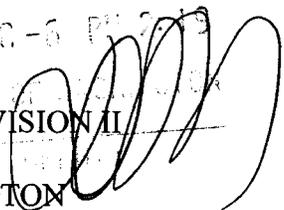


COURT OF APPEALS
DIVISION II

No. 40119-3

FILED - 6 PM 2/2/19

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON



CLYDE H. REED,

Appellant/Cross-Respondent,

vs.

CATHERINA Y. BROWN,

Respondent/Cross-Appellant.

APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY,
THE HONORABLE JOHN R. HICKMAN, PRESIDING

BRIEF OF RESPONDENT

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ORIGINAL

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III. STATEMENT OF FACTS

The facts pertinent to this appeal are set forth in the following argument section of this brief.

IV. ARGUMENT

A. APPELLANT HAS FAILED TO PRESERVE ANY CLAIM OF ERROR REGARDING THE JUDGMENT AND ORDER DETERMINING PARENTAGE AND GRANTING ADDITIONAL RELIEF.

Appellant failed to include in his notice of appeal any mention of the Judgment and Order Determining Parentage and Granting Additional Relief (JODPGAR).¹ In addition, in his opening brief, appellant fails to assign error to the JODPGAR, or to either quote paragraph 3.5 establishing the primary residence of the child with respondent, or to append a copy of the judgment to his brief. By failing to do all of these, appellant has failed to preserve any claim of error with regard to the JODPGAR.

To preserve a claim of error regarding the JODPGAR, appellant was required to timely include that order in his notice of appeal. RAP 5.3 (a) (3) provides that “[a] notice of appeal must ... (3) designate the decision or part of decision which the party wants reviewed...” As appellant failed to do so, any claim of error regarding that judgment cannot be considered. *CTVC of Hawaii Co., Ltd. v. Shinawatra*, 82 Wn.

¹ CP 378-385.

App. 699, 706 n. 1, 919 P. 2d 1243, 932 P. 2d 664, *review denied*, 131 Wash.2d 1020 (1997) The JODPGAR incorporated by reference the Parenting Plan filed on December 8, 2008.² The Parenting Plan recites that it is “*the final parenting plan signed by the court pursuant to an order signed by the court on this date or dated 12/8/08, which establishes parentage.*”³ Paragraph 3.12 of the Parenting Plan directs that the parties’ child shall reside a majority of the time with respondent.⁴ As with the JODPGAR, appellant failed to include the Parenting Plan in his notice of appeal. Therefore, any argument by appellant regarding the parenting plan cannot be considered. *CTVC of Hawaii Co., Ltd. v. Shinawatra*, 82 Wn. App. 706 n. 1.

To present a claim of error regarding the JODPGAR, appellant was required to assign error thereto in his brief. RAP 10.3(a) (4) (“*The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated: ... (4) Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.*”).

Appellant’s Assignments of Error Nos. 1-9 address alleged errors by the trial court in entering the Judgment and Order Establishing Residential

² CP 366-77.

³ CP 366.

⁴ CP 371.

Schedule/Parenting Plan, JOERSPP⁵, but do not address either the JODPGAR or the Parenting Plan filed on December 8, 2008. AB at 3. Because he failed to do so, any argument by appellant regarding the JODPGAR or the Parenting Plan filed on December 8, 2008 should not be considered. *Escude v. King County Hospital District*, 117 Wn. App. 183, 190 n. 4, 69 P. 3d 895 (2004).

Appellant likewise fails to assign error to the Parenting Plan Final Order entered on November 19, 2009, or paragraph 3.12 thereof, requiring the child to spend the majority of the time with respondent.⁶ Appellant also fails to assign error to paragraph 3.3 of the JOERSPP, which provides, in pertinent part, that the primary residence of the child shall be with respondent.⁷ Any argument with regard to those orders should not be considered. *Escude v. King County Hospital District*, 117 Wn. App. 190 n. 4.

RAP 10.4 (c) provides as follows:

If a party presents an issue which requires study of a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.

⁵ CP 622-624.

⁶ CP 613.

⁷ CP 623.

Appellant fails to either quote or append any provision of the JOERSPP or the JODPGAR or the Parenting Plan filed on December 8, 2008. Nor does appellant either quote or append any of the Supplemental Findings of Fact and Conclusions of Law. As a result, appellant's arguments regarding those orders should not be considered. *Thomas v. French*, 99 Wn. 2d 95, 99-101, 659 P. 2d 1097 (1983).

The requirements of the Rules of Appellate Procedure apply equally to pro se litigants such as appellant as they do to attorneys. *State Farm Mutual Auto Inc. Co. v. Avery*, 114 Wn. App. 299, 310, 57 P. 3d 300 (2002). Therefore, appellant faces the same consequences for his failure to comply with the Rules of Appellate Procedure as would a licensed attorney.

