

FILED
Court of Appeals
Division II
State of Washington
1/11/2019 3:25 PM

No. 51945-3-II

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

SHERRI KIRSCHBAUM,

Respondent,

vs.

NOLAN ANDERSON, III,

Appellant.

BRIEF OF RESPONDENT

Charles H. Houser, III, WSBA #12155
Pope, Houser & Barnes, PLLC
1605 Cooper Point Road NW
Olympia, WA 98502-8325
(360) 866-4000

Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondent
Sherri Kirschbaum

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iv-vi
A. INTRODUCTION	1
B. STATEMENT OF THE CASE.....	2
C. SUMMARY OF ARGUMENT	8
D. ARGUMENT	9
(1) <u>Standard of Review</u>	9
(2) <u>Framework of Relevant Statutes</u>	10
(3) <u>Substantial Evidence Supports the Challenged Findings Supporting the Trial Court’s Imposition of Restrictions under RCW 26.09.191(3)</u>	12
(a) <u>Substantial Evidence Supports the Finding that Anderson Had Emotional Limitations that Interfered with His Parenting</u>	13
(b) <u>Substantial Evidence Supports the Trial Court’s Findings that Anderson Withheld His Address and Failed to Sign a Release; These Findings Supported the Trial Court’s Intransigence Ruling, Not the Parenting Plan Restrictions</u>	15
(c) <u>Substantial Evidence Supports the Trial Court’s Findings that Anderson Failed to Provide a Release for the GAL to Speak to One of the Child’s Counselors; the Finder of Fact Is Allowed to Draw Inferences from Evidence</u>	18

(d)	<u>Substantial Evidence Supports Findings that Anderson Took the Child to Counselors Without Agreement or Notice to Kirschbaum</u>	19
(e)	<u>Substantial Evidence Supports the Finding that Anderson Coached the Child to Make False Allegations to Counselors</u>	21
(f)	<u>Substantial Evidence Supports the Finding that Anderson Engaged in Abusive Use of Conflict and Emotional Abuse by Interrogating the Young Child During their Interactions</u>	24
(g)	<u>Anderson Admits There Is Substantial Evidence in the Record to Support the Finding that Anderson Made False Allegations About Kirschbaum that Caused the Involvement of Child Protective Agencies; Anderson Improperly Suggests this Court Should Strike Evidence the Trial Court Did Not Strike</u>	26
(h)	<u>Substantial Evidence Supports the Trial Court’s Findings that Anderson Made the Child Afraid and Emotionally Abused Him</u>	27
(4)	<u>The Final Parenting Plan Is Supported by the Facts Adduced at Trial and the Law; the Trial Court Did Not Err in Considering Evidence that Predated the Temporary Parenting Plan, Nor in Adopting a Plan that Happened to Be Similar to the Temporary Parenting Plan</u>	29
(5)	<u>Substantial Evidence and Unchallenged Findings Support the Trial Court’s Award of Attorney Fees to Kirschbaum</u>	32

(6)	<u>This Court Should Award Attorney Fees to Kirschbaum on Appeal Based on Anderson’s Intransigence, the Parties’ Relative Need and Ability to Pay, and Under RAP 18.9 for Bringing a Frivolous Appeal</u>	35
(a)	<u>Anderson’s Intransigence in the Trial Court and on Appeal Justifies a Reasonable Attorney Fee Award to Kirschbaum</u>	35
(b)	<u>A Fee Award Is Warranted Based on the Parties’ Relative Need and Ability to Pay</u>	37
(c)	<u>A Reasonable Attorney Fee Award to Kirschbaum Is Also Warranted Because Anderson’s Appeal is Frivolous</u>	39
E.	CONCLUSION.....	39

Appendices

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Acosta v. City of Mabton</i> , 2 Wn. App. 2d 131, 408 P.3d 1095 (2018).....	28
<i>Adler v. University Boat Mart, Inc.</i> , 63 Wn.2d 334, 387 P.2d 509 (1963).....	17, 18
<i>Anderson v. Anderson</i> , 14 Wn. App. 366, 541 P.2d 996 (1975), <i>review denied</i> , 86 Wn.2d 1009 (1976).....	12
<i>Bower v. Reich</i> , 89 Wn. App. 9, 964 P.2d 359 (1997).....	11
<i>Burbo v. Harley C. Douglass, Inc.</i> , 125 Wn. App. 684, 106 P.3d 258, <i>review denied</i> , 155 Wn.2d 1026 (2005).....	26
<i>Chapman v. Perera</i> , 41 Wn. App. 444, 704 P.2d 1224, <i>review denied</i> , 104 Wn.2d 1020 (1985).....	35, 36, 39
<i>Coons v. Coons</i> , 6 Wn. App. 123, 491 P.2d 1333 (1971).....	38
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	20
<i>DD & L, Inc. v. Burgess</i> , 51 Wn. App. 329, 753 P.2d 561 (1988).....	17
<i>Eide v. Eide</i> , 1 Wn. App. 440, 462 P.2d 562 (1969).....	36
<i>George v. Helliard</i> , 62 Wn. App. 378, 814 P.2d 238 (1991).....	12
<i>In re Marriage of Chandola</i> , 180 Wn.2d 632, 327 P.3d 644 (2014), <i>as corrected</i> (Sept. 9, 2014).....	14
<i>In re Marriage of Coy</i> , 160 Wn. App. 797, 248 P.3d 1101 (2011).....	10
<i>In re Marriage of Harshman</i> , 18 Wn. App. 116, 567 P.2d 667 (1977).....	38
<i>In re Marriage of Knight</i> , 75 Wn. App. 721, 880 P.2d 71 (1994), <i>review denied</i> , 126 Wn.2d 1011 (1995).....	38
<i>In re Marriage of Kovacs</i> , 121 Wn.2d 795, 854 P.2d 629 (1993).....	9, 29, 30
<i>In re Marriage of Lawrence</i> , 105 Wn. App. 683, 20 P.3d 972 (2001).....	9
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	9, 10

<i>In re Marriage of Morrow</i> , 53 Wn. App. 579, 770 P.2d 197 (1989).....	36
<i>In re Marriage of Nelson</i> , 62 Wn. App. 515, 814 P.2d 1208 (1991).....	10
<i>In re Marriage of Schneider</i> , 82 Wn. App. 471, 918 P.2d 543 (1996), <i>overruled on other grounds</i> , <i>Littlefield</i> , 133 Wn.2d at 57	10
<i>In re Marriage of Shui & Rose</i> , 132 Wn. App. 568, 125 P.3d 180, (2005), <i>review denied</i> , 158 Wn.2d 1017 (2006).....	31
<i>In re Marriage of Watson</i> , 132 Wn. App. 222, 130 P.3d 915 (2006).....	12, 29
<i>In re Parentage of Schroeder</i> , 106 Wn. App. 343, 22 P.3d 1280 (2001).....	10
<i>Matter of Marriage of Greenlee</i> , 65 Wn. App. 703, 829 P.2d 1120, <i>review denied</i> , 120 Wn.2d 1002 (1992).....	36, 39
<i>Matter of Parenting Support of Rainbow</i> , 2016 WL 6084115, 196 Wn. App. 1031 (2016), <i>review denied</i> , 187 Wn.2d 1027 (2017)	31
<i>Mattson v. Mattson</i> , 95 Wn. App. 592, 976 P.2d 157 (1999).....	36
<i>Rush v. Blackburn</i> , 190 Wn. App. 945, 361 P.3d 217 (2015).....	34
<i>State v. Elliott</i> , 114 Wn.2d 6, 785 P.2d 440, <i>cert. denied</i> , 498 U.S. 838, (1990).....	20
<i>State v. Marintorres</i> , 93 Wn. App. 442, 969 P.2d 501 (1999).....	20
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994), <i>cert. denied</i> , 514 U.S. 1129 (1995).....	18
<i>State v. Sadler</i> , 147 Wn. App. 97, 193 P.3d 1108 (2008), <i>review denied</i> , 176 Wn.2d 1032 (2013).....	21
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004), <i>aff'd</i> , 166 Wn.2d 380 (2009).....	15
<i>State v. Williams</i> , 159 Wn. App. 298, 244 P.3d 1018, <i>review denied</i> , 171 Wn.2d 1025 (2011).....	23
<i>Wimberly v. Caravello</i> , 136 Wn. App. 327, 149 P.3d 402 (2006).....	28

Statutes

RCW 26.09	40
RCW 26.09.140	35, 38
RCW 26.09.187	31
RCW 26.09.187(3)(a)	30

RCW 26.09.191	<i>passim</i>
RCW 26.09.191(3).....	12
RCW 26.09.191(3)(b)	12, 14
RCW 26.09.191(3)(d)	12
RCW 26.09.191(3)(e)	12
RCW 26.09.191(3)(g)	12, 14
RCW 26.09.191(4).....	30
RCW 26.09.197	30
RCW 26.09.260	10, 11
RCW 26.09.260(1).....	11

Codes, Rules and Regulations

GR 14.1	31
RAP 2.5(a)	23
RAP 9.6(b)(1)(a)	8
RAP 10.3(a)(5).....	2
RAP 10.3(a)(6).....	15, 29
RAP 18.1.....	35
RAP 18.9.....	35, 39

Other Authorities

1987 Proposed Parenting Act Commentary and Text.....	30
--	----

A. INTRODUCTION

Sherri Kirschbaum and Nolan Anderson are the mother and father of a child, A.A. After a trial on a petition for modification, the trial court entered findings and conclusions and a final parenting plan. Because there was ample evidence at trial that Anderson's behavior constituted emotional abuse, alienation, and abusive use of conflict, the trial court imposed restrictions on Anderson's time with the child and decision making under RCW 26.09.191.

Anderson has appealed that decision, challenging most of the trial court's findings on .191 restrictions. However, his challenges to the trial court's exercise of discretion are confined to: (1) ignoring evidence in the record, (2) attempting to focus this Court's attention only on evidence favorable to him, or (3) suggesting that the trial court should not have considered certain evidence, even though he did not timely object to its admission at trial and does not even challenge the trial court's decision to admit that evidence in his appeal. He challenges the trial court's decision to award Kirschbaum fees for intransigence on largely the same grounds.

Anderson's appeal of the parenting plan is frivolous and constitutes a continuation of Anderson's intransigent conduct in the trial court. It had no prospects of succeeding in anything except driving up Kirschbaum's

legal costs. This Court should affirm and award Kirschbaum attorney fees for having to defend against his appeal.

B. STATEMENT OF THE CASE

Anderson's statement of the case is an incomplete procedural history. Br. of App. at 13-14. He does not include any of the facts that are material to his appeal from the parenting plan. *Id.* Anderson's "Introduction," however, contains a long and improper recitation of facts. Br. of App. at 6-9.

