

No. 73508-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

TINA M. SHIBLEY, Respondent

v.

ERIC R. SHIBLEY, Appellant

RECEIVED
COURT OF APPEALS
DIVISION ONE
DEC 14 2013

BRIEF OF APPELLANT

DEC 14 11:03 AM '13

E

H. Michael Finesilver (fka
Fields)
Attorney for Appellant

207 E. Edgar Street
Seattle, WA 98102
(206) 322-2060
W.S.B.A. #5495

TABLE OF CONTENTS

I. Statement of the Case.....1

 A. Parenting Issues.....1

 B. Property Division.....5

 C. Maintenance and Child Support.....6

 D. Attorney Fee Award.....6

II. Assignments of Error.....7

 A. The Child Support Order.....7

 B. Attorney Fee Award.....7

 C. Property Division.....7

 D. The Parenting Plan Order.....8

III. Argument.....8

 A. The Property Division.....8

 B. Attorney Fees: The Amount Awarded
 Was An Abuse of Discretion.....11

 1. The Court Failed To Weigh The
 Financial Circumstances of Each
 Party In Determining What Portion
 Of Fees, If Any, Should Be Paid By
 Eric Shibley.....11

 2. The Fees Paid On Tina Shibley’s
 Behalf Should Have Been Deducted.....13

 C. Child Support.....13

1. An Amount In Excess of the Standard Calculation Where Incomes Exceed The Maximum Advisory Amount Are Not Deviations.....	13
2. The Court’s Findings Are Insufficient.....	14
3. Court Erred In Determining The Standard Calculation Because It Failed To Deduct The Mandatory Taxes To Derive Eric Shibley’s Net Monthly Income.....	16
D. Parenting Issues.....	18
1. The Section 3.10 Provision Referencing Restrictions On Dr. Shibley’s Residential Time Must Be Eliminated Since There Are None.....	18
2. The Findings Under RCW 26.09.191 (3) Are Either Insufficient Or Not Based Upon Substantial Evidence.....	18
a. Substantial Non-Performance of Parenting Functions.....	19
b. Neglect.....	20
c. Other Conduct That Are Adverse To The Best Interests of the Child: The Restriction That The Father Have Proper Supervision At Home and The Workplace.....	24
d. The Findings That Eric Shibley Engaged In The Abusive Use Of Conflict That Endangered The Ryan’s Psychological Development Are Insufficient or Not Based	

Upon Substantial Evidence.....	25
1. Disclosing Tina Shibley’s Journals And Medical Records Without Her Permission.....	25
2. Failing To Pay Child Support (O.D. 8).....	26
3. Failing To Discuss Health Care With The Mother After The Court Ordered Him To Do So (O.D. 8).....	26
4. Allowing Abusive Litigation Tactics Including Attorney Letters.....	27
5. Selling The Mobile Home Contrary To Court Order (O.D. 8).....	28
6. Threatening Dr. Shushan In Front Of Ryan (O.D.8).....	28
e. Findings Should Have Been Entered As To Tina’s Abusive Use of Conflict That Endangered The Ryan’s Psychological Development.....	28
3. Decision-Making Authority.....	32
a. Reasons for Sole Decision Making.....	32
b. A Number Of Major Decisions Under Section 4.2 Are Beyond The Scope of A Trial Court’s Authority To Impose.....	33

4. Primary Residential Care of Ryan
Should Have Been Awarded To
Eric Shibley.....34

 a. The Required Statutory Factors
 Were Not Properly Weighed.....34

 b. The Problems With Which Tina
 Struggled As of Trial Were Not
 Present In Eric’s Care Of Ryan.....41

IV. Conclusion.....43

 A. Financial Issues.....43

 B. Parenting Issues.....43

TABLE OF AUTHORITIES

Table of Cases

<i>City of Olympia v. Drebick</i> , 156 Wash.2d 289 126 P.3d 802 (2006).....	35
<i>Dave Johnson Ins., Inc. v. Wright</i> , 167 Wash. App. 758, 275 P.3d 339 (2012).....	11
<i>Lucker v. Lucker</i> , 71 Wa 2d 165, at 168, 426 P.2d 081 (1967).....	9
<i>In re Marriage of Ayyad</i> , 110 Wash.App. 462, 38 P.3d 1033 (1980).....	11
<i>In re Marriage of Bobbitt</i> , 135 Wash.App. 8, 144 P.3d 306 (2006).....	12
<i>In re the Marriage of Cabalquinto</i> , 100 Wash.2d 325, 669 P.2d 325 (1983).....	44
<i>In re the Marriage of Crosetto</i> , 82 Wash.App 545, 918 P.2d 954 (1996).....	9
<i>In re the Marriage of Daubert</i> , 124 Wa.App 483, 99 P.3d 401 (2004).....	14, 15
<i>In re Marriage of Gillespie</i> , 89 Wa.App 390, 948 P.2d 1338 (1997).....	8
<i>In re Marriage of Hughes</i> , 11 Wash.App. 454, 524 P.2d 472 (1974).....	16
<i>In re Marriage of Kovacs</i> , 121 Wash.2d 795, 854 P.2d 629 (1993).....	34
<i>In re Marriage of Leslie</i> , 90 Wa App 796 at 804, 954 P.2d 330 (1998).....	14

<i>In re Marriage of McCausland</i> , 159 Wa 2d 607, 152 P.3d 101 (2007).....	14
<i>In re Marriage of Monkowski</i> , 17 Wa App 816 at 818, 565 P.2d 1210 (1977).....	25
<i>In re Marriage of Scanlon and Witrak</i> , 109 Wash.App. 167, 34 P.3d 877 (2001).....	12
<i>In re Marriage of Watson</i> , 132 Wa App 222 at 234, 130 P.3d 915 (2006).....	19
<i>Mayo v. Mayo</i> , 75 Wa2d 35 at 39, 448 P.2d 926 (1968).....	9
<i>Schultz v. Schultz</i> , 66 Wash.2d 713 at 722, 404 P.2d 987 (1965).....	36
<i>Shaffer v. Shaffer</i> , 61 Wash.2d 699 at 702, 379 P.2d 995 (1963).....	44
<i>State v. Sunich</i> , 76 Wa App 202 at 206-207, 884 P.2d 1 (1994).....	19
<i>Travis v. Bohannon</i> , 128 Wa App 231 at 242, 115 P.3d 342 (2005).....	21
<i>Wildermuth v. Wildermuth</i> , 13 Wa.App 445, 655 P.2d 718 (1982).....	44

Statutes

RCW 26.09.002.....	44
RCW 26.09.080.....	9

RCW 26.09.090.....	11
RCW 26.09.140.....	12
RCW 26.09.184.....	33, 34
RCW 26.09.187.....	8, 33, 34, 35
RCW 26.09.191.....	19, 25, 32, 33
RCW 26.19.011.....	16
RCW 26.19.071.....	17
RCW 26.19.080.....	15, 16
RCW 26.19.191.....	18
RCW 26.44.020.....	20

Regulations and Rules

CR 35.....	25
------------	----

Other References

Webster's New World Dictionary, 3 rd Edition, pages 297 and 1336 (1988).....	19
--------------------------------------------------------------------------------------------	----

I. Statement of the Case:

A. Parenting Issues:

The parties were married on May 6, 2008 in Nashville, Tennessee and were separated on April 26, 2013. (CP 21). They have one child Eric Ryan Shibley, Jr., age 4. (CP 25, 583). He will be referred to as “Ryan.”

Eric Shibley, (hereafter to be referred to as “Eric”) worked at all times pertinent here as a medical doctor. When they married, Tina Shibley (hereafter to be referred to as “Tina”) was disabled due to a traumatic head injury, chronic depression and some suicide ideation. (CP 23, 1153). She suffered another head injury due to a car crash in November 2013. (CP 1291). She suffers severe migraine headaches which continued monthly after Ryan was born. (CP 954, 1199, 1366). As of the time of trial she was not allowed by the Department of Vocational Rehabilitation to work more than 10 hours per week. (RP 1323, and RP 1383).

