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71624-7

No. 71624-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

HARRY GEORGE NIWRANSKI,

Respondent,

v.

LAURA LEE NIWRANSKI,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR WHATCOM COUNTY
THE HONORABLE IRA UHRIG

AMENDED BRIEF OF RESPONDENT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF CASE	2
	A. Harry and Laura were married for 11 years, including a nearly 2-year separation. They have two children, now ages 12 and 14.	3
	B. Harry started a helicopter parts business before the parties married that he still owned at the time of trial. Both Harry and Laura were compensated during the marriage for their work for the company.....	4
	C. Both parties owned real property when they married in 2000. The parties also bought acreage during the marriage for investment.....	9
	D. The parties' marriage was volatile.....	12
	1. The parties separated for the first time in May 2009 after Laura was arrested for assaulting Harry. The parties reconciled nearly two years later in March 2011.	12
	2. The parties' reconciliation was short-lived. The parties separated for the final time in November 2011 after Laura was arrested once again for assaulting Harry.....	14
	E. Procedural history.	17
	1. The guardian ad litem recommended that the children reside primarily with Harry.....	17

- 2. Despite Laura’s failure to timely disclose her expert witnesses the trial court allowed the majority of her late-disclosed witnesses to testify..... 20
- 3. After a 10-day trial, the trial court designated Harry as primary residential parent; awarded each party their separate property; and awarded Laura 73% of the community property and maintenance for four years. 26

III. ARGUMENT31

- A. The trial court was not required to continue the trial date to accommodate appellant’s failure to timely disclose expert witnesses, and that decision did not warrant reconsideration of the trial court’s carefully considered final orders. (Response to Assignments of Error no. 1, 4).....31
- B. The trial court’s determination of the character of property is supported by substantial evidence. The award of separate property to the owning spouse and a disproportionate share of the community property to the wife was well within its discretion. (Response to Assignment of Error no. 3)..... 37
- C. Substantial evidence supports the trial court’s parenting plan designating the father as the primary residential parent and granting him sole decision-making. (Response to Assignments of Error no. 2, 3) 40

IV. CONCLUSION 43

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Nicholson v. Rushen</i> , 767 F.2d 1426 (9 th Cir. 1985).....	34
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, <i>rev. denied</i> , 467 U.S. 1267 (1984)	34

STATE CASES

<i>Allied Financial Servs., Inc. v. Mangum</i> , 72 Wn. App. 164, 864 P.2d 1 (1993), <i>amended by</i> , 871 P.2d 1075 (1994)	36
<i>Barci v. Intalco Aluminum Corp.</i> , 11 Wn. App. 342, 522 P.2d 1159, <i>rev. denied</i> , 84 Wn.2d 1012 (1974)	35
<i>Collings v. City First Mortgage Servs., LLC</i> , 177 Wn. App. 908, 317 P.3d 1047 (2013) <i>rev. denied</i> , 179 Wn.2d 1028 (2014).....	32
<i>DewBerry v. George</i> , 115 Wn. App. 351, 62 P.3d 525, <i>rev. denied</i> , 150 Wn.2d 1006 (2003).....	42
<i>Estate of Borghi</i> , 167 Wn.2d 480, 219 P.3d 932 (2009).....	38-39
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 573 P.2d 1302 (1978).....	37
<i>King v. King</i> , 162 Wn.2d 378, 174 P.3d 659 (2007).....	33
<i>Lancaster v. Perry</i> , 127 Wn. App. 826, 113 P.3d 1 (2005)	32, 36

<i>Latham v. Hennessey</i> , 13 Wn. App. 518, 535 P.2d 838 (1975), <i>aff'd</i> , 87 Wn.2d 550, 554 P.2d 1057 (1976).....	35
<i>Marriage of Burrill</i> , 113 Wn. App. 863, 56 P.3d 993 (2002), <i>rev. denied</i> , 149 Wn.2d 1007 (2003).....	41-42
<i>Marriage of Fiorito</i> , 112 Wn. App. 657, 50 P.3d 298 (2002)	42
<i>Marriage of Jacobson</i> , 90 Wn. App. 738, 954 P.2d 297, <i>rev. denied</i> , 136 Wn.2d 1023 (1998)	40-41
<i>Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	40
<i>Marriage of Petrie</i> , 105 Wn. App. 268, 19 P.3d 443 (2001)	41
<i>Marriage of Rich</i> , 80 Wn. App. 252, 907 P.2d 1234, <i>rev. denied</i> , 129 Wn.2d 1030 (1996).....	41
<i>Marriage of Thomas</i> , 63 Wn. App. 658, 821 P.2d 1227 (1991)	41
<i>Marriage of Tomsovic</i> , 118 Wn. App. 96, 74 P.3d 692 (2003)	32
<i>Marriage of Wallace</i> , 111 Wn. App. 697, 45 P.3d 1131 (2002), <i>rev. denied</i> , 148 Wn.2d 1011 (2003).....	39
<i>Pacific Continental Bank v. Soundview 90, LLC</i> , 167 Wn. App. 373, 273 P.3d 1009, <i>rev. denied</i> , 175 Wn.2d 1018 (2012).....	3
<i>Southwick v. Seattle Police Officer John Doe #s 1-5</i> , 145 Wn. App. 292, 186 P.3d 1089 (2008).....	36

<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992)	34
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	34
<i>Tucker v. Tucker</i> , 14 Wn. App. 454, 542 P.2d 789 (1975)	32

STATUTES

RCW 26.09.080	39
RCW 26.09.191	1
RCW 26.16.010	37

RULES AND REGULATIONS

RAP 10.3.....	2
RAP 10.4.....	3

I. INTRODUCTION

The parties married in June 2000, separated for the first time in May 2009, and separated for the final time in November 2011. Two days before the parties began a 10-day trial to dissolve their marriage, the wife disclosed her expert witnesses for the first time. After the wife agreed to “pare down” her list to 8 expert witnesses, the trial court allowed all her experts to testify except two financial experts and her criminal defense attorney, who the wife agreed was at the “bottom” in priority. The trial court found that it would be far too prejudicial to allow the financial experts to testify, and the “lesser sanction” of a continuance would not be a practical option because the case had already been pending two years as a result of the wife’s earlier requested continuance.

