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NO. 50809-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE PARENTING AND SUPPORT OF T.W.:

LUCAS WAGONER,

Appellant,

v.

ALEXANDRIA RUSSUM,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii, iv, v, vi

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....2

III. STANDARD OF REVIEW.....9

IV. ARGUMENT.....9

 1. The Superior Court acted well within its discretion in proceeding to trial despite Wagoner’s lack of legal representation.....9

 A. Wagoner was not entitled to a trial continuance simply because his attorney withdrew, and the Superior Court acted clearly within its discretion in denying Wagoner’s request for a continuance.....10

 B. Wagoner failed to demonstrate any prejudice resulting from the denial of his request for a continuance.....15

 2. Wagoner was not denied due process by the Superior Court’s decision to proceed with trial though Wagoner was not represented by counsel.....17

 A. Wagoner did not have a due process “right to counsel” in the Superior Court proceeding.....18

 B. Wagoner waived any objections to proceeding to trial without counsel.....24

3.	The Superior Court’s award of attorney’s fees was reasonable and should be upheld.....	27
4.	This Court should award Russum her attorney fees for having to respond to Wagoner’s frivolous appeal, and based on her need and Wagoner’s ability to pay.....	32
V.	CONCLUSION.....	34

TABLE OF AUTHORITIES

CASE LAW

<i>Associated Mortgage Investors v. G.P. Kent Construction Co.</i> , 15 Wn. App. 223, 229, 548 P.2d 558 (1976).....	11
<i>Barrinuevo v. Barrinuevo</i> , 47 Wash.2d 296, 287 P.2d 349 (1955).....	12
<i>Boddie v. Connecticut</i> , 401 U.S. 371, 378-9, 91 S. Ct. 780 (1971)	22
<i>Childs v. Allen</i> , 125 Wn. App. 50, 58, 105 P.3d 411 (2004), <i>rev. denied</i> , 155 Wn.2d 1005 (2005).....	11
<i>Ciccarelli v. Carey Canadian Mines</i> , 757 F.2d 548, 554 (3d Cir. 1985).....	23
<i>Donaldson v. Greenwood</i> , 40 Wash.2d 238, 242 P.2d P.2d 1038 (1952).....	12
<i>Grunewald v. Missouri Pac. R.R.</i> , 333 F.2d 983 (8th Cir.1964).....	12
<i>In re Dependency of Grove</i> , 127 Wn.2d 221, 897 P.2d 1252 (1995)	20
<i>In re Det. Of C.M.</i> , 148 Wn.Ap. 111, 118, 197 P.3d 1233, 1236 (2009).....	9
<i>In re Disciplinary Proceeding against Jackson</i> , 180 Wn.2d 201,322 P.3d 795 (2014).....	16
<i>In re Guardianship of AGM</i> , 154, Wn. App. 53, 83, 223 P.3d 1276 (2010).....	33, 34
<i>Marriage of Knight</i> , 75 Wn. App. 721,729, 800 P.2d 71 (1994), <i>rev. denied</i> , 126 Wn.2d 1011 (1995).....	27, 28

<i>In re Marriage of Giordano</i> , 57 Wn. App. 74, 787 P.2d 51 (1990)	21, 22, 23
<i>In re Marriage of Root</i> , 185 Wn. App. 1009 (2014)	13
<i>In re Marriage of Van Camp</i> , 82 Wn.App. 339 (1996).....	28
<i>In re Parenting and Support of S.M.L.</i> , 142 Wn. App. 110, 173 P.3d 967 (2007).....	11
<i>In re Welfare of G.E.</i> , 116 Wn. App. 326, 65 P.3d 1219 (2003)	27
<i>Jankelson v. Cisel</i> , 3 Wa. App. 139, 473 P.2d 202 (1970)	12
<i>King v. King</i> , 162 Wn.2d 378, 174 P.3d 659 (2007)	18, 19, 20
<i>MacKay v. Mackay</i> , 55 Wash.2d 344, 348, 347 P.2d 1069 (1959).....	9
<i>Marriage of Firchua</i> , 88 Wn. 2d 109, 115, 558 P.2d 194 (1977).....	27
<i>Marriage of Leslie</i> , 90 Wn. App. 796, 807, 954 P.2d. 330, <i>rev. denied</i> , 137 Wn. 29 1003 (1999).....	33
<i>Martonik v. Durkam</i> , 23 Wn. App. 47, 596 P.2d 1054 (1979)	13
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 684, 132 P.3d 115 (2006).....	11
<i>Peterson v. Crockett</i> , 158 Wash. 631, 291 P. 721 (1930).....	12
<i>Rehak v. Rehak</i> , 1 Wa. App. 963, 465 P.2d 687 (1970)	12

<i>Richards v. Richards</i> , 5 Wn. App. 609, 614, 489 P.2d 928 (1971) ...	28
<i>State v. Angulo</i> , 69 Wn. App. 337, 341-42, 848 P.2d 1276, <i>rev. denied</i> 122 Wn.2d 1008 (1993)	15,16
<i>State v. Campbell</i> , 78 Wn. App. 813, 901 P.2d 1050 (1995)	15
<i>State ex.rel. Carroll v. Junker</i> , 79 Wash.2d 12, 26, 482 P.2d 775 (1971).....	9
<i>State v. Downing</i> , 151 Wash.2d 265,272, 87 P.3d 1169 (2004).....	9
<i>State v. Early</i> , 70 Wn. App. 452, 458, 853 P.2d 964 (1993), <i>rev. denied</i> , 123 Wn.2d 1004, 868 P.2d 872 (1994)	15
<i>State v. Kelly</i> , 32 Wn. App. 112, 114, 645 P.2d 1146, <i>rev. denied</i> , 97 Wn.2d 1037 (1982)	16
<i>State v. Rohrich</i> , 149 Wn.2d 647, 654, 71 P.3d 638 (2003).....	11
<i>Swope v. Sundgren</i> , 73 Wash.2d 747, 440 P.2d 494 (1968).....	12
<i>Willapa Tasing Co. v. Muscanto, Inc.</i> , 45 Wn. App. 779, 727 P.2d 687 (1986)	11

