

69047-7

69047-7

No. 69047-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

MICHAEL MORGAN,

Appellant,

v.

COLLEEN MORGAN,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE PATRICK OISHI

AMENDED BRIEF OF RESPONDENT

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I. INTRODUCTION

Perpetuating his intransigent and contemptuous behavior below, Michael Morgan appeals the full array of the trial court's discretionary decisions in dissolving the parties' twelve-year marriage. The trial court fairly exercised its discretion in dividing the marital estate, crafting a residential schedule for the parties' daughter, and in managing its courtroom. The trial court did not abuse its discretion in holding Michael, an attorney who had no excuse for his conduct, in contempt after Michael refused to comply with two separate court orders. This court should affirm and award attorney's fees to respondent Colleen Morgan.

II. RESTATEMENT OF THE CASE

Michael makes 10 assignments of error (App. Br. 1-3), but does not challenge any findings of fact. RAP 10.3(g) ("a separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number"). The trial court's findings are thus verities on appeal. *Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). The following statement of facts is based on the trial court's unchallenged findings and the evidence presented at trial:

A. The Wife Cared For The Parties' Home And Daughter While The Husband Pursued His Career As A Public Defender And Municipal Court Judge.

Respondent Colleen Morgan, age 43, and appellant Michael Morgan, age 53, married on January 13, 1998, after briefly living together, and separated on November 28, 2009. (FF 2.4-2.5, CP 151; CP 1; 9/12 RP 150; 9/19 RP 20) They have one daughter, C.M., born on May 29, 1999, who was 12 at the time of trial. (FF 2.17, CP 156; 9/19 RP 22)

Colleen has never worked outside of the home during the marriage, and was primarily responsible for C.M.'s care. (FF 2.12, CP 155; 9/12 RP 118, 146; 9/14 RP 185; 9/19 RP 21-22, 54) Colleen has some post-secondary education but has never obtained a degree. (FF 2.12, CP 155; 9/12 RP 158; 9/14 RP 30) Colleen, who is a recovering alcoholic, testified at trial that while she was looking for employment, she was still focused on her recovery and planned to return to school. (9/14 RP 14)

Michael worked as a public defender at the Associated Counsel For The Accused from 1989 until the end of 2005, when he was elected as a municipal court judge. (9/14 RP 47, 79; 9/19 RP 21; 9/26 RP 60; Exs. 102-04) Michael earned over \$100,000 annually as a judge. (Exs. 102-04; FF 2.12, CP 155; 11/9 RP 49)

Michael lost his reelection campaign in 2009, the year the parties separated, and returned to private practice on a part-time basis. (9/14 RP 44-45; 9/26 RP 60) Michael never fully explained why he never returned to full-time employment. Michael has substantial separate property, including his inheritance of interests in several partnerships and investment accounts. (FF 2.9, CP 153-54; 9/12 RP 32, 44-45; 9/14 RP 51-52; Exs. 30, 33-36, 71-73)

B. The Wife Struggled With Alcoholism During The Parties' Marriage And Throughout The Separation.

Colleen suffers from alcoholism. (FF 2.12, CP 155; 9/19 RP 30) Although she has been in treatment since 2007, Colleen has relapsed several times. (9/14 RP 25-27) After the parties separated, Colleen received intensive treatment, both inpatient and outpatient, for her alcoholism. (9/14 RP 89-90) At the time of trial, Colleen continued to meet with an addiction counselor, attend Alcoholics Anonymous meetings, and regularly took urinalysis tests as a condition of visiting the parties' daughter under the temporary parenting plan. (9/14 RP 25-28, 89-90; *see* § II.C.1)

C. Procedural History

1. The Trial Court Designated The Father As Primary Residential Parent And Ordered Increasing Visitation For The Mother Conditioned On Her Demonstrated Sobriety.

On December 14, 2009, Michael filed a petition to dissolve the parties' marriage in King County Superior Court. (CP 1-5) In January 2010, Commissioner Ponomarchuk appointed attorney Suellen Howard as guardian ad litem for the parties' daughter. (Sub. No. 52, Supp. CP 552; 9/12 RP 83) Ms. Howard recommended that the parties' daughter reside primarily with Michael. (9/12 RP 104)

On January 11, 2010, Michael was ordered to pay temporary monthly maintenance of \$5,000 to Colleen. (Sub. No. 52; Supp. CP 552) His monthly maintenance obligation was subsequently reduced to \$2,500 on April 22, 2010. (Sub. No. 92, Supp. CP 554)

On September 12, 2011, the parties appeared before King County Superior Court Judge Patrick Oishi ("the trial court") for a five-day trial. The trial court designated Michael as the primary residential parent. (CP 104-16) The trial court provided that Colleen's residential time with the daughter would increase over time in "phases" based on Colleen's demonstrated sobriety. (CP