At the end of the trial, the trial court awarded each party their separate property, and awarded the wife 73% of the community property and four years of maintenance, in addition to the two years of temporary maintenance she had received while this dissolution action was pending. In total, the wife received \$1.59 million in property, plus maintenance of \$432,000, after a 9-year marriage. The trial court designated the husband primary residential parent and imposed RCW 26.09.191 restrictions on

decision-making for the parties' two children on the wife, who after being arrested twice for assaulting the husband accepted a deferred prosecution due to "mental problems."

In her appeal, the mother does not seriously argue that the trial court abused its discretion in making these fact-based decisions based on the substantial evidence before it. Instead, she alleges "ineffective assistance of counsel" because of her trial attorney's failure to timely disclose witnesses. But the trial court's decisions, both substantive and procedural, were well within its discretion and made after careful consideration of the facts and law. The wife was not prejudiced in any way by the trial court's resolution of this matter, and this Court should affirm.

II. RESTATEMENT OF CASE

RAP 10.3(a)(5) requires a "fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement." Contrary to this rule, appellant's "Statement of the Case" consists largely of argument, unsupported factual claims, and what is best described as an improper and belated "offer of proof" of the testimony of persons who were either not called as witnesses or who were properly excluded. In the few instances

where appellant does cite to the record, she improperly cites to the sub numbers from the superior court docket and not by the clerk's papers index. See RAP 10.4(f); *Pacific Continental Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 375, n. 1, 273 P.3d 1009, *rev. denied*, 175 Wn.2d 1018 (2012). The Court should rely on this Restatement of the Case, a "fair statement of the facts" supported by the record on which the trial court relied in making its fact-based and discretionary decisions:

A. Harry and Laura were married for 11 years, including a nearly 2-year separation. They have two children, now ages 12 and 14.

Respondent Harry Niwranksi, now age 60, and appellant Laura Niwranski, now age 51, were married on June 16, 2000. (CP 457-58, 463) The parties separated for the first time in May 2009, and Laura filed a petition for dissolution. (See CP 44; Ex. 42 at 3; RP 582, 583) They reconciled in March 2011 and the dissolution action was dismissed. (RP 340, 582, 713) The parties separated for the final time on November 11, 2011, and Harry filed this second petition for dissolution. (Finding of Fact (FF) 2.4, 2.5, CP 440; CP 457) The parties have two children, a daughter age 14 (DOB 8/15/2000) and a son age 12 (DOB 6/20/2002). (FF 2.7, CP 442-43; RP 327, 566; Ex. 42 at 2)

When the parties met, Harry was living in Blaine, Washington, and Laura was living in Richmond, British Columbia. (RP 673) According to Laura, the parties met on March 15, 1998 and began living together by the end of that month. (RP 673-74) According to Harry, the parties met sometime in 1999 and began living together part-time in December 1999 when they learned Laura was pregnant with their daughter, born in August 2000. (RP 566-67)

B. Harry started a helicopter parts business before the parties married that he still owned at the time of trial. Both Harry and Laura were compensated during the marriage for their work for the company.

Harry has been interested in aviation since he was a child. (RP 327) After graduating from high school, Harry obtained his aircraft mechanics license. (RP 328) At age 20, Harry began working as a mechanic for Okanogan Helicopters, where he worked for many years. (RP 328-29) He started a helicopter parts company in 1986 or 1987 after noticing there were few companies specializing in helicopter parts. (RP 330) While continuing to work nights as a mechanic, Harry formed Helicopter Parts International (HPI) and was granted a distributor license in Canada – the first of its kind – to sell new, used, commercial, and military helicopter parts. (RP 330-31) Harry’s previous contacts through Okanogan

Helicopters helped grow HPI, allowing him to quit his night job and focus on his business. (RP 330)

In approximately 1990, Harry decided HPI would have greater growth potential if he moved his business to the United States. (RP 331) Harry relocated and incorporated HPI in Washington State in 1991, building his first “compound” for the business on a five-acre property in Blaine, Washington. (RP 324, 332, 334) In 1997, Harry formed Aviation Component Services (ACS), which holds an FAA repair station certification and owns an FAA-certified facility near the Blaine airport that it rents to HPI. (RP 71, 142, 319, 323, 341) As of trial, approximately 80% of HPI’s work came through government contracts. (RP 591)

Laura was seven months pregnant with the parties’ first child when they married in June 2000. (See RP 566-67) Laura quit her job as a dental hygienist in British Columbia. (RP 674-75) Even though she had no background or training in that field, HPI eventually hired Laura as a bookkeeper/office manager. (RP 164-65, 581, 680) Over the parties’ marriage, HPI compensated Laura for her services at an average of over \$70,000 annually:

<u>Year</u>	<u>Gross Wages</u>
2001	\$ 26,722
2002	\$ 41,600
2003	\$ 43,940
2004	\$ 52,200
2005	\$ 52,300
2006	\$ 83,755
2007	\$ 81,600
2008	\$ 87,300
2009	\$ 32,400
2010	\$136,000
2011	\$139,000

(Ex. 27; RP 570) On a number of occasions, Laura asked Harry, HPI's sole shareholder, to issue shares of HPI in her name, in addition to the salary that she received. Harry refused each time.

(RP 197, 573)

The business grew steadily during the marriage. (RP 685)
HPI compensated Harry for his services at an average of over \$183,000 annually during the marriage:

<u>Year</u>	<u>Gross Wages</u>
2001	\$ 59,000
2002	\$ 60,000
2003	\$ 136,000
2004	\$ 85,000
2005	\$ 70,000
2006	\$ 227,000
2007	\$ 275,000
2008	\$ 235,000
2009	\$ 264,000
2010	\$ 281,650
2011	\$ 328,550

(Ex. 28)

Harry believed that Laura did a “terrible job” at HPI (RP 581), and the company’s accountant testified that the books that Laura managed were filled with discrepancies. (RP 165-66; Ex. 24) After looking closely at the books, the accountant realized that Laura had been embezzling from the company. (RP 165-67, 168-69) For instance, Laura had documented a \$100,000 check in the company books as “helicopter parts,” when Laura actually wrote the check to herself and deposited it into her personal account. (RP 169) Laura wrote another check from HPI for \$100,000 with the notation “transf to health savings,” and deposited the funds into a certificate of deposit in her name only. (RP 169, 355; Ex. 39) Harry was forced to remove Laura from any signing authority with the bank at least three times during the marriage due to her misuse of company funds. (RP 584) Harry reinstated Laura each time to keep peace within the marriage. (RP 582-84)