B. THE TRIAL COURT COMMITTED NO ERROR IN PLACING THE PARTIES' CHILD WITH RESPONDENT AS PRIMARY CUSTODIAN.

1. Standards of Review

The trial court's ruling regarding a parenting plan is reviewed for abuse of discretion. *Parentage of J. H.*, 112 Wn. App. 486, 492, 49 P. 3d 154, *review denied*, 148 Wash.2d 1024 (2003). A court's discretion is abused only when it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Ibid.* The trial court's ruling on child custody is entitled to great deference. *Id.*

The trial court's findings of fact are verities on appeal if there is substantial evidence to support them. *Jacobson v. Jacobson*, 90 Wn. App. 738, 743, 954 P. 2d 297, *review denied*, 136 Wash.2d 1023 (1998). Substantial evidence is evidence of sufficient quantum to persuade a reasonable fact finder in the truth of the declared premise. *Holland v. The Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). Findings of fact to which no error has been assigned are verities on appeal. *Dickson v. Kates*, 132 Wn. App. 724, 730. 133 P. 3d 498 (2006).

2. The Issue of Primary Custody of the Parties Child, Having Previously Been Decided, Was Not Before the Court in the September, 2009, Trial.

The trial court concluded that the issue of primary custody of the parties' child had been addressed in the original trial in December, 2008, and that primary custody was not one of the issues reserved for future hearings.⁸ The court concluded further that any change in the primary custodian would require a modification petition since the issue was not reserved in the JODPGAR.⁹ Thus, the trial court did not re-address the issue of primary custody of the parties' child in the September, 2009 trial.

⁸ RP VI p. 532 lines 6-15.

⁹ RP VI p. 532 lines 16-19.

The trial court's refusal to re-address the issue of primary custody of the parties' child is consistent with RCW 26.26.130 (7) and RCW 26.26.160 (3):

(7) On the same basis as provided in chapter 26.09 RCW, the court shall make residential provisions with regard to minor children of the parties, except that a parenting plan shall not be required unless requested by a party.

(3) The court may modify a parenting plan or residential provisions adopted pursuant to RCW 26.26.130(7) in accordance with the provisions of chapter 26.09 RCW.

Under RCW Chapter 26.09, modification of a parenting plan requires compliance with RCW 26.09.260.¹⁰ Appellant made no attempt to comply with RCW 26.09.260. Thus, in the September, 2009 trial, the trial court properly refused to re-address the issue of primary custody of the parties' child.

3. The Trial Court Adequately Considered the Relevant Factors in Placing the Parties' Child With Respondent.

Appellant asserts that the trial court erred by deciding the residential placement of the parties' child without adequate findings of fact on that issue. AB 16-23. Even if the issue of residential placement was before the court in the September 2009 trial, Appellant overlooks that on November 19, 2009, the same day that it entered the Parenting Plan

¹⁰ APP 1.

Final Order (PPFO) and the JOERSPP, the trial court entered Supplemental Findings of Fact and Conclusions of Law.¹¹ Therein, in Finding 2.9, the trial court found that “[t]he child has a strong, loving relationship with both parents. Neither parent relationship with the child causes concern.”¹² Appellant has not challenged this finding.

Finding 2.9 satisfies the requirements of RCW 26.09.187 (3) (i):

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent;...

Factor (i) shall be given the greatest weight.

Even if it was required to re-address the issue of primary custody of the parties, child, the trial court was not required to make an express finding as to each factor listed in RCW 26.09.187. In *Marriage of Croley*, 91 Wn. 2d 288, 588 P. 2d 738 (1978), the Washington Supreme Court held that findings of fact are not required on each factor. “*Where, as here,*

¹¹ CP 618-21.

¹² CP 619.

the record indicates substantial evidence was presented on the statutory factors thus making them available for consideration by the trial court and for review by an appellate court, specific findings are not required on each factor.” 91 Wn. 2d 292.

Similarly, in *Marriage of Shui and Rose*, 132 Wn. App. 568, 125 P. 3d 180 (2005), the trial court’s residential placement of the parties’ children was affirmed on appeal. The trial court found, based upon the GAL’s evaluation, that the mother was better suited to serve as the primary residential parent. The trial court’s finding was affirmed on appeal:

...While the trial court did not explicitly address every factor set forth in RCW 26.09.187(3)(a) in its findings of fact and conclusion of law, a review of Waldroup's report reveals that it encompasses the relevant factors; furthermore, it is evident that both Waldroup and the trial court gave the most weight to the first statutory factor, as is required by the statute. Waldroup's report, testimony, and ultimate recommendation taken together are substantial evidence in the record upon which the trial court based its decision.