When Ryan was 2 years old, the parties moved from the Lake Sammamish area to a mobile home in Marysville, Washington. (RP 957). While Eric would be at work, neighbors would often see Ryan wandering around the neighborhood and have to bring him back home. Within the cul de sac was a long steep cliff with no guard rail. (RP 975; trial exhibit 38). One of the neighbors, expressed concerns to Tina who answered that Ryan

could get around on his own. (RP 633-634). He would also walk around with unchanged, soiled, or leaky diapers. (RP 646). Tina admitted not only to spanking Ryan, but hitting him with a wooden spoon prior to separation. (RP 182, 632, 1318).

Eric provided 80% of Ryan's care when home from work every other week during the last year before separation when he worked in Wyoming (RP 962 and 977). Prior to that, he would often come home early after work because Tina was unable to care for him (RP 976-977).

On April 26, 2013 Tina separated. She took Ryan without prior warning. (RP 976). She did not tell Eric her address. During that first month father and son were able to see each other twice in a park with Tina. She did not need and did not seek a domestic violence protection order. (RP 1299). They made a commitment to see a counselor separately and then together. He was informed through the counselor that she was living in domestic violence shelter. Eric even attempted to obtain a writ of habeas corpus but the court refused to issue it (RP 988).

It would be another four months before Ryan could see or have any communication with his father. Eventually Eric ascertained their whereabouts, got her served with this proceeding and immediately sought a temporary parenting plan order, in a hearing that occurred on August 13,

2013. Tina made allegations of domestic violence against her by Eric that he denied. (RP 996).

The court entered a temporary order the morning of August 13, 2013 granting each parent equal overnight residential time with Ryan every other week, (Trial Exhibit 40). Eric's residential time did not occur in August as ordered because within hours after that order was entered, Tina obtained an ex parte domestic violence protection order prohibiting contact with Ryan in a Skagit County proceeding based upon the same allegations she had made against Eric. She did not inform the Skagit County Commissioner of the Snohomish County order entered earlier that day (RP 995; trial exhibit 83). Eventually, upon learning of what occurred in Snohomish County, the Skagit county commissioner quashed the domestic violence protection order. (RP 998 and 1360). Thus, the first time Ryan and his father had any contact since early May was not until September, 2013 (RP 997).

A guardian ad litem, Dr. Marnee Milner was appointed by the Snohomish County court. (RP 139). Ryan exhibited severe behavior problems by the time her evaluation was completed five months later. (CP 117). She did not assess what effect the loss of contact for several months

with his father had on Ryan or what impact it might have on his current behavior. (RP 381, 467).

Tina made two subsequent failed attempts to obtain domestic violence protection orders during the pendency the last of which was in September 2014, based upon the same pre-separation allegations. (RP 1361-1363). She renewed that request, sought supervised visits and domestic violence treatment orders at trial which were all denied (RP 1296; 1423-24; 1438).

At trial in March 2015, Dr. Milner, testified along various other experts on behalf of both parties including Tina's domestic violence support personnel. (RP 446 and 485) (CP 20).

By the time of trial Eric had moved to West Seattle to perform medical services for rest homes. (RP 217). The court awarded Tina sole decision-making authority, and Eric, residential time every other weekend from Friday through Sundays, face time privileges mid-week, and an equal sharing of the winter, mid-winter and spring breaks, and up to two weeks of vacation each summer. (CP 6-8). There were no restrictions placed upon his residential time.

Nevertheless, the trial court found him to have been neglectful and to have engaged in an abusive use of conflict that could endanger the

child's psychological development. (CP 50-5). It did not do so as to Tina Shibley.

B. Property Division:

At the time of marriage, the couple entered into a prenuptial agreement under the law of Tennessee, which the trial court found valid and enforceable. (CP 21-22). Under that agreement property in both names has the effect of being joint and any property in his or her own name is the separate property of that party even if acquired during the marriage. (RP 1429; page 4 of trial exhibit 46). (RP 1429 - 1431). During the marriage they spent \$175,000 to purchase gold. During the separation Eric sold the gold for 42.9% of its purchase cost: \$75,000 (RP 1407). By stipulation reached during the trial the parties asked the court to determine how much of the sale proceeds derived from receipts in both names or as "walk-ins" and was asked to divide that amount as joint or community property accordingly. That totaled \$43,000 (RP 1407, 1432; exhibit 143).

The court did not honor the stipulation without stating a reason. It observed the sale was in violation of a restraining order. It awarded Tina 90% of the purchase cost of the community portion, rather than the fair market value and awarded a resulting judgment against Eric in Tina's

favor for \$102,302. (CP 22-23) The court found that their total community property net of debt was worth less than \$90,000. (CP 22-23).

C. Maintenance and Child Support:

At the time of trial Tina's rent and utilities were \$100 per month. Her phone bill was \$33.00 per month. Day Care was \$15 per month. Head Start was free. (RP 1387-1388). There was no evidence as to how much would be necessary to eliminate the need or entitlement to public assistance. Nor did she present any evidence as to what her expenses and those of Ryan would be if she were awarded sufficient maintenance and child support to go off public assistance.

The court awarded Tina Shibley \$4,000 per month in maintenance (CP 17) for three years, and \$3,000 per month in child support, more than double the standard calculation, plus 97% of uninsured therapy and other health costs, and educational expenses. (CP 36).

D. Attorney Fee Award:

The trial court admonished the behavior of Eric Shibley's attorney numerous times throughout the trial. Eventually she sanctioned him \$500 ordering payment to the N.W. Justice Project. (RP 421 and CP 15).

Tina's attorney fees were paid in full by an agency receiving federal grants. (RP 1430). And yet the court awarded all fees incurred on her behalf, \$113,000 against Eric. (CP 15 and May 15, 2015 OD 14).

II. Assignments of Error:

A. The Child Support Order:

1. Failing to Order The Standard Calculation of \$1,447.24 per month
2. Treating the amount ordered as an upward deviation
3. Justifying The Award of \$3,000 per month On Insufficient Findings

B. Attorney Fee Award

4. The Court Erred by failing to consider the fees paid through government subsidy and by failing to consider the total financial circumstances of the parties.

C. Property Division

5. Awarding Tina Shibley a Judgment of \$102,302,
 - a) By failing to weigh the factors required under RCW 26.09.080.
 - b) Basing the award upon purchase cost rather than fair market value; and,
 - c) By failing to implement the in court stipulation of the parties as to characterization and distribution; and,

d) By punishing Eric Shibley for misconduct.

D. The Parenting Plan Order

6. Ordering Limitations On Eric Shibley Based Upon Non Existence Restrictions
7. Entering Findings Of Substantial Nonperformance Of Parenting Functions And Neglect and Abusive Use of Conflict Either Not Supported By Substantial Evidence or Insufficient To Justify Limitations.
8. Failing To Place Restrictions On The Mother's Conduct.
9. Authorizing Major Decisions That Are Beyond the Scope Permitted By RCW 26.09.187 (4) and (5).
10. Failing To Award Primary Residential Care And Sole Decision-Making To Eric Shibley

III. Argument:

A. The Property Division:

Whether a property division imposed by a trial court should be reversed depends upon whether the trial court abused its discretion. Abuse of discretion has been defined as a decision based upon untenable grounds or for untenable reasons. (See, *In re Marriage of Gillespie*, 89 Wa.App

390 at 399, 948 P.2d 1338 (1997). The court abused its discretion in four distinct ways.