STATUTES

RCW 26.09.....	2, 14, 18, 28
RCW 26.09.002.....	18
RCW 26.09.140	28, 29, 32
RCW 26.09.181	14
RCW 26.09.191	8

RCW 26.09.260.....19

Superior Court Civil Rule 715, 24, 25

RULES AND REGULATIONS

RAP 18.1.....32

RAP 18.9.....33

I. INTRODUCTION

Appellant, Luke Wagoner (hereinafter "Wagoner") appeals from an order of the Superior Court of Washington, Clark County, that adopted a Final Parenting Plan, regarding T.W., the daughter of Wagoner and Respondent, Alexandria Russum (hereinafter "Russum.") The Superior Court also entered orders regarding child support, attorney fees and a restraining order.

In his appeal, Wagoner apparently does not take issue with the substance of the Superior Court's decision. Instead, he argues that the case should be remanded for a new trial because the Superior Court refused to grant a trial continuance after his attorney moved to withdraw more than six weeks prior to the trial of this matter. He asserts that proceeding to trial without legal representation amounted to a denial of due process because it deprived him of a meaningful opportunity to be heard.

As demonstrated below, the Superior Court properly exercised its discretion in proceeding with the trial on the scheduled trial date. This in no way infringed on Wagoner's due process rights. Moreover, on the day of trial, Wagoner advised the Superior Court that he was ready for trial, and he made no objection whatsoever to proceeding.

Wagoner also argues on appeal that the Superior Court's award of attorney's fees was erroneous because it did not employ the *Lodestar* method to calculate attorney's fees. As set forth below, Wagoner's argument is both legally and factually incorrect. *Lodestar* does not apply to proceedings under RCW 26.09. Furthermore, there was ample evidence before the Superior Court to support its award of reasonable attorney fees to Russum.

Russum seeks attorney fees as allowed under RAP 18.1.

II. STATEMENT OF THE CASE

Russum and Wagoner were in a relationship and have one minor daughter, T.W., who was born on April 22, 2011. Verbatim Report of Proceedings, hereinafter "VRP," (page 64, lines 20-24) The relationship ended on or about April 2015, as a result of Wagoner's drug and alcohol abuse, bizarre and frightening behavior, and extensive absences from the home. *Id.* at page 71 (line 8 to page 75, line 7)

Wagoner's drug and alcohol abuse not only led to the end of the relationship, but also caused Russum to request Wagoner have only supervised visits with T.W. out of concern for her safety and well-being. *Id.* page 75, line 22 to page 76, line 3.

In July 2015, Wagoner commenced this action by filing a Petition for Residential Schedule and Child Support in the Washington Superior Court, Clark County. Clerk's Papers, hereinafter "CP," Sub. No. 3.

Extensive motion practice followed the initiation of the proceeding. In these pretrial proceedings, the parties sought, *inter alia*, to establish a temporary parenting plan, modify the temporary parenting plan, require drug and alcohol testing for Wagoner, discontinue drug and alcohol testing for Wagoner, hold Wagoner in contempt of court, and appoint a Guardian Ad Litem. As a result of these pretrial proceedings, Wagoner was twice held in contempt of court for failure to pay child support, and for violating a temporary restraining order that barred contact with T.W. (CP 145, 225, VRP p. 53) He was required to undergo drug testing and treatment (CP 40, 91, 92, 93), and restrictions were placed on his visitation with T.W. out of concern for her safety and well-being. (CP 196)

A Guardian Ad Litem was also appointed for T.W. on May 11, 2016 (CP 137). The Guardian was concerned for T.W.'s welfare due to the violent death of T.W.'s Yorkshire Terrier while T.W. and the dog were visiting Wagoner at Wagoner's parents' home.

The Guardian's report states:

I spent time attempting to determine whether allowing the dogs to run in the street at night due to the death of Dibs (the puppy) and because I wanted to know if Larry Wagoner may have taken the blame so that his sons time with [T.W.] was not restricted. I have never observed the Wagoners' dogs to be allowed outside the confines of their yard without a leash. I observed the young blue healer [sic] pup being called back as he neared the edge of the yard. There is a fence around the entire back yard where the dogs could "do their business" and where I have often seen the dogs. Neighbors report the dogs at the Wagoners' home are never let out to run in the streets. They report the dogs are either playing supervised in the small front yard with the family, or they are walked on leashes. (CP 177, p. 30)

I am not inclined to believe Larry Wagoner's statements under penalty of perjury that it was him who let [T.W.'s] puppy "out along with our other two dogs around 9:30 pm to do their business before going to bed" and then check on them a half hour later. *The puppy was killed due to an injury at the base of its skull, secondary to blunt force trauma.* I will not speculate on what ultimately killed the dog but the pattern of care for dogs at the Wagoner home does not appear to be consistent with Larry Wagoner's statements. *This causes me great concern for the welfare of [T.W.] because it appears Larry Wagoner would "cover" for his son to ensure visits with [T.W.] continue, despite apparent risk to her well being...* *Id.* (pp. 30-31) (Emphasis added.)

The Guardian was also concerned for T.W.'s welfare due to Wagoner's continuing use of illegal drugs:

In my opinion, the use of Opiates in the absence of a prescription, including the drastic fluctuations of levels in...Wagoner's system, as well as the death of an animal in the home by blunt force trauma represent potential harm to [T.W.] in the Wagoner home. *Due to the frequency of positive testing*

by...Wagoner I believe it is more likely than not that [T.W.] has found herself in the company of Wagoner when he was using illegal substances. Id. at p. 31. (Emphasis added.)