132 Wn. App. 591.

Appellant fails to discuss either *Croley* or *Shui and Rose*, and instead, chooses to rely upon *Federal Signal Co. v. Safety Factors, Inc.*, 125 Wn. 2d 413, 886 P. 2d 172 (1994) and *DGHI Enterprises v. Pacific*

Cities, Inc., 137 Wn. 2d 933, 977 2d 1231 (1999)/ AB at 17, 22, 34 40, 43. *Federal Signal* involved the failure of a trial court to enter findings of fact to support its conclusion that there were no express warranties in that case. *DGHI Enterprises v. Pacific Cities* addressed whether a successor judge could sign findings of fact in a case heard by another judge who died before entry of the findings. Neither *Federal Signal* nor *Enterprises v. Pacific Cities* addressed the need for findings on each of the factors in RCW 26.09.187 (3). Neither *Federal Signal* nor *Enterprises v. Pacific Cities* mentioned *Marriage of Croley*. Thus, appellant's reliance upon *Federal Signal* and *Enterprises v. Pacific Cities* in this case is misplaced.

In addition to Finding 2.9, the record in this case reveals that the trial court was presented with substantial evidence on each of the statutory factors. The trial court heard evidence on each parent's past and potential for future performance of parenting functions.¹³ The trial court heard testimony from Dr. Karen Holdener, T.'s pediatrician, who testified that she has never had any concerns as to respondent's parenting of T.¹⁴ The trial court heard from Angela Matthews, a registered nurse and long-time friend of respondent, whose daughter plays with T., who testified that she observed loving and attentive relationship between respondent and T.¹⁵

¹³ RCW 26.09.187 (3) (a) (iii).

¹⁴ RP IV p. 246 lines 12-15.

¹⁵ RP V p. 308 line 8-p. 309 line 20.

Ms. Matthews has no concerns as to respondent's parenting of T.¹⁶ The trial court heard from Johnsie S. Brown, respondent's mother, who has frequent contact with respondent and T., and who testified that respondent is a good mother and she has no concerns about respondent's care of T.¹⁷ The trial court heard from respondent regarding her attendance at parenting classes.¹⁸ The trial court heard from respondent regarding the structure that she gives to T.'s daily routine.¹⁹ The trial court also heard testimony from a parenting evaluator, Christin Larue. The trial court also had the benefit of three reports concerning appellant's parenting of T. authored by Ms. Larue that had been admitted in proceedings prior to the trial.²⁰ Ms. Larue testified at length regarding her August 2009 assessment of appellant's parenting of T.²¹

The trial court also heard testimony on the emotional needs and developmental level of the child.²² The trial court heard from Dyana Bamboe, a certified occupational therapist at Mary Bridge Hospital, who testified regarding treatment provided to T for sensory integration disorder.²³ The trial court heard from Dyana Bamboe regarding the

¹⁶ RP V p. 309 lines 21-24.

¹⁷ RP IV p. 279 lines 7-21.

¹⁸ RP V p. 334 lines 13-p. 335 line 6; EX 60.

¹⁹ RP V p. 367 line 4-p. 368 line 5.

²⁰ RP IV p. 203 line 25-p. 205 line 16; EX 51, 52, 53.

²¹ RP IV p. 208 line 14-p. 216 line 16.

²² RCW 26.09.187 (3) (a) (iv).

²³ RP VI p. 398 line 11-p. 399 line 14; p. 402 line 24-p. 404 line 11; EX 45.

improvement that T. showed as a result of the therapies provided at Mary Bridge.²⁴ The trial court heard from respondent, who testified that she enrolled T. in another treatment program for T's sensory integration issues in September, 2009.²⁵ The trial court heard from respondent that she continued the home therapies recommended by Dyana Bamboe.²⁶ The trial court heard respondent's plans to enroll T. in pre-school in January, 2010.²⁷ The trial court heard that, despite a lack of financial resources, respondent still engages T. by taking her to the park, to the library, by reading to her, and taking her to dance classes, swimming, and visiting family and friends.²⁸

The trial court heard testimony regarding the child's relationships with other significant adults, as well as the child's involvement with his or her physical surroundings.²⁹ The trial court heard about respondent's three-bedroom home, about T.'s own room in that house, and about respondent's efforts to make the home safe for her young daughter.³⁰ The trial court heard that respondent's mother's house is located just around the corner from respondent's house.³¹ The court heard that respondent's

²⁴ RP V p. 411 lines 10-p. 413 line 1.

²⁵ RP VI p. 426 line 11-p. 427 line 18.

²⁶ RP VI p. 427 line 23-p. 428 line 1.

²⁷ RP VI p. 479 lines 13-20.

²⁸ RP V p. 365 line 18-p. 366 line 9.

²⁹ RCW 26.09.187 (3) (a) (v).

³⁰ RP V p. 347 line 25-p. 348 line 23.