The facts contained in Anderson's Introduction should be disregarded, as they violate several appellate rules and principles. First, they are included in his Introduction section rather than his Statement of the Case section. The Statement of the Case is where facts *and* procedure relevant to the issues on review should be located. RAP 10.3(a)(5). Second, because some of these facts pertain to his arguments on appeal, he should have provided record citations. *Id.* Third, Anderson includes only the facts favorable to his position, and none of the adverse facts adduced at trial. Br. of App. at 6-9. It is not a "fair" statement of the facts as required by the rules. RAP 10.3(a)(5).

When Kirschbaum became pregnant with A.A., Anderson demanded that she have an abortion "because it wasn't a right good time for him." RP 41. He said the child would be an "abomination" and told

Kirschbaum to kill herself. RP 42. Kirschbaum refused, and gave birth to A.A. in 2011. CP 3. Approximately 2 weeks after the child's birth, Kirschbaum notified Anderson. RP 42. She received a letter from Anderson's attorney telling her never to contact Anderson again. *Id.* Shortly thereafter, Anderson subjected Kirschbaum to online harassment, posting claims that she was "passing around sexually transmitted diseases" and that she did not know who her child's father was. RP 44-45. After her attorney reached out to Anderson's attorney about the posts, they were taken down the next day. *Id.*

Anderson was verified as the father in a paternity action in late 2012. RP 40. Although there was no parenting or visitation order in place, Kirschbaum allowed Anderson to visit the child. RP 45-46. Anderson first saw the child when he was six months old. RP 43. The parties later obtained various agreed parenting plans in Texas that allowed Anderson substantial visitation and residential time. Ex. 25.

In March 2013, Kirschbaum was transferred to Joint Base Lewis-McChord. RP 50. She and the child lived in Vancouver, Washington. *Id.* Kirschbaum became increasingly concerned for the child when she learned that Anderson was either making, or causing to be made, false reports to child protective agencies about her actions. RP 47-54. Kirschbaum had to file public information requests to obtain this information. *Id.* When she

saw the reports, she became afraid for the child. *Id.* The untrue allegations included claims that Kirschbaum had essentially poisoned the child with peanut butter – to which he is allergic – and then denied him life-saving medication. Ex. 14 at 6. A.A. falsely stated to a counselor that Kirschbaum put his “head in the toilet” and inappropriately touched him. *Id.* at 7. One particular incident involved direct “coaching” of the child to make a false allegation:

According to Ms. Marsh, [of the Family Advocacy Program at Joint Base Lewis McChord] who had reviewed the records, *when [A.A.] was interviewed in Texas, he first said nothing. He then went out to see his dad. Nolan then said he should talk to the interviewer again, and this time [A.A.] made allegations.* Ms. Marsh said she reviewed the interviewer’s notes and they were yes or no questions, which are not appropriate in a forensic setting. She told Nolan this and he became upset. Nolan gets upset when he is not getting what he wants.

Ex. 14 at 8 (emphasis added). Kirschbaum was concerned that Anderson was harming A.A. with these actions. RP 47. Anderson was taking the child to multiple counselors – without Kirschbaum’s prior consent – in an attempt to paint Kirschbaum as an unfit parent. Ex. 14. This also violated the joint decision-making provisions of the Texas parenting plan. CP 173 (FF 10.4).

Kirschbaum petitioned for modification of the Texas parenting plan. CP 2. Anderson stipulated that there was adequate cause for modification.

CP 22. A temporary parenting plan was ordered in January 2017. CP 39. It put significant restrictions on Anderson based on evidence of his abusive use of conflict and alienation. CP 40. It placed all major decision making with Kirschbaum, and restricted Anderson's contact with the child to several phone calls per week. *Id.*

During the proceedings, Anderson took a number of actions that drove up Kirschbaum's legal costs. Anderson refused to comply with court orders, repeatedly changed positions, and submitted late filings that drove up Kirschbaum's legal costs. *Id.* (FF 10.35). It also found that Anderson's false reports to child protective agencies caused Kirschbaum to defend herself needlessly, causing her to incur more legal costs. *Id.* (FF 10.36).

One specific example is Anderson's motion for a new temporary parenting plan by Anderson, filed on October 16, 2017, less than six weeks before trial was scheduled to begin on November 30, 2017. CP 57, 60, 112. He said that Kirschbaum had "relocated" to Fort Hood in September 2017 and her failure to notify him was "bad faith."¹ CP 61. However, this was only a temporary assignment. CP 90; RP 37-38. Kirschbaum's private

¹ Anderson claimed that Kirschbaum had violated the relocation provisions of the temporary parenting plan because she was again living in Texas and had not told him. CP 57-60. However, her presence in Texas was due to a short, temporary military assignment; she had not "relocated." CP 90. Also, Anderson's motion failed to explain how Kirschbaum's presence in Texas constituted cause to seek a new temporary parenting plan less than two months before the trial was scheduled. CP 57-60.

sector position was held open and she was returning to her home in Vancouver in May 2018. RP 37-38. Based on Kirschbaum's temporary reassignment, with less than two months until trial, Anderson proposed a new temporary parenting plan that gave him residential time with the child and joint decision making. CP 98. The trial court denied Anderson's motion for new temporary parenting plan, citing his failure to comply with provisions in the existing temporary parenting plan and because it was filed so close to trial date. CP 112.

Another example of Anderson's intransigent behavior was the adequate cause issue. Anderson stipulated to adequate cause in his first filed pleading, his answer to Kirschbaum's petition for modification. CP 18. He filed that document in August of 2016. Then, on February 8, 2018, 18 months later and four days before trial was to begin, he filed a "Withdrawal of Stipulation to Adequate Cause." CP 230; Appendix A at 7-8.²

Another example is Anderson's late filing of his trial brief and witness list. The parties were ordered to file trial briefs no later than "the status conference the week before trial is scheduled to commence." CP 115.

² Anderson failed to include his "Withdrawal of Stipulation to Adequate Cause" in the record, although it appears in the docket. Kirschbaum has designated this document to be included in the record on review.

Anderson filed his trial brief and witness list on February 12, the first day of trial. CP 232-33; Appendix A at 8.

At trial, numerous witnesses testified to Anderson's concerning interactions with A.A. In addition to the coaching of false allegations, the repeated subjection of the young child to counselors, and the attempts to alienate him from his primary caregiver, Kirschbaum, even Anderson's phone calls with the child raised serious concerns. The Guardian Ad Litem (GAL) testified at trial that Anderson caused emotional harm to the child in numerous ways, including accusing the child of lying and becoming angry at the child over trivial matters. RP 215-18. The child would frequently cry when his father was critical of, or angry with him. RP 31-32, 121-22.

Caregiver Beth Harley observed a phone interaction where Anderson asked, in a tone that "wasn't a very nice tone," why the child was dressed in girl's clothes. RP 16. The child was upset, responding that he was playing dress-up. Anderson told him that he should not be wearing girl's clothes. Another caregiver, Beth Brown Smith, testified that the child liked to talk about how a toilet worked, and Anderson asked him why he was talking about "potties," and said "[N]ormal people don't talk like that." RP 25-26. She also testified to another incident where Anderson called the child while he was eating, and Anderson criticized him for what he was eating. RP 26-27. On one occasion, when Kirschbaum tried to assist the

child in responding to Anderson's inquiries about his eating habits, Anderson said to Kirschbaum: "You don't need to be talking to him that way. He is not stupid. He knows what he had for dinner." RP 28. Anderson also repeatedly criticized the young child for referring to himself as "cuckoo crazy," admonishing him never to say it again, until the child cried and asked to end the phone call. RP 31-32.

The trial court entered detailed findings and a permanent parenting plan. CP 171-77. Based on the evidence at trial, the new plan imposed restrictions on Anderson's time with the child under RCW 26.09.191. *Id.* at 172. Anderson timely appealed. Appendix A at 9.³

C. SUMMARY OF ARGUMENT

Anderson provides no colorable argument to support reversal. He simply denies the existence of substantial evidence in the record that supports the trial court's findings. Instead, he focuses this Court's attention on evidence he believes favors him or criticizes the admission of certain evidence even though he did not object at trial and does not challenge the admission of that evidence on appeal.

The trial, like this appeal, was full of intransigent conduct. The trial court's discretionary award of attorney fees to Kirschbaum was proper, and

³ Anderson did not designate his notice of appeal, in violation of RAP 9.6(b)(1)(a). However, the trial court docket reflects that the notice was timely filed. Appendix A at 9.

this Court should award such fees on appeal for Anderson's intransigent and frivolous filing.

D. ARGUMENT

(1) Standard of Review

Anderson's recitation of the standard of review is partly correct and partly incorrect. Anderson correctly recites the standard for this Court's review of a parenting plan, but not for its review of the trial court's decision on attorney fees. Br. of App. at 15. He states that the standard of review for the parenting plan is abuse of discretion. *Id.* However, when discussing review of the attorney fee award, he recites the factual basis for awarding fees, not the standard of review. *Id.* (“[T]he standard of review is...when the party engaged in ‘foot-dragging’ and ‘obstruction’...or simply when one party made the trial unduly difficult...”). *Id.*

This Court reviews the trial court's rulings on residential provisions in a parenting plan for an abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 52–53, 940 P.2d 1362 (1997). A decision to modify a parenting plan is also reviewed for abuse of discretion. *In re Marriage of Lawrence*, 105 Wn. App. 683, 686, 20 P.3d 972 (2001), citing *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Littlefield*, 133 Wn.2d at

46–47. A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices. *Littlefield*, 133 Wn.2d at 47. A decision is based on untenable grounds if the findings are not supported by the record. *Littlefield*, 133 Wn.2d at 47. Finally, a decision is based on untenable reasons if the court applies the wrong legal standard or the facts do not establish the legal requirements of the correct standard. *Littlefield*, 133 Wn.2d at 47.

Because of the trial court's unique opportunity to observe the parties, the appellate court should be “extremely reluctant to disturb child placement dispositions.” *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280, 1284 (2001), citing *In re Marriage of Schneider*, 82 Wn. App. 471, 476, 918 P.2d 543 (1996), *overruled on other grounds*, *Littlefield*, 133 Wn.2d at 57.

The trial court’s statutory attorney fee decision is also reviewed for abuse of discretion. *In re Marriage of Nelson*, 62 Wn. App. 515, 521, 814 P.2d 1208 (1991); *In re Marriage of Coy*, 160 Wn. App. 797, 807, 248 P.3d 1101, 1106 (2011).

(2) Framework of Relevant Statutes

Anderson’s argument is that the trial court misapplied RCW 26.09.260, the statute governing a trial court’s decision to modify a

parenting plan, and RCW 26.09.191, the statute governing a trial court's decision to impose restrictions on a parent's contact. Br. of App. at 16-30.