Ironically, Wagoner, himself, placed the case on the trial calendar on February 16, 2016 by filing a Notice to Set for Trial. (CP 102) At a hearing on April 1, 2016, the court set a trial readiness hearing for December 2, 2016 and a trial date of January 2, 2017. (CP 111) On December 2, 2016, the trial readiness hearing was held, and the court adjourned the trial until July 24, 2017 because the January 2nd trial date fell on a court holiday, and it scheduled a new trial readiness hearing for June 16, 2017. Wagoner did not object to the new date. (CP 206)

Wagoner's attorney served him with a Notice of Intent to Withdraw as Attorney of Record on June 8, 2017. (CP 228) As required by Superior Court Civil Rule 71, the notice stated that it would become effective without Court order unless an objection was served on the withdrawing attorney. Wagoner made no objection to the Notice, and his attorney withdrew as of June 15, 2017.

A trial readiness hearing was held before The Honorable Suzan Clark on June 16, 2017. At that hearing, trial was scheduled for July 24 through July 27, 2017. Wagoner appeared at the hearing pro se and requested a continuance of the trial date, yet provided no basis for his

request. The court denied the request and noted that the trial dates remained as set.

On July 24, 2017, the case was called for trial. Mr. Wagoner advised the Court that although he was not represented by counsel and unfamiliar with Court proceedings, he was ready for trial. He did not advise the Court that he was attempting to secure legal representation or that he was having problems trying to do so. He did not object to proceeding without representation.

The Court asked the parties whether they were prepared to proceed with trial, and both parties answered in the affirmative:

Clerk: All rise. Court is in session. The Honorable Suzan Clark presiding.

The Court: Thank you. Pleas[e] be seated. We're on the record in Wagoner and Russum, cause [sic] number 15-3-01417-7. Are the parties ready to proceed?

Mr. Sundstrom: Yes, Your Honor.

The Court: Mr. Wagoner?

Mr. Wagoner: Yeah, I guess so. (VRP, page 3, lines 2 to line 10)

The Court then inquired of Mr. Wagoner whether he planned to call witnesses:

The Court: Okay. Well, you're the Petitioner in this matter. Are you planning on calling witnesses today?

Mr. Wagoner: I would like to. I just — Like I said, I didn't have time to get Legal Counsel and I don't know how to do any of this Court stuff.

The Court: Okay. Have you told Mr. Sundstrom who you intend to call as witnesses?

Mr. Wagoner: No, like I said, I don't know how to — I don't know how any of this Court stuff works, so...

The Court: Okay. Who are you intending to call as a witness today?

Mr. Wagoner: Well, I was hoping to call my treatment counselor.

The Court: Do you have that person here?

Mr. Wagoner: He's not here right now.

The Court: Okay. Is that person scheduled to be here?

Mr. Wagoner: No, but I can give him a call and he'll show up.

The Court: Okay. Who else are you intending to call?

Mr. Wagoner: Right now that's it.

The Court: Okay. Are you planning to testify on your own behalf?

Mr. Wagoner: Yeah.

The Court: Well, you are the Petitioner in this matter, you do have the burden of going forward.

Mr. Wagoner: I understand that. *Id.* at page 3 (line 2 to page 4, line 19)

The trial of this matter then proceeded and Mr. Wagoner participated in the trial. He was afforded the opportunity to make an opening statement. (VRP p. 7) He offered direct testimony (VRP pp. 7-12), engaged in limited cross examination (VRP pp. 176-177, 183-186), and was given the chance to call witnesses (VRP pp. 3, 186-7) and make closing remarks. (VRP p. 187)

The trial was concluded and on August 11, 2017, the court issued a Final Order and Findings for a Parenting Plan, Residential Schedule and/or Child Support (CP 236), a Final Parenting Plan (CP 237), a Final Child Support Order (CP 238), and a Restraining Order (CP 234).

Pursuant to RCW 26.09.191, the Final Parenting Plan (hereinafter the "Plan," (CP 237) placed limitations on Wagoner's contact with T.W. due to his neglect of parental duties, his long-term emotional problems that interfere with his ability to parent T.W., his substance abuse, and his abusive use of conflict. *Id* at p. 2. The Plan limited Wagoner's contact with T.W. In order to resume visitation, Wagoner was required to schedule reunification counseling after verifying through weekly drug testing that he has been sober from drugs and alcohol for six months. *Id.* at pp. 2-5. He was also required to undergo a psychological evaluation and an evaluation by a specified substance abuse counselor. The Plan also

requires Wagoner to disclose documentation of his prescription drug use and criminal records. *Id.* at p. 3-5.

III. STANDARD OF REVIEW

The standard of review on all of the issues presented on this appeal is the abuse of discretion standard. The application of that standard to the facts of this case is explained in detail below. Because the Superior Court properly exercised its discretion in denying Wagoner's request for a trial continuance and in awarding Russum attorney's fees, the decision should be affirmed and Wagoner's appeal should be denied.

IV. ARGUMENT

- 1. The Superior Court acted well within its discretion in proceeding to trial despite Wagoner's lack of legal representation.**

In Criminal and civil matters, the decision to deny a continuance is reviewed for abuse of discretion. *State v. Downing*, 151 Wash.2d 265,272, 87 P.3d 1169 (2004); *MacKay v. Mackay*, 55 Wash.2d 344, 348, 347 P.2d 1069 (1959). Discretion is abused if it is exercised without tenable grounds or reasons. *State ex.rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). "A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law."