The first is that, although a trial court has broad discretion under RCW 26.09.080, its decision must reflect that it considered, and did not merely pay lip service to all of the statutory factors. *In re the Marriage of Crosetto*, 82 Wash.App 545, 918 P.2d 954 (1996). Here, there is nothing in the record to indicate that the court considered any of the factors required of it under RCW 26.09.080. Its judgment award should be reversed and remanded for that reason alone.

The second was to base its award of \$102,301.46 upon the purchase cost of the community property gold rather than its fair market value. (4/1/15 O.D. 12). There was no evidence that the sale price obtained by Eric was less than fair market value.

Fair market value, both its increases and decreases, is the basis upon which property is to be valued in marital dissolution cases. See *Lucker v. Lucker*, 71 Wa 2d 165, at 168, 426 P.2d 081 (1967). The value must be current. *Mayo v. Mayo*, 75 Wa2d 35 at 39, 448 P.2d 926 (1968).

The trial court's determination of what property is separate and what is community was governed by the parties' prenuptial agreement which the court determined to be valid and enforceable. (4/1/15 O.D. 9;

CP 21-22). Under that agreement any property in the name of either party is deemed the separate property of that party and was treated accordingly by the trial court.

Trial exhibit 143 is comprised of all the purchase receipts totaling \$175,000. 42.9% of \$175,000 is \$75,075, some in Eric's name, some in Tina's name and some in no one's name and as "walk-ins". \$1334.00 was the cost of the gold purchased in Tina's name, 42.9% of which, \$486.48 is her separate property. \$62,846.34 of the gold was the cost purchased in Eric's name, 42.9% of which, \$26,961.00, is his separate property. The balance of the total receipts of the gold was properly characterized as community property. Their total cost to purchase was \$113,669 and sold at 42.9% of cost, or \$48,764. Her share of the community property sold should be a percentage of the \$48,764 of community gold sold, not a percentage of what the community gold cost to purchase, plus her separate share of \$486.48. The court's award must be reversed.

The third error was to fail to implement the stipulation of the parties on this issue reached during trial. That stipulation demonstrates that both parties treated the sales proceeds as a reflection of fair market value, by agreeing that the sales proceeds determined by the court to be community in nature was to be distributed to the parties. The in court

stipulation acknowledged that \$75,000 was what all the gold sold for, whether separate or community; that all receipts solely in each party's name be the separate property of that party; the remainder to be considered the community portion of the total sales proceeds. "So, whatever you consider to be community property, it only be considered at 42.9% of the purchase would be its value for the court to distribute." (RP 1407). The court's failure to honor that stipulation is an abuse of its discretion.

Finally the court erred by awarding her 90% of the community portion of what it cost to purchase for no other reason than to punish Eric for selling it in violation of a restraining order. (April 1, 2015 OD 11-12). RCW 26.09.090 expressly prohibits a trial court from rendering an award of property based upon misconduct. This constitutes reversible error. See *In re Marriage of Ayyad*, 110 Wash.App. 462, 38 P.3d 1033 (1980).

B. Attorney Fees: The Amount Awarded Was An Abuse of Discretion

1. The Court Failed To Weigh The Financial Circumstances of Each Party In Determining What Portion Of Fees, If Any, Should Be Paid By Eric Shibley

Attorney fees can only be awarded based upon statute, contract or some recognized ground in equity. *Dave Johnson Ins., Inc. v. Wright*, 167 Wash. App. 758, 275 P.3d 339 (2012) Intransigence is a recognized

ground in equity in marital dissolution cases. A blanket award of fees based upon intransigence can only be justified if there is a finding that the intransigence pervaded the entire proceeding. Otherwise, there must be findings as to specific acts of intransigence and what it cost the aggrieved party. (See, *In re Marriage of Bobbitt*, 135 Wash.App. 8, 144 P.3d 306 (2006).

Here there was no finding of intransigence and no finding that if it occurred, it pervaded the entire proceeding. There is nothing in the record that indicates that intransigence was considered. It was not argued. (April 1, 2015 O.D. 2 to 18 and CP 24-29).

The only other basis is RCW 26.09.140 which requires that the total financial circumstances of both parties be considered. *In re Marriage of Scanlon and Witrak*, 109 Wash.App. 167, 34 P.3d 877 (2001). The court found Eric's gross income to be \$16,500 per month. (CP 24. 35). After payment of \$4,000 per month in maintenance and \$3,000 per month in child support, he was left with approximately \$3,000 per month less \$1,500 per month in rent. (RP 1060). He owed attorney fees to his lawyer.

Tina had \$7,000 per month to pay \$100 per month in rent leaving her \$6,900 per month. She owes no fees to her attorney. Thus his financial

circumstances were in fact worse than hers going forward. Awarding all of the fees incurred on her behalf was therefore an abuse of discretion.

2.The Fees Paid On Tina Shibley’s Behalf Should Have Been Deducted

Tina’s attorney fees were paid by an agency that receives federal grants. (RP 1429-1430). The request for fees did not include a deduction for the fees already paid by that agency. The award of fees in effect paid them twice for the same thing.

Attorney Girard had been paid \$36,000 at \$90 an hour. That is ascertained by taking his request for \$80,000 at \$200 per hour which shows he put in 400 hours. \$90 per hour times 400 hours equals \$36,000. The same analysis with attorney Loge having been paid at \$125 per hour shows she worked 165 hours which equates to \$20,625. Thus the total fees unpaid, at \$200 per hour were \$56,375, \$44,000 to Gerard and \$12,375 to Loge. \$56,375 should be determined to be the unpaid fees.

C. Child Support:

1. An Amount In Excess of the Standard Calculation Where Incomes Exceed The Maximum Advisory Amount Are Not Deviations

The standard calculation in the trial court’s order was \$1,447.24. (CP 36). The court awarded \$3,000 per month as an “upward deviation”

more than twice the standard calculation. (CP 36). A transfer payment in excess of the standard calculation is not a deviation where, as here, the combined net incomes of both parties exceed the maximum advisory level. (CP 34). *In re Marriage of Leslie*, 90 Wa App 796 at 804, 954 P.2d 330 (1998). The court erred in concluding it to be an upward deviation. (CP 36-37).

2. The Court's Findings Are Insufficient.

The standards which must be fulfilled to justify imposing an amount that exceeds the maximum advisory level where the court finds their combined net monthly income exceed \$12,000 per month have been defined by case law. They are that there must be findings that are not cursory, even if supported by the record. (*In re Marriage of McCausland*, 159 Wa 2d 607, 152 P.3d 101 (2007)). Here the findings are cursory.

Furthermore, the court must consider and implement the factors under *In re the Marriage of Daubert*, 124 Wa.App 483, 99 P.3d 401 (2004) as required by our State Supreme Court in *McCausland supra* at 614 (2007). Under *Daubert supra*, a trial court was reversed for misapplying those factors as reflected by findings that the father has sufficient wealth, that the children need an additional amount to have a standard of living commensurate with their father and that they will

benefit by the opportunities available to them from the additional funds. Those findings were deemed insufficient as a result of which the trial court's decision was reversed. *Daubert*, supra at 407 (2004). The findings justifying the award here are virtual mirror images of those deemed legally insufficient under *Daubert*, supra at 407. (2004).

The court held: "The fact that the children will benefit by the opportunities available to them from additional funds is not the test for additional support. It is not enough that the funds might be spent on allowable or beneficial opportunities. The opportunities and expenditures ... must be both necessary and reasonable." *Daubert supra* at 407 (2004).

All child support orders create three separate components of a child support obligation, all governed by apportioning each party's share based upon their monthly incomes net of taxes. One category is called "special child rearing expenses". These include work related day care, educational, and extracurricular expenses (see RCW 26.19.080(3)). This type is addressed in section 3.15 of the child support order (CP 39) Eric also pays 97% of those costs.