The standards for modifying a parenting plan are statutorily prescribed by RCW 26.09.260. *Bower v. Reich*, 89 Wn. App. 9, 14, 964 P.2d 359 (1997). Compliance with the statute is mandatory. *Id.* Under subsection (1) of the statute, the court is directed that it shall not modify a custody decree or parenting plan unless it finds a substantial change in the circumstances of the child or the nonmoving party, and that modification is necessary to serve the best interests of the child. RCW 26.09.260(1). Subsection (4) allows the court to 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. These subsections apply to major modifications of the residential schedule and establish a preference for stability in the child's living arrangements. *Bower*, 89 Wn. App. at 15.

Courts have interpreted RCW 26.09.260 to mean that a modification is permissible only when there is sufficient evidence to support a finding that: "(1) there has been a change in circumstances, (2) the best interests of the child will be served, (3) the present environment is detrimental to the child's well-being, and (4) the harm caused by the change is outweighed by

the advantage of the change.” *George v. Helliard*, 62 Wn. App. 378, 383, 814 P.2d 238 (1991) (quoting *Anderson v. Anderson*, 14 Wn. App. 366, 368, 541 P.2d 996 (1975), *review denied*, 86 Wn.2d 1009 (1976)).

RCW 26.09.191(3) establishes several bases for limitations in a parenting plan that are relevant here. Limitations can be based on an emotional impairment that interferes with parenting functions. RCW 26.09.191(3)(b). Restrictions may also be based on involvement or conduct that would adversely affect a child’s best interests because of an “absence or substantial impairment of emotional ties between the parent and the child.” RCW 26.09.191(3)(d). They can also be based on a parent’s abusive use of conflict. RCW 26.09.191(3)(e). The statute also allows the trial court to limit the terms of the parenting plan if it finds a parent's conduct is “adverse to the best interests of the child.” RCW 26.09.191(3)(g).

A court has authority to impose restrictions under RCW 26.09.191 when modifying a parenting plan to the same extent it has such authority at the time of dissolution. *In re Marriage of Watson*, 132 Wn. App. 222, 232, 130 P.3d 915, 919 (2006).

(3) Substantial Evidence Supports the Challenged Findings Supporting the Trial Court’s Imposition of Restrictions under RCW 26.09.191(3)

Anderson challenges many of the trial court’s factual findings. Br. of App. at 16-30. He claims that the trial court lacked substantial evidence

for each. *Id.* The substantial evidence supporting the challenged findings is catalogued below.

(a) Substantial Evidence Supports the Finding that Anderson Had Emotional Limitations that Interfered with His Parenting

Anderson argues that there was no evidence at trial to support the finding that he had physical or emotional limitations that interfered with his parenting. Br. of App. at 16. He states that there was no evidence of any physical limitations, citing his medical reports and his own testimony at trial that he is healthy. *Id.* He relies on the same record references to support his claim that he suffers no emotional limitations. *Id.*

Anderson's argument regarding physical limitations is a red herring. The trial court did *not* find that Anderson had physical limitations, only emotional limitations. CP 173-76. The provision to which Anderson refers in the parenting plan bases the restriction on physical *or* emotional limitations. CP 179. It does not require both. Thus, there is no finding of fact to challenge regarding physical limitations.

The trial court found that Anderson had emotional limitations, all of which are supported by substantial evidence. CP 174-76 (FF 10.20-10.30). The GAL report (applying the statutory factors for modification under of .260) states that Anderson had problems with abusive use of conflict, anger, and parental alienation. Ex. 14 at 10. The GAL documented, and

Kirschbaum testified to, Anderson's attempts to use Child Protective Services and counselors against Kirschbaum by making false accusations against her or encouraging the child to do so. Ex. 14 at 7-9. He reported that Anderson would get upset when his attempts to falsely accuse Kirschbaum would fail. Also, the GAL testified at trial that Anderson caused emotional harm to the child in numerous ways, including accusing the child of lying and becoming angry at the child over trivial matters. RP 215-18. Caregivers who witnessed Anderson's phone interactions with the child testified to similar emotionally inappropriate behavior. RP 15-18, 24-27. There was also evidence that Anderson's emotional problems negatively impacted the 6-year-old child. Ex. 14 at 9; RP 14, 16, 215-18. In particular, the child would frequently cry when his father was critical of, or angry with him. RP 31-32, 121-22.

The inaccurate implication of Anderson's argument on this point—although not directly stated—is that *only* his medical records are a proper source of evidence of his emotional problems. Br. of App. at 16. This notion is unsupported by case law interpreting the plain language of RCW 26.09.191(3)(b). *See, e.g., In re Marriage of Chandola*, 180 Wn.2d 632, 649, 327 P.3d 644, 653 (2014), *as corrected* (Sept. 9, 2014) (testimony of expert and eyewitnesses of emotional impairment provided “ample support” for finding that restrictions were warranted under RCW 26.09.191(3)(g)).

Anderson's argument that there was not substantial evidence of his emotional impairment is unsustainable. The record is ample, and the trial court's findings of fact on this issue should be upheld.

(b) Substantial Evidence Supports the Trial Court's Findings that Anderson Withheld His Address and Failed to Sign a Release; These Findings Supported the Trial Court's Intransigence Ruling, Not the Parenting Plan Restrictions

The trial court found that Anderson withheld his address information from Kirschbaum. CP 174 (FF 10.11 and 10.16). It also found that Anderson failed to sign a release to allow the GAL to interview a counsellor to whom Anderson had taken the child. *Id.* These two findings of fact support the trial court's conclusion that Anderson was intransigent, which in turn support the trial court's attorney fee award to Kirschbaum. *Id.* at 176.

Anderson responds (in a subsection heading only) that these two findings are not a basis for .191 restrictions. Br. of App. at 16.⁴ He also avers that substantial evidence does not support these two findings. Br. of App. at 17.

⁴ Technically, Anderson's brief only asserts that findings 10.11 and 10.16 are the "basis for restricting Anderson's parenting opportunities" in a heading. Br. of App. at 16. The body of the argument under this heading does not actually make this argument. Br. of App. at 17. Any argument made only in a heading is insufficient for this court to address. See *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380 (2009); RAP 10.3(a)(6). However, because the trial court did not cite these findings as a basis for .191 restrictions, Anderson's technical violation is of no consequence.

Anderson's heading mischaracterizes the trial court's order. There is no indication that the trial court relied on Anderson's failure to disclose his address or sign a release form as a basis for .191 restrictions. CP 171-76. These actions support the trial court's attorney fee award for Anderson's intransigent conduct. CP 176.

Regarding evidence that Anderson withheld his address, Kirschbaum testified to this directly:

Q: You had previously identified that you have requested an address from Mr. Anderson; is that correct?

A. Yes.

Q. And were you provided that?

A. Ultimately, just recent. ...Probably a few months ago, I'm not sure of the date. It hasn't been very long that I have had it.

Q. But it was after these proceedings were initiated?

A. Okay, yes.

Q. Is he required to produce this to you under the Texas parenting plan?

A. Yes, I asked him several times, knowing that he wasn't at the address that he actually was living.

Q. So what concerns did you have about his address then? Where did you think he was living?

- A. I wasn't sure, but I have only been to his parents' home one time, but I knew that was not where he was at or where [A.A.] was staying.

RP 100-01. Although Anderson ultimately provided Kirschbaum with his true address when faced with legal proceedings, her testimony is substantial evidence that he had withheld his address.

Regarding evidence that he failed to sign at least one release, the GAL report states that the GAL could not speak with Catherine Parten because Anderson had not signed a release. Ex. 14 at 8. The GAL also stated that Parten had spoken to Anderson about a release, and would get back to the GAL “in a couple of days.” *Id.* Parten never got back to him, nor did she respond to a subsequent voice mail message. *Id.*

The trial court was permitted to infer from these facts that Anderson never signed a release; the finder of fact is entitled to make all reasonable inferences from the evidence presented. *Adler v. University Boat Mart, Inc.*, 63 Wn.2d 334, 338, 387 P.2d 509 (1963); *DD & L, Inc. v. Burgess*, 51 Wn. App. 329, 330, 753 P.2d 561 (1988).

The challenged findings were supported by substantial evidence and those findings support the trial court’s conclusion that Anderson was intransigent.

(c) Substantial Evidence Supports the Trial Court's Finding that Anderson Failed to Provide a Release for the GAL to Speak to One of the Child's Counselors; the Finder of Fact Is Allowed to Draw Inferences from Evidence

Because Anderson never signed a release form to allow the GAL to speak to Parten, the trial court inferred that Parten would have contradicted Anderson's account of the child's sessions with Parten. CP 174 (FF 10.16).

Anderson claims that the trial court's finding is "speculation." Br. of App. at 17-18. He also complains that the GAL report was "incomplete," claiming that the GAL should have filed a supplemental report. *Id.*

Again, the finder of fact is permitted to draw reasonable inferences from the evidence. *Adler*, 63 Wn.2d at 338. Also, the finder of fact is allowed to draw negative inferences from a party's decision to obstruct witness testimony. *See State v. Russell*, 125 Wn.2d 24, 92, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995) (under "missing witness doctrine," one party may invite fact finder to draw negative inference that witnesses opposing party chose not to call would present unfavorable testimony).

Both of these challenged findings of fact should be upheld. Finding of fact 10.11 is supported by substantial evidence. Finding of fact 10.16 is not "speculation," it is a reasonable inference drawn from the facts in the GAL report.

(d) Substantial Evidence Supports Findings that Anderson Took the Child to Counselors Without Agreement or Notice to Kirschbaum

The trial court found that Anderson took the child to counselors without notice to, or agreement by, Kirschbaum. CP 174 (FF 10.17). Under the Texas agreement, they were to have joint decision-making regarding non-emergency medical treatment. Ex. 25.

Anderson argues that there is “no basis” for this finding. Br. of App. at 19-20. He quotes from the trial transcript Kirschbaum’s statement that *one* counselor, Parten, contacted Kirschbaum *the same day of treatment* asking for her permission to treat the child. *Id.* at 19. He does not cite to the record.⁵ He appears to concede that he did not have Kirschbaum’s agreement regarding other providers, and that the parties had joint decision-making. *Id.* Nonetheless, he argues that the failure to obtain Kirschbaum’s consent was justified. *Id.* at 19-20. He cites the child’s concerning behavior, discusses some of the child’s disclosures to providers, and points to his testimony claiming that Kirschbaum did not always obtain his agreement about medical decisions. *Id.*

By citing his belated notification to Kirschbaum with respect to Parten, but saying nothing about the other counsellors, Anderson concedes

⁵ Anderson’s failure to cite to the record violates RAP 10.3(a)(6).

that he did not obtain Kirschbaum's agreement and consent to take A.A. to at least some counsellors. This concession is supported by evidence in the record that he did not obtain Kirschbaum's agreement:

Q. And after Ms. Parten, did you learn there were more counselors?

A. Through the CPS report.

Q. Were you contacted by Mr. Anderson about [A.A.] seeing more counselors?

A. No, not at all.

RP 61. Also, the evidence to which Anderson points in the hope of overturning this finding is irrelevant. First, whether the child was having problems is not an excuse to forego joint decision-making under the Texas orders unless the problems were a medical emergency. Ex. 25. Anderson makes no argument and cites to no authority stating that having nightmares and displaying "concerning behavior" constitutes an emergency, and this Court need not consider his implied contention.⁶ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority or analysis need not be considered). Second, Kirschbaum's compliance with the Texas parenting plan is not at

⁶ See also, *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440, cert. denied, 498 U.S. 838, (1990) (appellate court need not consider claims that are insufficiently argued); *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (appellate court need not consider pro se arguments that are conclusory).

issue here, and the trial court was not obligated to credit Anderson's testimony accusing Kirschbaum of noncompliance. *State v. Sadler*, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008), *review denied*, 176 Wn.2d 1032 (2013) (“[I]t is axiomatic that assessment of demeanor and credibility is peculiarly within a trial judge's province as a finder of fact.” (internal quotation marks and citation omitted)).