After the parties finally separated, a forensic accountant calculated that Laura had misappropriated \$368,486 in cash from HPI between May 2010 and November 2011 alone. (Ex. 39; RP 357) At trial, Laura conceded that she probably should not have used company funds as she had (RP 706), including using HPI money to fund her “hobby” of collecting vintage Thunderbird cars

valued at \$325,000. (RP 354, 355-56, 359, 541, 698-99) But Laura testified that, just like Harry, who owned a helicopter (“Blue Thunder”) through HPI, she was “entitled to a hobby.” (RP 699)

After the parties separated for the final time in 2011, Laura wrote a letter to HPI’s customers advising them of the parties’ upcoming divorce, describing the “terrible current situation,” and claiming that “my children and our entire lives and future lives is at stake now.” (Ex. 33) Laura urged HPI customers to contact her directly and to “report anything to 911 that you feel is for the safety of my children.” (Ex. 33)

Laura’s letter created an “embarrassing situation,” and Harry noticed that “business dropped off” after she sent the letter to his customers. (RP 595) Harry obtained a restraining order preventing Laura from contacting any customers of HPI/ACS and restraining her from interfering with the operations of the businesses. (Sub no. 24, Supp. CP 483)

At trial, the court valued HPI and ACS at \$3.3 million. (CP 392; RP 303) Because the community was compensated for their services during the marriage, the trial court found the companies, which had been formed prior to marriage, to be Harry’s separate property. (FF 2.9, CP 441; RP 324-25)

C. Both parties owned real property when they married in 2000. The parties also bought acreage during the marriage for investment.

In addition to HPI/ACS and the assets owned by the companies, Harry also owned a residence at 8515 Semiahmoo Drive in Bellingham when the parties married, purchased in 1995 for \$212,546 from the sale of properties he owned in Canada. (RP 334, 337, 535) The property included a small house, which Harry planned to tear down and replace. (RP 334-35) When the parties met in 1998 or 1999, Harry had already torn down the small house and broken ground for construction of a new home. (RP 335-39, 692-93) By the time the parties married, Harry had spent a total of \$588,760.51 towards the property, excluding the value of his labor. (Ex. 56; RP 535-36) Laura did not contribute any money to the house prior to marriage. (RP 537) The family lived in the Semiahmoo Drive home throughout the marriage. (RP 327, 700) The trial court valued the Semiahmoo Drive home at \$1.25 million. (CP 392; RP 47; Ex. 1)

Harry also owned a nearly 15-acre landlocked property near the airport, which he had purchased in 1998 for recreation purposes. (RP 546) He used the property to target shoot and run his dog Baron, who Harry had raised since he was a puppy. (RP

546) The trial court valued this property at \$206,000. (CP 392; RP 57-60; Ex. 4)

In 2005, Laura presented Harry with quit claim deeds for these properties and other real property acquired by HPI/ACS prior to marriage. (RP 546-47; Ex. 107, 108, 109, 111) Harry testified that Laura claimed that the deeds were necessary “in case something happens to me, that there wouldn’t be a problem with the will and insurance policies and with the court.” (RP 547) The deeds purported to convey the properties to both parties, but made no mention of any intent to create community property. (See Ex. 107, 108, 109, 111) Harry, who had not consulted an attorney, testified that he did not intend to change the ownership of any of his properties, but only intended the deeds to be used for estate planning purposes. (RP 547, 574-75)

Laura testified that the deeds were intended to “commingle” the parties’ properties. (RP 1278) The trial court found Laura’s testimony “less credible” than Harry’s. (CP 446) With the exception of the Semiahmoo Drive property, the trial court found all these pre-marital properties to be Harry’s separate property. (CP 441) The trial court found that the Semiahmoo Drive property was part community and part separate property – Harry’s \$588,760.51

pre-marital contribution was separate property, and the remaining value was community property. (FF 2.8, 2.9, CP 441; CP 392)

Laura owned a 6.71-acreage on Bay Road in Blaine, Washington, prior to marriage. (RP 546) Laura had signed a quit claim deed purporting to convey this property to both parties. (Ex. 110) The trial court valued the Bay Road property at \$157,500, and found it to be Laura's separate property. (CP 392; FF 2.9, CP 441; RP 661; Ex. 5)

Laura also owned a home on E Street in Blaine prior to marriage. (RP 675-76) Laura paid off the \$37,778 mortgage and made improvements to the property during the marriage. (RP 189, 538) Laura did not execute a quit claim deed for this property. (RP 596, 1278) The trial court valued the E Street property at \$177,000, and found that \$139,213 was Laura's separate property, and the remaining value was community property. (CP 392; FF 2.8, 2.9, CP 441; RP 51-52; Ex. 2)

Finally, Laura also owned a rental home in Blaine when the properties married, which she sold for \$89,000 in 2001. (RP 547, 896) Laura also did not execute a quit claim deed for this property. Laura retained the proceeds from the sale, and the trial court found

the proceeds were Laura's separate property. (CP 392; FF 2.9, CP 441)

The only real property acquired during marriage were three parcels of nearly 32 acres, described as "H&L Land." (RP 54-55, 538) The parties had initially considered developing the property for investment or their retirement. (RP 540) The trial court valued the H&L Land at \$272,000 and found it to be community property, even though its mortgage was paid by HPI, Harry's separate property business. (CP 392; FF 2.8, CP 441; RP 55, 553, 588; Ex. 3)

D. The parties' marriage was volatile.

- 1. The parties separated for the first time in May 2009 after Laura was arrested for assaulting Harry. The parties reconciled nearly two years later in March 2011.**

The parties had a volatile relationship, punctuated by violent outbursts by Laura against Harry. In September 2007, the parties were arguing about company finances. Harry attempted to leave for a dentist appointment and asked Laura to move her car since she was blocking him. (RP 530) Laura, still screaming at Harry, got into her car, backed it up, and drove up on to the sidewalk where Harry's beagle Baron was sleeping, killing Baron. (RP 530-31) Laura told Harry, "I just killed your fucking dog." (RP 531) Laura also hit Harry's new dog Czar, a German Shepherd puppy, with her

car. (RP 531) Laura did not deny killing Baron or hitting Czar, but claimed both incidents were “accidents.” (RP 790-93)