³¹ RP VI p. 445 line 19-24.

mother's house has also been secured for a toddler.³² The trial court heard that respondent uses her mother's house for day care of T., and that T. is cared for by respondent's mother, sister, brother and brother-in-law.³³ The trial court heard that respondent frequently stays with T. overnight at her mother's house, and that T. sleeps in a crib there.³⁴ The trial court heard that time with her grandmother is part of T.'s normal daily routine.³⁵ The trial court heard about the structure of T.'s day when she is with her grandmother.³⁶

The trial court heard testimony regarding the wishes of the parents.³⁷ The trial court heard respondent's request to be the primary custodial parent for T.³⁸ The trial court heard appellant's wish to be the primary custodial parent.³⁹

The trial court heard testimony regarding each parent's employment schedule.⁴⁰ The trial court heard that appellant is employed as a senior research analyst for the King County Council.⁴¹ The trial court heard that, depending on work flow, appellant can take a day off during

³² RP IV p. 281 line 11-p. 282 line 1; RP V p. 348 line 24- p. 349 line 23.

³³ RP V p. 355 lines 17-20; p.430 line 22-p. 431 line 13; RP VI p. 472 line 19-24

³⁴ RP V p. 445 line 25-p. 446 line 23.

³⁵ RP VI p. 473 lines 3-19.

³⁶ RP IV p. 286 line 13-p. 288 line 11.

³⁷ RCW 26.09.187 (3) (a) (vi).

³⁸ RP V p. 337 lines 9-19; p. 347 line 25-p. 349 line 23; p. 367 line 4-p. 368 line 5; p. 370 line 10-371 line 5; p. 385 line 16-p. 386 line 23; RP VI p. 511 lines 5-8.

³⁹ RP III p. 127 lines 1-5.

⁴⁰ RCW 26.09.187 (3) (a) (vii).

⁴¹ RP III p. 72 lines 11-24.

the week, and that he has furlough days, accrued vacation and family leave.⁴² The trial court also heard that respondent was unemployed at the time of trial.⁴³

In the absence of evidence to the contrary, it is assumed that the trial court considered all of the foregoing evidence. *Marriage of Croley*, 91 Wn. 2d 291 (“*In absence of evidence to the contrary, we assume the trial court discharged its duty and considered all evidence before it.*”).

Marriage of Horner, 151 Wn. 2d 884, 93 P. 3d 124 (2004) does not compel a contrary conclusion here. In *Horner*, the factors in the statute in question, RCW 26.09.520, were not weighted. 151 Wn. 2d 894. In contrast, in the statute in question here, RCW 26.09.187 (3), the Legislature provided that the first factor is to be given the greatest weight. Further, in *Horner*, the record did not reflect that substantial evidence was presented on each relocation factor. 151 Wn. 2d 896. In contrast, as set forth above, substantial evidence was presented on each of the factors in RCW 26.09.187 (3) (a). Further, in *Horner*, the trial court failed to make findings on the relocation factors in RCW 26.09.520. 151 Wn. 2d 896-97. Here, in contrast, In Supplemental Finding 2.9, *supra*, the trial court made a specific finding regarding that addresses the factor entitled to the

⁴² RP III p. 73 line 22-p. 75 line 2.

⁴³ RP V p. 332 lines 16-17.

greatest weight under RCW 26.09.187 (3) (a). *Horner* is therefore not controlling here.

Appellant invites the Court to weigh the evidence regarding residential placement. AB at 22-23. On appeal, the reviewing court does not reweigh the evidence. *Greene v. Greene*, 97 Wn. App. 708, 714, 986 P. 2d 144 (1999); *Marriage of Rich*, 80 Wn. App. 252, 259, 907 P. 2d 1236, *review denied*, (1996).

4. The Trial Court Did Not Err in Granting Respondent's Motion in Limine.

Appellant waived any claim of error with regard to the order granting respondent's motion in limine when appellant's counsel agreed in open court to confine the evidence to incidents occurring after December 8, 2008.⁴⁴ The stipulation of appellant's counsel, having been made in open court, is binding upon appellant. CR 2A ("*No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.*"). An agreement arrived at on the record is binding on the parties and will not be reviewed on appeal unless the party contesting it can show that the concession was a

⁴⁴ RP III p. 53 lines 6-22; p. 55 lines 15-23;

product of fraud or that the attorney overreached his authority. *Nguyen v. Sacred Heart Medical Center*, 97 Wn. App. 721, 735, 987 P. 2d 634 (1999); *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 987 P. 2d 634, review denied, 91 Wn. 2d 1001 (1978).

Contrary to appellant's argument, the trial court did not rely on *res judicata* in granting respondent's motion in limine. AB at 25. There is no mention of *res judicata* in either the trial court's oral ruling or its written order.⁴⁵

5. The Trial Court Did Not Err in Finding No RCW 26.09.191 Restrictions.

Appellant argues that the trial court erred in finding no RCW 26.09.191 factors were present. AB at 25. Appellant fails to specify which finding he is referring to, nor does he either quote or append the finding to his brief. Consequently, appellant's argument should not be considered. RAP 10.4 (c), *supra*.