The second category is uninsured health care costs. (See RCW 26.19.080(2)). This type is addressed in section 3.19 of the child support order and include any therapy expenses for the child. (CP 42). These too

are apportioned between the parents based upon their net monthly incomes. Eric also pays 97% of those costs above and beyond the monthly transfer payment.

The third category is the monthly transfer payment under section 3.5 of the order. It covers all other child related expenses such as housing, food, clothing, etc. as required by RCW 26.19.080 (1). The amount is derived by apportioning, pro rata, based upon both parents' net monthly incomes, the cost attributed by the economic table to the costs of raising the child in the home of the parent with whom the child resides the majority of the time. (*In re Marriage of Hughes*, 11 Wash.App. 454, 524 P.2d 472 (1974). The resulting amount is known as the "standard calculation". (RCW 26.19.011)(8).

Here, the court resorted to Ryan's need for behavioral therapy and educational support to justify a transfer payment of \$3,000 per month, which is more than twice the standard calculation, even though Eric is also ordered to pay 97% of Ryan's therapy and 97% of educational expenses in addition to the transfer payment. (CP 42). The decision must be reversed and the standard calculation imposed.

3. Court Erred In Determining The Standard Calculation Because It Failed To Deduct The

**Mandatory Taxes To Derive Eric
Shibley's Net Monthly Income.**

Trial Exhibit 204 shows Eric Shibley's after tax income of \$10,747 per month as of October 2013. His March 2014 financial declaration showed similar income, but incorrectly calculated his taxes based upon his monthly business gross revenue rather than upon his net revenue after the deduction of \$11,000 in normal business expenses. Thus it calculated his net after tax income lower than it should have been at \$3,543 per month. The trial court however erred by failing to deduct any mandatory taxes to derive his net income. (CP 44).

RCW 26.19.071 requires that mandatory taxes be calculated and deducted to determine a parent's net monthly income for purposes of calculating his or her net income for child support purposes. Support Calc does so automatically. Had the court done so it would conclude that Eric Shibley's net monthly income is \$10,487.94 per month. (See **appendix 1**). This is virtually the same as in the October 2013 child support order entered into with the State (trial exhibit 206). His support obligation should therefore be the standard calculation of \$1,098.11 per month and his percentage contributions to uninsured health costs, educational expenses and agreed extra-curricular activities should be 73.6%.

D. Parenting Issues:

1. The Section 3.10 Provision Referencing Restrictions On Dr. Shibley's Residential Time Must Be Eliminated Since There Are None

Findings as to domestic violence, willful abandonment that continues for a substantial period of time, substantial refusal to perform parenting functions, or emotional abuse of a child are all deemed mandatory restrictions of residential time under RCW 26.09.191 (1) and (2). Section 3.10 of the final parenting plan order labeled "Restrictions" provides: "The ...father's residential time with the children shall be limited because there are limiting factors in paragraphs 2.1 and 2.2. (CP 54). However, the court found that restrictions under RCW 26.09.191 (1) and (2) do not apply. (CP 21). Thus no limits were placed upon Eric's residential time. Thus, section 3.10 should be reversed and eliminated.

2. The Findings Under RCW 26.09.191 (3) Are Either Insufficient Or Not Based Upon Substantial Evidence

The trial court determined that there are restrictions under RCW 26.09.191 (3) (a): neglect or substantial non-performance of parenting functions; (e) abusive use of conflict that creates the danger of serious damage to the child's psychological development; and (g) such other

conduct that the court finds adverse to the best interests of the child. (CP 50). The evidence does not support any those findings.

a. Substantial Non-Performance of Parenting Functions.

Webster's dictionary defines the word "substantial" as "considerable". It defines "considerable" as "a large amount or number." (See Webster's New World Dictionary, 3rd Edition, pages 297 and 1336 (1988). The legislature is presumed to afford words their dictionary definition unless it specifically defines them otherwise. (See, *State v. Sunich*, 76 Wa App 202 at 206-207, 884 P.2d 1 (1994). Here there was no evidence that Eric Shibley engaged in the non-performance of parenting functions, let alone "substantial" non-performance. The only period of time he did not perform parenting functions was during the first five months of separation when Tina absconded with Ryan and would not disclose his whereabouts.

A similar decision by a trial court was overruled because the parent did not create the conditions that constituted the limitation. *In re Marriage of Watson*, 132 Wa App 222 at 234, 130 P.3d 915 (2006) involved a father who was found to have impairment of emotional ties under RCW 26.09.191 (3) (d). The court of appeals reversed since the creation of that

impairment was due to the mother's false allegations of sexual abuse and the temporary court order that erred on the side of over-protecting the child by imposing severely limited time between father and daughter. Since they were beyond his control the impairment contemplated by the statute was reversed.

Here the "substantial non-performance" was due to the mother hiding Ryan's her whereabouts and not allowing contact for five months between April and September 2013. (RP 986).

b. Neglect

The legislature has defined what is meant by neglect. " 'Abuse or neglect'" means ... injury of a child by any person under circumstances which cause harm to the child's health, welfare or safety...or the negligent treatment or maltreatment of a child by a person responsible for providing care to the child." RCW 26.44.020 (1). " 'Negligent treatment or maltreatment' means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare or safety." (RCW 26.44.020 (16). The statute goes on to illustrate that even exposure to domestic

violence does not in and of itself constitute negligent treatment or maltreatment.

At common law, negligent behavior requires a showing that harm resulted from the failure to act, and that the harm was the foreseeable consequence of the party's conduct or failure to act. See, *Travis v. Bohannon*, 128 Wa App 231 at 242, 115 P.3d 342 (2005).

On one occasion 11 months prior to trial (May 1, 2014) (RP 339) Eric left Ryan for 15 minutes in his car at a post office parking lot on a hot day while in the post office (RP 340). Eric was coming out of the post office as the police arrived. (RP 372). The police did not know how hot it was in the car (RP 342). Ryan was crying as he was looking most of the time towards Eric, who was pleading with the officer. Ryan drank water but the officer did not know how much. (RP 361). No doctor was called to the scene. The paramedics did not take him to the hospital or administer CPR or give him oxygen. (RP 368-369). They confirmed that Ryan was okay. (RP 344).

The guardian ad litem did not see this as neglect. (RP 415). In the 10 months since it occurred, as of the time of trial, it did not recur. The incident did not rise to the level of neglect as defined by statute and common law.

Neither does the finding that leaving him at his place of employment without appropriate supervision constitute neglect. There was no evidence that he was left with irresponsible people, or that his health or safety was in jeopardy. The unrefuted testimony was that he left Ryan at times with employees for an hour or so. Ryan was familiar with the employees with whom he was left and in a secure room less than an hour at a time. (RP 1121).

The court found that dropping Ryan in to day care for a single day at times was neglect, speculating that it caused psychological harm. (OD 8). Baby sitters used by him already were familiar with him. (RP 1102 – 1103): Marysville Daycare, two years prior, (RP 1121), Kids ‘n Us in Everett and Marysville, and Puyallup a couple of days, two week span, three drops two hours each; Kinder Care, in Burien, 1 hour one day (RP 1122).

He finally settled upon one pre-school which provided all care on Eric’s residential time for four months prior to trial, and who reported no behavior problems after the first three to four weeks. (RP 655 to 660).

The trial court also relied upon Eric’s failure to acknowledge Ryan’s need for counseling. This was based upon his own experience and that of the current preschool care provider during his residential time of

every other week. His refusal to allow implementation of an agreed order to hire a therapist, posed no danger to Ryan's health. In fact, as of trial, Tina could not get him in to the therapy that she chose for the several months that had already passed since she was authorized by the court to do so. (RP 1279 and 1285).

Eventually Eric was able to get Ryan in to therapy with Dr. Kelly Maloney at Catholic Community Services in West Seattle verified by the guardian ad litem. (RP 196). Ryan was acting out. But there was no evidence that therapy would, more likely than not, be effective or result in an improvement in Ryan's behavior. No harm was proven by the absence of therapy for Ryan, and no benefit was proven after he had been in therapy.