The decision to grant or deny a trial continuance is one left to the discretion of the trial court judge. *In re Det. Of C.M.*, 148 Wn. App. 111, 118, 197 P.3d 1233, 1236 (2009)

It is clear Wagoner has failed to establish that the trial court abused its discretion, or engaged in an erroneous view of the law. At the June 16, 2017 trial readiness hearing, Wagoner requested a continuance of the July 24, 2017 trial date because he was no longer represented by counsel. The Superior Court denied this request. On appeal, Wagoner contends that the Superior Court's refusal to grant a continuance was reversible error. He is incorrect.

As demonstrated below, all of the facts before the Superior Court supported its decision to proceed, and that decision was well within the discretion of the court. In addition, Wagoner has failed to carry his burden in this appeal of showing that the Superior Court abused its discretion, and has instead merely presented conclusory statements that he was deprived of a meaningful opportunity to be heard and due process. Wagoner's appeal must be rejected because 1) he was not entitled to a continuance, 2) the denial of the continuance was well within the Superior Court's discretion, and 3) he has failed to demonstrate any prejudice resulting from the denial of the continuance.

- A. Wagoner was not entitled to a trial continuance simply because his attorney withdrew, and the Superior Court acted clearly within its discretion in denying Wagoner's request for a continuance.**

The Superior Court properly exercised its discretion in denying Wagoner's request for a continuance and proceeding to trial on the scheduled trial date. "[A] party does not have an absolute right to a continuance, and the granting or denial of a motion for a continuance is reversible error only if the ruling was a manifest abuse of discretion." *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn.App. 779, 785, 727 P.2d 687 (1986).

As stated by the Court of Appeals:

The trial court abuses its discretion when its "decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *Associated Mortgage Investors v. G.P. Kent Construction Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)). "[I]f the trial court relies on unsupported facts or applies the wrong legal standard," its decision is exercised on untenable grounds or for untenable reasons; and "if 'the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take,'" the trial court's decision is manifestly unreasonable. *Mayer*, 156 Wn.2d at 684 (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). The appellant "bears the burden of proving that the trial court abused its discretion." *Childs v. Allen*, 125 Wn. App. 50, 58, 105 P.3d 411 (2004), *review denied*, 155 Wn.2d 1005 (2005).

In re Parenting and Support of S.M.L., 142 Wn. App. 110, 173 P.3d 967 (2007)

The standard for granting or denying a continuance upon the withdrawal of a party's attorney is the same. It is well recognized that the withdrawal of an attorney does not give a party to a civil action an absolute right to a trial continuance. The standard of review for a decision to allow or deny a continuance after the withdrawal of an attorney has been settled law for nearly half a century.

The withdrawal of an attorney in a civil case...does not give the party an absolute right of continuance. Grunewald v. Missouri Pac. R.R., 333 F.2d 983 (8th Cir.1964). The rationale for this rule is that if a contrary rule should prevail, all a party desiring a continuance, under such circumstances, would have to do would be to discharge his counsel or induce him to file a notice of withdrawal. *Peterson v. Crockett*, 158 Wash. 631, 291 P. 721 (1930). (Emphasis added.)

The corollary of this rule is that the decision whether to grant or to refuse a continuance in such a situation rests in the discretion of the court to which the application is made, and *the ruling of the trial court in the exercise of that discretion will not be disturbed except for manifest abuse of discretion.* (Emphasis added.) *Swope v. Sundgren*, 73 Wash.2d 747, 440 P.2d 494 (1968); *Barrinuevo v. Barrinuevo*, 47 Wash.2d 296, 287 P.2d 349 (1955); *Donaldson v. Greenwood*, 40 Wash.2d 238, 242 P.2d P.2d 1038 (1952); *see note and cases cited in 26 Wash. L. Rev. 212 (1951).*

Jankelson v. Cisel, 3 Wa. App. 139, 473 P.2d 202 (1970).

“Discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Jankelson, supra*, citing *Rehak v. Rehak*, 1 Wa. App. 963, 465 P.2d 687 (1970).

Many considerations may inform a trial court's decision whether to grant or deny a continuance:

[t]he court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

Martonik v. Durkam, 23 Wn. App. 47, 596 P.2d 1054 (1979), *see also In re Marriage of Root*, 185 Wn. App. 1009 (2014).

In the case at bar, the Superior Court judge was familiar with the case before her, not only from the record, but because she had presided over some of the pretrial proceedings. (See CP 149, 195, 201, 225, 226, 234) Wagoner was the party who placed the case on the trial calendar (CP 102), and at the time of the June 16, 2017 trial readiness hearing, the case had been pending for nearly two years. Trial of this matter was already adjourned once due to a court scheduling error, and this resulted in an approximate seven month delay in the trial. At the time of the trial readiness hearing, there were approximately six weeks before trial was set to begin, more than sufficient time for Mr. Wagoner to obtain a new attorney, and Wagoner had over six weeks from the Notice of Intent to Withdraw to seek new counsel. From the court record, the Superior Court

was aware that there had been extensive motion practice during the pendency of this matter resulting in substantial attorneys' fees for Russum, and that further delay would likely necessitate additional legal costs. This can be plainly inferred from the extensive pretrial motion practice regarding custody and visitation, and from Wagoner's intransigence regarding continued substance abuse treatment and testing, his failure to pay child support and otherwise abide by the orders of the Superior Court.

Finally, and most importantly, adjourning the trial date and leaving this case unresolved would have resulted in further uncertainty and unwarranted delay in establishing permanent parenting arrangements for T.W., and that would clearly not have been in her best interests.¹ This principle is reflected in RCW 26.09.181 which states:

Procedure for determining permanent parenting plan.

(6) TRIAL SETTING. Trial dates for actions involving minor children brought under this chapter shall receive priority.

¹ It is confusing that Wagoner argues that "in divorce cases a liberal view is to be taken toward granting continuances", Brief of Appellant, pp. 11, 14. The instant action is not one for divorce (or "dissolution," more appropriately.) Russum and Wagoner were not married. The purpose of this proceeding is to establish a Parenting Plan for a minor child of their relationship pursuant to the provisions of RCW 26.09. As argued herein, the legislative intent embodied in 26.09.181 (6) was to expedite trials, such as the one in this case, involving minor children.