104-16) The court required that Colleen's residential time be supervised by ABC Visitation Services for the first two phases. (CP 106-07) The trial court ordered Michael to pay for the full costs of supervision during the first phase, and half the costs of supervision during the second phase. (CP 106-07) The trial court also ordered Colleen to pay for her treatment and urinalyses, and the costs of the guardian ad litem. (CP 106-07)

The trial court entered a child support order requiring Colleen to pay Michael \$724.37/month. (CP 145-49, 174-88) In calculating the child support payment, the trial court imputed monthly income of \$6,000 to Michael based on its finding that he was "voluntarily underemployed" and on his past earnings as a public defender and municipal court judge. (CP 177-78; 11/9 RP 48-50) The trial court imputed monthly income of \$1,500 to Colleen based on what she might earn working full-time for minimum wage. (CP 176; 11/9 RP 51)

2. The Trial Court Awarded A Slightly Disproportionate Share Of The Community Property And Spousal Maintenance To The Wife. The Husband Was Awarded The Remainder Of The Community Property And His Separate Property.

The trial court awarded Colleen 55% of the community property, at a value of \$353,290, including a \$137,393 transfer payment from Michael. (FF 2.8, CP 152-53; CP 161; 11/9 RP 47-48) The transfer payment reflected certain credits to Michael, including \$4,403 for Colleen's post-separation debts previously paid by him and \$9,150 for one-half the value of a ring that the trial court found was community property, but that was missing by the time of trial. (FF 2.8, CP 152-53; CP 165; 11/9 RP 46-48) Michael was awarded the remainder of the community property (45%), including the family residence, and his separate income-producing business interests. (FF 2.8, CP 152-53; FF 2.9, CP 153-54; CP 161-62)

Based on Colleen's alcoholism, unemployment, and lack of post-secondary education, the trial court ordered Michael to pay Colleen maintenance of \$2,500 per month for four years and \$1,500 per month for a fifth year. (FF 2.12, CP 155 (Colleen's "health is poor due to chronic alcoholismWith the treatment she needs to pursue and her past struggles with sobriety the court

questions if she is employable at this time”; “Mr. Morgan has ability to pay maintenance, based both on his separate property and his ability to meet his financial needs”); CP 164) The trial court awarded Colleen \$15,000 in attorney’s fees that Michael had already paid before trial. (FF 2.15, CP 156)

3. The Husband Repeatedly Disobeyed The Court’s Orders, Forcing The Wife To Bring Multiple Contempt Motions That The Trial Court Granted.

Although the trial court issued its oral ruling on November 9, 2011, the trial court did not enter formal findings of fact, conclusions of law, and a decree memorializing its property division and maintenance award until March 20, 2012. (CP 150-59, 160-66) After the oral ruling, Michael stopped paying his court-ordered temporary maintenance obligation. (CP 168; Sub. No. 92, Supp. CP 553-56) On March 20, 2012, the trial court found Michael in contempt for his intentional disobedience of the temporary order and ordered Michael to make back maintenance payments. (CP 167-73) On August 29, 2012, the trial court found Michael in contempt for failing to pay the costs of Colleen’s supervised visitation as ordered in the parenting plan. (8/29 RP 22; CP 543-49)

4. The Trial Court Denied The Husband's Numerous Post-Trial Motions.

Following trial, Michael filed numerous motions for reconsideration, as well as a motion to “clarify,” a motion seeking to vacate the parenting plan, and a motion for a new trial. (CP 189-296, 308-25, 326-331, 332-49, 350-66, 385-89) Although he is an attorney, many of Michael’s motions failed to comply with the King County Local Civil Rules and Local Family Law Rules. (CP 371, 373, 379, 384) His motions were also not well taken substantively:

Despite not objecting at the time, Michael argued that a new trial was required because the trial court had excluded the guardian ad litem from the courtroom during trial, when the trial court informed the parties that it had brief ex parte contact with one of Michael’s proposed rebuttal witnesses (another superior court judge). (9/26 RP 2-16) Both parties declined the trial court’s offer to recuse itself. (CP 326-29; 9/26 RP 2-16) Michael also argued that the trial court erred by not distributing a condominium, even though there was no evidence that the parties owned this condominium. (CP 194, 203) The trial court denied each of Michael’s motions with the exceptions of reducing the transfer payment by \$13,752 after recalculating the community portion of

the family house and clarifying the length of maintenance. (CP 371-72, 373-78, 379-80, 381-83, 384, 390, 449-51)

Michael appeals the trial court's Findings of Fact and Conclusions of Law, its Decree of Dissolution, its Order of Child Support, its contempt orders, and its orders denying several of his post-trial motions. (CP 393-438; Sub. No. 257, Supp. CP 599-603; Sub. No. 272, Supp. CP 604-13) Michael's initial notice of appeal, filed on June 29, 2012, did not designate or attach the trial court's May 31, 2012 order denying his motion for a new trial based on the guardian ad litem's exclusion. (CP 373-75)

III. ARGUMENT

A. **The Husband Challenges Trial Court Decisions That Are Reviewed Only For A Manifest Abuse Of Discretion.**

Trial courts have great discretion in the area of domestic relations. *Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985). "Trial court decisions in a dissolution action will seldom be changed upon appeal—the spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court." *Marriage of Bowen*, 168 Wn. App. 581, 586, ¶ 12, 279 P.3d 885, *rev. denied*, 290 P.3d 994 (2012). The reason for such deference is that "[t]he emotional and

financial interests affected by such decisions are best served by finality.” *Landry*, 103 Wn.2d at 809. In particular, the trial court is given “broad discretion” in the division of property “because it is in the best position to determine what is fair, just, and equitable.” *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). Michael has not met his “heavy burden” to show that the trial court manifestly abused its discretion in any of the decisions he challenges on appeal. This court should affirm.

