver to ask the other parent to watch the children for a few hours on occasion while she goes to the supermarket, etc. This did not detract from Ms. Madden’s role as the children’s primary caregiver.” (FF 2.19, CP 1045, *unchallenged*)

B. Throughout The Marriage, The Father Verbally And Emotionally Abused The Mother.

Throughout the parties’ marriage, Marr verbally and emotionally abused Karen. Marr constantly cursed and put Karen down in front of the children. (RP 127-29, 245-47) Karen felt that Marr’s use of profanity, especially in front of the children, was hurtful, humiliating, degrading, and disrespectful. (RP 246) Karen

and others also testified that Marr also undermined Karen's parenting in front of the children. (RP 139, 168-69, 175-6, 186-88)

The trial court found that Marr "repeatedly disparaged [Karen] in front of the boys," which was "absolutely inappropriate." (FF 2.19, CP 1044, *unchallenged*) The trial court expressed concern that Marr's behavior "causes a serious risk to the boys and to their relationship with their mother." (FF 2.19, CP 1048, *unchallenged*)

One friend testified that Marr was "contemptuous" of Karen and became increasingly critical of her during the marriage. (RP 175) The friend described that Marr was "always putting her down. Criticizing what she cooks, how she looks, tell her she's fat, tell her she's lazy, tells her that she's a bad mom." (RP 175) Karen testified that Marr's verbal abuse made her feel "unsafe." (RP 248)

After the parties separated, Marr continued his abuse of Karen through email. In two separate emails, Marr described Karen as "pathetic" and a "spiteful bitch." (RP 312, 315; Ex. 12, 13; see also Ex. 14, 15) Marr's constant criticism negatively affected Karen's self-esteem. (RP 244) The trial court found that Marr was "verbally abusive toward Ms. Madden" during the marriage. (FF

2.19, CP 1047, *challenged*) The trial court also found that the father “continued to act abusively toward [the mother] while [the] divorce has been pending,” noting that “even post-separation, [the father] continued to send verbally abusive emails to [the mother].” (FF 2.19, CP 1048, *challenged*)

Marr was also sexually aggressive towards Karen. (RP 252) Even after Karen said no to his sexual advances, Marr continued to press up against her in bed and refused to accept her rejection. (RP 252) Karen could only avoid contact by leaving the bed and sleeping elsewhere. (RP 252) Karen became concerned for her safety due to Marr’s increasing demands for sex. (RP 254)

As a result of Karen’s rejection, Marr called Karen “asexual” to Karen and others, as a way to humiliate her. (RP 131, 255) Marr emailed Karen’s aunt complaining about Karen’s “lack of sexuality.” (RP 131, 255) Marr also emailed Karen’s father complaining that Karen refused to perform oral sex. (RP 139-40) Karen was humiliated, embarrassed, and horrified that Marr involved her family in the details of their sex life. (RP 131, 253, 255) Based on this evidence, the trial court found that Marr

“sexually humiliated her in front of her family and others.” (FF 2.19, CP 1047, *unchallenged*)

At trial, Marr testified that he believed Karen’s “repressive” sexuality would negatively affect the parties’ sons by impacting their “sexual development.” (RP 647) The trial court found that there was “no proof or evidence of any sort [] offered in support of these claims and the court found it to be further evidence of Mr. Madden’s abusive behavior toward Ms. Madden.” (FF 2.19, CP 1048, *challenged*)

C. The Father Unilaterally Removed The Mother’s Name From Joint Accounts, Forcing Her To Become Dependent On Him For Money, As A Means Of Controlling The Mother.

Marr used finances as means to control Karen during the marriage. (RP 126) Without her knowledge, Marr had Karen’s name taken off joint accounts. (RP 117-18) Once Karen found out, she demanded that Marr reinstate her on the joint account. (RP 118) Marr did, but then subsequently took Karen’s name off the joint account again. (RP 119) Marr controlled all of the parties’ money except what Karen earned babysitting. (RP 123-24) Karen became increasingly concerned because this caused her to be

entirely dependent on Marr for money. (RP 123-24) This “scared” Karen. (RP 124)

Marr admitted that he took Karen off the joint accounts, but claimed it was because she threatened to take the children to California and not return. (RP 579) But the trial court “reject[ed] [the father]’s argument that he removed [the mother] from the community bank accounts ‘to protect the family’ and to stop [the mother] from absconding with the children. There is no evidence other than [the father]’s own testimony (which the court did not find credible) that [the mother] ever threatened to kidnap the children or move away without [the father]’s consent.” (FF 2.19, CP 1047, *challenged*) The trial court found that the father “repeatedly and wrongfully” removed Karen from their joint accounts. (FF 2.19, CP 1047, *challenged*)

D. Procedural History.

1. The Parties Separated After The Father Assaulted The Mother.

In 2009, Karen became increasingly concerned that Marr was trying to cut her out of the parties’ joint finances. (RP 262-63) Marr had threatened to take her off his health insurance, and refused to reinstate her on the parties’ joint account after she

discovered that he had once again removed her name from the account. (RP 263)

Karen filed a petition to dissolve the parties' marriage on December 7, 2009. (CP 1) Karen initially did not obtain a physical restraining order against Marr, and only sought financial restraints. (See CP 17-20)

Karen also had not initially sought to have Marr removed from the house immediately, because she wanted to maintain the "status quo" for the children and because the holidays were coming up. (RP 268) However, on December 28, 2009, the parties got into an argument over finances. (RP 272) As Karen tried to reach for a bill, Marr began grabbing her arms, then shoving her, and tried to force her out of the room. (RP 273, 275) Karen testified that "it was frightening to see so much anger and hatred in his face." (RP 273)

Marr called the police, and accused Karen of abusing him. (See RP 273-74, 277) However, when the police arrived and interviewed both parties, the police concluded that in fact Marr was the aggressor and arrested and charged him with Assault in the Fourth Degree (Domestic Violence). (RP 277-78; Ex. 7)

Marr was later released, and the charges against him were eventually dropped. (RP 585) While Marr tried to claim that the fact of the dismissal of charges after the December 28 incident was proof that he did not assault Karen, the trial court noted that “there is an entirely different standard of proof in a criminal case than there is in a civil family law case. Based upon the evidence presented at trial, this court finds that Mr. Madden assaulted Ms. Madden on December 28, 2009 by grabbing her arms and shoving her out of the room.” (FF 2.19, CP 1047, *unchallenged*)

2. Temporary Orders Were Entered Placing The Children Primarily With The Mother, And Imposing A Physical Restraining Order On The Father.

Soon after this incident, both parties sought a temporary parenting plan asking to be designated as the primary residential parent. (CP 54, 85) Marr described Karen as “physically aggressive,” and alleged that she has acted “in an inappropriate fashion towards the children and me.” (CP 62) In an effort to support his temporary parenting plan, which would have placed the children with him primarily, Marr raised the same allegations that he brought up at trial, and he repeats in this appeal. (CP 62-66) Marr also sought a restraining order against Karen. (See CP 54)

King County Superior Court Commissioner Meg Sassaman entered a temporary parenting plan designating Karen as the primary residential parent. (CP 311) The commissioner also appointed Margo Waldroup as the parenting evaluator. (CP 306-09) The commissioner apparently rejected Marr's claims that Karen was domestically violent, denied his request for a restraining order against Karen, and instead entered an order physically restraining Marr from "disturbing the peace of" Karen, and from coming within "1000 feet" of the family residence, where Karen was allowed to reside. (CP 286)

After trial in this matter, the trial judge also rejected Marr's allegations that Karen was the aggressor in the relationship. The trial court found that the mother has not "committed domestic violence or emotional abuse upon the father." (RP 743) The trial court found that Karen was a "credible, open, and honest witness," whereas Marr was not a credible witness, and "his testimony was self-serving and demonstrated a lack of understanding of his abusive behavior. He took no responsibility for his actions before or after the parties' separation." (FF 2.19, CP 1044, *unchallenged*)

3. After A Five-Day Trial, The Trial Court Designated The Mother As The Primary Residential Parent, Imposed RCW 26.09.191 Limitations On The Father's Residential Time, And Granted The Mother A Continuing Restraining Order.