In May 2009, the parties got into an argument over groceries, precipitated by an earlier argument over finances. (RP 527-28) Harry admitted that he threw some groceries that Laura had purchased in the garbage. (RP 528) Laura retaliated by emptying a garbage can on the hood of Harry’s Mercedes. (RP 528, 761-62) Harry then broke a car window, but realizing that the argument was getting out of control, he retreated. (RP 528-29) As Harry tried to leave the house with the children to let matters cool down, Laura called 911 and told Harry that she would have him arrested. (RP 528) Laura then pounded her fists on the side of Harry’s head in the driveway. (RP 529)

Laura returned to the house while Harry and the children remained outside. (RP 529) When the police arrived, there was blood running down the side of Harry’s head. (RP 529) Laura was arrested for assault. (RP 529) Laura denied striking Harry, but subsequently pled to a lesser charge of disorderly conduct. (RP 529, 766-67)

After this incident, Laura filed the first petition for dissolution. (See RP 583) Even though she was the one arrested

for assault, Laura claimed Harry was the aggressor during the marriage. She alleged, among other claims, that Harry had punched her in the stomach without warning while she was speaking to two people at the company. (RP 753-54) Harry denied Laura's allegations. (RP 576)

Apparently most of the professionals involved in the parenting dispute during the 2009 dissolution action sided with Laura, believing that Harry was the aggressor. (See Ex. 48 at 15) There was significant concern regarding the children's well-being at the time due to the high conflict between the parties. (See Ex. 48 at 15) Despite the ongoing litigation and conflict, the parties worked toward reconciliation, ultimately dismissing the dissolution action in March 2011 after a nearly two-year separation. (RP 552-53, 583, 713)

2. The parties' reconciliation was short-lived. The parties separated for the final time in November 2011 after Laura was arrested once again for assaulting Harry.

The reconciliation was short-lived. In September 2011, Laura attacked Harry after another argument regarding company finances, surprising Harry with an upper cut to the jaw and causing him to fall back onto the floor. (RP 524-25) As a result of this attack, several of Harry teeth were chipped, requiring extensive

dental work. (RP 526) After this attack, Harry told Laura that if she ever hit him again, he would call 911. (RP 525)

Two months later, on November 11, 2011, the parties separated for the final time when Laura was arrested a second time for assaulting Harry. (RP 517-18) Harry had been watching television with the children when Laura accused Harry of “stabbing” a cake that she had recently baked. (RP 518-19) Harry denied the accusation, and Laura hit Harry on the temple – “not very hard but hard enough to get my attention.” (RP 519) Harry and the parties’ son went to the kitchen to look at the cake. (RP 519) It appeared to have “little cracks” that one would expect when a cake is taken out of the oven. (RP 519) After Harry tried to explain the cracks to Laura, she punched him in the eye. (RP 520; Exs. 53, 54)

Harry was on the ground and Laura stood over him with her fists clenched, telling him to get up and fight. (RP 520) Harry called 911. (RP 520) The police interviewed the parties for two hours. (RP 520-21) Harry told the police that he did not want Laura arrested since the children were home. (RP 521; Ex. 52) However, the police told him that they had to take Laura to the police station. (RP 521-22)

Once again, Laura denied striking Harry (RP 785), but both children reported to the police that they had witnessed Laura “poke” and “punch” their father. (RP 830; Ex. 52) And as a result of Laura’s attack, Harry had surgery on his eye with a specialist in Seattle. (RP 522-23)

Laura was again charged with assault. (Ex. 52) This time, Laura entered a mental health deferred prosecution to avoid trial. (RP 785-86) In her petition for deferred prosecution, she claimed that the “wrongful conduct charged is the result of or caused by mental problems.” (Ex. 45) Her petition also states that she understands “that the court will not accept a petition for deferred prosecution from a person who sincerely believes that she is innocent of the crime charged or does not suffer from alcoholism, drug addiction, or mental health problems.” (Ex. 45) Laura also “stipulate[d] to the admissibility and sufficiency of the facts in the attached police reports.” (Ex. 45) As part of the deferred prosecution, Laura was ordered to undergo counseling while on probation for five years. (RP 383)

After the parties separated, Harry and the children remained at the family residence on Semiahmoo Drive. (RP 327) Laura moved into her separate property residence on E Street. (RP 469)

E. Procedural history.

Harry filed a petition for dissolution on December 7, 2011. (CP 457) On February 2, 2012, a temporary parenting plan was entered placing the children primarily in Harry's care, with a mid-week visit and alternating weekends with Laura. (Sub no. 25, Supp. CP 485) Harry was also ordered to pay monthly temporary maintenance of \$8,000 to Laura starting February 1, 2012. (Ex. 83)

1. The guardian ad litem recommended that the children reside primarily with Harry.

Both parties sought to be designated primary residential parent. The trial court appointed David Nelson as guardian ad litem (GAL) on May 16, 2012. (CP 469) As part of his investigation, the GAL contacted the parties' collateral witnesses and the professionals involved in the prior dissolution. (RP 369, 371, 412-13, 416, 423, 424; Ex. 42 at 2-3) At the end of his investigation, the GAL concluded that the children should reside primarily with Harry, who the GAL believed provided the most stability for the children. (Ex. 42 at 19-20; RP 378, 424-25)

The GAL rejected Laura's claims that Harry was an alcoholic, mentally ill, and not in control of his emotions. (RP 388) The GAL noted that Harry had already been evaluated for chemical dependency, with the conclusion that there was insufficient

evidence of chemical dependency. (RP 407-08, 421, 449-50; Exs. 120, 122) The children also denied that their father abused alcohol. (RP 404) The GAL also reported that, based on his observations, he believed that Harry proved that he can control his emotions and create stability for the children. (Ex. 42 at 17; RP 446)

The GAL expressed concern that Laura's anger towards Harry was damaging the children. (RP 375-76, 378; Ex. 42 at 17) Both children reported that their mother discussed the criminal and divorce cases with them. (RP 378, 385-86) The children reported that their mother is "constantly discussing the case with them and blaming the father for both her criminal case, lack of visitation, the current temporary custody order, and her lack of money." (Ex. 42 at 5) The children reported feeling that the mother uses them to punish their father. (Ex. 42 at 5)

The GAL expressed concern that Laura continues to view herself as a "victim" despite evidence that she was the aggressor in the parties' relationship. (Ex. 42 at 17-18; RP 375-76, 386-87) The GAL noted that by pursuing a deferred prosecution, Laura essentially admitted to assaulting Harry due to mental health problems. (Ex. 42 at 18; RP 375) The GAL, as well as Laura's probation officer, both expressed concern that Laura's purported

mental health counseling for her probation was only serving to “reinforce and enable the mother into believing that she is a victim.” (Ex. 42 at 18; RP 386)

