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I. INTRODUCTION.

This appeal raises two questions. First, should the Respondent's residential time with his children be limited under RCW 26.09.191(2)(a) because of an undisputed history of domestic violence during and after the marriage? Second, did the trial court abuse its discretion in imputing \$1,500.00 income per month to Respondent when he is capable of earning over \$3,000.00 per month, but chooses not to in order to see his children more often.

The Appellant requests the court remand this case to the trial court to limit residential time under RCW 26.09.191(2)(a), and to impute income consistent with the Respondent's past work history.

II. ASSIGNMENTS OF ERROR.

The Appellant makes the following assignments of error:

1. From Section 3.2 of the Parenting Plan Final Order entered on October 27, 2014, in that the Respondent's residential time is not limited under RCW 26.09.191(2)(a).
2. From Section 3.13(b) of the Parenting Plan Final Order entered on October 27, 2014, in that the

residential schedule is not in the best interest of both children.

3. From Section 2.19 of the Findings of Fact and Conclusions of Law entered on October 27, 2014, in that the factors found by the court in adopting the parenting plan do not include the need for a restriction because of a history of domestic violence.

4. From Section 2.20(b)(10) of the Findings of Fact and Conclusions of Law in that the court erred in imputing \$1,500.00 income to Respondent when he is capable of earning over \$3,000.00 per month.

5. From Section 3.2.C of the Order of Child Support Final Order, stating "The net income of the obligor is imputed at \$1,500.00 because the court set his net income at that amount," and from Section 3.7(b), because the evidence shows that the Respondent is capable of earning over \$3,000.00 per month, but is voluntarily underemployed.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. Did the court abuse its discretion in failing to limit residential time with the Respondent under RCW 26.09.191(2)(b) where the undisputed testimony was that there was a history of domestic violence.

2. Did the court abuse its discretion by imputing net income to the Respondent in the amount of \$1,500.00, when the evidence was that he was capable of earning more than \$3,000.00 per month, but that he was voluntarily underemployed to spend more time with his children.

IV. FACTS.

Petitioner, Helen Christine Gillman (“Helen”) and Respondent, Michael Dean Gillman (“Michael”) were married on July 14, 2009. They separated on March 4, 2013. They have two children, Zachary John Gillman, age 8, who Michael adopted after his marriage to Helen, and Emily Rose Gillman, age 3.

The evidence at trial showed that Michael verbally abused Helen, and engaged in physical threats, yet the trial judge failed to account for the conduct when establishing a parenting plan.

The evidence is not disputed that Michael referred to Helen as a “whore” in front of Zachary.

Helen testified:

“There’s a connecting door into the house, and so he was yelling the name-calling as he walked across the house and from the garage, and he said “You’re a whore” or “your mother’s a whore” right in front of my son in front of the

house.”¹

Michael does not dispute that he called Helen this name. He testified:

“I heard him [Zachary] say, ‘you know, why do we have to move, mom?’ I was walking through the dining room in order to close the main garage door, and I said, probably louder than I should have, ‘Because your mom is a whore, that’s why’.”²

Then, he repeated the slur.

“So I walked through the house, I went to the garage, and I went to close the main garage door, and Helen was already there with Zachary in tow. And she said, ‘Go ahead, call me a whore in front of our son again.’ And I said ‘fine, Helen, you’re a whore.’”³

Second, during the marriage Michael grabbed Helen’s throat and pinned her against the wall.

“Q. Okay. And when he put his hands around your throat, did – was he squeezing or just pinning you to the wall?

A. It was kind of squeezing. I mean it was enough to make me, you know, have to try to catch my breath for a moment, but it was just kind of held there, and then he let go.”⁴

Michael does not dispute he put his hand on Helen’s throat.

“...with the other hand, I’m trying to push Helen

1 RP 60:4-9.

2 RP 214:12-16.

3 RP 215:12-17.

4 RP 70:3-9.

away from the bathtub. And, at some point, Helen got past my arm and grabbed Emily to pick her up. At that time, I dropped the – the shower thing and I reached up and I grabbed Helen with both my hands. And, yes, it was around the chest, the neck area there, and I pushed her out of the bathroom”⁵

Third, there was no dispute that Michael punched a hole in the bedroom door and kicked a hole in the hose box.

“A. The arguments continued, but the only – one other – well, two other times he got, not physical with me, but he punched a hole in the door of our bedroom and then he also kicked a hole in our hose box outside.

Q. And were those also in this kind of 2012 to 2013 timeframe?

A. Yeah, that was after the whole strangling thing...”⁶

Finally, Helen testified that Michael appeared to threaten her with a gun, once while she was sleeping on the couch, and another when she came home after separation to do some laundry.⁷ Michael concedes he met Helen at the door with his gun.