The parties appeared for a five-day trial before King County Superior Court Judge Mariane Spearman. Marr, who had appeared *pro se* earlier in the proceedings, was represented by Barry Rose. Karen was represented by Justin Sedell.

The issues before the court were parenting, child support, and attorney fees – all other issues were resolved in mediation. (RP 33-34) While the father had repeatedly claimed that he was seeking restrictions on the mother based on his allegations of mental illness and domestic violence, he dropped his demand for restrictions by trial. (See CP 62-66; RP 17, 31, 617-18) Instead, he sought a parenting plan that would have placed the children with him 51% of the time. (RP 617-18) Not coincidentally, the parties had previously stipulated that the primary residential parent should be awarded the family residence. (RP 618-19)

The trial court acknowledged that the father had “pursued baseless claims for restrictions under RCW 26.09.191 against Ms. Madden up until the day of trial when he suddenly changed his

requests and asked for 51% of the residential time with the boys without any restrictions against Ms. Madden.” (FF 2.19, CP 1048) The trial court noted that the father could not articulate the basis for his proposed parenting plan providing him with slightly more residential time, “other than to repeatedly bring up his desire to be awarded the home.” (FF 2.19, CP 1047, *unchallenged*)

The trial court designated the mother as the primary residential parent. In doing so, the trial court painstakingly went through the factors of RCW 26.09.187, in largely unchallenged findings. (FF 2.19, CP 1045-47) The trial court found that the mother was the children’s “primary caregiver and attachment figure,” and “has taken greater responsibility for performing parenting functions.” (FF 2.19, CP 1046, *unchallenged*) The trial court acknowledged that “the children love both their parents and want to spend time with both of them, [but] the children’s primary attachment figure is their mother and that remaining primarily in her care better serves their emotional and developmental needs.” (FF 2.19, CP 1046, *unchallenged*)

The trial court found that the father engaged in the abusive use of conflict, which has “negatively impacted the boys and

creates a serious risk of ongoing psychological harm.” (FF 2.19, CP 1048, *challenged*) The trial court found that the father “has allowed his anger toward Ms. Madden to cloud his judgment and has involved the children in this litigation by repeatedly telling them about the status of this case, the results of hearings, what was said in written documents submitted to the court, and other matters that they should not have been involved in whatsoever.” (FF 2.19, CP 1048 *unchallenged*) The trial court found that “[g]iven this abusive use of conflict, the court [found] that it is appropriate to enter a finding pursuant to RCW 26.09.191” against the father. (FF 2.19, CP 1048, *challenged*)

As a result of its RCW 26.09.191 findings, the trial court granted the mother sole decision-making because of the father’s abusive use of conflict, and the father’s historic refusal of following the recommendations of the children’s treating professionals. (FF 2.19, CP 1049, *unchallenged*) The trial court also adopted the parenting plan evaluator’s recommendation that the father engage in an anger management course. (FF 2.19, CP 1048-49)

Despite the trial court’s RCW 26.09.191 findings, it granted the father liberal residential time. (See CP 1075-76) The trial court

ordered that until the father completed his anger management course, the parties shall follow the temporary parenting plan, which provided the father with every Wednesday overnight, plus alternating weekends. (CP 311, 1049, 1075, 1079-80) Thereafter, the children will reside with the father every other weekend starting on Thursday evening, and every Thursday overnight. (CP 1075) Once the youngest child, who was age 6 at trial, reaches fifth grade, the parenting schedule would provide the father with an additional overnight every other week. (CP 1074, 1076)

The trial court continued the temporary restraining order for five years after finding that the mother “has a reasonable fear of harm of the husband based upon a history of controlling behavior, an abusive use of conflict, and an inability to control his anger.” (FF 2.13, CP 1042, 1068, 1071)

The parties had stipulated that the court could determine “whether and in what amount the wife should be awarded legal fees payable by the husband to reimburse her for the fees that she incurred between the time that she began preparing for the settlement conference that occurred in this case and finalization of

the divorce, plus any fees associated with the appeals¹ previously filed by Mr. Madden.” (FF 2.15, CP 1042; see also Ex. 10) The mother requested all of the fees that she incurred since she began preparing for the settlement conference, in the amount of \$55,613, based on both her need and the father’s ability to pay, and because of the father’s intransigence throughout the dissolution proceeding. (CP 975-76, 1103)

The trial court found that an award of attorney fees was warranted based on the father’s intransigence throughout the entire dissolution proceeding. The trial court found that the father “acted intransigently by engaging in a serious and ongoing abusive use of the court process by using litigation as a weapon in this divorce. His actions directly caused Ms. Madden to incur substantial attorneys’ fees over and above what she would have otherwise incurred in this divorce. The court finds that Mr. Madden repeatedly filed unnecessary motions; made unsubstantiated, false, and exaggerated allegations against Ms. Madden concerning her fitness as a parent that caused her to incur unnecessary and significant

¹ The father filed two discretionary “appeals” of pre-trial discovery rulings. By the time of trial he had agreed to, but had not yet, dismissed these “appeals”. (RP 630; Ex. 10)

attorneys' fees; and pursued meritless appeals causing substantial expense to Ms. Madden." (FF 2.15, CP 1042-43, *unchallenged*)

The father appeals. (CP 1110)

IV. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion In Designating The Mother As The Primary Residential Parent With Sole Decision-Making And In Ordering The Father To Attend Anger Management Counseling.**

1. **Standard Of Review.**

Trial courts are given broad discretion to fashion a parenting plan based upon the children's best interests, after consideration of the statutory factors. ***Marriage of Jacobson***, 90 Wn. App. 738, 743, 954 P.2d 297, *rev. denied*, 136 Wn.2d 1023 (1998) (*citing Marriage of Littlefield*, 133 Wn.2d 39, 52, 940 P.2d 1362 (1997)). Trial courts are afforded broad discretion in parenting matters "because so many of the factors to be considered can be more accurately evaluated by the trial judge, who has the distinct advantage of seeing and hearing witnesses, and is in a better position to determine their credibility, than the members of an appellate court, who have access only to the printed record on appeal, and to the briefs and argument of counsel." ***Chatwood v. Chatwood***, 44 Wn.2d 233, 240, 266 P.2d 782 (1954). Appellate

courts defer to the trial courts in making these decisions, *Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003), and are “extremely reluctant” to disturb child placement decisions. *Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (citations omitted).

Here, the trial court’s parenting decision designating the mother as the primary residential parent, and placing limited RCW 26.09.191 limitations on the father while still providing him with liberal residential time, was well within its discretion based on the statutory factors and taking into consideration the parties’ parenting abilities, the children’s needs, and the trial court’s credibility determinations.

2. The Trial Court Rejected The Father’s Allegations That The Mother Was Domestically Violent, And Therefore Was Not Required To Impose RCW 26.09.191 Limitations On The Mother And Could Designate Her As The Primary Residential Parent.
(Response to Assignments of Error 1, 2)

First, the father cannot complain on appeal that the trial court erred in failing to impose RCW 26.09.191 restrictions on the mother when he abandoned that claim at trial. (See RP 564-65; FF 2.19, CP 1048) A party waives a challenge on appeal by failing to

pursue the requested relief from the trial court. See **Marriage of Akon**, 160 Wn. App. 48, 60, ¶ 35, 248 P.3d 94, 100 (2011).