Appellant argues that the trial court's findings disregarded evidence of abusive use of conflict introduced in the December, 2008 trial. AB at 25-26. As more fully set forth in Paragraph VI B 4, *supra*, appellant is precluded from relying upon such evidence in light of the stipulation of appellant's attorney that the trial court would not consider such evidence.

⁴⁵ RP III p. 57 line 4-p. 58 line 18; CP 594.

Appellant fails to recognize that under RCW 26.09.191 (3), the court is not required to limit any provision of a parenting plan if any of the factors set forth therein are present. Instead, by use of the word “*may*” in RCW 26.09.191 (3), the Legislature conferred discretion upon the trial court to make such limitations. RCW 26.09.191 (3) provides, in pertinent part, that if any of the stated factors are present, “*the court may preclude or limit any provisions of the parenting plan...*” The Legislature’s use of the word “*may*” in the statute is presumed to convey the idea of discretion. *Streng v. Clarke*, 89 Wn. 2d 23, 28, 569 P. 2d 60 (1977); *Amren v. City of Kalama*, 131 Wn. 2d 25, 35 n.8, 929 P. 2d 389 (1997); *Granite Beach Holdings LLC v. State Department of Natural Resources*, 103 Wn. App. 186, 206-07, 11 P. 3d 847 (2000). Thus, unless he can establish an abuse of discretion in the trial court’s refusal to find 26.09.191 (3) factors present, appellant’s argument must fail.

Appellant argues at length that the evidence discloses abusive use of conflict by respondent. AB at 26-31. Appellant fails to recognize that RCW 26.09.191 (3) (e) provides: “[*t*]he abusive use of conflict by the parent which creates the danger of serious damage to the child’s psychological development... (Emphasis added)”. Appellant fails to identify any evidence that any conduct on respondent’s part presented

such a danger to T. Instead, Appellant persists in relying upon evidence in the December 2008 trial, contrary to the stipulation of his trial attorney. AB at 29, 30, 32, 33. Appellant's use of such evidence is improper. RAP 10.7.

Despite the lack of such evidence, Appellant argues, without citation to the record or authority, that the alleged abusive conflict by respondent is creating a danger of serious damage to T.'s psychological development. AB at 31. Appellant's argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P. 3d 232, *review denied*, 155 Wash.2d 1015 (2005); *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 344, 183 P. 3d 317 (2008).

Appellant argues that respondent withheld access to T. from him, in violation of RCW 26.09.191 (3) (f), citing Supplemental Finding 2.2. AB 31-33. Such a finding does not compel a limitation on the parenting plan, as RCW 26.09.191 (3) makes such a limitation discretionary with the trial court. *Streng*, 89 Wn. 2d 28. Appellant also overlooks that unchallenged Supplemental Finding 2.10 found that the lack of overnights did not damage the father-daughter bond.⁴⁶ Thus, the trial court found that appellant was not damaged by respondent's conduct in the sensory integration issue.

⁴⁶ CP 619.

The trial court stated that it found nothing in respondent's testimony that would warrant 26.09.191 restrictions. "[T]here's been no evidence that any type of 191 restrictions would be allowed or required."⁴⁷

Appellant continues to support his argument with evidence from the December, 2008, trial, contrary to his attorney's stipulation that such evidence would not be considered. AB at 25-33. Appellant's use of such evidence is improper. RAP 10.7.

6. The Trial Court Did Not Err in Failing to Make Findings of Fact Regarding Respondent's Lifestyle.

Appellant argues that the trial court must enter findings of fact on all material issues, including the alleged instability of respondent's lifestyle, citing *Federal Signal, supra*. AB at 34. Once again, appellant's reliance on *Federal Signal* is misplaced, as the trial court is not required to enter findings on each statutory issue. *Marriage of Croley*, 91 Wn. 2d 292. Appellant fails to cite any other authority that compels a finding regarding respondent's lifestyle. Moreover, appellant fails to identify a shred of evidence that T. has, is, or will be impaired by respondent's lifestyle. Dr. Holdener, T.'s pediatrician, did not think so.⁴⁸ Angela Matthews, a registered nurse, who closely observed respondent's

⁴⁷ RP V p. 393 lines 5-7.

⁴⁸ RP IV p. 246 lines 12-15.

interaction with T., did not think so.⁴⁹ Johnsie S. Brown, T.'s grandmother, who has daily contact with respondent and T., did not think so.⁵⁰ Appellant's argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824; *In re Irrevocable Trust of McKean*, 144 Wn. App. 344.

As the party with the burden of proof on such issue, the failure of the trial court to make a finding regarding respondent's lifestyle constitutes an implied negative finding against appellant on this issue. *Rhodes v. Gould*, 12 Wn. App. 437, 441, 576 P. 2d 914, *review denied*, 90 Wash.2d 1026 (1978); *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702, 754 P. 2d 1262, *review denied*, 111 Wash.2d 1014 (1988).