The Superior Court took all of the foregoing facts into consideration, and proceeded to trial on the trial date that had been set on December 18, 2016. This was clearly a proper exercise of the court's discretion. Wagoner cannot plausibly contend that no reasonable person would take the view of the Superior Court. Accordingly, the denial of Wagoner's request for a continuance due to his attorney's withdrawal provides no basis for overturning the Superior Court's decision.

B. Wagoner failed to demonstrate any prejudice resulting from the denial of his request for a continuance.

Wagoner's appeal must also be rejected because he has utterly failed to demonstrate how the denial of his request for a trial continuance resulted in any prejudice to his case. Wagoner appeared at trial and was afforded his day in court.

Simply alleging that the denial of a requested continuance was an abuse of discretion is an insufficient ground for appeal. Rather, an abuse of discretion will be found only if the appellant demonstrates prejudice, or that the outcome of the trial would have been different if the continuance had been granted. *State v. Early*, 70 Wn. App. 452, 458, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994), *State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995), *State v. Angulo*, 69

Wn. App. 337, 341-42, 848 P.2d 1276, *review denied*, 122 Wn.2d 1008 (1993); *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146, *review denied*, 97 Wn.2d 1037 (1982).

Wagoner has not even attempted to show how he was prejudiced by the Superior Court's decision to proceed to trial. He has not articulated in any way how the outcome of the Superior Court proceeding would have been different. He has not argued that any specific evidence favorable to his case would have been presented. He has not explained what evidence that was adduced at trial he would have impeached. He has not named a single, additional witness that he would have called, or stated what testimony such witnesses would have given. He has not argued that any of the witnesses who were called at trial would have been excluded or cross-examined to impeach their credibility. Although he complains of "significant objectionable material" (Brief of Appellant, p. 14), he has failed to advise this court of a single objection that might have been raised had he been represented by an attorney at trial. Such a bald assertion is insufficient to show prejudice. *See In re Disciplinary Proceeding against Jackson*, 180 Wn.2d 201, 322 P.3d 795 (2014) (failing to specify the particular evidence that was not introduced as a result of a denial of a request for a continuance merely constituted vague contentions that were insufficient to show prejudice.)

The burden was on Wagoner to demonstrate how the result of the trial would have been different if his request for a continuance had been granted. Given Wagoner's complete failure to demonstrate how he was prejudiced, his appeal must be denied.

2. Wagoner was not denied due process by the Superior Court's decision to proceed with trial though Wagoner was not represented by counsel.

Wagoner argues that he was denied due process because the Superior Court's refusal to grant a trial continuance in order to obtain new legal representation thus denying him meaningful opportunity to be heard. (Brief of Appellant, p. 14.) This argument is fatally flawed because it presumes erroneously that Wagoner had a due process right to legal counsel in the Superior Court proceeding. Not a single case is cited in support of this argument. As demonstrated below, no such right exists, and the Washington Supreme Court has expressly refuted such a claim.

In addition, the record clearly established that Wagoner relinquished his opportunity to be represented by counsel. For whatever reason not established by Wagoner, his previous counsel withdrew, but did so well before the commencement of trial affording Wagoner sufficient time to secure alternative counsel, and sufficient opportunity for new counsel to request a continuance to properly prepare for trial. None of this

occurred. Accordingly, he cannot now be heard to complain that he was unrepresented at trial.

A. Wagoner did not have a due process “right to counsel” in the Superior Court proceeding.

Wagoner was not entitled to be represented by an attorney in the Superior Court proceeding to establish a parenting plan under the provisions of RCW 26.09 because the proceeding did not threaten his fundamental constitutional rights.

In *King v. King*, 162 Wn.2d 378, 174 P.3d 659 (2007), the Washington Supreme Court made it clear that in a proceeding to establish a parenting plan, litigants do not have a right to counsel. Although *King* involved a claim of right to a publicly funded attorney, its reasoning applies *a fortiori* in cases where a party is not asserting a right to counsel at public expense.

As explained by the Court,

Dissolution proceedings are generally a *private action* between spouses resulting in termination of the marriage. Where the parties have children, the proceedings will also involve a decision on where the children will primarily live and how, among other things, parents will share placement time with the children. The legislature has provided that the best interests of the children is ordinarily served when the preexisting ‘pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents. . . .’ RCW 26.09.002. What this policy promotes is the continued parental involvement in

the children's lives to the greatest extent possible, given the dissolution of the marriage. *King*, 174 P.3d at 663 (Emphasis added.)

The Court then distinguished private proceedings to establish parenting plans — proceedings that do not give rise to a right of representation, from State initiated proceedings to terminate parental rights that do implicate the right to counsel.

The entry of a parenting plan effectuating the legislative purpose of continued parental involvement in the children's lives does not equate to an action where the State is seeking to terminate any and all parental rights and parental involvement with the children, severing the parent-child relationship permanently. [A] dissolution proceeding is fundamentally different from termination or dependency proceedings. *The dissolution proceeding is a private civil dispute initiated by private parties to resolve their legal rights vis-a-vis each other and their children...* Entry of such a parenting plan does not terminate the parental rights of either parent, but rather allocates or divides parental rights and responsibilities in such a way that they can be exercised by parents no longer joined in marriage. [Footnote omitted.] *Even where a parenting plan results in a child spending substantially more, or even all, of the child's time with one parent rather than the other, both parents remain parents and retain substantial rights, including the right to seek future modification of the parenting plan.* See RCW 26.09.260. As such, the parenting plan divides parental roles and responsibilities, rather than terminating the rights of either parent. *Id.* (Emphasis added.)