After hearing Laura testify, the trial court agreed with the GAL’s assessment, expressing concern with Laura’s view of herself as a victim. The trial court rejected Laura’s excuse that somehow Harry’s actions “drove” or “compelled” her to attack him. (CP 447) The trial court found that any alleged “verbal tirades” by Harry were eclipsed by Laura’s physical assaults. (CP 447-48)

The GAL acknowledged that his view of the case was contrary to those held by previous professionals involved in the case. (See RP 1423-24) However, most of these individuals had not been involved with the family for two or three years, or had only spoken with Laura. (RP 423, 424, 1424) The GAL believed that the family situation was much different now than it had been in 2009, because “there is stability now where there wasn’t before.” (RP 1425, 1431) The GAL concluded that this new stability was due to Harry learning from his prior experiences and making an effort to provide the children with stability now that they were residing primarily with him. (Ex. 42 at 17; RP 378, 424-25) The GAL believed that Laura had not learned anything and that she could not

control her emotions, as she continued to involve the children in the divorce despite being subject to court oversight. (RP 386, 1437-38)

The trial court agreed with the GAL, noting that the opinions of other professionals were “so remote in time” and “based on observations made a number of years ago.” (CP 447) The trial court also agreed that the evidence strongly suggested that if designated primary residential parent, Laura would “go to great lengths to restrict the husband’s time with the children in what seemed to be reflective of a desire to maintain control and punish the husband by withholding contact with the children rather than being motivated by a legitimate concern for the children’s best interests.” (CP 447)

2. Despite Laura’s failure to timely disclose her expert witnesses the trial court allowed the majority of her late-disclosed witnesses to testify.

The parties’ first trial date was scheduled for November 6, 2012. (CP 468) An order compelling discovery was entered on February 27, 2012, requiring the parties to disclose their expert witnesses by Monday, October 8, 2012 – 30 days before trial. (CP 468) The cut off for any discovery, other than supplemental responses, was also October 8, 2012. (CP 468)

Pursuant to the court's order, Harry disclosed his expert witnesses by October 8, 2012. (Sub no. 89, Supp. CP 495) Laura failed to disclose any expert witnesses. (RP 22, 252-53, 272)

On October 22, 2012, Laura sought to continue the November 6 trial date, claiming, among other things, that she had not finished answering the discovery requests that had been served on her on September 5, 2012. (Sub no. 93, Supp. CP 503-04) Laura claimed that she intended to "seek to introduce much of that which is discoverable and therefore needs time to obtain the various requested data and to complete the response to the interrogatories, so that they are all admissible at trial." (Sub no. 93, Supp. CP 504) Laura stated that she wanted sufficient time to complete her answers to discovery in advance of trial, because she was "concerned that [Harry] will object to evidence I seek to introduce as not having been produced in discovery." (Sub no. 98, Supp. CP 528-29)

The trial court granted Laura's request to continue the trial date. (Sub no. 100, Supp. CP 530-31) The court ordered the trial "continued to the earliest date after January 1, 2013 which the clerk can schedule this case for trial." (Sub no. 100, Supp. CP 531) Despite this order, the trial was continued to October 8, 2013 –

nearly a year after the original trial date. (Sub no. 109, Supp. CP 532) A new order compelling discovery was entered requiring disclosure of any expert witnesses by September 9, 2013. (CP 478) The new cut off for any discovery, other than supplemental responses, was also September 9, 2013. (CP 468)

Meanwhile, on November 27, 2012, Laura had purportedly completed her answer to discovery requests. (Ex. 77) In response to the interrogatory: “Do you intend to call any expert witnesses [] at the trial of this matter, and please state their name and what they are going to testify to, the substance of their opinion,” Laura answered, “Yes. See witness list provided in conjunction with these responses to interrogatories. Note, the witness list will be supplemented as needed.” (Ex. 77; RP 229) But Laura did not provide a witness list with her answer to interrogatories, nor did she ever supplement her answers. (RP 229, 270) Laura also failed to disclose her witnesses by the deadline of September 9, 2013 for the continued trial date. (RP 22, 272)

On Thursday, October 3, 2013 at 10:45 p.m. – two court days before trial was to start on Tuesday, October 8, 2013 – Laura disclosed the names of 14 expert witnesses she intended to call at trial, and for the first time produced their reports to Harry. (RP 4-

5, 229-30) One of the reports, dated November 6, 2012, was apparently provided to Laura before she had answered her discovery requests on November 27, 2012. (RP 229-30) Another report, dated May 15, 2013, was apparently provided to Laura four months before the final date to disclose expert witnesses. (RP 230) A final report, dated September 14, 2013, was apparently provided to Laura over three weeks before trial. (RP 230)

Of the 14 late-disclosed expert witnesses, two witnesses, Steven Kessler and Gregg Schneider, purported to be “financial” experts with knowledge of the valuation of the business and real property, respectively. (CP 36, 38) Four witnesses, Natalie Novick-Brown, Susan Kane-Ronning, Bob Chambers, and Don Layton, purported to be experts on parenting issues, as they all had previously been involved in the 2009 dissolution action four years earlier. (CP 36, 37, 38) Two witnesses, Dr. Patricia Otto and Dr. Anthony Zold, purported to be experts with knowledge of Laura’s health. (CP 37, 38-39) Five witnesses, Melody Rohde, Kerri Bartlett, John Plummer, Russell Sheinkopf, and Jeff Lustick, purported to be experts with knowledge of Laura’s criminal case and the terms of her probation. (CP 37-39) Laura’s 14th witness was the GAL for the current action, David Nelson. (CP 37)

With the exception of the GAL, Harry moved to exclude these late-disclosed witnesses on the first day of trial. (CP 40) Laura's counsel (who had been representing her throughout this second dissolution action, and had sought and obtained the first continuance) conceded error in failing to timely disclose the witnesses and reports, but asked the court to either deny Harry's motion or continue the trial date 30 days to allow Harry an opportunity to depose the expert witnesses. (CP 60) Laura also produced a "revised" disclosure, reducing the number of expert witnesses from 14 to 8. (CP 57)

The trial court declined to continue the trial date, noting it was not a practical solution since the case had already been continued once, for nearly a year, and the matter had now been pending two years. (RP 29-30) The trial court commented that if it were to continue the trial date it "would just get bumped by a criminal case and we might be looking at next October or next November before we can get in and have a trial, and I don't think that's well, that's something that I am not going to do." (RP 29-30)