B. The Trial Court Did Not Abuse Its Discretion By Excluding The Guardian Ad Litem While It Discussed An Ex Parte Contact With The Parties.
(Response to App. Br. 26-27)

This court should reject Michael’s appeal of the trial court’s order denying him a new trial based on the guardian ad litem’s exclusion because he never designated that order in a notice of appeal. Regardless, the trial court’s exclusion of a witness under ER 615 did not constitute a courtroom “closure” mandating a new trial. Even assuming a “closure” occurred, Michael fails to establish he suffered any “actual prejudice” from the exclusion and is not entitled to a new trial.

A party must seek review of an order within 30 days for this court to acquire appellate jurisdiction. RAP 5.2(a). An appellate court will review an undesignated order or ruling only where “the order or ruling prejudicially affects the decision designated in the notice.” RAP 2.4(b). Absent a timely notice of appeal designating the appealed order, an appeal must be dismissed. *Carrara, LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App. 822, 825-26, 155 P.3d 161 (2007) (dismissing appeal filed more than 30 days after entry of appealed order); *Bushong v. Wilsbach*, 151 Wn. App. 373, 376, ¶ 5, 213 P.3d 42 (2009) (same). Although Michael’s notice of appeal refers to “an open proceedings violation at trial” it does not designate or attach the order denying a new trial. (CP 373-75, 393-438) Therefore, Michael’s “appeal” of the trial court’s order denying a new trial is untimely and must be dismissed.

In any event, Michael fails to demonstrate an “open proceedings violation.” Washington’s constitution protects against undue courtroom closure by providing that “[j]ustice in all cases shall be administered openly.” Wash. Const. Art. I § 10. “[A] ‘closure’ of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.” *State v. Lormor*, 172 Wn.2d 85, 92, ¶ 11, 257

P.3d 624 (2011). “[T]he exclusion of one person, without more, is simply not a closure” and does not implicate the policies underlying Art. I § 10. *Lormor*, 172 Wn.2d at 93, ¶ 10.

Where no closure occurs, a trial court’s exclusion of persons from the courtroom is reviewed “as a matter of courtroom operations, where the trial court judge possesses broad discretion.” *Lormor*, 172 Wn.2d at 93-95, ¶¶ 12-14 (analogizing exclusion of disruptive spectator to exclusion of witness under ER 615 and finding no abuse of discretion); *see also* ER 615 (trial court may exclude witnesses from courtroom on its own motion). Here, the trial court properly exercised its discretion in excluding a single witness (the guardian ad litem) while the court and parties discussed a brief ex parte contact between the trial court and one of Michael’s proposed rebuttal witnesses. (9/26 RP 2-16; CP 374)

Further, where a party fails to contemporaneously object to a courtroom closure, the judgment will be reversed on appeal only if that party demonstrates “actual prejudice,” *i.e.*, “practical and identifiable consequences.” *Dependency of J.A.F.*, 168 Wn. App. 653, 661, ¶ 10, 278 P.3d 673 (2012). Here, Michael did not object to the guardian’s exclusion at trial and cannot establish “actual prejudice” that would entitle him to a new trial. *Dependency of*

J.A.F., 168 Wn. App. at 661, ¶ 10. Michael notes the significant role the guardian ad litem played at trial (App. Br. 27), but he fails to provide any explanation for how the guardian's brief exclusion from the courtroom prejudiced him in any identifiable way. The ex parte issue discussed during the guardian's exclusion had no bearing whatsoever on the guardian's testimony. Michael fails to establish that the trial court abused its discretion by excluding the guardian.

C. The Trial Court's Division Of The Marital Estate Was Well Within Its Discretion.

The trial court is given "broad discretion" in the division of property "because it is in the best position to determine what is fair, just, and equitable." *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied* 148 Wn.2d 1011 (2003); RCW 26.09.080. Trial courts have broad discretion in valuing property, and will only be overturned if there has been a manifest abuse of discretion. *Marriage of Gillespie*, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997). A trial court does not abuse its discretion by assigning values to property within the scope of the evidence. *See Marriage of Soriano*, 31 Wn. App 432, 435, 643 P.2d 450 (1982). If the trial court's finding on value is supported by substantial evidence,

viewed in the light most favorable to the prevailing party, its decision will be affirmed. *Gillespie*, 89 Wn. App. at 403-04.