Thus, the Supreme Court held that there was no right to legal representation because the interest at stake in a private proceeding to establish a parenting plan, “is not commensurate with the fundamental

parental liberty interest at stake in a termination or dependency proceeding. While a parent's interest in the provisions of a parenting plan is significant, that interest is less than those interests in a termination or dependency proceeding and must be analyzed as such." 174 P.3d at 663. "[W]here fundamental constitutional rights are not threatened, no right to counsel exists..." *King*, 174 P.3d at 662 citing *In re Dependency of Grove*, 127 Wash.2d 221, 897 P.2d 1252 (1995).

King is dispositive in the case at bar. Wagoner's "fundamental parental liberty interest" was not at stake before the Superior Court, and he therefore had no right to an attorney. Although the Plan adopted after trial places limits on Wagoner's contact with T.W., it in no way infringes his parental rights. The conditions were limited and completely reasonable, and were imposed upon Wagoner due to his neglect of T.W., his emotional problems, his long and well established history of substance abuse, his failure to comply with court ordered substance abuse counseling and drug and alcohol testing, and his abusive use of conflict. All of these factors were well documented by the Guardian Ad Litem and accepted as facts by the Superior Court. The Court found that Wagoner's ability to parent T.W. was impaired, and that Wagoner's problems were potentially harmful to T.W.'s best interests.

Accordingly, the Superior Court placed restrictions on his contact with T.W., and the Plan required Wagoner to undergo six months of weekly drug testing, psychological evaluation, and then to obtain a substance abuse evaluation. Following this six month period, Wagoner was required to initiate reunification counseling, and he would then be able to seek to resume visitation with T.W.

The conditions imposed by the Superior Court did not impair Wagoner's fundamental parental liberty interest. As a result, he had no due process right to counsel in the proceeding below, and his rights were not compromised when the Court proceeded with trial on the scheduled trial date and ultimately arrived at the Plan that placed conditions on Wagoner's contact with T.W.

It is puzzling that Wagoner cites *In re Marriage of Giordano*, 57 Wn. App. 74, 787 P.2d 51 (1990) to support his contention that he was denied "a meaningful opportunity to be heard" and thus denied "due process." Brief of Appellant, p. 11.

Quoting *Giordano*, Wagoner asserts that,

"[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

Giordano is easily distinguished on its facts, and moreover, the principles explained in that case undermine Wagoner's arguments.

First, it must be noted that Wagoner was not "forced to settle a claim right" of any sort, and he has not identified any such issue in this appeal. As explained *supra*, Wagoner had no right to an attorney in the Superior Court proceeding, and his parental liberty interest was not impaired by that proceeding.

The facts in *Giordano* are also readily distinguishable from the instant case. In *Giordano*, the Superior Court issued a temporary restraining order from further motion practice against an "unduly litigious" *pro se* litigant in a dissolution proceeding, because the litigant's abusive motion practice "threatened to preempt the family law motions calendar and involve all 39 Superior Court judges." *Id. at 57 Wn. App. at 75*. In reviewing the Superior Court's restraining order, the Court of Appeals rejected the appellant's argument that she was denied her right of access to the courts by the restraining order. The Court explained that the "opportunity to be heard" that must be afforded a litigant "depends on 'the nature of the case' and 'the limits of practicability.'" *Id. at 76*, quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-9, 91 S. Ct. 780 (1971). "In other words, '[t]here is no absolute and unlimited constitutional right of access to courts. All that is required is a reasonable right of access — a

reasonable opportunity to be heard.’ “ *Giordano*, 57 Wn. App. at 76 quoting *Ciccarelli v. Carey Canadian Mines*, 757 F.2d 548, 554 (3d Cir. 1985).

In the case at bar, Wagoner was given a reasonable opportunity to be heard. Although he was given notice of his right to oppose his attorney’s withdrawal, he made no objection whatsoever. He had ample opportunity before trial began to retain new legal counsel. He failed to do so. He was present for trial and indicated to the trial judge that he was prepared to proceed and that he had prepared remarks and intended to call witnesses. He then participated in the trial, offering direct testimony, cross examining Russum, and waived closing remarks.

In view of all that transpired both before and during trial, Wagoner received a reasonable opportunity to be heard, and his claim to the contrary is flatly contradicted by the record.

It should also be well noted that the *Giordano* court stated that it might reach the same conclusion simply because the appellant failed to demonstrate prejudice from the restraining order and that prejudice to her was not apparent from a review of the record. *Giordano* 57 Wn. App. at 76. As argued above, just like the appellant in *Giordano*, Wagoner has failed to demonstrate any prejudice resulting from the Superior Court’s

decision to proceed with trial on the scheduled trial date despite Wagoner's lack of representation.

B. Wagoner waived any objections to proceeding to trial without counsel.

Wagoner can hardly be heard to complain that he was not represented by an attorney in the Superior Court because his actions and words both before and during trial amounted to a waiver of counsel.

First, it should be noted that it was Wagoner who placed this case on the trial calendar with a Notice to Set for Trial filed February 16, 2016. (CP 102) At a hearing on April 1, 2016, a trial date of January 2, 2017 was set. (CP 111) This trial date was then postponed to July 24, 2017 due to a Court holiday. Thus, Wagoner himself placed this case on the trial calendar a full 18 months prior to the trial date. If there were problems developing between Wagoner and his attorney, Wagoner can hardly contend that he was caught unaware of the trial date that was set, and he had a lengthy period to remedy those problems and preserve his attorney-client relationship, or obtain new trial counsel.

In addition, Wagoner's attorney filed a Notice of Intent to Withdraw on June 8, 2017, nearly seven weeks before the scheduled trial date. (CP 228) As required by Superior Court Civil Rule 71(c), the notice

stated that it “shall become effective without Order of the Court unless an objection to the Withdrawal is served...” Thus, even though he was given notice that he could have objected to his attorney’s withdrawal, Wagoner failed to do so. As a result, the Notice became effective, and Wagoner was no longer represented.