Thus, there was no evidence that Eric's refusal endangered Ryan's health or safety. Absent that evidence, the finding that he refused to permit the child to be in therapy or to acknowledge his behavior or emotional problems is insufficient to justify the conclusion these were a form of neglect. (CP 51).

In her oral decision, the court also expressed concern that Eric had taken Ryan to an unlicensed therapist. (OD 9) referring to one Dr. Homs. However Eric hired Dr. Homs, not as a therapist for Ryan, but to help Eric

develop more effective parenting strategies. (RP 1132). Eric actually utilized his services to help improve his approaches to dealing with Ryan. (RP 1132). Thus the finding that he hired Dr. Homs to treat Ryan, was not supported by substantial evidence.

Eric expressed the belief that Ryan has behavior problems (RP 1122). He stated in August and November that Ryan has no problems when with him. (RP 1123). The preschool provider he used on his residential time reported no problems with Ryan after the first three weeks of him being in their facility. (RP 655).

He was asked to participate in counseling sessions with Kelly Maloney of Catholic Community Services. He did so. (RP 1125-26).

Thus none of the evidence supported the finding that he had neglected or failed to perform parenting functions.

c. Other Conduct That Are Adverse To The Best Interests of the Child: The Restriction That The Father Have Proper Supervision At Home and The Workplace

This restriction is based upon no evidence. A finding must support the legal conclusion reached. See, *In re Marriage of Monkowski*, 17 Wa App 816 at 818, 565 P.2d 1210 (1977). Supervision of what? By whom?

Toward what purpose? None of this is explained or defined by the trial court.

d. The Findings That Eric Shibley Engaged In The Abusive Use Of Conflict That Endangered The Ryan's Psychological Development Are Insufficient or Not Based Upon Substantial Evidence

RCW 26.09.191(3) requires more than a showing that a parent has engaged in abusive use of conflict. It also requires proof that the conflict has endangered the child's psychological development. In other words not only that it has occurred but that it has impacted the child. The findings made by the court either do not constitute abusive use of conflict by Eric, or did not endanger Ryan's psychological health.

1) Disclosing Tina Shibley's Journals And Medical Records Without Her Permission.

The only disclosures were to forensic professionals who were to evaluate Tina. She signed a release to the GAL and had a CR 35 exam performed by Dr. Olson. Given her medical history and current state, her medical records were relevant. (RP 1082).

The court focused on Eric's knowledge of HIPPA laws as a doctor absent her consent as abusive use of conflict. But his decision to provide medical records to professionals who wanted to see them, that she left

behind, was not as a physician treating a patient, but rather as a father in a parenting dispute in the pursuit of having evaluated whether her physical and mental health implicated her ability to parent. To turn that information over to evaluating experts is not an abusive use of conflict. Even if it were, there was no evidence that doing so endangered Ryan's psychological development.

2) Failing To Pay Child Support (O.D. 8).

Eric paid over \$6,000 of child support under a prior order. (RP 1052). He failed to pay under the order entered three months prior to trial because he did not know where to send the check. (RP 1052-1053; 1058). There was no evidence that the failure to pay endangered Ryan's psychological development. Thus the finding does not support the conclusion.

3) Failing To Discuss Health Care With The Mother After The Court Ordered Him To Do So. (O.D. 8)

The parents were ordered not to communicate with each other except through counsel, which he did on the subject. (RP 1000). There was no evidence that Ryan was harmed by Eric's failure to agree. Once the mother was empowered by the court to find Ryan a therapist she was unable to do so. (RP 1281, 1284-1285).

4) Allowing Abusive Litigation Tactics Including Attorney Letters.

The “tactics” were not specified by the court. There was no evidence that whatever attorney tactics or attorney’s letters the court had in mind, endangered Ryan’s psychological development.

As to cuts or bruises during Eric Shibley’s care, he did explain, through a letter of counsel, the nature and circumstances of the injuries. Because of the frequency of her inquiries, he indicated that he would not in the future explain each time what would happen and if hospitalization were to be necessary he would obtain it and inform her. (RP 1289). No hospitalization occurred and there was no evidence that Ryan needed hospitalization.

There were only two attorney letters in evidence from his current attorney. Trial Exhibit 36, a letter merely explaining what a witness was to do with subpoenaed records to avoid a deposition. The other, trial exhibit 135, a letter from his attorney to hers dated September 25, 2014. In it he explained why a developmental evaluation and therapy for Ryan was unnecessary and why Tina’s choice of therapist was suspect. It raised questions about her motives pointing out that she took Ryan to a doctor immediately after residential time with Eric 24 times within two years, and

7 of the last eight weeks in August and September 2014. There was no evidence that this letter was an abusive use of conflict or that the letter endangered Ryan's psychological development.

5) Selling The Mobile Home Contrary To Court Order. (O.D. 8).

This occurred three days before trial. (RP 1044). It had no connection with Ryan or his mental health. Thus it too fails to support the ultimate finding.

6) Threatening Dr. Shushan In Front Of Ryan. (O.D.8).

Eric was angry in front of Ryan towards the doctor because she would not turn over her records. There was no evidence of anything in that exchange that would endanger Ryan's psychological development beyond his discomfort from hearing his father confronts someone in anger at the moment. There was no proof that this one incident impacted Ryan's psychological development in any way.

e. Findings Should Have Been Entered As To Tina's Abusive Use of Conflict That Endangered The Ryan's Psychological Development

The court criticized Dr. Olsen's CR 35 examination of Tina Shibley as "cherry picking" only the evidence adverse to her. (April 1,

2015 OD 7). The trial court did the same thing in its evaluation of the best interests of the child, by “cherry picking” the evidence it viewed as being neglect or abusive use of conflict by Eric, while ignoring evidence of Tina’s abusive use of conflict that endangered Ryan’s psychological development. Thus it abused its discretion because it only imposed restrictions on him, designed to spare Ryan exposure to conflict, leaving Tina free to engage in it. (CP 50). The court should have imposed the same restrictions on her.

After she took Ryan and left, except for two occasions during that first month when she brought Ryan to a park, she did not allow any contact of any kind between them for the next four months. Eric was powerless to do anything about it because she would not reveal where they were. (RP 982)

Eric had a highly bonded relationship with Ryan before separation. He attended pre-natal classes. (RP 942). He helped out with the birth (RP 950-951). He would come home usually after the first four hours of 12 hour work shifts, to care for him, when Tina was too debilitated by migraines or depression to do so. (RP 955). During the year prior to the separation he would be home every other week and do 80% of the child care. (RP 977).

Before separation Ryan was observed as being full of energy, on the go, (RP 632). There was no evidence that he would scream and yell loudly (RP 639); or that he was chronically angry, or that he would hit or bite other children or adults (RP 643). There was evidence that he would wander off in the neighborhood due to Tina not supervising him. But there was no evidence that he would run away from either parent when watched, or defy adults by talking back to them, or bite or hit them. All of that behavior occurred after he was taken from his father. Ryan's post separation behavior was so bad that Ryan was kicked out of two day care centers that he attended on Tina residential time. (RP 394, 1016, 1018-1024; 1272 and 1318).

Tina raised the same pre-separation domestic violence allegations in contesting his motion for a temporary parenting plan. His motion was granted in August, 2013. It ordered Ryan begin spending every other full week with Eric later the next week. (Trial Exhibit 40). Tina circumvented that order by going up to Bellingham, to obtain an immediate ex parte order of protection that deprived Ryan of any contact with his father based on the same allegations. It wasn't until mid September the court was informed of her deception and the Snohomish County order of September

4 that the Skagit County Court dismissed her domestic violence proceeding. (CP 997).