“I came to the door, and I said, ‘who’s there?’ And Helen responded ‘It’s me. You locked the deadbolt. I can’t get in.’ So I unlocked the deadbolt. I opened the door. I turned around and walked back towards my room. It was that

5 RP 236:13-20.

6 RP 70:20 – 71:2.

7 RP 64:1-18.

time that she saw the handgun by my side. Said 'Why do you have your gun out?' And I as like, 'Because you were just trying to break down the door'."⁸

Despite the pattern of physical and emotional abuse, the court makes no mention to the conduct in its oral decision, nor is it factored into the Decree or Findings of Fact.

The evidence at trial further showed that Michael was capable of earning more than the \$1,500.00 per month imputed income allocated by the court. In 2006, Michael earned approximately \$6,000.00 per month part of the year working for Western Fabrication.

“Q. Okay. So in 2009, based on your testimony, you were out of the home for about – almost 140 days that year, correct?”

A. Um – 2009 was – yeah, from July until end of November. So –

Q. So let’s look at your net pay, same wage stuff.

A. Okay.

Q. Your net pay for that year was \$40,000.00 – just about \$40,000.00, is that correct?

A. Yes.

8 RP 233:4-10.

Q. Okay. And – and your testimony is that you didn't even start with Western Fabrication until the summer of that year, correct?

A. Correct.

Q. Okay. So based on this, if we're going to average it from July through December, your average monthly gross pay was over \$6,000.00, correct?

A. That's including per diem, correct?

Q. Mm-hmm.

A. Okay. I would – including the per diem, that's probably accurate.⁹

The same was true for 2011.

“So this is 2011, and this is your wage stub from 2011, correct?”

A. Ah – yes.

Q. Okay. And your total net pay for Western Fabrication, 2011, is almost \$46,000.00, correct, down there at net pay?

A. Correct.

Q. And your per diems that year were \$20,625.00?

A. Correct.

Q. Okay. So that year you worked out of the home even more than the 2009 year, correct?

A. Yes.¹⁰

9 RP 301:2-23, Exhibit 1N.

10 RP 302:4-16, Exhibit 1W.

Despite his high earnings potential, Michael now chooses not to work for Western Fabrication, thereby lowering his income.

“Q. And what were his statements about his plans for his future employment.”

A. He had mentioned that Western Fab had been asking him to – if he came back to work and that, but he couldn’t because of the kids.”¹¹

At paragraph 2.19 of the Findings of Fact and Conclusions of Law “Parenting Plan”, the court makes 10 factual findings to determine the best interest of the children. Nowhere does the court address the past physical and emotional abuse in its findings. Moreover, at paragraph 3.2 of the Parenting Plan “School Schedule”, the court awarded the parents equal time, being with Michael from Monday at 6:00 p.m. to Thursday at 6:00 p.m., and then with Helen Thursday at 6:00 p.m. to Monday at 6:00 p.m., except for the first weekend when the children are with Michael.

Helen requests the Court of Appeals modify the trial court’s decision in two ways: First, that the father’s residential time be reduced due to his

11 RP 334:17-24.

repeated emotional and physical abuse during the marriage. Helen requests the Court of Appeals remand the case to limit residential time.

Second, Helen requests that Michael's income be imputed at \$3,000.00 per month because he is currently under employed and has the ability to earn substantially more than \$1,500.00 per month.

V. ARGUMENT.

A. The Court Erred by Failing to Consider Respondent's Past Emotional and Physical Abuse When Establishing a Parenting Plan.

The court is required to make decisions on a parenting plan based on the best interests of the children.¹²

"Because the trial court has a unique opportunity to observe the parties, we are 'extremely reluctant to disturb child placement dispositions.'"¹³

But, the court must consider past acts of domestic violence.

"If the trial court finds that one of the parents has engaged in certain conduct specified in RCW 26.09.191(2)(a), the trial court must limit that parent's residential time."¹⁴

12 RCW 26.09.187(3)(a).

13 Underwood v. Underwood, 181 Wash. App. 608, 326 P.3d 793 (2014).

14 Underwood, supra, 181 Wash. App. 608.

RCW 26.09.191(2)(a) provides:

“The parent’s residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct:...(iii) a history of acts of domestic violence as defined in RCW 26.50.010(1)...”

RCW 26.50.010 defines “Domestic Violence” as:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members...”

In Underwood, the court found there was a history of domestic violence based upon evidence that the husband ran his truck into the moving van when the wife was moving out and threatened to kill a man. Further,

“In response to a question about whether Robert was an intimidating person, Kara [the wife], responded, ‘When someone is posturing over you, spitting in your face, keeping you up all night long, throwing things through windows, has weapons, is a ranger trained in the military, yes, he’s a threatening person, intimidating person.’”¹⁵

In Underwood, the trial court was required to limit the husband’s residential time.