Substantial evidence supports the trial court's finding that Anderson failed to notify Kirschbaum or obtain her agreement before taking the child to counsellors.

(e) Substantial Evidence Supports the Finding that Anderson Coached the Child to Make False Allegations to Counselors

The trial court found that Anderson “essentially coached or encouraged” the child to make false allegations of abuse to professionals. CP 174 (FF 10.17).

Anderson argues that the word “coaching” does not appear in the record. Br. of App. at 21. He says that the word “encouraging” is used only in a different context. *Id.*

There is substantial evidence in the record that Anderson encouraged the child to make false allegations to professionals. For example, the GAL reported that the child told one doctor that Kirschbaum would feed him peanut butter, to which the child was allergic, and then not

treat him for it. Ex. 14 at 6. The doctor reported A.A. claiming Kirschbaum put his “head in the toilet” and inappropriately touched him. *Id.* at 7. One particular incident appears to reflect this coaching in action:

According to Ms. Marsh, [of the Family Advocacy Program at Joint Base Lewis McChord] who had reviewed the records, ***when [A.A.] was interviewed in Texas, he first said nothing. He then went out to see his dad. Nolan then said he should talk to the interviewer again, and this time [A.A.] made allegations.*** Ms. Marsh said she reviewed the interviewer’s notes and they were yes or no questions, which are not appropriate in a forensic setting. She told Nolan this and he became upset. Nolan gets upset when he is not getting what he wants.

Ex. 14 at 8 (emphasis added). The GAL testified to this incident at trial as well. RP 193-94. Marsh also reported to the GAL that Anderson would tell the child to tell the truth but would then get upset if the child did not say “bad things” about Kirschbaum. RP 194.

In an attempt to undermine the finding that the child’s allegations were false, Anderson claims that the “coaching” allegation was “connected” only to the unfounded allegations to child protection agencies and social workers. Br. of App. at 21. He does not cite the written findings, but the oral ruling. *Id.* He claims that the GAL’s report documenting the outcome of those investigations was inadmissible hearsay. *Id.* Later in his brief, he repeats that it is not “appropriate” to rely on the GAL report to support the

results of the investigations, and says it is “susceptible to hearsay objection and/or requires a lot of speculation.” Br. of App. at 24.

Neither of Anderson’s contentions is true. In the trial court’s written findings, the coaching allegation and unfounded CPS/CID allegations are not “connected.” CP 174 (FF 10.17, 10.18). Therefore, Anderson’s suggestion that the coaching only occurred in connection with these events is untrue.

Also, the GAL’s report and testimony regarding the outcome of the prior investigations were both admitted at trial, as well as other evidence of false reporting. Ex. 14, 29, 58; RP 187. Kirschbaum also testified to the outcomes of the CPS reports. RP 116. Anderson did not object to this evidence at trial, nor does he challenge its admission on appeal. Failure to timely object usually waives the issue on appeal, including issues regarding instructional errors. RAP 2.5(a); *State v. Williams*, 159 Wn. App. 298, 312, 244 P.3d 1018, *review denied*, 171 Wn.2d 1025 (2011).

All of this testimonial and documentary evidence, the admission of which Anderson does not challenge on appeal, supports the finding that Anderson was telling the child: “Tell the truth, and the truth is that mom does bad things.” RP 194. Multiple child protection services and counselors concluded that A.A. was reporting false allegations. Ex. 14 at 7-9. Those allegations certainly fall into the category of “bad things” about

Kirschbaum. The trial court could and did infer that Nolan was telling the child to make these allegations.

(f) Substantial Evidence Supports the Finding that Anderson Engaged in Abusive Use of Conflict and Emotional Abuse by Interrogating the Young Child During their Interactions

The trial court found that Anderson engaged in abusive use of conflict by interrogating the child during phone calls, causing the child to fear saying the wrong thing or letting his father down by offering inadequate answers. CP 175 (FF 10.20, 10.24).

Anderson does not deny that the “interrogation” of the child would constitute abusive use of conflict and emotional abuse. Br. of App. at 22-23. Instead, he again claims lack of substantial evidence. He cites only testimony of Monique Ferrer, Beth Harley, and Beth Brown, who were caregivers. *Id.* He describes them as “third party witnesses.” *Id.* He claims those three witnesses do not mention “interrogating.” *Id.*

It is unclear why Anderson believes that the three witnesses he cites are the only source of evidence on this point, but it is irrelevant. Several witnesses, including with Kirschbaum and the GAL, testified to the “interrogating” behavior. Beth Harley observed an interaction where Anderson asked, in a tone that “wasn’t a very nice tone” why the child was dressed in girl’s clothes. RP 16. The child was upset, responding that he

was playing dress-up. Anderson told him that he should not be wearing girl's clothes. Beth Brown Smith testified that the child liked to talk about how a toilet worked, and Anderson asked him why he was talking about "potties," and said "[N]ormal people don't talk like that." RP 25-26. She also testified to another incident where Anderson called the child while he was eating, and Anderson criticized him for what he was eating:

One day, [Anderson] had called, and [A.A.] had just gotten done eating dinner, and he asked [A.A.] what he had for dinner, and [A.A.] said that he had had pizza rolls, and he said, "Well, what are you eating?" He was like, "What are you doing?" And he was like, "I'm eating." And he was like, "Well, what are you eating?" And he said, "I'm eating pudding." And he said, "What? You had pudding for dinner? That's no kind of dinner for anybody to be eating." And [A.A.] said, "No, I said I had pizza rolls for dinner, and now I'm having pudding." And he said, "Well, that's no kind of food to be eating. I will just have to see about that."

RP 26-27. On one occasion, when Kirschbaum tried to assist the child in responding to Anderson's inquiries about his eating habits, Anderson said to Kirschbaum: "You don't need to be talking to him that way. He is not stupid. He knows what he had for dinner." RP 28. Anderson also repeatedly criticized the young child for referring to himself as "cuckoo crazy," admonishing him never to say it again, until the child cried and asked to end the phone call. RP 31-32.

This substantial evidence in the record supports the trial court's finding that Anderson's interrogating behavior constituted emotional abuse and abusive use of conflict.

- (g) Anderson Admits There Is Substantial Evidence in the Record to Support the Finding that Anderson Made False Allegations About Kirschbaum that Caused the Involvement of Child Protective Agencies; Anderson Improperly Suggests this Court Should Strike Evidence the Trial Court Did Not Strike

Anderson asks this Court to overturn the trial court's finding that he made or caused to be made unsubstantiated reports about Kirschbaum to child protective agencies. Br. of App. at 24. He does not claim that there is no evidence to support this finding; he concedes that the GAL presented such evidence. *Id.* Instead, he states that "the evidence is susceptible to hearsay objection and/or requires a lot of speculation." *Id.*

Motions to exclude evidence must be addressed to the trial court. *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 692, 106 P.3d 258, 263, *review denied*, 155 Wn.2d 1026 (2005). When determining whether a finding is supported by substantial evidence, this Court presumes that the trial court knows the law and disregards improper evidence. *Id.* The sole question is whether the trial court manifestly abused its discretion by making a finding that was not supported by substantial evidence. *Id.*

Anderson's argument regarding the evidence of his false allegations misapprehends this Court's function. He has not sought review of the trial court's decision to admit the GAL's report and testimony. He does not even cite any trial objection on this point, because he did not object. RP 208-09. He instead asks this Court to disregard evidence that the trial court considered based on claims that the evidence is hearsay or speculation.

Because Anderson concedes that substantial evidence supports this finding, did not raise this issue at trial, and does not properly challenge the trial court's decision to admit that evidence on appeal, his challenge to the finding should be rejected.

(h) Substantial Evidence Supports the Trial Court's Findings that Anderson Made the Child Afraid and Emotionally Abused Him

Anderson argues that substantial evidence does not support the trial court's findings that he made the child afraid and emotionally abused him. Br. of App. at 24-26. He argues that those findings mischaracterize the evidence. *Id.* at 24. He also points to other evidence in the record that he considers supportive, including testimony of his family members. *Id.* at 25-26.

Much of this evidence on this point overlaps with the evidence supporting the findings that Anderson interrogated the child and engaged in abusive use of conflict. CP 174-75; Br. of Resp. § D(3)(f). The GAL report

also states that the child is afraid that Anderson will be angry with him if he does not say the right thing. Ex. 14. at 7. Dr. David Callies reported that the child becomes nervous, anxious, and upset about the prospect of speaking to his father on the phone. *Id.* at 9. Anderson admitted at least one disturbing incident to the GAL, in which he suggested to the young child that he would burn in hell if he lied:

I talked to Nolan about that, and he says does often talk to him about lying. He said, on one occasion, he said if you -- he said, on one occasion, [A.A.] asked him about God, and he said -- *Nolan said to [A.A.] that, 'if you lie, you will burn.'*

RP 190-91 (emphasis added).

Anderson improperly suggests that this Court should ignore this substantial evidence and instead credit only evidence supportive of his position. The finder of fact, not the appellate court, weighs and credits evidence. *Wimberly v. Caravello*, 136 Wn. App. 327, 339, 149 P.3d 402, 409 (2006). That finder of fact is entitled to disbelieve evidence. *See Acosta v. City of Mabton*, 2 Wn. App. 2d 131, 138, 408 P.3d 1095, 1099 (2018). This Court's role is to review the record for substantial evidence. *Wimberly*, 136 Wn. App. at 339.

Substantial evidence supports the trial court's findings that Anderson made the child afraid and emotionally abused him.