Thereafter, she took him repeatedly to doctors and filed numerous CPS complaints, all unfounded. (Trial Exhibit 135; RP 195 and 455-456). Tina Shibley had continuing unwarranted suspicions of sexual abuse on three occasions when she took him straight away to the doctor after getting him back from Eric (RP 461, 468 and 470). In responding to a specific question about Tina's abusive use of conflict, the GAL noted that her checking Ryan after each visit is not appropriate. (RP 413). These behaviors, individually or collectively constitute abusive use of conflict that affected his emotional development.

As to endangering Ryan's psychological development no one, not even the GAL evaluated the effect on Ryan resulting from the abrupt severing of the relationship for several months with a parent who provided ongoing and extensive care for his entire life up to that point. It doesn't take an expert to know that a three year old's sense of time is dramatically different from that of an adult. They have no concept of a day or a week or a month. There was no direct evidence of what harm to his sense of security, his view of his world, or of himself this prolonged absence, coupled with him hearing negative comments about his father stated by

Tina to her counselor (RP 886), had on him. There was however, indirect evidence. More evidence than the mere speculation engaged in by the trial court as to the psychological effect of Ryan occasionally being left with strangers for brief periods (April 1, OD 8). Having to take his clothes off and be examined for sexual abuse as traumatic for Ryan (RP 456).

Instead of limiting its order to prohibiting only the father from involving the child in conflict, that restriction should have been extended to both parents. Thus, there was ample evidence that Tina engaged in an abusive use of conflict that endangered Ryan's psychological development. At the very least it was conduct adverse to Ryan's best interests under RCW 26.09.191 (3). Findings should have been entered accordingly.

3. Decision-Making Authority

a. Reasons For Sole Decision Making

As to reasons for awarding sole decision-making to one parent, the only provision endorsed by the court, warranted by the evidence, was their mutual inability to cooperate with one another in each of the areas under RCW 26.09.184(4)(a). The alternative bases should be eliminated as being unsupported by the evidence.

b. A Number Of Major Decisions Under Section 4.2 Are Beyond The Scope of A Trial Court's Authority To Impose.

The trial court gave Tina authority to make decisions regarding criminal behavior, getting tattoos, military service and marriage before the child reaches the age of 18. (CP 56). These are all areas of decision making beyond the scope of the court's authority to impose absent agreement of the parties. RCW 26.09.187(5)(a) provides: "The plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in RCW 26.09.187 and 26.09.191. Regardless of the allocation of decision-making in the parenting plan, either parent may make emergency decisions affecting the health or safety of the child."

Thus the court only has the authority to impose decision-making authority as to educational, non-emergent health care and religious upbringing. Any other areas identified, must be as to parenting functions under RCW 26.09.184 and then only, if by agreement of the parents. Criminality, tattooing, military service and marriage under the age of 18 are not among the parenting functions covered under .184 and were not

agreed to by the parties. They are beyond the scope of a trial court to impose.

Nevertheless, sole decision-making should have been awarded to Eric because he should have been awarded primary residential care.

4. Primary Residential Care of Ryan Should Have Been Awarded To Eric Shibley

a. The Required Statutory Factors Were Not Properly Weighed.

A trial judge is required to weigh all statutory factors identified under RCW 26.09.187 (3) in determining a final parenting plan order. *In re Marriage of Kovacs*, 121 Wash.2d 795, 854 P.2d 629 (1993). The evidence under (3) (iii) is quantitative. RCW 26.09.187 (3) (iii) requires the court to weigh “each parent’s past...performance of parenting functions”. The trial court did so. (O.D. 3 April 1). Both parents had the care of Ryan equally 19 months prior to trial.

Subsection RCW 26.09.187 (3) (i) is more qualitative in nature. It requires a weighing of the child’s relationship with each parent. Subsection (3)(i) requires the trial court to weigh “the relative strength, nature, and stability of the child’s relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the child’s daily needs.” Because that factor is the

most qualitative of all the factors, it is to be afforded the greatest weight by the express terms of the statute, in language set forth after sub-section (vii).

The provisions of a statute are to be read “in pare materia”, harmonizing all sub-sections to implement the intent of the legislature. *City of Olympia v. Drebeck*, 156 Wash.2d 289 126 P.3d 802 (2006). RCW 26.09.187 (3) (iii) also requires the trial judge to make findings as to “each parent’s potential for future performance of parenting functions.

The reference in sub-section (i) to the strength and stability of Ryan’s relationship with each of his parents relates to each parent’s potential for the future performance of parenting functions under sub-section (iii). In making that assessment, the trial court must take the parties where it finds them as of the time of trial. That is what the trial court failed to do here. As to that requirement of sub-section (3) (iii) and the elements under sub-section (3) (i), the trial judge abused its discretion.

The trial court was so profoundly impressed with Tina’s willingness to understand her limitations, to learn from all of the professional support systems available to her, and her desire to give Ryan what he needs (O.D. 3) that it failed to find that she was not able to effectively parent him on a sustained basis. It failed to find that she was

unable to effectively meet his needs posing risks to Ryan's potential physical and psychological peril as compared to Eric Shibley. Those failures warrant a reversal and remand as explained below.

Our State Supreme Court states in the matter of *Schultz v. Schultz*, 66 Wash.2d 713 at 722, 404 P.2d 987 (1965):

“Mental disturbance may also render a parent ineligible for child custodial responsibilities. *Atkinson, supra...*

...While it is hoped that the respondent's condition will improve and that she will not suffer a relapse, the award of custody cannot rest on hoped-for recovery...”

Ryan exhibited rebellious and physically violent behavior when in her care, and that of her day care provider, which she did not deny in her testimony, in contrast to Eric's relationship with Ryan, and with those who would care for Ryan when in Eric's residential care. (RP 1021, 1272, and 655).

The trial court noted that Dustin Johnson works with her on a daily basis (OD 4 and RP 797). Although he observed Ryan looks clean and nourished (RP 801) and that her apartment is cluttered, but clean and hygienic (RP 802 -803); that she makes eye contact, speaks in short declarative sentences easy to understand; is consistent with voicing options with consequences and rewards appropriate behaviors (RP 815) he

admitted that as to depression, even though she takes medication, she wears her emotions on her sleeve; struggles with feelings of helplessness, particularly around this situation; he's seen the effects of that on her (RP 826). The court also relied upon the testimony of Wendy Begle.

Begle observed Tina frequently during the first nine months until February 2014. (RP 860). She was referred through Citizens Against Domestic Violence. (RP 861). She saw Tina once a week for three or four months for an hour helping with parenting strategies then every other week for about a year. (RP 866-867). She observed a good attachment between the two of them. He runs to her when he gets hurt; asks when needs something. He's clean.

However, the reason for the frequent visits by Begel is that Tina has challenges and needs the help. (RP 894). Begel discussed the challenges that Tina has as one of the causes of Ryan's behavior. (RP 896). Thus Begel admitted that Tina's weakness is being really firm and believable. "That's something that is still a bit of a struggle. She works on it all the time. She recognizes it is an issue and she works on it." (RP 875). "At first she was pretty scattered and emotional." (RP 876). Even with that aid she was unable to keep him from respecting boundaries designed to keep Ryan from getting into harm's way.

Begel observed that at the park he ran quickly so we grabbed him and took away the privilege of riding the truck; he had to hold one of our hands the rest of the way. (RP 872). After he ran away from her she advised Tina to make him hold your hand and take the truck away, so she worked on that. (RP 873). She was very worried that Ryan runs out into the street. (RP 878).

Tina admitted the following:

In October 2014 Tina reported that still inconsistent with discipline (RP 882-3). Tina herself admitted that her brain injury, depression, and migraines, impair her ability to effectively protect him.

Her problems are severe at times. She has headaches daily and migraines at least once per month. (RP 445).