“Because the trial court found that Robert emotionally abused the children, it was required to impose limitations on his residential time under RCW 26.09.191(2).”¹⁶

15 Underwood, supra, 191 Wash. App. 608.

16 Underwood, supra, 181 Wash. App. 608.

Although a parenting plan must be reviewed for abuse of discretion,¹⁷ the court is required to limit residential time if there is a history of domestic violence.¹⁸ In this case, there was ample evidence of a history of domestic violence that was not addressed in the trial court's oral decision, nor Final Orders. There was no dispute that during the marriage, Michael punched his hand through a wall, grabbed Helen by the throat, threatened Helen with a gun on more than one occasion, and referred to Helen as a "whore" twice in front of his son. These acts are demeaning, threatening, intimidating, and not disputed. These acts require the court limit Michael's residential time, yet, they were not mentioned or addressed by the court at trial.

The Appellant requests the Court of Appeals remand the case to the trial court for entry of specific findings of incidents of domestic violence and a limitation in the Respondent's residential time.

¹⁷ *Underwood*, supra, 181 Wash. App. 608.

¹⁸ RCW 26.090.191(2)(a).

B. The Trial Court Erred By Imputing Only \$1,500.00 Income Per Month to the Respondent.

During the marriage, Michael attempted to start and operate Evergreen Legal, a business that does process serving, and he worked for Western Fabrication installing and maintaining wind turbines. When working at Western Fabrication, Michael earned approximately \$6,000.00 per month, including per diem pay.

At trial, Michael contends that he cannot work for Western Fabrication because he needs to be near his children, and the job at Western Fabrication takes him out of the local area. But, by refusing Western Fabrication work, Michael is voluntarily under employed.

The Appellate Court reviews the imputation of income for abuse of discretion.¹⁹ Under RCW 26.19.071(6), the court is required to impute income to a parent “when the parent is voluntarily unemployed or voluntarily under employed. The court shall determine whether the parent is voluntarily under employed or voluntarily unemployed based

¹⁹ In Re: Marriage of Shui, 132 Wash. App. 568, 125 P.3d 180 (2005).

upon that parent's work history, education, health, and age, or any other relevant factors."

In Schumacher v. Watson,²⁰ the evidence showed Watson worked only a few months in 1998, was, at one time, unable to work because he fell off the roof, and that he worked an average of 8.9 days a month in 1998. The court observed that "the Washington Supreme Court has stated that a court should look at the level employment 'at which a parent is capable and qualified'."²¹ The Schumacher court held the trial court did not abuse its discretion in finding that Watson was under employed.

In In Re: Marriage of Wright,²² the wife argued that she could only work half time at a hospital as a nurse because she was the primary caretaker of five children and was a member of the National Guard. Nonetheless, the Court of Appeals affirmed the trial court's imposition of imputed income.

"Although this court is sympathetic to the significant difficulties faced by a single parent, we have held that voluntary under-employment by either parent will not shield that parent from a child support obligation. This principle applies

20 100 Wash. App. 208, 997 P.2d 399 (2000).

21 Schumacher v. Watson, supra, 100 Wash. App. 208.

22 78 Wash. App. 230, 896 P.2d 735 (1995).

with equal force to men and women, regardless of the merit of the reason for the under-employment.”²³

In this case, Michael is not the primary caretaker of his children. The evidence was that he was able to earn at least \$40,000.00 a year at Western Fabrication, that he could still be employed by that company, but he chose not to work for it to stay close to his children. But, under the principles outlined by the Wright court, that decision should not insulate Michael from the requirement to pay child support based on his likely earning capacity. Because Michael was able to earn in excess of \$40,000.00 per year, his imputed income should be at least \$3,000.00 per month.

The Appellant request this court remand the case to the trial court with instructions to impute income based upon Michael's income from Western Fabrication

VI. CONCLUSION.

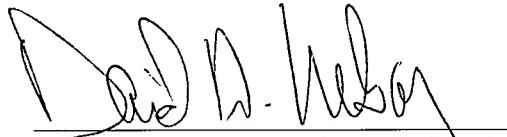
The trial court erred in failing to limit residential time as required by RCW 26.09.191(2)(a). Further, the court erred in failing to impute income of at least \$3,000.00 to the

23 78 Wash. App. at 234.

Respondent. The Appellant requests the Court of Appeals remand this case to limit residential time with the Respondent and to impute income to Respondent based upon his past history and capability.

DATED this 14th day of July,
2015.

NELSON LAW FIRM, PLLC



David A. Nelson, WSBA #19145
Attorney for Appellant

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on the date given below, I caused to be served in the manner indicated a true and accurate copy of the foregoing, upon the following, first class mail:

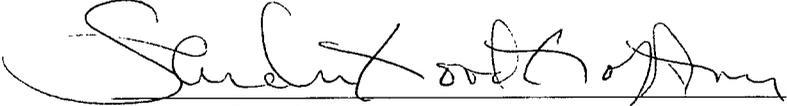
Appellant's Opening Brief

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Nelson Law Firm, PLLC


Sandra Good-Gaffney