Second, after assessing the credibility of the parties, the trial court clearly and summarily rejected the father's allegations that the mother has a "history of domestic violence." (RP 743: "I'm not finding the mother has committed domestic violence or emotional abuse upon the father"; FF 2.19, CP 1044) Credibility determinations are left to the trier of fact and are not subject to review. **Marriage of Burrill**, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003); *see also DewBerry v. George*, 115 Wn. App. 351, 362, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003) (credibility findings should not be subject to review on appeal) (citing **Marriage of Fiorito**, 112 Wn. App. 657, 667, 50 P.3d 298 (2002)). In any event, the father does not assign error to the trial court's credibility finding and it is thus a verity on appeal. **Marriage of Brewer**, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

Below, and in this appeal, the father sets forth incidents that he claims are "undisputed" and are evidence of the mother's "history of domestic violence." (App. Br. 16-17) But his

descriptions are wholly one-sided, exaggerated, and fail to disclose his participation in the conflict. As the trial court found, the father's "testimony was self-serving and demonstrated a lack of understanding of his abusive behavior. He took no responsibility for his actions before or after the parties' separation." (FF 2.19, CP 1044, *unchallenged*)

For example, the father alleges that the mother was domestically violent because she "threatened to cut off [his] genitals during an argument." (App. Br. 16) But the mother explained that this happened after one of the many times that the father aggressively pursued her sexually. The mother testified: "he was demanding of sex. He was rubbing his penis all over me. And it was get it, get it off of me or I will cut it off." (RP 533-34) The mother testified that it was not a "serious threat," she did not have a knife, and she did not actually intend to assault the father. (RP 534) The trial court did not find the mother's exasperated threat to defend herself was domestic violence, and in fact recognized that the father needed to take "responsibility" for his own actions. (See FF 2.19, CP 1044)

The trial court's determination that the mother was not domestically violent was wholly within its province and this court should not re-examine its determination on appeal. Because the trial court did not find that she had a history of domestic violence, the trial court was not required to impose RCW 26.09.191 limitations on her residential schedule and decision-making, and it was within its discretion to designate the mother as the primary residential parent.²

3. RCW 26.09.191 Limitations On The Father Were Warranted Due To His Controlling And Abusive Behavior. (Response to Assignments of Error 8, 9, 10, 11, 12, 13, 14, 15)

The father's challenge to the RCW 26.09.191 limitations imposed on him, which include a requirement that he attend anger management counseling and granting sole decision-making to the mother, is based entirely on findings of fact that the father disputes. But this court accepts the trial court's findings of fact as verities if

² The father also argues that the trial court erred in finding that the mother had been the primary parent during the marriage because "she took the primary role in all parenting functions defined in RCW 26.09.004(3)," (FF 2.19, CP 1045), asserting that this was the "wrong standard" since this provision of the statute defines "permanent parenting plan." (Assignment of Error 16, App. Br. 43) The trial court's finding clearly contains a typo and it intended to cite to RCW 26.09.004(2), which defines "parenting functions." This is not the type of error that warrants reversal.

the findings are supported by substantial evidence in the record. ***Marriage of Thomas***, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). “Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” ***Marriage of Burrill***, 113 Wn. App. at 868. As set forth above in the Restatement of Facts and below, the trial court’s RCW 26.09.191 findings are supported by substantial evidence and should be affirmed.

a. Substantial Evidence Supports The Trial Court’s Determination That The Father Must Engage In Anger Management Counseling Before His Residential Time Is Expanded.

RCW 26.09.191(3)(e) allows the court to impose limitations in the parenting plan if there is evidence that a parent has engaged in the “abusive use of conflict,” “which creates the danger of serious damage to the child’s psychological development.” Here, there is substantial evidence to support the trial court’s determination that the father has engaged in the abusive use of conflict, which warrant RCW 26.09.191(3)(e) limitations such as the anger management counseling that the father was ordered to undergo.

The mother described incidents during the marriage when the father shoved her out of rooms, grabbed her arms, and got

“right up into her face” when he was angry. (RP 259) After separation, the mother described an incident during an exchange at school where the father was angry at the mother and threw the children’s luggage and cursed at her in front of another mother. (RP 351-52) Another time, the parents were attempting to discuss an exchange of personal property, and the father became agitated and cursed at the mother in front of the children. (RP 247)

Although the father in his appeal denies having an anger problem (App. Br. 32), the parenting evaluator testified that she believed that the father has “got a lot of anger that he’s not even aware of sometimes.” (RP 434) The evaluator testified that the father’s anger issues have not improved while the dissolution was ongoing. (RP 435) In her report, the evaluator also noted that for the father “he needs to understand that his anger and feelings of injustice are creating a significant emotional risk for his children. While they are coping with this in the short term, they are showing confusion over why their father is so angry with their mother and they are spending developmental energy worrying about their father’s adjustment rather than focusing on their own.” (Ex. 9 at 20)

The mother also described how the father used the litigation to continue to “bully” her after separation. (RP 339) After the parenting evaluator issued her report and recommended that the father engage in anger management, the father decided to represent himself *pro se* and began filing motion after motion, causing the mother to incur attorney fees to respond. (RP 339) The father also began to relentlessly pursue the mother’s privileged counseling records, requiring the mother to obtain a protective order. (RP 339, 763, 852)

During the father’s *pro se* deposition of the mother, he “hounded” the mother regarding her “gynecological issues.” (RP 329) The mother sobbed through this “intrusive” and “horrible” questioning. (RP 329) Even though the deposition was temporarily stopped so the mother could compose herself, the father continued to question her. (RP 329-30) The father later claimed that his questions regarding the mother’s “genitalia” were relevant because of his concern “she will repress the boys’ sexual development.” (RP 647)

Based on this evidence, and the facts set forth in the Restatement of Facts, there was substantial evidence to support

the trial court's imposition of RCW 26.09.191 limitations against the father, and that he should be ordered to engage in anger management counseling.

b. Substantial Evidence Supports The Trial Court's Determination That The Mother Should Be Granted Sole Decision-Making.

A trial court has authority to grant sole decision-making to one parent if "one parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection." RCW 26.09.187(b)(2)(iii). The criteria for sole decision-making includes: (i) The existence of a limitation under RCW 26.09.191; (ii) The history of participation of each parent in decision making; (iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making; and (iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions. RCW 26.09.187(2)(c)(i)-(iv).

After consideration of the statutory factors, the trial court properly ordered that sole decision-making should be granted to the mother. (CP 1082-83) The trial court found that "[g]iven the history of conflict and Mr. Madden's refusal to follow the recommendations

of the children's treating professionals, the court finds that the children would be negatively impacted by a requirement that the parties engage in joint decision-making." (FF 2.19, CP 1044) While the father denies that he has engaged in the abusive use of conflict, as set forth previously, there is substantial evidence to support this determination. (See also RP 328: "[The father's] decision-making is clouded by his anger at [the mother]") The father does not deny that he has refused the recommendation of the children's treating professionals, but even if he had, there is also substantial evidence to support that finding.

The father has refused to allow the mother to have the children receive flu shots even though their pediatrician recommended it. (RP 108) The father also refused to allow the children to receive certain immunization shots even though the pediatrician insisted on it, and "lectured" the mother on the risk of not having the children immunized. (RP 108-09) Finally, the father continuously challenged the mother's treatment of the children's constipation even though she followed the recommendation of both the children's pediatrician, and of her father, who is also a pediatrician. (RP 109-10)

Based on this evidence, the trial court properly granted sole decision-making to the mother after consideration of RCW 26.09.191(3)(e) and RCW 26.09.187(2)(b), (c).

B. The Trial Court Properly Entered A Continuing Restraining Order Against The Father Based On The Mother's Reasonable Fear Of Harm. (Response to Assignment of Error 6)

RCW 26.09.050(1) explicitly authorizes a trial court to issue *any necessary continuing restraining orders* when it enters the decree of dissolution of marriage. A trial court also has broad equitable powers to fashion remedies appropriate to each case. Kenneth W. Weber, 20 Washington Practice: Family and Community Property Law, § 41.3 at 524 (1997).