Michael fails to cite to any evidence to support several of his arguments regarding the trial court's valuation of property. (*See, e.g.*, App. Br. 8-12) This court should reject these assignments of error for this reason alone. RAP 10.3(a)(6) (argument must include "references to relevant parts of the record"); *Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418 (2002) (refusing to consider argument not supported by reference to record or authority). Regardless, Michael fails to establish that the trial court abused its substantial discretion in dividing and valuing the parties' property.

1. The Trial Court Did Not Abuse Its Discretion By Not Awarding A Condominium That Neither Party Owned. (Response to App. Br. 15-16)

This court should reject Michael's claim of error regarding a Moclips condominium that he asserts the parties "owned." When distributing the marital estate, "a trial court focuses on the assets then before it." *White v. White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). Here, no exhibit or testimony established that the parties owned a Moclips condominium. Therefore, there was no asset before the trial court to distribute. The only testimony concerning condominiums was from Colleen's father, who testified that *he*

owned condominiums that he let the parties use. (9/14 RP 113) Colleen confirmed in her answer to Michael's motion for reconsideration that her father owned the Moclips condominium, not the parties. (See Sub. No. 243, Supp. CP 594-95) Michael asserts that Colleen's trial brief listed the condominium as community property, but "[p]leadings are not evidence." *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 510, ¶ 17, 278 P.3d 197, rev. denied, 175 Wn.2d 1027 (2012). Had the trial court distributed the condominium, it would have been error because there was no evidence that this was an asset before the court to distribute. *White*, 105 Wn. App. at 549.

2. The Trial Court Did Not Abuse Its Discretion In Valuing A Bank Account As Of Trial.
(Response to App. Br. 8-9)

Michael fails to establish that the trial court abused its discretion by valuing a US Bank checking account at \$0. (App. Br. 8-9) A trial court does not abuse its discretion by assigning values to property within the scope of the evidence. *See Marriage of Soriano*, 31 Wn. App 432, 435, 643 P.2d 450 (1982). Here, there was evidence that this account was worth \$31,453 at separation, but there was also evidence that it was worth \$0 at trial. (Ex. 13) Washington's dissolution "statutes give courts in divorce

proceedings broad discretion to pick an evaluation date that is equitable.” *Koher v. Morgan*, 93 Wn. App. 398, 404, 968 P.2d 920 (1998), *rev. denied*, 137 Wn.2d 1035 (1999). It would have been inequitable to value the account as of the date of separation for purposes of “distributing” the account to one party when it is undisputed that those funds were no longer available at the time of trial, and could not be distributed. *See Marriage of White*, 105 Wn. App. 545, 552, 20 P.3d 481 (2001) (the court could not distribute funds that no longer existed at the time of trial, because they had been spent on the family residence and car four years earlier).

The trial court expressly rejected Michael’s argument that its distribution of the checking accounts resulted in an unjust windfall to Colleen (CP 450), and properly denied Michael’s demand to “distribute” the account valued at \$31,453 to Colleen because those funds no longer existed at the time of trial. (FF 2.8, CP 152)

3. The Trial Court Did Not Abuse Its Discretion By Reimbursing The Husband \$4,403 For His Post-Separation Payment Of Debts. (Response to App. Br. 10-12)

There is no merit to Michael’s claim that the trial court abused its discretion in refusing to credit Michael for all of the payments that Michael alleged he made towards Colleen’s separate

debt. First, Michael provides no authority for his claim that “reimbursement for separate debts by one party should reduce the transfer payment on a dollar for dollar basis.” (App. Br. 11) In any event, Michael fails to provide any argument supporting his characterization of the debts that he purportedly paid.

The “key test” in determining whether a debt is community or separate is “whether, at the time the obligation was entered into, there was a reasonable expectation the community would receive a material benefit from it.” *Trinity Universal Ins. Co. of Kansas v. Cook*, 168 Wn. App. 431, 437, ¶ 18, 276 P.3d 372 (quoting *Sunkidd Venture, Inc. v. Snyder–Entel*, 87 Wn. App. 211, 215, 941 P.2d 16 (1997), *rev. denied*, 134 Wn.2d 1007 (1998)), *rev. denied*, 175 Wn.2d 1016, 287 P.3d 11 (2012). Rather than apply this test, Michael simply lists (without citation to the record) various debts that he asserts require reimbursement. (App. Br. 11-12) But it is not this court’s function “to comb the record with a view toward constructing arguments for counsel.” *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

Regardless, the trial court did not abuse its discretion by rejecting Michael’s characterization of various debts. The trial court did not “cryptically” (App. Br. 10) allocate debts, but rather “looked

carefully” at each debt and provided a list of the debts (with amounts) for which it was reimbursing Michael. (11/9 RP 47-48; *see also* CP 165)¹ For example, the trial court reimbursed Michael \$814 for Colleen’s auto insurance and \$827 for a FIA collection account. (11/9 RP 47) The trial court was not required to accept Michael’s characterization of each debt, but could – and did – exercise its discretion to assign the debts in an equitable manner, which included reimbursing Michael \$4,403.