(4) The Final Parenting Plan Is Supported by the Facts Adduced at Trial and the Law; the Trial Court Did Not Err in Considering Evidence that Predated the Temporary Parenting Plan, Nor in Adopting a Plan that Happened to Be Similar to the Temporary Parenting Plan

Anderson's legal argument with respect to the parenting plan is somewhat confusing. He argues that he is not contesting a finding of a substantial change in circumstances supporting modification of the prior plan, but is challenging the conclusion that the facts of this case support restrictions on his residential time as permitted by RCW 26.09.191. Br. of App. at 27. He then avers that the trial court improperly drew presumptions from the temporary parenting plan in crafting the final parenting plan. *Id.* at 27-28. He complains that the trial court considered evidence about his parenting skills that predated the temporary parenting plan. *Id.* He argues the trial court should have credited more recent evidence that he had positive interactions with the child. *Id.* He cites *In re Marriage of Watson*, 132 Wn. App. 222, 234, 130 P.3d 915, 920 (2006) and *In re Marriage of Kovacs*, 121 Wn.2d 795, 809, 854 P.2d 629, 636 (1993).

Anderson's argument appears to be this: the trial court erred in considering evidence predating entry of the temporary parenting plan. Br. of App. at 27-30. He implies that by considering all of the evidence of his parenting and emotional skills throughout the child's life, the trial court failed to ascertain what his skills would be going forward. *Id.* He also

suggests that the final parenting plan does not give him the opportunity to modify the current residential restrictions in the future. *Id.*

Anderson is correct that the trial court may not draw any presumptions from the provisions in a temporary parenting plan in crafting a permanent parenting plan. RCW 26.09.191(4). This is because a temporary plan and a permanent plan serve two very different functions. RCW 26.09.197 requires a trial court awarding temporary residential placement to “give particular consideration” to (1) which parent has taken greater responsibility during the last 12 months for performing parenting functions relating to the daily needs of the child and (2) which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending, as well as to the seven factors listed in RCW 26.09.187(3)(a). In enacting these temporary parenting plan provisions, the Legislature recognized “the importance to the child's emotional stability of maintaining established patterns of care during what is generally a highly chaotic and emotionally stressful time.” *Kovacs*, 121 Wn.2d at 808, citing 1987 Proposed Parenting Act Commentary and Text at 18. These same two considerations are not among the factors to be considered when developing the residential provisions of a *permanent* parenting plan.

However, the trial court here did not draw presumptions from the temporary parenting plan, nor does Anderson point to any evidence that it

did. The trial focused exclusively on Kirschbaum's and Anderson's parenting skills, emotional stability, and interactions with the child, as well as the child's emotional well-being.

Anderson's error is in equating the prohibition on drawing presumptions from the temporary parenting plan with a prohibition on considering *evidence* that predates the temporary parenting plan. Br. of App. at 28-29. Nothing in RCW 26.09.187 or .191 prohibits a trial court crafting a final parenting plan from considering evidence that predates the temporary parenting plan. In fact, trial courts routinely consider evidence of parent-child interaction that predates even the dissolution. *See, e.g., In re Marriage of Shui & Rose*, 132 Wn. App. 568, 591, 125 P.3d 180, 191 (2005), *review denied*, 158 Wn.2d 1017 (2006) (in crafting a permanent parenting plan, trial court appropriately considered testimony of "nannies and housekeepers who had worked for the parties during their marriage"); *Matter of Parenting Support of Rainbow*, 2016 WL 6084115 *4, 196 Wn. App. 1031 (2016), *review denied*, 187 Wn.2d 1027 (2017)⁷ (evidence of domestic violence during the parties' relationship warranted .191 restrictions in permanent parenting plan).

⁷ Unpublished decision cited as persuasive authority only under GR 14.1.

There is no evidence in this record that the trial court used the mother's status as primary caregiver in the temporary parenting plan as a factor in crafting the permanent plan. The only mention of the temporary parenting plan is in Finding 10.32, where the trial court found: "as was identified in the temporary order and as requested by the [GAL], that it is appropriate for Mr. Anderson to demonstrate changed behaviors before the Court would consider making changes to the parenting plan." CP 176. The trial court did not use the temporary plan as a factor, but simply observed that Anderson had consistently demonstrated the need to behave more appropriately. *Id.*

What the trial court did do is look at the entire history of the parties' conduct, both before and after entry of the temporary parenting plan, to determine whether .191 restrictions were in the best interests of the child. The trial court did not err in concluding that the findings of fact here warranted such restrictions.

(5) Substantial Evidence and Unchallenged Findings Support the Trial Court's Award of Attorney Fees to Kirschbaum

The trial court ordered Anderson to pay Kirschbaum attorney fees based on Anderson's intransigence, which drove up Kirschbaum's legal costs. CP 176. It also based the award on the parties' relative need and ability to pay. *Id.* The trial court found that Anderson stipulated to adequate

cause for modification, but then attempted to improperly withdraw that stipulation on the morning of trial. CP 173-74 (FF 10.4-10.7). It found that he violated the joint decision-making in the Texas parenting plan. CP 173 (FF 10.4). It found that Anderson refused to comply with court orders, repeatedly changed positions, and submitted late filings that drove up Kirschbaum's legal costs. *Id.* (FF 10.35). It also found that Anderson's false reports to child protective agencies caused Kirschbaum to defend herself needlessly, causing her to incur more legal costs. *Id.* (FF 10.36).

Anderson argues that the trial court erred by granting attorney fees, because the "record in this case is replete with agreement and cooperation." Br. of App. at 30-31. He also argues that nothing he did delayed the outcome in the case. *Id.* He then recites the various agreed orders filed in the case. *Id.* He claims that none of his filed pleadings "could be considered foot dragging or "obstruction." *Id.* at 31.

Although he admits that an award of fees is appropriate when one party makes the trial unduly difficult, Anderson's legal argument does not address the trial court's findings that he made the trial unduly difficult for Kirschbaum. Br. of App. at 30-31. He instead claims that because he sometimes agreed to orders and did not cause a delay in the trial, the fees were inappropriate. *Id.*

However, the trial court did not base its intransigence finding on any findings that Anderson failed to sign some agreed orders, or that he caused a delay in the trial. CP 176. The actual findings – which Anderson does not challenge – support the conclusion that Anderson made the trial unduly difficult. CP 173-74, 176 (FF 10.5-10.11, 10.34-10.37). Unchallenged findings of fact are verities on appeal. *Rush v. Blackburn*, 190 Wn. App. 945, 956, 361 P.3d 217, 222 (2015).

Also, substantial evidence supports the trial court’s findings on intransigence. Anderson did stipulate to adequate cause, CP 18, only to try to withdraw that stipulation on the eve of trial. CP 230; Appendix A at 7-8.⁸ Anderson did attempt to radically modify the temporary parenting plan when trial was imminent. CP 98-112. He also filed numerous documents late, including filing his trial brief and witness list on the day of trial. CP 232-33, Appendix A at 8. Anderson did cause Kirschbaum to incur legal costs defending herself from horrific and false allegations of abuse. RP 49, 52, 62, 70; Ex. 14.⁹

⁸ Anderson failed to include his “Withdrawal of Stipulation to Adequate Cause” in the record, although it appears in the docket. Kirschbaum has designated this document to be included in the record on review, as well as his late-filed witness list and trial brief. For this Court’s reference, these three documents are at Appendix B, C, and D.

⁹ Anderson realleges that this Court should disregard evidence of his false allegations of abuse against Kirschbaum because the GAL report and testimony regarding these incidents is deficient. *Id.* This argument was addressed *supra* § D.3(e), and the trial court’s findings on this point are supported by substantial evidence.

The trial court found that Anderson withheld his address information from Kirschbaum. CP 174 (FF 10.11 and 10.16). It also found that Anderson failed to sign a release to allow the GAL to interview a counsellor to whom Anderson had taken the child. *Id.*

The trial court found, based on Anderson's actions, that an award of attorney fees was appropriate based on Anderson's intransigence and the need and ability to pay. CP 176. These findings are based on substantial evidence and the award was well within the trial court's discretion.

(6) This Court Should Award Attorney Fees to Kirschbaum on Appeal Based on Anderson's Intransigence, the Parties' Relative Need and Ability to Pay, and Under RAP 18.9 for Bringing a Frivolous Appeal

RAP 18.1 provides for an award of attorney fees if authorized by applicable law. There are three such grounds here: the common law grounds of intransigence, the statutory ground of the parties' relative need and ability to pay, and the court rule providing fees to a party forced to defend against a frivolous appeal.

(a) Anderson's Intransigence in the Trial Court and on Appeal Justifies a Reasonable Attorney Fee Award to Kirschbaum

Intransigence is a basis for awarding fees on appeal, separate from RCW 26.09.140 (financial need) or RAP 18.9 (frivolous appeals). *Chapman v. Perera*, 41 Wn. App. 444, 455–56, 704 P.2d 1224, *review*

denied, 104 Wn.2d 1020 (1985). The financial resources of the parties need not be considered when intransigence by one party is established. *Matter of Marriage of Greenlee*, 65 Wn. App. 703, 711, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992); *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). Thus, no affidavit of financial need is required to make the award. *Mattson v. Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157, 165 (1999). Moreover, a party's intransigence in the trial court can also support an award of attorney fees on appeal. *Eide v. Eide*, 1 Wn. App. 440, 445–46, 462 P.2d 562 (1969); *Chapman*, 41 Wn. App. at 456.

Here, Anderson was intransigent in the trial court. CP 176. This alone is grounds for fees on appeal. However, Anderson's arguments on appeal themselves demonstrate intransigence. Anderson's brief is mostly challenges to findings of fact that have ample support in the record. He either ignores evidence, or improperly tries to have this Court disregard admitted evidence with no articulable legal ground for doing so. Kirschbaum's counsel was required to answer these pointless challenges with specific citations to the record that Anderson failed to provide.

Also, Anderson's intransigence continues on appeal in the form of his opening brief. In addition to the rules violations and failure to provide factual citations to the record, he omits any reference to evidence that

directly contradicts his positions, and fails to explain how this evidence does not support the trial court's ruling.

One particular aspect of Anderson's brief typifies his exasperating conduct at trial. In an effort to overturn the trial court's ruling on intransigence, he emphasizes that several agreed orders were submitted in the case, including the stipulation to adequate cause for a modification hearing. Br. of App. at 30-31. In fact, his argument that "this case is replete with agreement and cooperation" appears to be the central focus of his argument. *Id.*

However, Anderson failed to designate his "Withdrawal of Stipulation to Adequate Cause," a document in which he claimed, 4 days prior to trial, that he was withdrawing his stipulation because "Attorney Suellen Howard *did not have my permission to enter into any agreed orders.*" CP 231, Appendix B (emphasis added). So, Anderson represents to this Court that he was not intransigent because he agreed to adequate cause as well as other matters, and tries to conceal the fact that he denied any such agreements in the trial court in a last-minute attempt to upend the proceedings.