Appellant continues to rely upon the evidence from the December, 2008, trial, contrary to the stipulation of his attorney. AB at 34-36. Appellant's use of such evidence is improper. RAP 10.7.

7. The Trial Court Did Not Err in Failing to Find That Respondent's Conduct Regarding T.'s Health Constitutes Neglect or Substantial Nonperformance of Parenting Functions.

Appellant's argument that the trial court erred in failing to enter a finding that respondent's conduct regarding T.'s health constitutes neglect or substantial nonperformance of parenting functions fails for the same

⁴⁹ RP V p. 308 line 8-p. 309 line 20.

⁵⁰ RP IV p. 279 lines 7-21.

reasons as did his argument regarding a finding on respondent's lifestyle. AB at 37-40. The trial court was not required to make such a finding. *Marriage of Croley*, 91 Wn. 2d 292. As he fails to support his argument with citation to authority, appellant's argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824; *In re Irrevocable Trust of McKean*, 144 Wn. App. 344.

The failure of the trial court to make a finding regarding respondent's neglect or substantial nonperformance of parental duty constitutes an implied negative finding against appellant on this issue. *Rhodes v. Gould*, 12 Wn. App. 441; *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 702.

Appellant offers three incidents to support his argument: the delay in T. attending the Birth-to-Three program, T.'s black eye, and a cut on T.'s left foot. AB 40-42. None of those incidents support appellant's requested finding. The delay in T.'s attendance at the Birth-to-Three program was caused by a waiting list for that program.⁵¹ Respondent continued the therapies recommended by Dyana Bamboe, and she has not seen any regression in T.⁵² Appellant failed to introduce any evidence that T. was in any way harmed by the delay in T.'s attendance in that program.

⁵¹ RP V p. 426 line 11-p. 427 line 18.

⁵² RP V p. 427 line 23-p. 428 line 4.

Respondent never saw T.'s alleged black eye.⁵³ Instead, respondent noticed a small hematoma under T.'s eye.⁵⁴ Respondent took T. to the doctor for the hematoma after receiving a call from a social worker at Children's Hospital.⁵⁵ There was no investigation regarding abuse.⁵⁶ T. does not have a permanent scar under her eye.⁵⁷ Respondent was out of town when T. received the injury.⁵⁸

T. received an injury to the heel of her foot when she stepped up on an air conditioner at respondent's mother's house one evening, causing a lamp to fall. As T. stepped, down, she slit the heel of her foot.⁵⁹ The accident happened in an instant, right behind respondent's mother.⁶⁰ Respondent took T. to the emergency room, where they bandaged the wound and gave T. a splint to keep the wound from opening.⁶¹ Respondent received instructions to keep the splint on full-time for the first 48 hours, and then to keep it on during the daytime until the wound healed.⁶² Respondent scheduled a follow-up visit for the following Friday,

⁵³ RP V. p. 340 line 23-25.

⁵⁴ *Ibid*

⁵⁵ RP V p. 341 line 1-p.343 line 21.

⁵⁶ RP V p. 343 lines 22-23.

⁵⁷ RP V p. 344 lines 3-4.

⁵⁸ RP V p. 441 lines 14-16.

⁵⁹ RP IV p. 282 lines 2-20

⁶⁰ RP IV p. 282 lines 21-23.

⁶¹ RP V. p. 345 lines 2-11: EX 9.

⁶² RP V. p. 345 lines 12-17.

due to a scheduled court hearing.⁶³ Respondent checked the dressing every night, and found no infection, oozing, pus or blood.⁶⁴

In light for the foregoing, the incidents relied upon by appellant would not support a finding of neglect or substantial nonperformance of a parental function.

8. The Trial Court Did Not Err in Failing to Enter a Finding That Appellant Had Demonstrated a Stronger Relationship with T. Than the Bond Between T. and Respondent.

Appellant chooses to ignore Supplemental Finding 2.9, and instead, urges the Court to enter a finding that appellant demonstrated a stronger relationship with T. than did respondent. AB 40-41. Appellant's argument is nothing more than an invitation for the Court to reweigh the evidence. On appeal, the reviewing court does not reweigh the evidence. *Greene v. Greene*, 97 Wn. App. 714; *Marriage of Rich*, 80 Wn. App. 259.

9. The Trial Court's Findings of Fact Are Not At Odds With its Conclusions of Law.

Appellant argues that the findings of fact conflict with the conclusions of law. AB at 41-43. But which finding allegedly conflicts with which conclusion? Appellant fails to provide either the Court or respondent with sufficient information to intelligently respond to his argument. More is required of appellant. RAP 10.4 (c) requires appellant

⁶³ RP V p. 345 lines 20-22.

⁶⁴ RP V. p. 346 lines 2-14.

to either quote or append the finding or conclusion at issue. Appellant has done neither. Therefore, his argument should not be considered. *Thomas v. French*, 99 Wn. 2d 99-101.