Here, the trial court found that the mother “has a reasonable fear of harm from the husband based upon a history of controlling behavior, and abusive use of conflict, and an inability to control his anger.” (FF 2.13, CP 1042) Evidence of the father’s controlling and abusive behavior described in this finding is replete in the record. (See *Restatement of Facts*, § B, C) The mother testified that she feared that without the restraints, the father would continue to try to confront her after the divorce, and that she felt “safer” knowing that he could not go to her home. (RP 350-51) The

mother testified of her fear of the father's escalating anger, over which he has little control. (RP 353) Because of the father's constant insistence that the family residence was "his" house, the mother feared that the father would return to the home "at will," and "make waves." (RP 352) The mother was afraid that another situation could arise where the police might be called and the father might once again falsely accuse *her* of domestic violence. (RP 352) Based on the mother's testimony, there was substantial evidence to support the trial court's imposition of a continuing restraining order on the father.

C. The Trial Court Properly Limited The Scope Of The Discovery Sought By The Father. (Response to Assignment of Error 3)

"The trial judge possesses broad discretion to manage discovery in a fashion that will implement the philosophy of full disclosure of relevant information and at the same time afford protection against harmful side effects." *State v. Hamilton*, 24 Wn. App. 927, 935-36, 604 P.2d 1008 (1979), *rev. denied*, 94 Wn.2d 1007 (1980) (*citing* 4 J. Moore and J. Lucas, Moore's Federal Practice § 26.67 (2d ed. 1979)). "To that end, the court can issue protective orders regulating the extent and manner of discovery."

Hamilton, 24 Wn. App. at 936. Further, trial courts are “given reasonable discretion in determining how far a party should be required to go in answering interrogatories.” *deLisle v. FMC Corp.*, 57 Wn. App. 79, 87, 786 P.2d 839, *rev. denied*, 114 Wn.2d 1026 (1990).

Here, the trial court properly granted the mother a protective order limiting the father’s discovery requests to those set forth in the King County Bar Association pattern interrogatories and requests for production designed for family law litigation, plus an additional 10 interrogatories and 5 requests for production. (CP 764) The father had previously sought answers to “over 800+ interrogatories [] more than 85 requests for productions, and insist[ed] upon production of over 10-15+ years of records” from the mother, even though their marriage only lasted twelve years. (CP 380) The trial court properly limited the father’s discovery after it found that the father’s discovery was “overburdensome and an inappropriate use of the discovery process.” (CP 764)

While the father complains that the expanded discovery he sought was needed to “further repudiate the court’s finding that I had a history of financially controlling behavior” (App. Br. 24), he

does not set forth what discovery he was deprived of that would have supported his position. The father states that “access to credit card statements, checking account balances, cancelled checks and payment histories would further show that Karen spent freely and I paid her bills.” (App. Br. 24) But there was no evidence that the records requested, even if relevant, “were not obtainable by any other means.” (App. Br. 24) It is undisputed that the father’s name (and sometimes his alone) was on the parties’ bank accounts and credit cards. He could have sought the same information directly from the financial institutions. The trial court did not abuse its discretion in limiting the father’s overburdensome discovery.

D. The Trial Court Properly Denied The Father’s Discovery Request For The Mother’s Privileged Counseling Records. (Response to Assignment of Error 5)

The trial court properly denied the father’s request for the mother’s counseling records because they were privileged under RCW 5.60.060. (CP 764, 852-53) A trial court’s decision to maintain the confidentiality of counseling records is discretionary. ***Marriage of True***, 104 Wn. App. 291, 296-97, 16 P.3d 646 (2000). “Absent proof of a compelling need or relevance, the statutory

privilege between counselor and patient, or physician and patient, prohibits the discovery of counseling records.” *True*, 104 Wn. App. at 296-97.

The father’s reliance on *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 878 P.2d 483 (1994) (App. Br. 27) to claim that the mother’s counseling records were not privileged is misplaced. In that case the parties were joint patients, which is not the case here. Here, the mother denied that the parties engaged in “joint” counseling with the counselor from whom the father sought discovery. (CP 810) The mother asserted that this counselor was her “individual” counselor, and that their relationship was still ongoing. (CP 810) The mother expressed concern that the father’s rabid pursuit of discovery “undermines the confidentiality of my counseling relationship with [the counselor] and detracts from my ability to have some emotional support during this difficult divorce.” (CP 810) The father apparently believes that he was in “joint counseling” because he was present for a limited number of the mother’s appointments. But the mother explained that his presence was so that she “could address some of my concerns about our marriage in a supportive environment,” but that

it was not joint counseling. (CP 810) Further, the counselor indicated that she only had records that were personal to her counseling relationship with the mother. (CP 810)

Even if these limited sessions were considered “joint counseling,” the trial court properly denied the discovery when the father admitted that “he didn’t really care about what was in [the records],” and that he only wanted the records to “prove” the mother was “lying” and that the parties had in fact engaged in “joint” counseling and not “individual” counseling as the mother asserted. (RP 576; *see also* CP 820) In an unchallenged finding the trial court found that the mother “appropriately sought counseling and medication for situational depression,” which does not affect her ability to parent. (FF 2.19, CP 1045) The trial court properly denied the father’s request for the mother’s counseling records.

E. The Trial Court Did Not Abuse Its Discretion In Excluding Handwritten Calendars That The Father Claimed Proved He Was The “Primary Parent.”
(Response to Assignment of Error 4)

“A trial judge has considerable discretion to exclude evidence,” and its decision will only be overturned if the judge abused his discretion. *Marriage of Zigler and Sidwell*, 154 Wn. App. 803, 814, ¶ 26, 226 P.3d 202, *rev. denied*, 169 Wn.2d 1015,

236 P.3d 895 (2010). Here, the trial court properly excluded “family calendars” with handwritten notations as an exhibit, which the father claimed would “corroborate” his testimony that he was the “primary parent.” (App. Br. 24) **Griffith v. Whittier**, 37 Wn.2d 351, 355, 223 P.2d 1062 (1950) (holding that it “extremely doubtful” that a calendar with handwritten notations would be admissible evidence, as it is “not a book of account or business record,” and it is largely being offered as a “self-serving declaration”).

In excluding this evidence, the trial court properly recognized that the calendars were not particularly probative. At trial, the father attempted to use these calendars to calculate how much time the mother was outside of the home, based on handwritten notations on the calendar. (RP 378-79, 669-71) But as the trial court accurately noted, the calendars did not set forth times for any particular event (RP 670), and the trial court was properly skeptical of the father’s claim that he could “interpret” the calendars in order to determine how long the mother was absent from the home:

So you’re saying that your client was able to look at calendar here, now in [] December of 2010 and look at a calendar of September of 2007, three years ago, and remember exactly how long someone was absent from the home?

(RP 670) Further, the trial court found that in light of the fact that both parties were conceding that the other parent should have “substantial” residential time (even though each parent also sought to be designated the primary residential parent), the calendars were “not gonna be the factor that sways me one way or another.” (RP 379)

The mother also explained that the calendars were used so the family “could be aware of events that are coming up during the week,” and would not be an accurate depiction of her time away from the children simply by the father “assigning an hour value” to each event. (RP 347) The mother also testified that some of the handwriting on the calendars was not her own and she could not be sure that the calendars were authentic and had not been altered. (RP 347)

Because the calendars were not authenticated and had limited probative value, the trial court did not abuse its discretion in refusing to admit the calendars at trial.