- (b) A Fee Award Is Warranted Based on the Parties' Relative Need and Ability to Pay

RCW 26.09.140 provides that fees are available here in this Court's discretion:

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 or other professional fees in connection therewith.... Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

Generally, when determining an award of attorney fees, the trial court must first balance the needs of the spouse requesting them against the ability of the other spouse to pay. *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995); *In re Marriage of Harshman*, 18 Wn. App 116, 128, 567 P.2d 667 (1977). In *Coons v. Coons*, 6 Wn. App. 123, 491 P.2d 1333 (1971), the court cited language defining "need" as not meaning "destitution or poverty, but it does mean an absence of funds and a lack of ability to get them without extreme hardship."

Here, the trial court concluded that the parties' relative need and ability to pay warranted an award of reasonable attorney fees to Kirschbaum. CP 176. Kirschbaum's financial circumstances have not

changed substantially since the date of that award. This Court should award reasonable attorney fees to Kirschbaum on appeal.¹⁰

(c) A Reasonable Attorney Fee Award to Kirschbaum Is Also Warranted Because Anderson's Appeal Is Frivolous

A party may also request attorney fees on appeal based on RAP 18.9 if the appeal is frivolous. *Greenlee*, 65 Wn. App. at 711. “An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” (Citations omitted.) *See Chapman*, 41 Wn. App. at 455–56.

This Court should award Kirschbaum fees based on RAP 18.9. Anderson's appeal is frivolous. He offers no colorable legal argument to support his claim that the trial court abused its discretion with respect to the parenting plan or the attorney fees. His brief is based on a denial of the facts in the record, and a request that this Court re-weigh the record and re-try this case, which it may not do.

E. CONCLUSION

Anderson's appeal has no merit. The trial court's findings are based on substantial evidence, and the parenting plan is well within its discretion.

¹⁰ Kirschbaum will be complying with RAP 18.1(c) by filing an affidavit of financial need.

The plan complies with RCW 26.09 and protects the best interests of the child. The award of attorney fees to Kirschbaum was not an abuse of discretion and it should be upheld. This Court should award Kirschbaum her reasonable attorney fees for defending against Anderson's appeal.

DATED this 11 day of January, 2019.

Respectfully submitted,



Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Charles H. Houser, III, WSBA #12155
Pope, Houser & Barnes, PLLC
1605 Cooper Point Road NW
Olympia, WA 98502-8325
(360) 866-4000

Attorneys for Respondent

APPENDIX A

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

SHERRI LYNNETTE KIRSCHBAUM
vs
NOLAN HAMILTON ANDERSON, III

§
§
§
§
§
§

Location: Thurston
Filed on: 04/28/2016
JS/SCOMIS Case Number: 16-3-00596-0
SCOMIS Judgment Number: 18-9-02554-3

CASE INFORMATION

Statistical Closures
04/25/2018 Judgment/Order/Decree Filed

Case Type: PPS Parenting Plan/Child Support

Case Status: 05/21/2018 On Appeal

Case Flags: SCJ

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	16-3-00596-34
Court	Thurston
Date Assigned	04/28/2016

PARTY INFORMATION

Petitioner (WIP) KIRSCHBAUM, SHERRI LYNNETTE

Lead Attorneys
HOUSER, CHARLES
HARDING, III
Retained
360-866-4000(W)

Respondent (WIP) ANDERSON, NOLAN HAMILTON, III

TEAL, ADAM R.
Retained
253-471-7774(W)

Minor (WIP) ANDERSON, ALEXANDER MACALE

DATE

EVENTS & ORDERS OF THE COURT

INDEX

04/28/2016	 Confidential Information Form	<i>Index # 1</i>
04/28/2016	 Case Information Cover Sheet	<i>Index # 2</i>
04/28/2016	 Summons	<i>Index # 3</i>
04/28/2016	 Petition Motion to Modify	<i>Index # 4</i>
04/28/2016	 Proposed Parenting Plan	<i>Index # 5</i>
04/28/2016	 Declaration Affidavit <i>Petitioner</i>	<i>Index # 6</i>
04/28/2016	 Copy <i>Orders from Bell County, Texas Court</i>	<i>Index # 7</i>
04/28/2016	 Report	<i>Index # 8</i>

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

Dept of Defense Data Center

04/28/2016	 Notice of Issue <i>Adequate Cause</i>	<i>Index # 9</i>
05/05/2016	 Affidavit Declaration Certificate Confirmation of Service	<i>Index # 10</i>
07/05/2016	 Notice of Appearance	<i>Index # 11</i>
07/07/2016	 Notice of Continuance <i>Review</i>	<i>Index # 12</i>
07/14/2016	CANCELED Adequate Cause (9:00 AM) (Judicial Officer: Thomas, Indu ;Location: Family and Juvenile Courtroom 2) <i>Continuance</i>	
08/01/2016	 Declaration Affidavit <i>Sherri Kirschbaum</i>	<i>Index # 13</i>
08/01/2016	 Declaration Affidavit <i>Nolan Anderson</i>	<i>Index # 14</i>
08/01/2016	 Response	<i>Index # 15</i>
08/04/2016	Review Hearing (9:00 AM) (Judicial Officer: Thomas, Indu ;Location: Family and Juvenile Courtroom 2) Resource: Court Reporter 34FTR Events: 07/07/2016 Notice of Continuance	
08/04/2016	 Motion Hearing	<i>Index # 16</i>
08/04/2016	 Order Re Adequate Cause Granted	<i>Index # 17</i>
08/04/2016	 Order Transferring To Family Court	<i>Index # 18</i>
08/11/2016	 Order Setting <i>Presentation</i>	<i>Index # 19</i>
08/11/2016	Ex Parte Action With Order	
08/18/2016	 Parenting Plan Temporary	<i>Index # 20</i>
08/18/2016	Ex Parte Action With Order	
09/01/2016	CANCELED Presentation of Order (9:00 AM) (Judicial Officer: Thomas, Indu ;Location: Family and Juvenile Courtroom 2) <i>Stricken</i>	
09/09/2016	 Case Information Cover Sheet	<i>Index # 21</i>
09/09/2016	 Summons	<i>Index # 23</i>
09/09/2016	 Petition Motion to Modify	

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

09/19/2016	 Proposed Parenting Plan	Index # 24
09/19/2016	 Declaration Affidavit <i>Nolan Anderson</i>	Index # 25
09/20/2016	 Response <i>declaration of Sherri Kirschbaum</i>	Index # 26
09/22/2016	 Review Hearing	Index # 27
09/22/2016	Review Hearing (9:00 AM) (Judicial Officer: Thomas, Indu ;Location: Family and Juvenile Courtroom 2) <i>Mediation Review</i> Resource: Court Reporter 34FTR Events: 08/04/2016 Order Transferring To Family Court	Index # 29
09/22/2016	 Order Setting <i>presentation</i>	Index # 28
10/11/2016	Presentation of Order (9:00 AM) (Judicial Officer: Thomas, Indu ;Location: Family and Juvenile Courtroom 2) Resource: Court Reporter 34FTR Events: 09/22/2016 Order Setting	
10/11/2016	 Order Re Release of Information	Index # 31
10/11/2016	 Order Appointing Guardian Ad Litem	Index # 32
10/11/2016	 Order on Review Hearing	Index # 33
10/11/2016	 Motion Hearing	Index # 30
10/12/2016	 Request <i>Duplication of Proceedings</i>	Index # 34
10/17/2016	 Order Re Release of Information	Index # 35
10/27/2016	 Notice Withdraw and Substitution of Counsel	Index # 36
12/15/2016	Review Hearing (9:00 AM) (Judicial Officer: Thomas, Indu ;Location: Family and Juvenile Courtroom 2) <i>GAL report</i> Resource: Court Reporter 34FTR Events: 10/11/2016 Order Re Release of Information	
12/15/2016	 Motion Hearing	Index # 37
12/15/2016	 Order Setting	Index # 38
12/29/2016	Review Hearing (9:00 AM) (Judicial Officer: Thomas, Indu ;Location: Family and Juvenile Courtroom 2) <i>GAL</i> Resource: Court Reporter 34FTR	

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

Events: 12/15/2016 Order Setting

12/29/2016	 Motion Hearing	Index # 39
12/29/2016	 Order Setting	Index # 40
01/19/2017	Review Hearing (9:00 AM) (Judicial Officer: Thomas, Indu ; Location: Family and Juvenile Courtroom 2) <i>GAL Report</i> Resource: Court Reporter 34FTR Events: 12/29/2016 Order Setting	
01/19/2017	 Parenting Plan Temporary	Index # 41
01/19/2017	 Motion Hearing	Index # 42
01/23/2017	 Settlement Conference Setting	Index # 43
01/23/2017	 Report of Guardian Ad Litem	Index # 44
01/23/2017	 Sealed Confidential Reports Cover Sheet <i>GAL Report</i>	Index # 45
01/25/2017	 Notice of Absence Unavailability	Index # 46
02/01/2017	 Response <i>STLCON</i>	Index # 47
02/06/2017	Settlement Conference (9:00 AM) Events: 01/23/2017 Settlement Conference Setting	
03/01/2017	 Notice of Intended Relocation of Children	Index # 48
03/08/2017	 Affidavit of Mailing	Index # 49
03/24/2017	 Notice of Hearing	Index # 50
03/24/2017	 Motion for Temporary Family Law Order and Restraining Order	Index # 51
03/31/2017	 Order Waiving Mandatory Mediation	Index # 52
03/31/2017	Ex Parte Action With Order	
04/03/2017	 Hearing Cancelled Stipulated	Index # 53
04/06/2017	CANCELED Temporary Order (9:00 AM) (Judicial Officer: Thomas, Indu ; Location: Family and Juvenile Courtroom 2) <i>Stipulated</i>	
04/12/2017	 Order Setting Family Law Settlement Conference <i>10:00</i>	Index # 54

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

04/14/2017	 Notice <i>Striking 6/19</i>	Index # 55
04/14/2017	 Order Setting Family Law Settlement Conference <i>10:00</i>	Index # 56
05/24/2017	 Order Setting Family Law Settlement Conference <i>1:30 / 2nd Reset</i>	Index # 57
06/19/2017	CANCELED Settlement Conference (10:00 AM) <i>Court's Request</i>	
07/11/2017	 Certificate <i>Nurturing Father's Program</i>	Index # 58
07/11/2017	 Settlement Conference Setting <i>Re-Setting</i>	Index # 59
07/24/2017	Settlement Conference (11:00 AM) (Judicial Officer: Kortokrax, Nathan L.; Location: Family and Juvenile Courtroom 1) Resource: Court Reporter 34FTR Events: 07/11/2017 Settlement Conference Setting	
07/24/2017	CANCELED Settlement Conference (1:30 PM) (Judicial Officer: Hirsch, Anne; Location: Family and Juvenile Courtroom 1) <i>Court's Request</i> 07/25/2017 Reset by Court to 07/24/2017	
07/24/2017	 Settlement Conference Hearing Held <i>Not Settled</i>	Index # 60
07/24/2017	 Notice of Trial Date	Index # 61
09/15/2017	 Financial Declaration of Petitioner	Index # 62
09/15/2017	 Sealed Financial Source Documents	Index # 63
09/19/2017	 Notice of Appearance	Index # 64
10/10/2017	 Financial Declaration of Respondent	Index # 65
10/10/2017	 Sealed Financial Source Documents <i>Pay Stub</i>	Index # 66
10/16/2017	 Notice of Intended Relocation of Children	Index # 67
10/16/2017	 Notice of Hearing <i>Calendar Ful - call</i>	Index # 68
10/16/2017	 Motion for Temporary Family Law Order and Restraining Order	Index # 69
10/16/2017	 Declaration Affidavit	Index # 70