4. The Trial Court Did Not Abuse Its Discretion By Dividing The Value Of A Diamond Ring Equally. (Response to App. Br. 13-15)

Michael’s claim that the trial court abused its discretion by not finding a diamond ring was his separate property ignores that the ring had been lost prior to trial and was no longer available for distribution. (FF 2.8, CP 152-53) Thus, to the extent there was any error, it was that the trial court purported to allocate an asset that no longer existed and reduced Michael’s transfer payment by over \$9,000 based on this “allocation.” *See Marriage of White*, 105 Wn. App. 545, 552, 20 P.3d 481 (2001). Michael cannot complain about

¹ Michael again wrongly relies on Colleen’s trial brief as “evidence” in support of this argument. (App. Br. 11-12) *Moore*, 168 Wn. App. at 510, ¶ 17 (“[p]leadings are not evidence”).

an error that benefited him. *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (1991) (Appellant must show that his case was materially prejudiced by a claimed error; absent such proof, the error is harmless), *rev. denied*, 117 Wn.2d 1026.

Regardless, Michael fails to demonstrate that the trial court's alleged mischaracterization resulted in an inequitable property division. "[M]ischaracterization of property is not grounds for setting aside a trial court's allocation of liabilities and assets, so long as the distribution is fair and equitable." *Marriage of Griswold*, 112 Wn. App. 333, 346, 48 P.3d 1018 (2002) (quotation omitted), *rev. denied*, 148 Wn.2d 1023 (2003). "Where there is mischaracterization, the trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly influenced by characterization and (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization." *Griswold*, 112 Wn. App. at 346 (quotation omitted); *see also Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 ("This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors."), *cert. denied*, 473 U.S. 906 (1985).

The trial court found that there “was a substantial factual dispute” regarding the ring and “exercised discretion” to award each party half the ring’s value. (FF 2.8, CP 152-53) Because Colleen lost the ring before trial, the trial court reduced Michael’s transfer payment by half of the ring’s value (\$9,150). (11/9 RP 46) Michael’s argument focuses solely on the ring’s characterization and provides no explanation for how the trial court’s decision to award each party half the ring’s value was inequitable. *Griswold*, 112 Wn. App. at 346. Far from being inequitable, the trial court fairly divided the value of a heavily disputed asset and reduced Michael’s transfer payment by over \$9,000.

D. The Trial Court Did Not Abuse Its Discretion In Ordering The Husband To Pay The Cost Of Supervised Visits. (Response to App. Br. 16-19)

The trial court crafted a parenting plan that allowed Colleen to maintain a relationship with the daughter, which it found was in the daughter’s best interests. Michael fails to establish that the trial court abused its discretion.

In a dissolution action, “the best interests of the child shall be the standard by which the court determines and allocates the parties’ parental responsibilities.” RCW 26.09.002. “The best interests of the child are served by a parenting arrangement that

best maintains a child's emotional growth, health and stability, and physical care." RCW 26.09.002; *see also* RCW 26.09.184 (setting forth parenting plan objectives including "[m]aintain[ing] the child's emotional stability"); RCW 26.09.187(3)(a)(iv) (court shall consider child's "emotional needs and developmental level" when creating residential provisions).

The trial court found that it was in the daughter's best interest that she have regular visits with her mother, so long as Colleen demonstrated sobriety, and adopted a detailed residential schedule to achieve that goal, including having the visitation supervised. (CP 105-13; *see also* 11/9 RP 30 (parenting plan intends that C.M. "have a relationship with her father, as well as her mother"); *see also* 9/12 RP 117 (guardian ad litem's testimony that it is important for Colleen and C.M. to have a relationship)) Thus, after concluding that supervised visitation between the mother and daughter was in the daughter's best interests, it was within the trial court's discretion to apportion the cost by ordering Michael to pay the costs for a limited period of time. *See, e.g., In re Marriage of Chua & Root*, 149 Wn. App. 147, 153, 156, ¶¶ 13, 27, 202 P.3d 367 (2009) (order that included equal division of "the costs of the

supervised visitations” was not abuse of discretion), *rev. denied*, 166 Wn.2d 1027 (2009), *cert. denied*, 130 S.Ct. 1696 (2010).