10. The Trial Court Did Not Err In Amending Prior Restraining Orders.

Appellant fails to support his argument on res judicata with a single citation to the record. AB 43-44. Appellant's argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824; *In re Irrevocable Trust of McKean*, 144 Wn. App. 344. Nor does appellant either quote or append relevant portions of the trial court's orders. Appellant's argument should therefore not be considered. RAP 10.4 (c); *Thomas v. French*, 99 Wn. 2d 99-101.

Central to appellant's argument is a ruling by the Tacoma Municipal Court granting a dismissal of a deferred prosecution. AB 43-44. Appellant fails to provide a citation in the record to the transcript of proceedings in that case. Appellant's brief thereby violates RAP 10.3 (a) (6), and thereby substantially prejudices the Court's and Respondent's ability to respond to the factual statements in Appellant's Brief. *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P. 2d 945 (1990). *See also Estate of Lint*, 135 Wn.2d 518, 532, 957 P. 2d 955 (1998). Appellant's use of such evidence is improper. RAP 10.7.

Assuming that appellant has otherwise properly presented this argument, a dismissal of the proceedings in the municipal court is not res judicata in this case. *Young v. City of Seattle*, 25 Wn. 2d 888, 172 P. 2d 222 (1946). In *Young*, the court concluded that a dismissal of a criminal prosecution in a municipal court was not res judicata in a related case in superior court:

The offered exhibit at least showed that the case which was tried in the municipal court on August 17, 1945, was a criminal case. A criminal charge must be proven beyond a reasonable doubt. A charge of negligence in a civil case can be proven by a mere preponderance of the evidence. It, therefore, follows that one may be properly acquitted on a charge of criminal negligence and yet be properly held responsible for negligence in a civil case on the very same evidence. How, then, can the acquittal in the criminal case be res judicata in this action?

25 Wn. 2d 894-95.

11. The Court Lacks Jurisdiction to Consider the Proceedings in Pierce County Cause No. 07-2-02403-0.

Appellant argues that the Pierce County Superior Court in Cause Number 07-2-02403-0 lacked jurisdiction to enter a protection order. AB 44-46. Appellant's notice of appeal does not include an order from that case.⁶⁵ Nor does appellant provide any evidence that he has filed a notice of appeal in that case. The jurisdiction of the Court of Appeals is defined

⁶⁵ CP __.

by the notice of appeal. RAP 5.1; *Chaney v. Fetterly*, 100 Wn. App. 140, 151, 995 P. 2d 1284, *review denied*, 142 Wash.2d 1001 (2000) (“*It is axiomatic that a party must file a notice of appeal when he or she is asking an upper tribunal to review the ruling of a lower tribunal, or, in alternative terms, when he or she is asking the upper level tribunal to exercise appellate jurisdiction.*”). Because appellant has not appealed any order in Pierce County Superior Court in Cause Number 07-2-02403-0, it follows that the Court lacks appellate jurisdiction over that case.

Appellant fails to establish whether he raised this argument in the trial court. Issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5 (a) (“*The appellate court may refuse to review any claim of error which was not raised in the trial court.*”).

12. The Reviewing Court Does Not Make Credibility Determinations.

Appellant engages in a pointless discussion of credibility. AB 46-48. Appellant fails to support his argument with a single citation to authority. Appellant’s argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824; *In re Irrevocable Trust of McKean*, 144 Wn. App. 344. Appellate courts do not make credibility determinations, nor do they review the credibility determinations made by the trier of fact. *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P. 3d 671 (2005).

C. APPELLANT REQUESTS AN AWARD OF ATTORNEY FEES ON APPEAL.

RCW 26.25.625 (3) provides as follows:

(3) Except as otherwise provided in subsection (4) of this section, the court may assess filing fees, reasonable attorneys' fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this section and RCW 26.26.500 through 26.26.620 and 26.26.630. The court may award attorneys' fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name.

Unlike RCW 26.09.140, an award of attorney fees under RCW 26.26.625 (3) is not conditioned upon need and ability to pay. Nevertheless, nothing in RCW 26.26.625 (3) prohibits the Court from considering the burden imposed upon respondent by this appeal. Until recently, appellant had been unemployed since October, 2008.⁶⁶ Having to respond to this appeal has forced respondent to incur further attorney fees, beyond the \$19,000 dollars incurred by her in the trial court.⁶⁷ Respondent, in contrast, enjoys a current net monthly income of \$14,943.00.⁶⁸

⁶⁶ RP V p. 332 lines 16-17.

⁶⁷ RP V p. 384 line 24-p. 385 line 5.

⁶⁸ RP III p. 151 lines 21-23; EX 5.