When Wagoner’s attorney withdrew, trial was not imminent, and Wagoner had ample time to secure counsel. Despite this fact, there is no indication whatsoever in the record of Wagoner’s efforts to find new representation in the nearly two months from the time his attorney moved to withdraw until the date of trial.

Finally, when the case was called for trial on July 24, 2017, Mr. Wagoner advised the Court that although he was not represented by counsel and was unfamiliar with Court proceedings, he was ready for trial. He did not advise the Court that he was attempting to secure legal representation. He did not describe any particular difficulties he encountered obtaining counsel. He did not object to proceeding without representation.

The Court asked the parties whether they were prepared to proceed with trial, and both parties answered in the affirmative:

Clerk: All rise. Court is in session. The Honorable Suzan Clark presiding.

The Court: Thank you. Pleas[e] be seated. We're on the record in Wagoner and Russum, cause [sic] number 15-3-01417-7. Are the parties ready to proceed?

Mr. Sundstrom: Yes, Your Honor.

The Court: Mr. Wagoner?

Mr. Wagoner: Yeah, I guess so. (VRP page 3, lines 2 to line 10)

The Court then inquired of Mr. Wagoner whether he planned to call witnesses:

The Court: Okay. Well, you're the Petitioner in this matter. Are you planning on calling witnesses today?

Mr. Wagoner: I would like to. I just — Like I said, I didn't have time to get Legal counsel and I don't know how to do any of this Court stuff. Id. at page 3, lines 11-16.

The trial of this matter then proceeded and Mr. Wagoner participated in the proceedings. As noted in his Appellate Brief, his case in chief lasted one hour. (Brief of Appellant, p. 9) Although in hindsight Wagoner's performance as a pro se litigant may have been detrimental to his case, his performance is not germane to the issues now before the Court.

A parent can waive the right to counsel in proceedings where such a right exists. *In re Welfare of G.E.*, 116 Wn. App. 326, 65 P.3d 1219 (2003). It follows that a party can, through their words and actions, forego legal representation in a proceeding where there is no such right. Through his delay and failure to obtain new counsel despite sufficient notice, time, and opportunity, and by his statements and actions before the Superior Court, Wagoner waived legal representation. This Court should decline the opportunity to afford Wagoner a second bite at the apple because he is now dissatisfied with the outcome of the trial.

3. The Superior Court's award of attorney's fees was reasonable and should be upheld.

A trial court has "complete discretion over the amount of attorney fees to award." *Marriage of Firchua*, 88 Wn. 2d 109, 115, 558 P.2d 194 (1977). The party challenging an award of attorney fees "bears the burden of proving that the trial court exercised this discretion in a way that was clearly untenable or manifestly unreasonable." *Marriage of Knight*, 75 Wn. App. 721, 729, 800 P.2d 71 (1994), *rev. denied*, 126 Wn.2d 1011 (1995).

Wagoner has completely failed to meet his burden of proving that the trial court abused its discretion in awarding Russum attorney fees

incurred in Superior Court, and worse, premises his argument on an incorrect legal standard. The Superior Court's award of attorney's fees to Russum was reasonable and well supported by the evidence before the Court. Moreover, the argument advanced by Wagoner that the Court erred by not applying the *Lodestar* method to compute attorney's fees is inapposite and contradicted by well-established statutory and case law. Simply put, *Lodestar* calculations are not required in proceedings under RCW 26.09; specifically RCW 26.09.140; and Wagoner has cited no authority for his assertion that a *Lodestar* calculation is required under RCW 26.09.140. He has failed to do so because no such authority exists.

In fact, the Washington Court of Appeals explicitly rejected *Lodestar* methodology in proceedings pursuant to RCW 26.09.140, stating that "the primary considerations for the award of a fee in a dissolution action ... are equitable." *In re Marriage of Van Camp*, 82 Wn. App 339 (1996) (petition for review denied, 130 Wn.2d 1019, 928 P.2d 416 (1996) (citing *Marriage of Knight*, 75 Wn. App. 721, 730, 800 P.2d 71 (1994)

"The overriding considerations are the need of the party requesting the fees, the ability to pay of the party against whom the fee is being requested, and the general equity of the fee given the disposition of the marital property." *Van Camp*, 82 Wn. App. at 340, RCW 26.09.140, *Richards v. Richards*, 5 Wn. App. 609, 614, 489 P.2d 928 (1971). Thus,

the Washington Court of Appeals rejected the very argument proffered by Wagoner that the award of attorney's fees should be reversed.

Moreover, Wagoner's argument is contradicted by plain language of RCW 26.09.140. That provision states, in part

Payment of costs, attorneys' fees, etc.

The court from time to time *after considering the financial resources of both parties* may order a party to pay a *reasonable amount* for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees... (Emphasis added.)

Wagoner is not only incorrect about the legal standard for determining attorney's fees under RCW 26.09.140, he mischaracterizes the Superior Court's attorney's fees ruling in asserting that the "trial court seemingly pulled [the attorney's fee award] out of thin air." (Brief of Appellant, p. 16) Russum's Trial Memorandum identified her attorney fees incurred and her request for an award of fees based on Wagoner's "misuse of the court process, his ongoing misrepresentations, and admitted perjury", and that "he continues to violate court orders, which has resulted in a temporary termination of his visitation rights". (CP 232, pg. 2) Russum provided in her Trial Memorandum the governing authority and the basis of her application for her request for attorney fees. (CP 232, pg. 11-12) Additionally, Russum's Affidavit in Support of Request for Attorney Fees was admitted at trial (CP 233). The Affidavit provided

reasonable and customary rates in Clark County, Washington for the period of time in which Wagoner filed his Petition for Residential Schedule and Placement of the child from August 7, 2015 through July 15, 2017. The Affidavit identified the hourly rate, total fees paid, total fees outstanding and total fee and costs incurred which were reasonable and necessary for the protection of the minor child, T.W.