F. The Trial Court Properly Awarded Attorney Fees To The Mother Based On The Father's Intransigence. (Response to Assignment of Error 7)

The trial court did not abuse its discretion in awarding attorney fees to the mother based on the father's intransigence. The father complains about the trial court's award of attorney fees to the mother based on his claim that her father is a "wealthy physician" and "happy" to pay her attorney fees. (App. Br. 32) But even if a third party's willingness to pay attorney fees was a factor the court could consider, when intransigence is involved, the financial resources of the parties do not matter. ***Marriage of Crosetto***, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). When attorney fees are based on intransigence, the burden of proving the trial court exercised its discretion in a way that was clearly untenable or manifestly unreasonable is on the party challenging the award. ***Crosetto***, 82 Wn. App. at 563.

In making its attorney fee award, the trial court found the father was intransigent by engaging in a "serious and ongoing abusive use of the court process by using litigation as a weapon in this divorce," including by making "unsubstantiated, false, and exaggerated allegations against Ms. Madden concerning her fitness

as a parent,” and pursuing “meritless appeals causing substantial expense to Ms. Madden.” (FF 2.15, CP 1042-43) The father does not challenge these findings, but instead argues that the parties’ CR 2A Agreement somehow limited the trial court’s ability to award attorney fees to only intransigence that occurred *after* the CR2A Agreement was signed. (App. Br. 33) The CR2A Agreement was not so limited. The only limitation was that the mother could only pursue fees that were incurred starting with her preparation for the settlement conference through trial, plus any fees she incurred to respond to the father’s abandoned attempts to pursue discretionary review of the trial court’s discovery orders:

The request for attorney fees for preparation for the settlement conference and thereafter for trial is reserved for trial or further agreement. Attorney fees for preparation & attendance at the settlement and preparation & attendance at trial are reserved. Award of attorney fees regarding the Court of Appeals appeals filed by Marr are reserved for further agreement or trial.

(Ex. 10) This did not limit the trial court from considering the father’s behavior before this period in deciding whether to award attorney fees.

In any event, the father’s intransigence was ongoing. Up until trial, the father aggressively pursued RCW 26.09.191

limitations on the mother based on the father's "unsubstantiated, false, and exaggerated allegations." (FF 2.15, CP 1042) The mother incurred substantial legal fees preparing for trial to adequately defend herself from these allegations. (CP 1170) The father had also disclosed that he intended to examine a large number of witnesses at trial. The mother's attorney had to spend considerable time preparing to address any testimony offered by these witnesses, only to have the father withdraw these witnesses at the last minute. (See CP 1170)

Further, the Agreement allowed the court to award attorney fees to the mother for having to address the father's attempts to pursue discretionary review of the trial court's two discovery orders that he now challenges on appeal. (Ex. 10) Although the father later agreed to dismiss review, this did not happen until well after the mother had already incurred significant legal fees to first research the Court of Appeals' authority to address the relief requested by the father (since he originally sought review as a matter of right), but then to substantively address his challenges when the father filed a Motion for Discretionary Review after this court ruled he could not pursue an appeal. (CP 1171) While these

“appeals” were ultimately voluntarily dismissed, they still caused the mother to incur substantial legal fees. (CP 1171) In contrast, the father did not incur one cent in legal fees related to his “appeals” because he represented himself *pro se* in those actions, as he does here.

The father’s intransigence increased the mother’s legal fees, and the trial court did not abuse its discretion in making its award. ***Marriage of Burrill***, 113 Wn. App. 863, 873-74, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003); *see also Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992) (award of fees is warranted when one party made the trial unduly difficult and increased legal costs for the other party by his actions). And, in any event, the trial court only awarded the mother a fraction of what she actually incurred during this period.

The trial court did not abuse its discretion in awarding these fees to the mother, nor was it required to segregate which fees related to the father’s intransigence and which did not. “Where a party’s bad acts permeate the entire proceedings, the court need

not segregate which fees were incurred as a result of intransigence and which were not.” *Burrill*, 113 Wn. App. at 873.

G. This Court Should Award Attorney Fees To The Mother.

This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). This court should award attorney fees to the mother because she has the need for her fees to be paid and the father has the ability to pay. RAP 18.1; RCW 26.09.140 (court may award fees considering the financial resources of the parties on any appeal).

This court should also award attorney fees to the mother based on the father’s continued intransigence. The trial court found the husband acted intransigently “by engaging in a serious and ongoing abusive use of the court process by using litigation as a weapon in the divorce.” (FF 2.15, CP 1042-43) This appeal is simply an extension of the intransigent conduct found by the trial court, warranting an award of attorney fees in this court. See *Chapman v. Perera*, 41 Wn. App. 444, 456, 704 P.2d 1224, *rev. denied*, 104 Wn.2d 1020 (1985) (awarding attorney fees to the

respondents based on appellants' excessive filing of various motions in the trial court and appellate court while the appeal was pending and because the appeal lacked little merit).

The father pursues frivolous litigation in this court representing himself, and is not constrained by the cost of litigation. While most litigants perceive the potential expense of attorney fees as a constraint before pursuing a frivolous appeal, the appellant has no such "check." The mother's only option is to either allow the appeal to go unchallenged or pay even more attorney fees to an attorney to advocate on her behalf in the appellate court. The mother asks the court to order appellant to pay her attorney fees for his intransigence, so that in the future he might think twice before pursuing frivolous litigation in court.

V. CONCLUSION

The trial court's parenting plan, its evidentiary rulings, and its award of attorney fees based on the father's intransigence, were well within the trial court's discretion and supported by substantial evidence. This court should affirm and award attorney fees to the mother.

Dated this 6th day of October, 2011.

MCKINLEY IRVIN, PLLC

SMITH GOODFRIEND, P.S.

By:  _____

By:  _____

Justin M. Sedell
WSBA No. 36872

Valerie A. Villacin
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Attorneys for Respondent

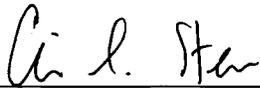
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 6, 2011, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Justin M. Sedell McKinley Irvin, PLLC 425 Pike Street, Suite 500 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Marr Paul Madden 10426 SE 25th Street Bellevue, WA 98004	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

DATED at Seattle, Washington this 6th day of October, 2011.



Carrie L. Steen

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DEPARTMENT OF
JUDICIAL ADMINISTRATION
KING COUNTY, WASHINGTON

Superior Court of Washington
County of King

In re the Marriage of:

KAREN LYNN MADDEN

No. 09-3-08031-7 SEA

and

Petitioner,

Findings of Fact and
Conclusions of Law
(Marriage)
(FNFCL)

MARR PAUL MADDEN

Respondent.

I. Basis for Findings

The findings are based on trial. The following people attended:

- The petitioner, Karen Madden
- The respondent, Marr Madden
- The petitioner's attorney, Justin M. Sedell
- The respondent's attorney, Barry D. Rose

Trial lasted five days. It began on November 29 through December 2, 2010 and resumed/finished on December 10, 2010. During trial, the following witnesses testified on behalf of the petitioner, Karen Madden:

- Wanda Yamashita
- Dr. Jim Tedford
- Eileen Vierra

Fndngs of Fact and Concl of Law (FNFCL) - Page 1 of 14
WPF DR 04.0300 Mandatory (6/2008) - CR 52; RCW 26.09.030;.070(3)

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- Eileen Chen
- Kristin Robinson
- Kim Conn
- Andrea Arnone

The court-appointed parenting plan evaluator, Margo Waldroup, testified on behalf of both parties.

A written stipulation was entered by the parties in lieu of live testimony by the respondent's witnesses. This stipulation was offered in lieu of the testimony of Megan March, Tony Vierra, and Paul Doherty. A copy of the stipulation was filed in the court file. The court accepted this stipulation. The parties agreed that the fact that this stipulation was used instead of live testimony by the respondent's witnesses should not be construed against the respondent in any way. Accordingly, the court did not construe this against Mr. Madden in any way and accepted the contents of the stipulation as if it were testified to by the above three individuals.