The trial court’s decision was entirely appropriate especially in light of the fact that Colleen had previously been the daughter’s primary caretaker, she was at the time of trial unemployed, she was ordered to pay child support (which will be paid from her limited maintenance award), and she testified that she was focused on her recovery. (FF 2.12, CP 155; CP 145-49, 174-88; 9/12 RP 118, 146; 9/14 RP 14, 185; 9/19 RP 21-22, 54) The trial court’s decision ensures that the daughter will be able to continue her relationship with her mother without interference due to any financial constraints of the mother. Michael argues – without citing any authority – that the trial court abused its discretion by creating an “incentive” for Colleen to remain in the initial, and most restrictive, visitation phase and thus continuously impose the costs of visitation on Michael. (App. Br. 17-18) This argument is disingenuous at best and offensive at worst. Colleen wants unsupervised visits with C.M. and is “100 percent dedicated to [her] sobriety” in order to allow that. (9/19 RP 40)

Likewise meritless is Michael’s argument that the trial court abused its discretion by including the supervision cost provisions in

the parenting plan and not the child support order. (App. Br. 16-17) Michael provides no authority for his claim that the cost of supervised visitation must be addressed in the child support order rather than in the parenting plan as done here. In any event, supervised visits and their attendant costs are part of a residential schedule and thus appropriately included in the parenting plan. RCW 26.09.184(d) (“The permanent parenting plan shall contain . . . residential provisions for the child.”). This court should affirm the trial court’s parenting plan.

E. The Trial Court Did Not Abuse Its Discretion In Holding The Husband In Contempt For His Intentional Defiance Of Its Orders.

In unchallenged findings the trial court found that Michael intentionally disobeyed two court orders when he ceased paying maintenance following trial but before entry of final orders and when he refused to pay for the costs of Colleen’s supervised visits as required by the parenting plan. (FF 2.1, CP 168; FF 2.1, CP 544) The trial court did not abuse its discretion by finding Michael in contempt after he openly and brazenly defied its orders.

Washington has long recognized that a “court in a dissolution proceeding has the authority to enforce its decree in a contempt proceeding.” *Marriage of Mathews*, 70 Wn. App. 116,

126, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993). Contempt is “intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court.” RCW 7.21.010. Dissolution proceedings have their own specialized contempt statutes. RCW 26.09.160(2)(a) (authorizing contempt motion “to coerce a parent to comply with an order establishing residential provisions for a child”); RCW 26.18.050 (authorizing contempt motion for failure to pay child support or maintenance). This court “review[s] a trial court’s decision on contempt for an abuse of discretion.” *Marriage of Davisson*, 131 Wn. App. 220, 224, ¶ 6, 126 P.3d 76, *rev. denied*, 158 Wn.2d 1004 (2006).

1. The Trial Court Appropriately Found The Husband In Contempt For His Intentional Defiance Of The Temporary Maintenance Order. (Response to App. Br. 21-23)

Michael does not dispute that he ceased paying maintenance under the temporary order after the trial court issued its oral ruling. (App. Br. 21-23; *see also* 3/20 RP 10-18). This alone supports the trial court’s finding of contempt.

Michael’s argument that he was not obligated to continue his maintenance payments under the temporary order because the trial court did not explicitly state so in its oral ruling is without merit.

(App. Br. 22) A temporary order only “[t]erminates when the final decree is entered.” RCW 26.09.060(10)(c). There was nothing “ambiguous” about the temporary order requiring Michael to pay maintenance until a final decree was entered. (Sub. No. 92, Supp. CP 554 (“Maintenance shall be \$2500 per month”)) Likewise, Michael’s assertion that a March 11, 2011 order superseded the April 22, 2010 temporary order is wholly unsupported by the record. (App. Br. 6, 23) No such order exists.

Equally mistaken is Michael’s argument that the trial court’s contempt order effectively awarded Colleen an extra four months of maintenance. (App. Br. 23) The trial court amended its maintenance finding to expressly state that the “[f]inal maintenance payment will be in October 2016 in consideration of \$10,000 in back maintenance awarded to respondent today in contempt proceeding.” (FF 2.12, CP 155; *see also* 3/20 RP 43 (“the final orders I enter today are going to indicate that it’s going to be four years and eight months and not five years”)) Indeed, Michael recognizes as much elsewhere in his brief. (App. Br. 7) The trial court was well within its discretion to hold Michael in contempt.

2. The Trial Court Appropriately Found The Husband In Contempt For His Intentional Refusal To Pay The Cost Of Visitation Supervision As Required By The Parenting Plan. (Response to App. Br. 19-21)

Michael admits that he ceased paying for the supervision costs as ordered by the parenting plan. (8/29 RP 9) (“Mrs. Morgan is correct, for the last few months I have not paid the cost for the supervised visits”). Rather than challenge the trial court’s finding that he intentionally disobeyed the parenting plan, Michael asserts that he was not required to comply with the plan because it was not “lawful.” (App. Br. 19-21) If Michael believed the parenting plan was erroneous, his remedy was not to summarily disobey the plan. *Estates of Smaldino*, 151 Wn. App. 356, 366, ¶ 28, 212 P.3d 579 (2009) (“a court order that is ‘merely erroneous’ must be obeyed and may not be collaterally attacked in a contempt proceeding”), *rev. denied*, 168 Wn.2d 1033 (2010). The trial court did not abuse its discretion by finding Michael in contempt based on undisputed evidence that he intentionally disobeyed the parenting plan.