In reality, Russum's attorney addressed the issue during trial, and he requested an award based both upon the parties' financial resources and also due to Wagoner intransigence. (VRP pp. 190-192) While the Superior Court referred briefly to an attorney's fee award at the conclusion of the trial, that remark was obviously not the court's final ruling. The Superior Court's final ruling and orders were filed with the clerk's office on August 11, 2017, and those documents demonstrate clearly that the attorney's fees award was factually well-founded. (*See* CP 236, 238)

It appears that Wagoner is unaware of the information that was before the Superior Court concerning the parties' income, the Superior Court's determination of his imputed income, and the court's determination of reasonable attorney's fees set forth in the Final Child Support Order (CP 238) and Final Order and Findings for a Parenting Plan, Residential Schedule and/or Child Support (CP 236).

Had Wagoner reviewed those documents, he would have known that the Superior Court imputed to him a net monthly income of \$3,312.65. The Court's order states that Wagoner's net monthly income is imputed because he is voluntarily unemployed or under-employed. The Court imputed his income from

Full time pay based on last known reliable information about past earnings. [Wagoner] testified that he is working, but paid cash only and would not provide an actual amount. He stated he could not work full time due to treatment requirements, yet information gathered from the [Guardian Ad Litem] indicated he was not attending all of his treatment classes because he claimed he was working. The court finds he is playing both sides. (CP 238, p. 2)

Wagoner also testified that he was living with his parents and paying minimal, if any, money in order to live there.

Russum testified that her income in 2016 was \$19,359, and her tax return was introduced as trial exhibit 10. (VRP pp. 178-179) The Superior Court also found that Russum's actual net monthly income was \$1,664.00. (CP 238, p. 2)

In awarding attorney's fees in the Final Child Support Order, the Superior Court stated

The court finds the award of attorney fees payable from Lucas Wagoner to Alexandria Russum to be reasonable and necessary for her to establish an appropriate parenting plan and child support order. The court finds Mr. Wagoner has the ability to pay, Ms. Russum has a demonstrated need, and the amount of fees awarded is part of Mr. Wagoner's domestic support obligation. (CP 238, p. 7)

The Superior Court found further, as stated in its Final Order for a Parenting Plan, at paragraph 13, that

Alexandria Russum has incurred fees and costs, and needs help to pay those fees and costs. Lucas Wagoner has the ability to help pay fees and costs and should be ordered to pay the amount as listed in the Child Support order. The court finds that the amount ordered is reasonable. (CP 236, p. 4)

In light of the foregoing, it is clear that the issue of attorney's fees was raised before the Superior Court, there was abundant evidence before the Superior Court to support the award of attorney's fees, and the Superior Court stated clearly and concisely its basis for the award. The Superior Court followed the requirements of RCW 26.09.140, and there is no merit whatsoever to Wagoner's appeal of the attorney's fee award. Accordingly, the Superior Court's award of attorney's fees to Russum should be affirmed.

- 4. This court should award Russum her attorney fees for having to respond to Wagoner's frivolous appeal, and based on her need and Wagoner's ability to pay.**

This court should award Russum her attorney fees incurred on appeal based upon her need and Wagoner's ability to pay, as well as award fees based upon an appeal without merit. RCW 26.09.140; RAP 18.1(a);

Marriage of Leslie, 90 WN. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999).

In any event, attorney fees to Russum or sanctions to this court are warranted due to the frivolousness of this appeal. Under RAP 18.9(a), this court may order a party who “files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages.” An appeal is frivolous and an award of attorney fees is appropriate “when there is no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court’s decision.” *In Re Guardianship of A.G.M.*, 154 Wn. App. 58,83, 223 P.3d 1276 (2010).

All of Wagoner’s challenges to the trial court’s orders are entirely devoid of merit; he has failed to establish any prejudice resulting from the trial court’s denial of a continuance for trial, a trial which Wagoner requested; and, he has failed to establish any merit to his argument that the trial court erred in ordering attorney fees following trial, notwithstanding his argument that the court failed to utilize a method of establishing attorney fees which is contrary to the statutory and case law addressing attorney fees in the creation of a residential schedule. And yet, Russum is

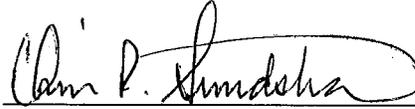
forced to defend against this appeal despite there being “no debatable issues on which reasonable minds could differ,” *A.G.M.* at 83.

Regardless of the frivolous nature of Wagoner’s appeal, Russum has the need and Wagoner’s has the ability to pay her attorney fees.

V. CONCLUSION

For the foregoing reasons, Russum respectfully requests that the decision and order of the Superior Court establishing a final parenting plan and awarding Russum attorney’s fees be upheld in its entirety, that Wagoner’s appeal be denied, and award Russum attorney fees incurred on appeal and sanction Wagoner for bringing this frivolous appeal.

Respectfully submitted,



Chris Sundstrom, WSBA No. 22579
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Lisa Laurenza, hereby certify that I served a true and correct copy of the Respondent's Brief (Case No. 50809-5-II In re: Wagoner v Russum) by the method, on the date, and on each attorney or party identified below:

By causing a copy thereof to be hand delivered to Travis Spears attorney for Appellant at his last known office address on the date set forth below;

Travis Spears
Attorney for Appellant
210 E 22nd Street
Vancouver, Washington 98663

By Electronic Service to: Travis Spears at: travis@brianwalkerlawfirm.com on the date set forth below.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED: 6/15/18

SPENCER & SUNDSTROM, PLLC
By: 
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