In September 2014, as he had driven off on a big wheeler and when caught, she did not run to him first, which she stated she should have done. She fought him for the big wheel which she took from him, and he ran away from her. The police had to be called (RP 1273-1274; 1303, 1304). This occurred by a busy thoroughfare, Commercial Ave in Anacortes. He traversed the parking lot of a restaurant before being caught (RP 1346 and 1350-1351). When she would try to hold his hand but he would wiggle out. She couldn't make him stop. (RP 1330). He was found

in the parking lot of a Mexican restaurant (RP 1275). Eric, by comparison, never lost Ryan. (RP 1101).

Ryan had run off from her at least four times previously. (RP 1305). He ran away from her while they waited at a bus stop before her deposition in 2014 when he was three years old. (RP 1329-1330). She was holding his hand and he wiggled out and ran into a hospital. She told him to stop and he refused. (RP 1303; 1330; 1332-1334).

Tina had two car seats for Ryan. He would unbuckle his seat belt while more than once, while Tina would drive the car. Ryan would do this with one particular car seat but not the other. She could not recall how many times. She would not use the other. (RP 1309). She still uses the car seat from which he disconnects the seat belt the last time being about a month before trial. It would take 10 – 15 minutes for her to get him back into his car seat because he liked to chase and play games although the last occurrence it took less than a minute (RP 1310-1312).

Eric never had a problem with getting him to stay in a car seat. Even when the police came in May as Eric was coming out of the post office, Ryan was in his car seat. (RP 374).

She has also had homicidal thoughts about Eric probably more than once that could be a function of her brain injury. (RP 1336 – 1337).

She acknowledged having suicidal thoughts possibly during the year prior to trial while Ryan is in her care. (RP 1365-1366).

She acknowledged having debilitating migraine headaches during the last year, while Ryan had been in her care. They last a couple of hours at a time. (RP 1366).

She had headaches during trial and was tired. (RP 1152). Fatigue is an ongoing issue. (RP 1156). She has suicidal, thoughts, just not as much as she used to. (RP 1159). Debilitating migraines, in the sense of cannot get up for several hours, last happened several months ago. (RP 1640.)

Tina would talk negatively about Eric in front of Ryan because she needed to take care of him while meeting with Begle. (RP 885-887). The trial court's failure to find Tina's abusive use of conflict endangering Ryan's psychological development should also have warranted restrictions on her residential time as it implicates her future parental capacity.

As far as dealing with Ryan in the future, Tina expressed the hope that her ability to deal with him will improve as his needs change, and that they will have a good relationship. (RP 1317-1318). However she acknowledged that her physical and mental limitations pose challenges to

her ability to function on a day to day basis although she could not explain how. (RP 1320-1321).

She is struggling to raise him. She feels lonely and alone. (RP 890). Her depression presents unique challenges as with all depressed parents she's worked with. (RP 891). She's had migraines and tries to put herself in a safe location in her apartment away from him. (RP 892).

Tina admitted that Ryan bites, hits, darts away and talks back. (RP 1271). He has bitten her and other children and teachers. (RP 1272). He bit her as recently as February 2015, a month before trial. Badly enough that he left a bruise on her. (RP 1318). (RP 1318). He talks back to her and teachers. (RP 1272). She admitted that her physical and mental limitations pose challenges to her ability to function on a daily basis. (RP 1320-1321).

b. The Problems With Which Tina Struggled As of Trial Were Not Present In Eric's Care Of Ryan

Ryan did not engage in the same behavior when under Eric's care and his behavior was normal at the day care chosen by Eric on his residential time (RP 1019 – 1024).

Ryan would hug Eric all the time. He constantly wanted to be with his dad. He would ask Eric to read to him. (RP 648). During visitations he would behave when out to dinner, and would eat his food. He was more

well-behaved and calmer with Eric than with Tina. Eric would impose discipline, by getting down with him and putting him in time out. Ryan followed the directive. (RP 649-650). Nor did Eric's pre-school provider have the difficulties that led to him being kicked out of day care facilities used during Tina's residential time. (RP 655 – 658).

Since mid-January 2015, Eric's pre-school provider, reported that while during the first three to four weeks Ryan was very disruptive. He would not make friends. He would spit in their faces or poke them in the eye, when he would arrive after being with his mother. (RP 655 and 660). During the first two to three weeks he would bite, hit, kick the staff, run for the door. (RP 680). However, after that time he was thriving in that program. (RP 655). He made friends, and played with other children (RP 656). The preschool provider attributed the good behavior to structure and knowing his schedule. (RP 656). He even has progressed to the point that he works independently at a desk, which he could not do in the beginning. (RP 659).

She also observed him with Eric 20 – 23 hours per week. He is excited to see Eric every day; hugs him; kisses him; Eric reciprocates. He also practices the same discipline techniques employed by the pre-school under the guidance of the director. He even utilized ideas as to how to

pack Ryan's lunches. (RP 665). She reported that he is a very loving parent who provides all the necessary needs for Ryan with a good knowledge of how to parent. (RP 669). Nor has she heard him speak negatively about Tina Shibley. (RP 670).

IV. Conclusion:

A. Financial Issues

The trial court fashioned a property division based upon an erroneous basis for valuing the gold sale proceeds and contrary to the stipulation of the parties. It awarded attorney fees without considering the relative financial circumstances of both parties, considering its award of spousal maintenance and child support and by failing to discount by what attorneys had already been paid. As to child support, it failed to deduct taxes mandated by statute and exceeded the maximum advisory level transfer payment on a legally insufficient basis. All of those decisions must be reversed.

B. Parenting Issues

Four year old Ryan Shibley is a handful for any adult. He poses challenges for the best of parents and care givers. Tina made great strides in compensating for her mental and physical disabilities and is motivated

to provide him what he needs. However, she is too disabled, physically and mentally, to provide him the limits and structure that he needs.

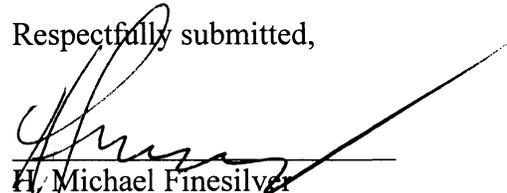
Since separation she cut off all contact between Ryan and his father with whom he had a close and nurturing relationship. There can be no doubt that this decision had a significantly negative impact upon his psychological development and must account, in part for the behavioral challenges he posed for her that did not typify his behavior prior to separation.

Decisions as to residential placement as between two parents cannot be based upon morality. Nor can the award of "... custody of a child... be used as a reward or punishment for the conduct of parents." *Shaffer v. Shaffer*, 61 Wash.2d 699 at 702, 379 P.2d 995 (1963). *Wildermuth v. Wildermuth*, 13 Wa.App 445, 655 P.2d 718 (1982). It cannot be a punishment for the behavior of a parent or his attorney based upon mere speculation that it might be harmful to the child. *In re the Marriage of Cabalquinto*, 100 Wash.2d 325, 669 P.2d 325 (1983). Thus, it cannot be a reward to parent for trying their best. Instead, residential placement must be based upon an objective assessment of what is best for the child. That is what RCW 26.09.002 instructs a trial court to do.

If one parent is not capable of meeting the challenges that a child's behavior poses, and the other parent is, majority residential placement must be with the parent who does. That is what the law requires and that is what the trial judge failed to do here. The decision as to primary residential placement and decision making as to major issues must be reversed, and restrictions placed upon both parents as to the content and means of communication to reduce the potential for conflict that could harm Ryan.

DATED this 14 day of December, 2015.