Michael mistakenly relies on *Marriage of Young*, 26 Wn. App. 843, 615 P.2d 508 (1980), for the proposition that he cannot be held in contempt for failing to pay the supervision costs because they are not support payments. *Young* is inapplicable because it

reversed the portion of a contempt judgment ordering the obligor *jailed*, but preserved the portion holding the obligor responsible for missed payments required under a property division. 26 Wn. App. at 847. Regardless, Michael completely ignores RCW 26.09.160(2), which expressly granted the trial court authority to find Michael in contempt for failing to comply with the residential provisions of the parenting plan.

Any failure by the supervising agency to file reports (as required by the parenting plan) could not excuse Michael from his obligation to pay supervision costs. RCW 26.09.160(1) (“An attempt by a parent . . . to condition one aspect of the parenting plan upon another . . . shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court”.) (App. Br. 20) By the same token, Michael’s allegations that Colleen failed to comply with the court’s provisions for documenting her sobriety are irrelevant to his obligation to pay supervision costs. (App. Br. 21) In any event, the trial court clearly rejected Michael’s contention that Colleen was “gaming” the system. (CP 379-80 (order denying motion to vacate parenting plan based on allegations that Colleen failed to comply with parenting plan provisions regarding documentation of her sobriety))

F. The Trial Court Did Not Abuse Its Discretion By Considering The Husband’s Work History When Calculating Maintenance. (Response to App. Br. 23-25)

Michael’s argument that the trial court erred by “imputing” him income when calculating maintenance ignores the full context of the trial court’s decision and its substantial discretion to determine maintenance. The trial court not only considered Michael’s potential income, but also Colleen’s health, Michael substantial separate property, and Colleen’s lack of education.

“The award of maintenance, like the division of property, is within the discretion of the trial court.” *Bulicek v. Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). “The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just.” *Bulicek*, 59 Wn. App. at 633; RCW 26.09.090(1) (“The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors”). Among other factors, RCW 26.09.090 directs the trial court to consider “[t]he ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.” *See also Marriage of*

Sheffer, 60 Wn. App. 51, 57, 802 P.2d 817 (1990) (trial court should consider “sacrifice of . . . economic opportunities” by one spouse when awarding maintenance).

The trial court considered all the factors in RCW 26.09.090 when it calculated maintenance, including Michael’s “ability to pay maintenance.” (FF 2.12, CP 155; 11/9 RP 51-52) The trial court found that Michael had the ability to pay maintenance because he could earn income closer to his historic income if he worked more than part-time and because he had substantial separate property. (FF 2.9, CP 153-54; FF 2.12, CP 155; 9/12 RP 32, 44-45; 9/14 RP 52; Exs. 30, 33-36, 71-73, 102-04) By contrast, Colleen was borderline unemployable based on her poor health, and lacked any significant education or skills after caring for the parties’ daughter during the marriage. (FF 2.12, CP 155; 9/12 RP 118, 146, 185; 9/14 RP 30, 185; 9/19 RP 21-22, 54; 11/9 RP 50-51) The trial court’s “imputation” of income to Michael recognized that he had the ability to pay maintenance and was well within its discretion.

As with child support, a spouse cannot avoid their maintenance obligation by staying voluntarily underemployed. *Marriage of Foley*, 84 Wn. App. 839, 843, 930 P.2d 929 (1997) (“A parent should not be allowed to avoid a child support obligation by

voluntarily remaining in a low paying job, or by not working at all.”); *see also* RCW 26.18.050(4) (spouse opposing contempt order for failing to pay maintenance must “establish that he or she exercised due diligence in seeking employment”). The trial court’s award of maintenance was all that is required – just.

G. The Trial Court Did Not Abuse Its Discretion By Rejecting The Husband’s Request For Attorney’s Fees. (Response to App. Br. 27-32)

The trial court did not abuse its discretion by rejecting Michael’s request for attorney’s fees based on Colleen’s alleged “intransigence.” (CP 451) A grant or denial of attorney fees is wholly within the trial court’s discretion. *Mattson v. Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). In determining whether to award fees, the court may consider, “the extent to which one spouse’s intransigence caused the spouse seeking a fee award to require additional legal services.” *Marriage of Williams*, 84 Wn. App. 263, 272, 927 P.2d 679 (1996), *rev. denied*, 131 Wn.2d 1025 (1997).

Michael’s allegations of intransigence are unfounded. (App. Br. 28-32) For example, Michael asserts that Colleen “lied throughout her trial testimony,” most notably about her alcohol use. (App. Br. 31) But Colleen openly admitted to her alcoholism at

trial. (9/19 RP 30) Colleen also testified that an incident at Great Wolf Lodge (in which she was very intoxicated with C.M.) was “the biggest mistake of my life.” (*Compare* 9/19 RP 34 with App. Br. 31) Michael provides no support whatsoever for his allegation that Colleen, “through the [guardian ad litem], provided a falsified urinalysis test.” (App. Br. 30) Far from lying, Colleen openly confronted her alcoholism and sought treatment. (9/14 RP 25-28, 89-90)

Michael’s other allegations of intransigence are likewise devoid of support. Colleen’s initial attempts to maintain primary care of the daughter are not intransigence, especially in light of her previous role as the primary caregiver. (App. Br. 28-29; 9/12 RP 118; 9/19 RP 22, 54) *Marriage of Wright*, 78 Wn. App. 230, 239, 896 P.2d 735 (1995) (An attempt to seek residential time with a party’s child does not justify a finding of intransigence). Nor does the fact that the parties provided disputed testimony justify a finding of intransigence. *Wright*, 78 Wn. App. at 239 (that a “dissolution action was highly contested,” without more, does not justify an award of attorney’s fees based on intransigence).