The trial court partially granted Harry's motion to exclude witnesses, finding that there was no "reasonable excuse" for Laura's failure to timely disclose her expert witnesses, particularly because

she purportedly knew as early as August which witnesses she wished to have testify. (RP 282) The trial court was also “shocked” that Laura had expert reports in her possession for some time, but “without any good justification” never produced them to Harry. (RP 283) The trial court found that while “apparently unintentional,” Harry was “sandbagged” by Laura’s failure to timely disclose. (RP 16)

The trial court “specifically” excluded Laura’s financial experts, finding that allowing them to testify “would result in prejudice to the petitioner’s case [that] would be very difficult to overcome.” (RP 283) However, the trial court noted that it believed that some of the information from these experts’ reports could still possibly come through rebuttal or “skillful cross-examination.” (RP 284)

The trial court also excluded Jeff Lustick, Laura’s attorney in the criminal matter, who Laura claimed would “explain” the order for her mental health deferred prosecution. (RP 241-42, 244, 283) The trial court questioned the need for Lustick’s testimony, as the documents related to her criminal case “should speak for themselves.” (RP 242, 244) Laura’s trial counsel agreed, acknowledging that he was not “married” to Lustick as a witness,

and that Lustick was at the “bottom” in priority, because counsel could argue the “finer points of criminal law in closing argument” himself. (RP 245; *see also* RP 267)

The trial court allowed the remaining witnesses to testify as either a direct or rebuttal witness, or as a fact witness. (RP 283, 285-89) The only other witness in dispute was a “fact” witness, Robert Gillespie, who Laura claimed would testify to a purported domestic violence incident between Laura and Harry. (RP 36) Laura asked the court to allow Gillespie to testify by telephone or some other electronic means because he allegedly feared Harry and demanded an armed escort from Canada to the courthouse. (RP 36-38) The trial court denied her request, finding that Gillespie’s alleged fear was not “at all reasonable,” that a “deputy on call” could provide security for Gillespie in the courthouse, and that he could testify live. (RP 284-85)

3. After a 10-day trial, the trial court designated Harry as primary residential parent; awarded each party their separate property; and awarded Laura 73% of the community property and maintenance for four years.

In dispute at the 10-day trial before Judge Uhrig were property distribution, maintenance, and parenting. (*See* CP 43-49) In a letter ruling issued on November 8, 2013, the trial court

acknowledged that it was faced with “numerous [] conflicting stories and explanations of events.” (CP 446) The trial court found that while Harry at times minimized facts that would reflect negatively upon him, overall Laura was “less credible” than Harry. (CP 446)

The trial court awarded each party their separate property. (CP 392) The trial court made a disproportionate award of the community property to Laura due to “the earning potential of the husband and the total amount of his separate property holdings and viewed in light of the factors to be considered in regard to the division of property.” (CP 447) The trial court awarded Laura \$1.205 million of the parties’ \$1.643 million community estate – 73% of the community property – including a \$250,000 cash payment and most of the cash accounts. (CP 392) In addition, Laura received over \$385,000 in separate property. (CP 392) Harry received \$437,735 of community property, including the family residence where he and the children reside, and separate property worth \$4.160 million, including the business valued at \$3.3 million.

The trial court also awarded Laura an additional four years of maintenance, after two years of temporary maintenance –

monthly maintenance of \$7,000 for two years; \$5,000 for one year; and \$3,000 for one year. (CP 389) The trial court made its maintenance award after considering “all of the statutory factors and, given the length of the separation, the business funds she misappropriated and the amount of maintenance she already received.” (CP 446) The trial court found that its maintenance award “should be more than sufficient to allow her to acquire any additional education or training she may wish to receive or to set up a business of her own if that is truly her desire (though not much evidence was presented in that regard) and maintain a very comfortable lifestyle during that period of time.” (CP 446)

The trial court designated Harry primary residential parent. (CP 428) While the trial court expressed concern with allegations that Harry has used inappropriate language in front of the children, then ages 13 and 11, it was more concerned with the fact that the mother has been charged with two crimes arising from physical assaults against the father. (CP 447) The trial court stated that it considered Laura’s decision to accept a deferred prosecution as an acknowledgment that she in fact committed the acts which led to her arrest. (CP 447) The trial court also found that Laura was

“equally capable of verbal abuse” that could emotionally harm the children. (CP 448)

In addition to the criminal charges, the trial court found that “other information presented during the trial compels the ruling that the [father] shall be the primary residential parent.” (CP 447) The trial court found that it was “strongly suggested by the evidence” that if the mother was designated as the primary residential parent she would go to “great lengths to restrict the [father]’s time with the children [] to maintain control and punish the [father] [and not due to] any legitimate concern for the children’s best interests.” (CP 447) The trial court stated that its decision was “made upon considering each and every statutory factor viewed in light of all the evidence and testimony, and is deemed to be that which is in the best interests of the children.” (CP 447)

The trial court found that restrictions on the mother’s decision-making ability were warranted, and ordered the father to have sole decision-making for major decisions for the children. (CP 427, 430, 447) The trial court found that the mother had a “history of domestic violence” and engaged in the “abusive use of conflict []

which creates the danger of serious damage to the children's psychological development." (CP 424)

The trial court ordered both parties to participate in a substance abuse evaluation and anger management/controlling behavior evaluation within 30 days. (CP 448) The trial court reasoned that the evaluations were warranted due to each party's "concerns with the behavior and habits of the other." (CP 448)

As dictated in the court's letter ruling, Harry completed the evaluations and submitted them to the court. (CP 186-220) Apparently disagreeing with the evaluations completed by Harry, Laura moved to stay or delay entry of the final orders until the parties agreed on the parameters of the evaluations.¹ (See CP 242) The trial court denied the motion, noting that it did not expect that the evaluations would change its decision on parenting. (RP 1604) The trial court did not intend to have a "new trial" after the evaluations were completed, and the recommended evaluations were simply intended to be "assurances" due to the parties' conflicting allegations. (RP 1600-03)

¹ This motion for stay is not in the record on appeal, or reflected on the superior court docket. However, it is mentioned in various parts of the record and in appellant's brief (without any citation to the record). (See CP 242; RP 1590; App. Br. 25)