In addition, attorney fees may be awarded when an appeal is frivolous. RAP 18.9 (a) provides as follows:

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

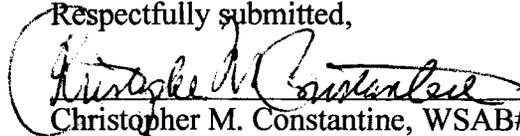
An appeal is frivolous under RAP 18.9 if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Andrus v. Department of Transportation*, 128 Wn. App. 895, 900, 117 P. 3d 1152, *review denied*, 157 Wash.2d 1005 (2006). As indicated above, there are no debatable issues in this appeal, and it is so devoid of merit that there is no reasonable possibility of reversal.

Sanctions under RAP 18.9, in the form of respondent's appellate attorney fees, are appropriate.

V. CONCLUSION

The Supplemental Findings of Fact and Conclusions of Law, the Judgment and Order Establishing Residential Schedule/Parenting Plan Child Support (Except Paragraph 3.2), and the Parenting Plan Final Order should be affirmed. Respondent should be awarded attorney fees on appeal.

Respectfully submitted,



Christopher M. Constantine, WSAB#11650
Attorney for respondent/cross-appellant

VI. APPENDIX

1. RCW 26.09.260:

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

(3) A conviction of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070 shall constitute a substantial change of circumstances for the purposes of this section.

(4) The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only

a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

- (a) Does not exceed twenty-four full days in a calendar year; or
- (b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or
- (c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

(6) The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

(7) A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191 (2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.

(8)(a) If a parent with whom the child does not reside a majority of the time voluntarily fails to exercise residential time for an extended period, that is, one year or longer, the court upon proper motion may make adjustments to the parenting plan in keeping with the best interests of the minor child.

(b) For the purposes of determining whether the parent has failed to exercise residential time for one year or longer, the court may not count any time periods during which the parent did not exercise residential time due to the effect of the parent's military duties potentially impacting parenting functions.

(9) A parent with whom the child does not reside a majority of the time who is required by the existing parenting plan to complete evaluations, treatment, parenting, or other classes may not seek expansion of residential time under subsection (5)(c) of this section unless that parent has fully complied with such requirements.

(10) The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child. Adjustments ordered under this section may be made without consideration of the factors set forth in subsection (2) of this section.

(11) If the parent with whom the child resides a majority of the time receives temporary duty, deployment, activation, or mobilization orders from the military that involve moving a substantial distance away from the parent's residence or otherwise would have a material effect on the parent's ability to exercise parenting functions and primary placement responsibilities, then:

(a) Any temporary custody order for the child during the parent's absence shall end no later than ten days after the returning parent provides notice to the temporary custodian, but shall not impair the discretion of the court to conduct an expedited or emergency hearing for resolution of the child's residential placement upon return of the parent and within ten days of the filing of a motion alleging an immediate danger of irreparable harm to the child. If a motion alleging immediate danger has not been filed, the motion for an order restoring the previous residential schedule shall be granted; and

(b) The temporary duty, activation, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer residential placement from the parent who is a military service member.

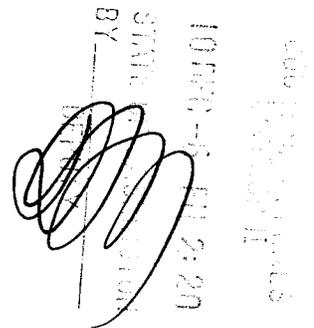
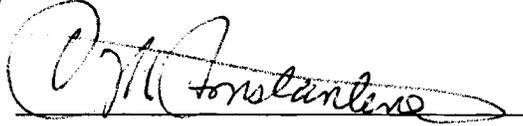
(12) If a parent receives military temporary duty, deployment, activation, or mobilization orders that involve moving a substantial distance away from the military parent's residence or otherwise have a material effect on the military parent's ability to exercise residential time or visitation rights, at the request of the military parent, the court may delegate the military parent's residential time or visitation rights, or a portion thereof, to a child's family member, including a stepparent, or another person other than a parent, with a close and substantial relationship to the minor child for the duration of the military parent's absence, if delegating residential time or visitation rights is in the child's best interest. The court may not permit the delegation of residential time or visitation rights to a person who would be subject to limitations on residential time under RCW 26.09.191. The parties shall attempt to resolve disputes regarding delegation of residential time or visitation rights through the dispute resolution process specified in their parenting plan, unless excused by the court for good cause shown. Such a court-ordered temporary delegation of a military parent's residential time or visitation rights does not create separate rights to residential time or visitation for a person other than a parent.

(13) If the court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court shall assess the attorney's fees and court costs of the nonmoving parent against the moving party.

VII. CERTIFICATE OF MAILING

I, Christopher M. Constantine, do hereby certify under the Law of the State of Washington in the County of Pierce that on the 6th day of December, 2010, I deposited in the United States mail, first class postage prepaid, the Brief of Respondent and this Certificate addressed to the following:

Clyde Reed
16210 East Shore Drive
Lynwood, WA 98087



10/11/10-6 PM 2:20
STATE OF WASHINGTON
BY _____
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10/11/10