Michael cites no factual support for his hearsay allegation that Colleen’s attorney called him a “purveyor of lies” (App. Br. 30),

nor any legal support for why such a statement would constitute intransigence.

The trial court rejected Michael's allegations of "intransigence" after hearing five days of testimony and presiding over multiple post-trial hearings. This court should not substitute its judgment for that of the trial court.

H. The Wife Is Entitled To Attorney's Fees On Appeal Based On Her Need, The Husband's Intransigence, And Her Defense Of The Contempt Orders.

In contrast to Colleen's conduct, Michael's conduct – including his refusal to obey court orders, filing numerous flawed motions for reconsideration, and his refusal to attend his deposition – demonstrates true intransigence. This court should award Colleen her attorney's fees on appeal based on her continuing financial need, on Michael's intransigence, and her defense of the contempt orders.

This court may award fees on appeal based on a party's financial need. RCW 26.09.140 ("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."); *Marriage of Shellenberger*, 80 Wn. App. 71, 87, 906 P.2d 968 (1995) ("At both the trial and appellate

levels in a dissolution or post-dissolution proceeding, a court asked to apportion attorney fees must consider the parties' relative need and ability to pay.”).

This court may also award fees on appeal based on a party's intransigence below. *Mattson v. Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999) (awarding fees on appeal based on “intransigence at trial” and “appeal of that outcome”); *see also Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). Intransigence has been found where a party “was forced to come to the court to enforce her decree” or “when a party filed repeated motions which were unnecessary.” *Matter of Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992). A refusal to attend a deposition is intransigence. *Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997).

Finally, a party who successfully defends a contempt order on appeal is entitled to attorney fees. *Marriage of Rideout*, 150 Wn.2d 337, 359, 77 P.3d 1174 (2003); *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 503, 903 P.2d 496 (1995) (citing RCW 7.21.030(3)), *rev. denied*, 129 Wn.2d 1010 (1996).

Here, this court should award Colleen her attorney's fees on appeal based on her continuing financial need, and Michael's ability to pay. The trial court found that Colleen was in poor health, had no formal degrees, and was borderline unemployable. (FF 2.12, CP 155; 11/9 RP 50-51) Meanwhile, the husband is employed, albeit part-time, and has additional resources from his separate property. (FF 2.12, CP 155)

Further, Michael's intransigence was well-documented. Michael filed numerous unnecessary post-trial motions, all of which were denied with two limited exceptions. *Greenlee*, 65 Wn. App. at 708 (CP 189-296, 308-25, 326-331, 332-49, 350-66, 385-89) Indeed, most of these motions failed to comply with the local court rules. (CP 371, 373, 379, 384) Michael refused to show up for his deposition, and Colleen was forced to file a motion to compel his attendance. *Foley*, 84 Wn. App. at 846. (Sub. No. 159, Supp. CP 557-59; Sub. No. 166, Supp. CP 588-89) Michael also trotted out numerous witnesses for no other purpose than to testify regarding Colleen's uncontested alcohol issues. (*Compare* 9/19 RP 30, 34 *with* 9/12 RP 33-39, 67-77, 80-81; 9/13 RP 3-6; 9/13 RP 6-12)

Finally, after the trial court orally announced its decision, Michael simply stopped paying maintenance. Colleen was then

“forced to come to the court to enforce her decree” through a contempt motion that the trial court granted. *Greenlee*, 65 Wn. App. at 708. (CP 167-73) Likewise, Michael summarily stopped paying for supervision costs after he decided that the parenting plan was “unlawful,” an action for which he was also held in contempt. (App. Br. 20)

This court should award Colleen her attorney’s fees on appeal based on her financial need, Michael’s intransigence, and for successfully defending his appeal of the contempt orders.

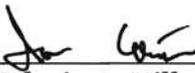
IV. CONCLUSION

This court should affirm the trial court in its entirety and should award Colleen her attorney’s fees on appeal.

Dated this 19th day of February, 2013.

SMITH GOODFRIEND, P.S.

DEBORAH A. BIANCO, P.S.

By:  _____

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 February 19, 2013, I arranged for service of the foregoing Amended Brief of Respondent, to the court and to the parties to this action as follows:

| | |
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| Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101 | <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail |
| Deborah Bianco Deborah A Bianco PS 14535 Bel Red Rd Ste 201 Bellevue, WA 98007-3907 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail |
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DATED at Seattle, Washington this 19th day of February,
2013.



Victoria K. Isaksen