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

Nolan Anderson

10/16/2017	 Proposed Order Findings	<i>Index # 71</i>
10/16/2017	 Proposed Order Findings	<i>Index # 72</i>
10/16/2017	 Proposed Parenting Plan	<i>Index # 73</i>
10/16/2017	 Notice of Hearing <i>Temporary Order</i>	<i>Index # 74</i>
10/18/2017	 Affidavit Declaration Certificate Confirmation of Service	<i>Index # 75</i>
10/23/2017	 Response <i>to Motion for Temp Law Order</i>	<i>Index # 76</i>
10/23/2017	 Declaration Affidavit <i>of Petitioner</i>	<i>Index # 77</i>
10/25/2017	 Declaration Affidavit <i>Nolan Anderson</i>	<i>Index # 78</i>
10/25/2017	 Affidavit of Service by Mail	<i>Index # 79</i>
10/26/2017	Temporary Order (9:00 AM) (Judicial Officer: Thomas, Indu ; Location: Family and Juvenile Courtroom 2) Resource: Court Reporter 34FTR Events: 10/16/2017 Notice of Hearing	
10/26/2017	 Motion Hearing	<i>Index # 80</i>
10/26/2017	 Declaration Affidavit <i>of Counsel re Fees</i>	<i>Index # 81</i>
10/26/2017	 Order Setting <i>Presentation</i>	<i>Index # 82</i>
10/26/2017	 Order <i>Increasing GAL Fee Cap</i>	<i>Index # 83</i>
11/03/2017	 Order Denying Motion Petition	<i>Index # 84</i>
11/03/2017	Ex Parte Action With Order	
11/03/2017	 Notice of Intent to Withdraw	<i>Index # 85</i>
11/09/2017	Presentation of Order (9:00 AM) (Judicial Officer: Thomas, Indu ; Location: Family and Juvenile Courtroom 2) Resource: Court Reporter 34FTR Events: 10/26/2017 Order Setting	
11/09/2017	 Confirmation of Parenting Class	<i>Index # 86</i>

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

11/09/2017	 Hearing Stricken In Court Other Reason	<i>Index # 87</i>
11/09/2017	 Affidavit of Mailing	<i>Index # 88</i>
11/16/2017	Pre-Trial Conference (1:30 PM) (Judicial Officer: Schaller, Christine; Location: Family and Juvenile Courtroom 4) Resource: Court Reporter 34FTR Events: 07/24/2017 Notice of Trial Date	
11/16/2017	 Order <i>Pretrial</i>	<i>Index # 89</i>
11/16/2017	 PreTrial Management Hearing	<i>Index # 90</i>
11/29/2017	 Notice of Appearance	<i>Index # 91</i>
11/30/2017	Status Conference (8:30 AM) (Judicial Officer: Schaller, Christine; Location: Family and Juvenile Courtroom 4) Resource: Court Admin 34EV Events: 07/24/2017 Notice of Trial Date	
11/30/2017	 Status Conference Hearing	<i>Index # 92</i>
12/04/2017	Non-Jury Trial (9:00 AM) Events: 07/24/2017 Notice of Trial Date	
12/04/2017	 Notice of Trial Date <i>Re-Set</i>	<i>Index # 93</i>
01/25/2018	Pre-Trial Conference (1:30 PM) (Judicial Officer: Wilson, Mary Sue; Location: Family and Juvenile Courtroom 1) Resource: Court Reporter 34FTR Events: 12/04/2017 Notice of Trial Date	
01/25/2018	 Order <i>Pre-Trial</i>	<i>Index # 94</i>
01/25/2018	 PreTrial Management Hearing	<i>Index # 95</i>
02/08/2018	Status Conference (8:30 AM) (Judicial Officer: Hirsch, Anne; Location: Family and Juvenile Courtroom 4) Resource: Court Admin 34EV Events: 12/04/2017 Notice of Trial Date	
02/08/2018	 Witness List	<i>Index # 96</i>
02/08/2018	 Trial Memorandum	<i>Index # 97</i>
02/08/2018	 Assignment of Trial Date	<i>Index # 98</i>
02/08/2018	 Withdrawal <i>of Stipulation to Adequate Cause</i>	<i>Index # 99</i>

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

02/08/2018	 Motion and Affidavit Declaration to Withdraw Counter-Petition	Index # 100
02/08/2018	 Response 1st Amended	Index # 101
02/09/2018	 Witness List Petitioner's Addendum	Index # 102
02/12/2018	Non-Jury Trial (9:00 AM) (Judicial Officer: Hirsch, Anne; Location: Family and Juvenile Courtroom 4) Events: 12/04/2017 Notice of Trial Date 02/08/2018 Assignment of Trial Date 02/12/2018 Reset by Court to 02/12/2018	
02/12/2018	 Declaration Affidavit of Counsel re Fees	Index # 103
02/12/2018	 Witness List Respondent	Index # 104
02/12/2018	 Trial Brief Respondent	Index # 105
02/12/2018	 NonJury Trial APT 6.0	Index # 106
02/13/2018	Non-Jury Trial (9:00 AM) (Judicial Officer: Hirsch, Anne; Location: Family and Juvenile Courtroom 4)	
02/13/2018	 Trial Minutes APT 3.0	Index # 107
02/14/2018	Non-Jury Trial (2:00 PM) (Judicial Officer: Hirsch, Anne; Location: Family and Juvenile Courtroom 4)	
02/14/2018	 Trial Minutes Day 3 APT 2.0	Index # 108
02/15/2018	 Status Conference Hearing	Index # 109
02/15/2018	 Assignment of Trial Date	Index # 110
02/21/2018	Non-Jury Trial (1:30 PM) (Judicial Officer: Hirsch, Anne; Location: Family and Juvenile Courtroom 4) Events: 02/15/2018 Assignment of Trial Date	
02/21/2018	 Trial Minutes Day 4 APT 2.0	Index # 111
02/21/2018	 Exhibit List	Index # 112
02/21/2018	 Stipulation and Order for Return of Exhibits and or Unopen	Index # 113

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

02/21/2018	 Declaration Affidavit of Counsel re Fees	Index # 114
02/22/2018	 Notice of Hearing Ruling	Index # 115
02/28/2018	Motion Hearing (3:00 PM) (Judicial Officer: Hirsch, Anne; Location: Family and Juvenile Courtroom 4) Events: 02/22/2018 Notice of Hearing	
02/28/2018	 Motion Hearing Ruling - Hearing Not Set, Notified Judge	Index # 116
03/02/2018	 Notice of Continuance Presentation	Index # 117
03/02/2018	 Declaration of Mailing	Index # 118
04/13/2018	 Notice of Intended Relocation of Children	Index # 119
04/24/2018	 Affidavit of Mailing	Index # 120
04/25/2018	 Judgment	Index # 121
04/25/2018	 Order on Modification	Index # 122
04/25/2018	 Parenting Plan Final Order	Index # 123
04/25/2018	 Verbatim Report of Proceedings February 28, 2018	Index # 124
04/25/2018	Domestic (Judicial Officer: Hirsch, Anne) Comment () Monetary/Property Award Creditors: KIRSCHBAUM, SHERRI LYNNETTE Debtors: ANDERSON, NOLAN HAMILTON, III Signed Date: 04/23/2018 Filed Date: 04/25/2018 Effective Date: 04/25/2018 Current Judgment Status: Status: Active Status Date: 04/25/2018 Monetary Award: Fee: Attorney Fee, Amount: \$25,000.00, Interest: 12.00%, Interest Start Date: 04/25/2018 Total: \$25,000.00	
04/27/2018	CANCELED Presentation of Order (9:00 AM) (Judicial Officer: Hirsch, Anne; Location: Family and Juvenile Courtroom 4) Case Completed	
05/21/2018	 Notice of Appeal to Court of Appeals	Index # 125
05/23/2018	 Transmittal Letter Copy Filed	

THURSTON
CASE SUMMARY
CASE NO. 16-3-00596-34

DATE		FINANCIAL INFORMATION
	<i>Notice of Appeal to Court of Appeals Div II</i>	<i>Index # 126</i>
06/04/2018	 Affidavit Declaration Certificate Confirmation of Service	<i>Index # 127</i>
06/14/2018	 Designation of Clerks Papers	<i>Index # 128</i>
06/14/2018	 Statement <i>of Arrangements</i>	<i>Index # 129</i>

Petitioner (WIP) KIRSCHBAUM, SHERRI LYNNETTE	
Total Charges	660.00
Total Payments and Credits	660.00
Balance Due as of 6/18/2018	0.00

APPENDIX B

2

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

2018 FEB -8 AM 8:21

Linda Myers-Emlow
Thurston County Clerk



5 court days of

hearing)

Hearing is set.

Date: WK OF 2/12/18

Time:

Judge/Calendar: WILSON

No hearing is set

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

In re:

NO. 16-3-00596-34

SHERRI LYNNETTE KIRSCHBAUM,
Petitioner,

RESPONDENT'S
WITHDRAWAL OF
STIPULATION TO ADEQUATE
CAUSE

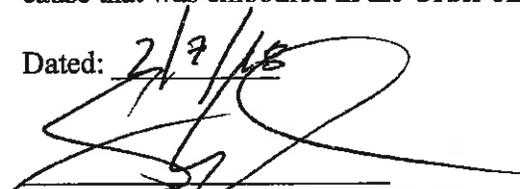
and

NOLAN HAMILTON ANDERSON III,
Respondent.

I. WITHDRAWAL OF STIPULATION TO ADEQUATE CAUSE

COMES NOW the Respondent herein who hereby WITHDRAWS his stipulation to adequate cause that was embodied in the Order on Adequate Cause entered on 8/4/16. Attached.

Dated: 2/7/18


SANS M. GILMORE, WSB #21855
Attorney for Respondent

II. DECLARATION

I am Nolan Anderson. I am the Respondent herein and I make the following Declaration based my involvement in the case and personal knowledge of all facts described herein. Attorney

RESPONDENT'S WITHDRAWAL OF
STIPULATION TO ADEQUATE CAUSE

SANS M. GILMORE, P.S. Inc.
2646 R.W. Johnson Blvd. SW, Ste. 100
Tumwater, WA 98512
Phone: 360-489-1120

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Suellen Howard did not have my permission to enter into any agreed orders.