Final orders were entered on December 13, 2013. (CP 387-444) On December 23, 2013, Laura, who by then had hired new counsel, moved for reconsideration. (CP 307) The trial court denied reconsideration on February 21, 2014. (CP 385) The trial court stated that its decision “was both significant and difficult and that there were strengths and weaknesses in each parties’ case, and the court having carefully considered those strengths and weaknesses and [had] based its original decision on such careful consideration and a weighing of all of the evidence and testimony.” (CP 379)

Laura appeals. (CP 380)

III. ARGUMENT

A. The trial court was not required to continue the trial date to accommodate appellant’s failure to timely disclose expert witnesses, and that decision did not warrant reconsideration of the trial court’s carefully considered final orders. (Response to Assignments of Error no. 1, 4)

After a 10-day trial, the trial court made fact-based discretionary decisions based on its careful consideration of the evidence before it and the relevant law. As a result of its decision, the wife received the lion’s share of the community property, her separate property, and a total of six years of maintenance after a 9-year marriage. The trial court properly denied the wife’s motion for

reconsideration based on her claim that the trial court should have continued the trial date when it was revealed that her trial counsel failed to timely disclose her expert witnesses.

A trial court's decision denying a motion for reconsideration or new trial will not be reversed on appeal absent a manifest abuse of discretion. *Marriage of Tomsovic*, 118 Wn. App. 96, 108, 74 P.3d 692 (2003); *Collings v. City First Mortgage Servs., LLC*, 177 Wn. App. 908, 918, 317 P.3d 1047 (2013) *rev. denied*, 179 Wn.2d 1028 (2014). Likewise, "whether to grant or deny a continuance is a question addressed to the sound discretion of the court, and the exercise of that discretion will be set aside only for a manifest abuse thereof." *Tucker v. Tucker*, 14 Wn. App. 454, 455, 542 P.2d 789 (1975) (citations omitted). Further, a trial court's decision to exclude a witness is reviewed by this Court for an abuse of discretion. *Lancaster v. Perry*, 127 Wn. App. 826, 830, ¶ 5, 113 P.3d 1 (2005). "This determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Lancaster*, 127 Wn. App. at 830, ¶ 5 (*quotations omitted*).

As appellant correctly acknowledges, “a finding of abuse of discretion on the part of a trial judge is a difficult threshold to reach.” (App. Br. 29) Here, the trial court’s decisions denying reconsideration, refusing to continue the trial when the case had already been pending for two years, and excluding three of the wife’s previously undisclosed witnesses were well within its discretion.

There is no basis for reversal particularly when the entire premise of the wife’s challenge to these decision is her argument that her “trial counsel had clearly and seriously damaged her case at every level by his clear and admitted failure to timely file and serve a comprehensive witness list and exhibit[s].” (App. Br. 28) In other words, the wife seeks a new trial based on the alleged ineffective assistance of her trial counsel. (App. Br. 35-36)

The wife was not entitled to counsel, effective or otherwise, in this action to dissolve her marriage. *See King v. King*, 162 Wn.2d 378, 395, ¶ 38, 174 P.3d 659 (2007) (there is no right to counsel in a dissolution proceeding). “Generally, a plaintiff in a civil case has no right to effective assistance of counsel. This rule is based on the presumption that, unless the indigent litigant may lose his physical liberty if he loses the litigation, there is generally no right to counsel

in a civil case.” *Nicholson v. Rushen*, 767 F.2d 1426, 1427 (9th Cir. 1985). All of the cases cited by the wife in claiming that she is entitled to a new trial because her representation by trial counsel “was grossly deficient, highly damaging in all respects to the mother and highly ineffective” are criminal cases, where there is a constitutional right to effective assistance of counsel. (App. Br. 35-36, citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (death penalty), *rev. denied*, 467 U.S. 1267 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (conviction for attempt to elude police); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (conviction for first degree murder), *cert. denied*, 506 U.S. 856 (1992)).

In any event, as the wife concedes, the vast majority of her witnesses were in fact allowed to testify. (See App. Br. 17-23) With the exception of the two financial experts, the other “excluded”² witnesses (for which appellant provides an improper, untimely, and unsupported offer of proof) (App. Br. 23-24) were cumulative of the testimony of other witnesses who testified on her behalf to support her claim that the wife was a victim of abuse and the husband was

² The trial court did not in fact “exclude” these witnesses. The wife had agreed to “pare down” her expert witnesses list and she (or her counsel) chose not to include these witnesses in the “revised” witness list. (CP 57-59)

the aggressor.³ *Latham v. Hennessey*, 13 Wn. App. 518, 526, 535 P.2d 838 (1975) (affirming exclusion of witnesses when the testimony would have been cumulative of other testimony), *aff'd*, 87 Wn.2d 550, 554 P.2d 1057 (1976).

The trial court also properly excluded the two financial expert witnesses. The trial court carefully considered the factors set forth in *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 350, 522 P.2d 1159, *rev. denied*, 84 Wn.2d 1012 (1974) in deciding to exclude these two witnesses. (RP 281) The trial court found that to allow the testimony would result in prejudice to the husband that “would be very difficult to overcome.” (RP 283) The court stated that “the failure to disclose affects [the husband]’s trial preparation and [his] ability to adequately and fairly present [his] case.” (RP 283-84) Another trial continuance was “not an option” since the case had already been pending for two years, and the practical effect

³ For instance, the wife claims the trial court’s refusal to allow one witness to testify by Skype or other electronic means excluded “critical evidence of Harry Niwranski having a clear history of being physically abusive to her.” (App. Br. 13) But this purported “evidence” was provided through the former parenting evaluator, who had previously interviewed this witness for the prior dissolution. (See RP 1152-54) The trial court had even questioned the former parenting evaluator about his statements, as it appeared inconsistent with those of another witness. (See RP 1242-43)

of a continuance was that the trial might not occur for another year due to the court's schedule. (RP 29-30)

Our courts regularly uphold decisions by the trial court excluding witnesses for failure to comply with local rules requiring timely disclosure without an adequate showing of good cause. *See Lancaster*, 127 Wn. App. at 830; *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008) (striking declaration of witness who was untimely disclosed); *Allied Financial Servs., Inc. v. Mangum*, 72 Wn. App. 164, 168, 864 P.2d 1 (1993), *amended by*, 871 P.2d 1075 (1994) (affirming exclusion of witnesses when party failed to submit a witness list as required by the pre-trial order).