Respectfully submitted,



Michael Finesilver
(f/k/a Fields)
Attorney for Appellant
W.S.B.A. #5495

1

1

1

1

1

1

1

1

Washington State Child Support Schedule Worksheets

[] Proposed by [] [] State of WA [] Other (CSWP)
 Or, [] Signed by the Judicial/Reviewing Officer. (CSW)

County SNOHOMISH

Case No. 13-3-01699-2

Child/ren and Age/s: Eric R. Shibley, 4

Parent 1 Eric Shibley

Parent 2 Tina Shibley

	Parent 1	Parent 2
Part I: Income (see Instructions, page 6)		
1. Gross Monthly Income		
a. Wages and Salaries	-	-
b. Interest and Dividend Income	-	-
c. Business Income	\$30000.00	-
d. Maintenance Received	-	\$4,000.00
e. Other Income	-	-
f. Imputed Income	-	-
g. Total Gross Monthly Income (add lines 1a through 1f)	\$30000.00	\$4,000.00
2. Monthly Deductions from Gross Income		
a. Income Taxes (Federal and State) Tax Year: 2015	\$3,544.95	\$246.26
b. FICA (Soc. Sec. + Medicare)/Self-Employment Taxes	\$1,548.11	-
c. State Industrial Insurance Deductions	-	-
d. Mandatory Union/Professional Dues	-	-
e. Mandatory Pension Plan Payments	-	-
f. Voluntary Retirement Contributions	-	-
g. Maintenance Paid	-	-
h. Normal Business Expenses	\$14419.00	-
i. Total Deductions from Gross Income (add lines 2a through 2h)	\$19,512.06	\$246.26
3. Monthly Net Income (line 1g minus 2i)	\$10,487.94	\$3,753.74
4. Combined Monthly Net Income (line 3 amounts combined)	\$14,241.68	
5. Basic Child Support Obligation (Combined amounts →)		
Eric R. Shibley \$1492.00	\$1,492.00	
-		
-		
-		
6. Proportional Share of Income (divide line 3 by line 4 for each parent)	.736	.264

	Parent 1	Parent 2
Part II: Basic Child Support Obligation (see Instructions, page 7)		
7. Each Parent's Basic Child Support Obligation without consideration of low income limitations (Each parent's Line 6 times Line 5.)	\$1,098.11	\$393.89
8. Calculating low income limitations: Fill in only those that apply.		
Self-Support Reserve: (125% of the Federal Poverty Guideline.)	\$1,226.00	
a. Is combined Net Income Less Than \$1,000? If yes, for each parent enter the presumptive \$50 per child.	-	-
b. Is Monthly Net Income Less Than Self-Support Reserve? If yes, for that parent enter the presumptive \$50 per child.	-	-
c. Is Monthly Net Income equal to or more than Self-Support Reserve? If yes, for each parent subtract the self-support reserve from line 3. If that amount is less than line 7, enter that amount or the presumptive \$50 per child, whichever is greater.	-	-
9. Each parent's basic child support obligation after calculating applicable limitations. For each parent, enter the lowest amount from line 7, 8a - 8c, but not less than the presumptive \$50 per child.	\$1,098.11	\$393.89
Part III: Health Care, Day Care, and Special Child Rearing Expenses (see Instructions, page 8)		
10. Health Care Expenses		
a. Monthly Health Insurance Premiums Paid for Child(ren)	-	-
b. Uninsured Monthly Health Care Expenses Paid for Child(ren)	-	-
c. Total Monthly Health Care Expenses (line 10a plus line 10b)	-	-
d. Combined Monthly Health Care Expenses (add parent 1's and parent 2's totals from line 10c)	-	-
11. Day Care and Special Expenses		
a. Day Care Expenses	-	-
b. Education Expenses	-	-
c. Long Distance Transportation Expenses	-	-
d. Other Special Expenses (describe)	-	-
	-	-
	-	-
	-	-
e. Total Day Care and Special Expenses (Add lines 11a through 11d)	-	-
12. Combined Monthly Total Day Care and Special Expenses (add parent 1's and parent 2's day care and special expenses from line 11e)	-	-
13. Total Health Care, Day Care, and Special Expenses (line 10d plus line 12)	-	-
14. Each Parent's Obligation for Health Care, Day Care, and Special Expenses (multiply each number on line 6 by line 13)	-	-
Part IV: Gross Child Support Obligation		
15. Gross Child Support Obligation (line 9 plus line 14)	\$1,098.11	\$393.89

	Parent 1	Parent 2
Part V: Child Support Credits (see Instructions, page 9)		
16. Child Support Credits		
a. Monthly Health Care Expenses Credit	-	-
b. Day Care and Special Expenses Credit	-	-
c. Other Ordinary Expenses Credit (describe)	-	-
	-	-
	-	-
d. Total Support Credits (add lines 16a through 16c)	-	-
Part VI: Standard Calculation/Presumptive Transfer Payment (see Instructions, page 9)		
17. Standard Calculation (line 15 minus line 16d or \$50 per child whichever is greater)	\$1,098.11	\$393.89
Part VII: Additional Informational Calculations		
18. 45% of each parent's net income from line 3 (.45 x amount from line 3 for each parent)	\$4,719.57	\$1,689.18
19. 25% of each parent's basic support obligation from line 9 (.25 x amount from line 9 for each parent)	\$274.53	\$98.47
Part VIII: Additional Factors for Consideration (see Instructions, page 9)		
20. Household Assets (List the estimated value of all major household assets.)		
a. Real Estate	-	-
b. Investments	-	-
c. Vehicles and Boats	-	-
d. Bank Accounts and Cash	-	-
e. Retirement Accounts	-	-
f. Other: (describe)	-	-
	-	-
	-	-
	-	-
21. Household Debt (List liens against household assets, extraordinary debt.)		
a.	-	-
b.	-	-
c.	-	-
d.	-	-
e.	-	-
f.	-	-
22. Other Household Income		
a. Income Of Current Spouse or Domestic Partner (if not the other parent of this action)		
Name	-	-
Name	-	-
b. Income Of Other Adults in Household		
Name	-	-
Name	-	-

Other Factors For Consideration (continued) (attach additional pages as necessary)

Signature and Dates

I declare, under penalty of perjury under the laws of the State of Washington, the information contained in these Worksheets is complete, true, and correct.

Parent 1's Signature

Parent 2's Signature

Date

City

Date

City

Judicial/Reviewing Officer

Date

**This Worksheet has been certified by the State of Washington Administrative Office of the Courts.
Photocopying of the worksheet is permitted.**

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Marriage of:)
)
 ERIC R. SHIBLEY,)
)
 Appellant,)
)
 v.)
)
 TINA M. SHIBLEY,)
)
 Respondent,)
 _____)

DECLARATION OF
 SERVICE
 RECEIVED
 COURT OF APPEALS
 DIVISION ONE
 DEC 14 2015

2015 DEC 14 PM 1:03
 COURT OF APPEALS
 STATE OF WASHINGTON
 E

I, Lester Feistel, state and declare as follows:

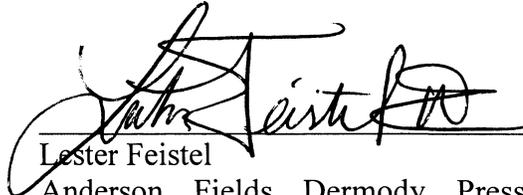
I am a Paralegal in the Law Offices of Anderson, Fields, Dermody,
 Pressnall & McIlwain, Inc., P.S. On the 14th day of December, 2015, I
 placed true and correct copies of the Brief of Appellant with Seattle Legal

Messengers for delivery on December 14, 2015 to:

Elizabeth A. Helm
 Northwest Justice Project
 401 Second Ave. S., Suite 407
 Seattle, WA 98104

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED at Seattle, Washington, on this 14th day of December, 2015.



Lester Feistel

Anderson, Fields, Dermody, Pressnall &
McIlwain, Inc., P.S.
207 E. Edgar Street
Seattle, Washington 98102
(206) 322-2060

RECEIVED
COURT OF APPEALS
DIVISION ONE

DEC 14 2015