II. Findings of Fact

Upon the basis of the court record, the court *Finds*:

2.1 Residency of Petitioner

The Petitioner is a resident of the State of Washington.

2.2 Notice to the Respondent

The respondent was properly served and responded to the petition.

2.3 Basis of Personal Jurisdiction Over the Respondent

The facts below establish personal jurisdiction over the respondent:

The respondent is currently residing in Washington.

The parties lived in Washington during their marriage and the petitioner continues to reside in this state.

The parties may have conceived a child while within Washington.

2.4 Date and Place of Marriage

The parties were married on October 11, 1997 at San Luis Obispo, California.

1 **2.5 Status of the Parties**

2 The parties separated on December 28, 2009.

3
4 **2.6 Status of Marriage**

5 The marriage is irretrievably broken and at least 90 days have elapsed since the date the
6 petition was filed and since the date the summons was served.

7 **2.7 Separation Contract or Prenuptial Agreement**

8 There was no prenuptial agreement between the parties.

9 The parties signed a CR2A settlement agreement on November 9, 2010. They are also
10 preparing a Property Settlement Agreement incorporating the provisions contained within
11 the CR2A Agreement. The parties shall finalize their Property Settlement Agreement
12 within 30 days or else submit the remaining disputes concerning the terms of the Property
13 Settlement Agreement to binding arbitration with Howard Bartlett. Any remaining
14 disputes not resolved in binding arbitration shall be resolved via motion before this court.

15 Once the Property Settlement Agreement is executed by the parties then a copy shall be
16 filed in the court file. Pending execution of the Property Settlement Agreement, the
17 parties' CR2A Agreement shall survive entry of the Decree of Dissolution and shall
18 remain in full force and effect. Either party shall have the right to enforce the terms of
19 the CR2A Agreement and/or Property Settlement Agreement.

20 **2.8 Community Property**

21 The parties have real or personal community property as set forth in the CR2A
22 Agreement and Property Settlement Agreement referenced above.

23 **2.9 Separate Property**

24 The parties have separate property as set forth in the CR2A Agreement and Property
25 Settlement Agreement referenced above.

26 **2.10 Community Liabilities**

27 The parties have community liabilities as set forth in the CR2A Agreement and Property
28 Settlement Agreement referenced above.

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2.11 Separate Liabilities

The parties have separate liabilities as set forth in the CR2A Agreement and Property Settlement Agreement referenced above.

2.12 Maintenance

Maintenance was not requested.

2.13 Continuing Restraining Order

The wife requested a continuing restraining order against the husband. The court finds that the wife has a reasonable fear of harm of the husband based upon a history of, controlling behavior, an abusive use of conflict, and an inability to control his anger.

The court finds that a continuing restraining order should be entered to protect the wife from the husband for a period of five (5) years. The respondent shall be restrained and enjoined from disturbing the wife's peace, going on to the grounds of or entering her home, work place, or school; or knowingly coming within or remaining within 1000 feet of her home, work place, or school.

The wife shall have the right to move the court to extend the expiration of these restraints before it expires. This motion may be filed on the Family Law Motions Calendar. When deciding the issue, the court shall apply the same standard applied to the renewal of domestic violence protection orders.

2.14 Protection Order

Does not apply.

2.15 Fees and Costs

The wife requested that the court award her attorneys' fees. Prior to trial, the parties reached a written settlement agreement resolving many of their disputes. One of the remaining issues for the court's determination, however, was whether and in what amount the wife should be awarded legal fees payable by the husband to reimburse her for the fees that she incurred between the time that she began preparing for the settlement conference that occurred in this case and finalization of the divorce, plus any fees associated with the appeals previously filed by Mr. Madden.

The court finds that attorney's fees should be paid by Mr. Madden. The court finds that Mr. Madden acted intransigently by engaging in a serious and ongoing abusive use of the court process by using litigation as a weapon in this divorce. His actions directly caused Ms. Madden to incur substantial attorneys' fees over and above what she would have

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1 otherwise incurred in this divorce. The court finds that Mr. Madden filed unnecessary
2 motions; made unsubstantiated, false, and exaggerated allegations against Ms. Madden
3 concerning her fitness as a parent that caused her to incur unnecessary and significant
4 attorneys' fees; and pursued meritless appeals causing substantial expense to Ms.
5 Madden.

6 Although Mr. Madden argues that Ms. Madden's family should pay for her legal fees, the
7 court rejects this argument. Ms. Madden's family should not have any legal obligation to
8 pay for the legal fees that Mr. Madden's behavior caused Ms. Madden to incur.

9 The court grants Ms. Madden's request for legal fees. Therefore, the remaining issue is
10 the amount of fees that should be awarded. Within 30 days of the date that these
11 Findings of Fact are entered, Ms. Madden shall file a motion without oral argument
12 requesting that the court set a fixed sum for the fees awarded to her. In support of her
13 motion, Ms. Madden shall submit an attorney fee declaration ~~and copies of attorney~~
14 ~~billing statements. Pursuant to Ms. Madden's request, the court will review these billing~~
15 ~~statements in camera without disclosure to Mr. Madden in order to maintain the attorney-~~
16 ~~client privileged information contained within the billing statements. Mr. Madden shall~~
17 have the opportunity to respond to Ms. Madden's motion in writing (pursuant to the
18 standard LR 7 motion procedures) and Ms. Madden may submit a reply. The court will
19 then issue its judgment and order without oral argument.

20 **2.16 Pregnancy**

21 The wife is not pregnant.

22 **2.17 Dependent Children**

23 The children listed below are dependent upon either or both spouses:

Name of Child	Age	Mother's/Father's Names
Brendan	10	Karen Madden Marr Madden
Alexander	10	Karen Madden Marr Madden
Spencer	6	Karen Madden

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3 **2.18 Jurisdiction Over the Children**

4 This court has jurisdiction over the children for the reasons set forth below:

5 This state is the home state of the children because the children lived in
6 Washington with a parent or a person acting as a parent for at least six
7 consecutive months immediately preceding the commencement of this
8 proceeding.

9 Any absences from Washington have been only temporary.

10 The children and the parents have significant connections with the state other than
11 mere physical presence; substantial evidence is available in this state concerning
12 the children's care, protection, training and personal relationships; and the
13 children have no home state elsewhere.

14 No other state has jurisdiction.

15 **2.19 Parenting Plan**

16 The Parenting Plan was the primary contested issue at trial. The court heard extensive
17 witness testimony, reviewed documentary evidence offered by both parties, and
18 considered the written report and oral testimony of the court-appointed parenting plan
19 evaluator, Margo Waldroup. In general, the court found Ms. Madden to be a credible,
20 open, and honest witness. The court believes that she has been forthright and honest with
21 the court and the parenting plan evaluator throughout this case. To the contrary, the court
22 did not find Mr. Madden to be a credible witness. His testimony was self-serving and
23 demonstrated a lack of understanding of his abusive behavior. He took no responsibility
24 for his actions before or after the parties' separation.

25 Based upon the evidence presented at trial, the court makes the following findings
concerning parenting:

- At all times since the children were born, Ms. Madden was a stay-at-home parent whose primary responsibility was for the parties' three sons.
- The court finds that Mr. Madden was an involved father and loves his children very much, but he worked full-time. The primary, day-to-day child-rearing responsibilities were borne by Ms. Madden while Mr. Madden worked full-time to support the family.
- The court rejects the father's testimony that the mother was routinely "absent"

1 from the home and that he was primarily responsible for the children's care while
2 the mother was nowhere to be found. Instead, the court finds that the mother was
3 involved in parenting-related activities such as the "Eastside Mothers of
4 Multiples" group and church-related parenting activities that directly or indirectly
5 benefitted the three boys. She took the boys with her to many of these activities.
6 Like any family, Mr. Madden sometimes cared for the children while Ms.
7 Madden went out to run errands or attend a function, but this was not any more
8 frequent than would be expected in a family with a stay-at-home parent. It is not
9 unusual for a primary caregiver to ask the other parent to watch the children for a
10 few hours on occasion while she goes to the supermarket, etc. This did not
11 detract from Ms. Madden's role as the children's primary caregiver.