Here, the wife does not seriously argue that the trial court abused its discretion in excluding the financial experts, and does not even assign error to the trial court's order excluding these witnesses.⁴ Instead, she lays the blame on her trial counsel: "the mother thus reiterates that she had absolutely *no* financial experts allowed to testify in her behalf due to the failure of her attorney to provide a timely witness or exhibit list." (App. Br. 15) But an

⁴ Appellant instead assigns error to the trial court's order denying a continuance, "resulting in exclusion of critical witnesses." (App. Br. 3)

attorney's negligence is attributable to the client, and is not a basis for reversal. *See Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) (trial court did not abuse its discretion in denying vacation of settlement judgment due to attorney's purported negligence in accepting settlement offer without approval).

The trial court was not required to continue the trial date due to wife's counsel's failure to timely disclose expert witnesses, and that decision did not warrant reconsideration of the trial court's carefully considered final orders.

B. The trial court's determination of the character of property is supported by substantial evidence. The award of separate property to the owning spouse and a disproportionate share of the community property to the wife was well within its discretion.
(Response to Assignment of Error no. 3)

The trial court properly characterized the properties owned by each party prior to marriage as separate property. RCW 26.16.010 (separate property is "property and pecuniary rights owned by a spouse before marriage"). The trial court also properly concluded that the properties retained their character as separate property, except to the extent that the community contributed to improvement, regardless of the quit claim deeds placing title in both parties' names.

“Once the separate character of property is established, a presumption arises that it remained separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property.” *Estate of Borghi*, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009). That the quit claim deeds purported to transfer ownership from the name of one spouse to both spouses is not “direct and positive evidence” of an intent to change the character of the property from separate to community. *Borghi*, 167 Wn.2d at 484, ¶ 12.

In *Borghi*, the Supreme Court rejected an argument that a special warranty deed placing both spouses’ names on title to real property owned by the wife prior to marriage created a presumption that the property had “transmuted” from separate to community property. The Court held that there must be “clear and convincing evidence of actual intent” of the separate property owning spouse to create community property to rebut the presumption that separate property retains its character. *Borghi*, 167 Wn.2d at 490, ¶ 17. The Court held that including the name of the other spouse on a deed alone is not “evidence [of] an intent to transmute separate property into community property, but merely

an intent to put both spouses' names on the deed or title.” *Borghi*, 167 Wn.2d at 489, ¶ 15.

Here, nothing in the deeds purports to create community property. Instead, as in *Borghi*, at most it shows an “intent to put both spouses’ names on the deed or title.” The husband testified that he did not intend to change ownership of the property by signing the quit claim deeds, and that his only intent was to accommodate any issues that might arise if he were to die. (RP 547, 574-75) The trial court properly concluded that these properties remained each party’s separate property regardless of the quit claim deeds.

After properly characterizing the properties, the trial court did not abuse its discretion in awarding each party their separate property and awarding the wife more of the community property in light of the husband’s greater separate property holdings. The trial court has “broad discretion” in dividing 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). The trial court considered the factors under RCW 26.09.080 in making a property division that it

found “equitable (noting that reaching an equitable division rather than an equal division is the Court’s goal).” (CP 447)

Here, the wife leaves a relatively short-term marriage with 73% of the community property, all of her separate property, and what amounts to a total of six years of maintenance. Overall, her award of property and maintenance exceeds \$2 million. The trial court’s property division was well within its discretion and should be affirmed.

C. Substantial evidence supports the trial court’s parenting plan designating the father as the primary residential parent and granting him sole decision-making. (Response to Assignments of Error no. 2, 3)

The trial court properly designated the father as the primary residential parent and granted him sole decision-making after finding that the mother had engaged in “a history of acts of domestic violence” and engaged in “the abusive use of conflict [] which creates the danger of serious damage to the children’s psychological development.” (CP 424) Trial courts are given broad discretion to fashion a parenting plan based upon the child’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)). Discretion is abused only if the decision

is manifestly unreasonable or based on untenable grounds. *Jacobson*, 90 Wn. App. at 743.

Here, the mother's complaint on appeal is simply that she believes that the evidence she presented was more "powerful" than the evidence presented by the father, and that *her* evidence did not support the trial court's decision to designate the father as the primary residential parent. (App. Br. 30) But factual disputes cannot be retried on appeal. This Court's "role or function is not to substitute our judgment for that of the trial court or to weigh the evidence or credibility of witnesses." *Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030 (1996).

This Court accepts the trial court's findings of fact as verities⁵ if the findings are supported by substantial evidence. *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. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003). Credibility determinations are left to the

⁵ This Court should also accept the trial court's findings of fact as verities because appellant did not assign error to the findings. (See App. Br. 3-4) *Marriage of Petrie*, 105 Wn. App. 268, 275, 19 P.3d 443 (2001) (findings are verities when appellant fails to assign error to the findings).

trier of fact and are not subject to review. *Burrill*, 113 Wn. App. at 868; *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)).

Here, the trial court, faced with conflicting evidence whether the father was an alcoholic and whether the mother or the father was the aggressor in the relationship, found the father and his evidence more credible than the mother. (CP 446) For instance, despite evidence from the mother's witnesses that the father allegedly abused alcohol, the trial found the father's testimony denying abuse and the alcohol evaluations concluding that he was not abusing alcohol more credible. (CP 446) The trial court also appropriately placed more weight on the GAL's testimony supporting the father as the primary residential parent than the mother's other witnesses, whose testimony was based on observations that were "remote in time." (CP 446)

Finally, the trial court did not abuse its discretion in denying the mother's request to stay entry of the final parenting plan until the parties participated in certain evaluations recommended by the trial court in its letter ruling. As the trial court asserted, its

recommendation for evaluations was merely an “assurance” for the parties, who each claimed the other party needed to be evaluated; the trial court had no intention to change its decision upon completion of those evaluations. (RP 1600-03) As a result, it was not necessary to stay entry of the final parenting plan, and the trial court properly denied the mother’s motion.

Based on the evidence that it found more credible and on which it placed greater weight, the trial court properly crafted a parenting plan that was in the children’s best interests. The trial court’s rejection of the wife’s evidence is not a basis for reversal.

IV. CONCLUSION

The trial court properly exercised its discretion in denying the wife’s requested continuance, dividing the parties’ property, and crafting a parenting plan for the parties’ children. This Court should affirm.

Dated this 1st day of October, 2014.

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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 1, 2014, 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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DATED at Seattle, Washington this 1st day of October, 2014.



Victoria K. Vigoren