- 12 • In contrast to the mother's history as a homemaker during the parties' marriage,
13 the father worked full-time. Although he worked from home for a portion of the
14 marriage, the court finds that his job precluded him from actively caring for the
15 boys in the same way that Ms. Madden did.
- 16 • Ms. Madden was the parent primarily responsible for taking the children to their
17 medical and dental appointments, administering discipline, researching and
18 choosing their schools, setting up and attending the children's play dates,
19 attending to the children's daily needs, managing their nutritional needs and
20 meals, and otherwise generally took the primary role in all parenting functions
21 defined in RCW 26.09.004(3). This is not to say that the father did not also take
22 part in some of these functions; rather, the court finds that the mother was the
23 parent who primarily performed these necessary and important parenting
24 functions for the children.
- 25 • Ms. Madden is attending school in the evenings so that she can become a school
teacher. Meanwhile, she plans to open an in-home day care. Both of these
careers will allow her to remain at home with the boys and will directly benefit
them by allowing her to provide their care instead of relying upon day care or
third parties.
- Throughout this litigation and at trial, Mr. Madden has argued that Ms. Madden's
mental health is detrimental to the children. He argues that she has serious
depression and anxiety issues which hinder her ability to provide appropriate care
for the children. The court rejects this argument in its entirety. Again, Mr.
Madden relies solely upon his own self-serving testimony in support of this
argument. The psychological testing performed by Dr. Marsha Hedrick as part of
the parenting plan evaluation by Ms. Waldroup did not uncover any mental illness
and it is clear that Ms. Madden has appropriately sought counseling and
medication for situational depression. While Mr. Madden repeatedly stated
during trial that he did not believe Ms. Madden to be an "unfit parent," he
continually denigrated her and argued that her mental health precluded her from
being the children's primary caregiver.
- In determining an appropriate residential schedule for the children, the court
closely considered the factors set forth in RCW 26.09.187(3)(a). Specifically, the
court finds:

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- Ms. Madden was the children's primary caregiver and attachment figure. The court considered the evidence presented concerning each party's relative strength, nature, and stability of their relationship with the children and clearly finds as explained above that Mr. Madden also has a strong bond with the children, but it does not surpass Ms. Madden's role as their primary caregiver throughout their entire lives. Pursuant to statute, this factor was given the most weight in the court's analysis.
 - The parties did not reach any agreements concerning a final parenting plan.
 - Ms. Madden has taken greater responsibility for performing parenting functions related to the daily needs of the children both before and after the parties' separation. She also has the stronger potential to continue providing that same level of hands-on care given her career plans that will allow her to remain at home with the boys when they are not at school.
 - The emotional needs and developmental level of the children was considered and favors both parties. There is no doubt that these children love both their parents and want to spend time with both of them. Still, the court finds that the children's primary attachment figure is their mother and that remaining primarily in her care better serves their emotional and developmental needs. At the same time, their best interests are served by having regular residential time with their father.
 - The children's relationship with other family members, physical surroundings, school, and activities were considered, but this is unlikely to change based upon which parent provides for the majority of their care.
 - The court considered the wishes of the boys as expressed through Margo Waldroup. They asked to spend additional residential time with their father. The final parenting plan increases the amount of time that the children will spend with their father when the father completes treatment and as the children mature. The court does not find it appropriate, despite a statement from one child that "50/50 is fair", a sufficient basis to impose an equally shared residential schedule at this time. The children are not sufficiently mature to decide upon an appropriate residential schedule that serves their best interests, nor should they ever be put in a position where they have to choose between their parents. Nonetheless, the court did consider their stated desire to spend more time with their father.
 - The wishes of the parents were made clear during trial. The father testified that he wanted to have the children "51% of the time" as stated in his proposed parenting plan so that he would receive the family residence in the divorce. (The parties' written settlement agreement provides that the parent with whom the children reside the majority of the time will be awarded the family home after buying out the other parent's interest. It also provides that the mother will be awarded the family home if the court adopts a 50:50 parenting plan at trial). While he said that it was in the

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children's best interests to adopt his parenting plan, he could not elaborate on this other than to repeatedly bring up his desire to be awarded the home.

- The court rejects the argument that Ms. Madden is not capable of maintaining the home for herself and the children. The photographs produced by Mr. Madden at trial do not support his claim that Ms. Madden is a "hoarder" or that the home is dangerous or unsuitable for children. The court finds that Ms. Madden can continue to provide a safe, suitable, and appropriate home for the children.
- The parents' employment schedules are addressed above. This factor weighs in Ms. Madden's favor as she will be able to continue providing in-home care for the children and has based her future career plans around the children's needs. She has already taken active steps toward these future career plans by enrolling in night school to obtain her teaching degree and by applying for a day care license for her in-home day care business.
- On December 28, 2009 when Mr. Madden was arrested for assaulting Ms. Madden at the family home. Although these charges were later dismissed by the Prosecuting Attorney, this does not lead to Mr. Madden's stated conclusion that it did not occur. There is an entirely different standard of proof in a criminal case than there is in a civil family law case. Based upon the evidence presented at trial, this court finds that Mr. Madden assaulted Ms. Madden on December 28, 2009 by grabbing her by the arms and shoving her out of the room.
- Mr. Madden was emotionally abusive throughout the marriage. The court finds that Mr. Madden repeatedly and wrongfully removed Ms. Madden from the community bank account that contained funds belonging to both parties. This caused Ms. Madden to fear not having sufficient funds to pay her bills and further caused her to become more dependent upon Mr. Madden. Although he voluntarily restored her to the bank account after the first time that he removed her, Ms. Madden had to obtain an ex parte restraining order requiring him to restore her before he would do so the second time.
- The court rejects Mr. Madden's argument that he removed Ms. Madden from the community bank accounts in order "to protect the family" and to stop Ms. Madden from absconding with the children. There is no evidence other than Mr. Madden's own testimony (which the court did not find credible) that Ms. Madden ever threatened to kidnap the children or move away without Mr. Madden's consent.
- Mr. Madden was verbally abusive toward Ms. Madden and sexually humiliated her in front of her family and others. He admittedly contacted her family members and complained that Ms. Madden would not perform oral sex on him and/or have sex with him with the frequency that he desired. Ms. Madden testified that this was humiliating to her. Further, Mr. Madden would tell people that Ms. Madden was "asexual" because she did not want to have sexual contact with him, further causing her additional humiliation and shame.

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- Even post-separation, Mr. Madden has continued to send verbally abusive emails to Ms. Madden, several of which were admitted into evidence at trial. The court further finds that Mr. Madden has continued to act abusively toward Ms. Madden while this divorce has been pending. He also acted inappropriately by monitoring Ms. Madden's voicemails after moving out of the family home.
- Mr. Madden has abusively used conflict as a weapon in this divorce to the detriment of the children. He has allowed his anger toward Ms. Madden to cloud his judgment and has involved the children in this litigation by repeatedly telling them about the status of this case, the results of hearings, what was said in written documents submitted to the court, and other matters that they should not have been involved in whatsoever. In contrast, the court finds that Ms. Madden has done her best to shelter the children from this information and protect them from being put in the middle of the warring parties.
- Mr. Madden has repeatedly disparaged Ms. Madden in front of the boys. He even did this in front of the court-appointed parenting plan evaluator, Margo Waldroup. This is absolutely inappropriate and causes a serious risk to the boys and to their relationship with their mother.
- Mr. Madden has abused the litigation process and used it as a weapon in this divorce by repeatedly filing baseless motions, meritless appeals, and abusing the discovery process. He pursued baseless claims for restrictions under RCW 26.09.191 against Ms. Madden up until the day of trial when he suddenly changed his requests and asked for 51% of the residential time with the boys without any restrictions against Ms. Madden.
- Mr. Madden claims that Ms. Madden's gynecological health impacts her ability to provide appropriate care for the boys and that her refusal to have sex with him or engage in sexual activity with him at his preferred frequency will impact their sons' sexual development. No proof or evidence of any sort was offered in support of these claims and the court finds it to be further evidence of Mr. Madden's abusive behavior toward Ms. Madden.
- Even after being sanctioned by the court and being barred from attempting to access Ms. Madden's privileged records by a protective order, Mr. Madden continued to abuse the litigation process. The court finds that Mr. Madden's abusive use of conflict has negatively impacted the boys and creates a serious risk of ongoing psychological harm.
- Given this abusive use of conflict, the court finds that it is appropriate to enter a finding pursuant to RCW 26.09.191 against Mr. Madden.
- Ms. Waldroup's report was completed in early July 2010. Both parties admit that the conflict between them has substantially increased since that time. Even Ms. Waldroup indicated in her oral testimony that she was concerned about the impact of this increased conflict on her recommendation for an equally shared residential schedule.
- The court adopts Ms. Waldroup's recommendation for Mr. Madden to successfully complete an anger management course with Lou Orsan at his sole expense. Mr. Madden must immediately enroll in this program and provide

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1 proof to the mother that he has done so. He shall sign a release authorizing the
2 program to send regular treatment progress reports to the court file, Ms. Madden,
3 and her attorney.

- 4 • Until Mr. Madden successfully completes the above program, the court finds that
5 it is in the children's best interests for the residential schedule to remain the same
6 as it is under the Temporary Parenting Plan. If Mr. Madden fails to comply with
7 the above provision, Ms. Madden may file a motion requesting that his residential
8 time be curtailed until he has complied and successfully completed these
9 requirements (in addition to her ability to move for contempt).
- 10 • Mr. Madden previously completed 6 hour online anger management course. The
11 Court finds that this is insufficient and does not satisfy the court's treatment
12 requirements contained in these Findings and in the Final Parenting Plan.
- 13 • Sole decision-making authority is awarded to Ms. Madden for two reasons. First,
14 sole decision-making is mandated under RCW 26.09.191 and RCW
15 26.09.187(2)(b)(i) due to the findings of abusive use of conflict. In addition, the
16 court finds Ms. Madden's request for sole decision-making to be reasonable under
17 RCW 26.09.187. Given the history of conflict and Mr. Madden's refusal to
18 follow the recommendations of the children's treating professionals, the court
19 finds that the children would be negatively impacted by a requirement that the
20 parties engage in joint decision-making. After considering the factors set forth in
21 RCW 26.09.187 and after making findings pursuant to RCW 26.09.191, the court
22 finds that sole decision-making should be awarded to Ms. Madden and is in the
23 children's best interests.
- 24 • Ms. Waldroup recommended that the parties engage Karin Ballantyne as a
25 "parenting coach" to help facilitate decision-making. Mr. Madden requested that
the court adopt this request and offered to pay for Ms. Ballantyne's services as
long as there was a financial cap. Since the court is awarding sole decision-
making to Ms. Madden, it is unclear what services Ms. Ballantyne's can provide.
Nonetheless, if both parties agree to use Ms. Ballantyne's services for any reason
other than to facilitate decision-making and Mr. Madden pays for 100% of this
service, then that is acceptable to the court. However, the parenting coach shall
not be used to limit Ms. Madden's sole decision-making authority for the children
in any way. Either parent may elect to terminate the services of the parenting
coach at any time.

Based upon the above findings, the court finds that the parenting plan entered on today's
date is in the children's best interests.

2.20 Child Support

There are children in need of support and child support should be set pursuant to the
Washington State Child Support Schedule. The Order of Child Support with child
support worksheets signed by the court on this date is incorporated by reference in these
findings.

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2 The parties resolved most child support matters in their settlement agreement. The
3 remaining issues for the court to decide were: (1) which party should be labeled the
4 obligor and which should be the obligee; and (2) whether there should be any deviation
5 from the standard calculation of child support. The parties already agreed to the terms of
6 the child support worksheets, which the court approves and adopts.

7 Given the determination that Ms. Madden will be the children's primary caregiver, Mr.
8 Madden shall be the obligor for child support purposes and Ms. Madden shall be the
9 obligee. In other words, Mr. Madden shall be ordered to pay child support to Ms.
10 Madden.

11 The parties offered testimony and documentary evidence in support of their financial
12 positions. Mr. Madden argued that he should be granted a residential credit pursuant to
13 RCW 26.19.075(d). Pursuant to this statute, the court may grant a deviation if the
14 children spend a significant amount of time with the obligor and if the deviation will not
15 result in insufficient funds to the obligee's household. Further, case law provides that the
16 obligor must demonstrate that he will incur increased costs for the children due to the
17 residential schedule that will correspondingly decrease costs to the obligee. *See State ex*
18 *rel. Sigler v. Sigler*; 85 Wn. App. 329, 338 (1997).

19 Mr. Madden did not offer any evidence whatsoever that the residential schedule will
20 result in him incurring additional costs for the children over and above what is generally
21 expected from a nonresidential parent and/or that these costs would decrease the costs to
22 be paid by Ms. Madden. Furthermore, the court specifically finds that any reduction
23 from the standard calculation of child support would be a serious financial hardship to
24 Ms. Madden and would result in insufficient funds to her household. Therefore, Mr.
25 Madden's request for a deviation is denied.

Mr. Madden shall pay child support to Ms. Madden using the standard calculation as
determined in the child support worksheets adopted by the court.

2.21 Family Home

In the parties' settlement agreement, it was agreed that the family home would be
awarded to the party with whom the children will reside the majority of the time. If the
court awarded an equally shared residential time, it was agreed that Ms. Madden would
receive the family home.

The court has adopted a final parenting plan establishing Ms. Madden as the children's
primary parent, meaning that they will reside with her for the majority of the time.
Therefore, the family home shall be awarded to Ms. Madden subject to the terms
concerning buying out Mr. Madden's financial interest in the home as contained within
the parties' Property Settlement Agreement.

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III. Conclusions of Law

The court makes the following conclusions of law from the foregoing findings of fact:

3.1 Jurisdiction

The court has jurisdiction to enter a decree in this matter.

3.2 Granting a Decree

The parties should be granted a decree.

3.3 Pregnancy

Does not apply.

3.4 Disposition

The court should determine the marital status of the parties, make provision for a parenting plan for any minor children of the marriage, make provision for the support of any minor children of the marriage entitled to support, consider or approve provision for maintenance of either spouse, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing restraining orders, and make provision for the change of name of any party. The distribution of property and liabilities as set forth in the decree is fair and equitable.

3.5 Continuing Restraining Order

A continuing restraining order should be entered.

3.6 Protection Order

Does not apply.

3.7 Attorney Fees and Costs

Attorney fees, other professional fees, and costs should be paid.

3.8 Other

Does not apply.

WJ

Dated: 12-17-10

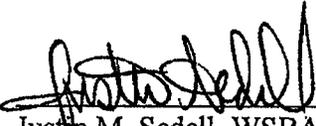
JUDGE MARIANE SPEARMAN

Presented by:

McKINLEY IRVIN, PLLC

Approved as to form:

Notice of presentation waived:

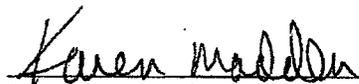


Justin M. Sedell, WSBA #36872
Attorney for Petitioner



Barry D. Rose WSBA #21995
Attorney for Respondent

Read and approved for entry:



Karen L. Madden
Petitioner

Read and approved as to form:



Marr P. Madden
Respondent

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