I declare under penalty of perjury under the laws of the State of Washington that the statement that my attorney, Suellen Howard, did not have permission to enter into any agreed orders.

Signed at Tumwater, WA, this 7th day of February, 2018.



NOLAN ANDERSON III
Respondent

APPENDIX C

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2018 FEB 12 PM 4:55

Linda Myhre Enlow
Thurston County Clerk

EXPEDITE (if filing within 5 court days of hearing)
 Hearing is set: _____
16-3-00596-34
WL 104 _____
Witness List _____
2573460 _____



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

SHERRI LYNNETTE KIRSCHBAUM,

Petitioner,

and

NOLAN HAMILTON ANDERSON III,

Respondent.

NO. 16-3-00596-34

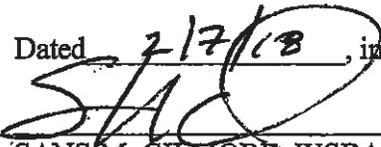
RESPONDENT'S WITNESS LIST

RESPONDENT'S WITNESS LIST

1. NOLAN H. ANDERSON III, Respondent
2. NOLAN H. ANDERSON, Jr., Alex's Grandfather
3. CLAUDETTE ANDERSON, Alex's Grandmother
4. TANYA YVETTE ANDERSON BROWN, Alex's Aunt
5. JON TROSSI, Friend

All of the witnesses, except for Mr. Trossi, have extensive knowledge of Alex and his relationship with the Respondent. All reside in San Antonio, Texas. All know the Petitioner. All of them met Alex when he was less than one year old. Mr. Trossi facilitated the beginning of the Summer 2016 exchange.

Dated 2/17/18, in Tumwater, Washington.


SANS M. GILMORE, WSBA #21855
Attorney for Respondent

RESPONDENT'S WITNESS LIST
Page 1 of 1

SANS M. GILMORE, P.S. Inc.
2646 R.W. Johnson Blvd. SW, Ste. 100
Tumwater, WA 98512
Phone: 360-489-1120

APPENDIX D



5 court days of

Hearing is set:
 Date: _____
 Time: _____
 Judge/Calendar: _____
 No hearing is set

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2018 FEB 12 PM 4:55

Linda Myhre Enlow
Thurston County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

In re:

NO. 16-3-00596-34

SHERRI LYNNETTE KIRSCHBAUM,
Petitioner,

RESPONDENT'S TRIAL BRIEF

and

NOLAN HAMILTON ANDERSON III,
Respondent.

I. FACTS

1.1 On November 26, 2012, at the conclusion of a trial, the District Court for the 264th Judicial District, Bell County, Texas, entered the following Order: *Order in Suit Affecting Parent-Child Relationship and Adjudicating Parentage* here after referred to as the Texas Order. Exhibit 1.

1.2 The Texas Order was based on a full testimonial hearing where both parties participated in the trial and both parties were represented by counsel. Id.

1.3 The Texas Order provides for a number of eventualities and future events. The Texas Order provided for a comprehensive alternate parenting scheme for when the parties reside less than 100 miles apart. And, the Texas Order provided a different, even more comprehensive scheme, for when the parties' Army duty may require them to live more than 100 miles apart.

RESPONDENT'S TRIAL BRIEF

SANS M. GILMORE, P.S. Inc.
2646 R.W. Johnson Blvd. SW, Ste. 100
Tumwater, WA 98512
Phone: 360-489-1120

1 Id. at pp. 8 – 17 (Standard Possession Order).

3 1.4 The Texas Order certainly took into account that Alex was 1 year old but that he would
4 become older.

5 1.5 The Texas Order certainly took into account that Mr. Anderson was a new parent with
6 limited parenting experience.

7 1.6 And, the Texas Order took into account Alex's allergy issues.

8 1.7 The parties agree that when the Texas Order was entered, both were living in Killeen,
9 Texas, and both were active duty Army officers.

10 1.8 About 4 months after entry of the Texas Order, the parties entered into what is referred to a
11 Rule 11 Agreement. Exhibit 2, pp. 4-5. The Rule 11 Agreement provided for (1.) the Summer
12 2013 visitation (including a pre-flight visitation and a post-return visitation), (2.) the use of
13 Family Wizard for communication (except in the event of emergency), (3.) exchange of current
14 addresses, (4.) child support, the creation and funding of a 529 Plan¹, how it would be funded,
15 and how it reduced Mr. Anderson's retroactive child support to -0-, (5.) how travel expenses are
16 to be divided, and (6.) is an acknowledgement of Ms. Kirschbaum's "pro se" status. This Rule
17 11 Agreement was embodied in an order entitled Order Terminating Child Support Arrearage
18 entered on 9/26/13. Id., pp. 1-3.

19 1.9 Once that agreed order was entered, both parties relied on themselves to work out all the
20 details on the alternate parenting that took place from 9/26/13 until Mr. Houser appeared on Ms.
21
22
23
24

25

¹ 529 plans are named after section 529 of the Internal Revenue Code 26 U.S.C. § 529. While most plans allow investors from out of state, there can be significant state tax advantages and other benefits, such as matching grant and scholarship opportunities, protection from creditors and exemption from state financial aid calculations for investors who invest in 529 plans in their state of residence. Only 2.5 percent of all families had 529 college savings accounts in 2013^{III}.

1 Kirschbaum's behalf in April, 2016. Without attorneys, the parties were able to work out the
3 following alternate parenting schedule:

4 2013 December/Christmas Visit (20 + days)

5 2014 July 2 – 30 (28 days)

6 2015 May 30 – July 11 (42 days); and, Dec 5 – 31 (27 days)

7 2016 Jan 1-30 (PLUS an additional 30 days); and, May 28 – Jul 9 (42 days)²

8 In totality, Mr. Anderson has had Alex in his care about 48 days per year. He even had Alex in
9 his care for 120 days while Ms. Kirschbaum attended a senior course and just before Ms.
10 Kirschbaum moved from Texas to Washington.

11 Kirschbaum moved from Texas to Washington.

12 **1.10** So, if the parties have such comprehensive Texas Orders AND they have demonstrated a
13 great ability to WORK TOGETHER to reach such detailed agreements, agreements that benefit
14 the child currently and in the distant future, WHAT HAPPENED and WHY ARE WE HERE?
15

16 II. ISSUES

17 A. WHETHER THE PETITIONER SATISFIED THE NECESSITY OF AN FINDING OF
18 ADEQUATE CAUSE AS REQUIRED BY RCW 26.09.270 AND 26.09.260(1) IF ALL THAT
19 HAPPENED WAS THE TWO ATTORNEYS AGREED ON A GENERIC ORDER AND THE
20 TRIAL COURT DIDN'T CONDUCT A DETERMINATION HEARING BASED ON THE
RECORD AS IT EXISTED ON 4/28/16 OR AS OF 8/4/16 AS REQUIRED BY STATUTE.
Ans. NO.

21 B. WHETHER THE COURT SHOULD FIND AND CONCLUDE THAT EITHER PARTY
22 HAS ENGAGED IN ABUSIVE USE OF CONFLICT THAT SUPPORTS EITHER PARTIES'
23 PETITION FOR A MAJOR MODIFICATION OF THE TEXAS ORDER WHEN THE
24 PETITIONER INTENDS TO EXCLUDE ALL OF THE PSYCHOLOGICAL CARE THAT
ALEX HAS HAD THE BENEFIT OF SINCE THE SUMMER OF 2015 FROM THE COURT'S
25 CONSIDERATION. Ans. NO.

² The Summer 2016 visitation schedule was worked out on 3/21/16 which is prior to Ms. Kirschbaum filing her
Petition. She had her Petition served on Mr. Anderson 3 weeks before he was to receive the child. And, Mr. Houser
sent Mr. Anderson a letter that arrived about a week after the child arrived in Texas.

1 C. WHETHER THE COURT SHOULD DENY ALL OF PETITIONER'S RELIEF AND
2 REINSTATE THE 2012 TEXAS ORDERS WITHOUT MODIFICATION OR CHANGE AS
3 THERE ARE INSUFFICIENT CHANGES IN CIRCUMSTANCE TO JUSTIFY EITHER A
4 MAJOR OR EVEN A MINOR MODIFICATION. Ans. **PROBABLY.**

5 **III. LEGAL ANALYSIS**

6 3.1 This is a modification action. The applicable law sections read,

7 **RCW 26.09.260**

8 **Modification of parenting plan or custody decree.**

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

17 **III.A. ADEQUATE CAUSE**

18 **RCW 26.09.270**

19 **Child custody—Temporary custody order, temporary parenting plan, or modification of**
20 **custody decree—Affidavits required.**

21 A party seeking a ... modification of a custody decree or parenting plan shall submit together
22 with his or her motion, **an affidavit** setting forth facts supporting the requested order or
23 modification and shall give notice, together with a copy of his or her affidavit, to other parties to
24 the proceedings, who may file opposing affidavits. The court shall deny the motion unless it
25 finds that adequate cause for hearing the motion is established by the affidavits, in which case it
shall set a date for hearing on an order to show cause why the requested order or modification
should not be granted.

3.2 RCW 26.09.270 is very specific. It says, "The court shall deny the motion unless it finds
that adequate cause for hearing the motion is established by the affidavits..." RCW 26.09.270
makes no provision for generic adequate cause by agreement of the parties. As this case comes
before the trial court, it is unfortunate that the Court Commissioner or other Judicial Officer

1 hasn't considered if the Petition and supporting Declaration constitutes a prima facie case. The
3 Petition is generic. Exhibit 3. The Declaration contains some specifics, but certainly not enough
4 to support a finding of adequate cause. Exhibit 4. As of 2/8/18 the Respondent has withdrawn
5 any stipulation that Ms. Suellen Howard agreed to on 8/4/16. Exhibit _____. As of 2/8/18, the
6 Respondent has filed a Motion to have his opposing Petition Dismissed pursuant to CR 41.
7 Exhibit _____. And, as of 2/8/18, the Respondent has filed his 1st Amended Response. Exhibit
8 _____. Originals of these pleadings have been filed with the court as of 2/8/18 and copies provided
9 to Petitioner's attorney the same morning. The Respondent will ask the trial court to rule on the
10 Motion to Dismiss if not otherwise agreed to by the two parties prior to trial. By virtue of these
11 actions, the trial court should be free to take a fresh look at adequate cause and determine if a
12 trial is warranted.
13
14

15 3.3 Washington case law includes, "To establish that he or she is entitled to a full hearing on
16 a petition to modify a residential schedule, the petitioner must first demonstrate that adequate
17 cause exists. RCW 26.09.270; Bower, 89 Wash.App. at 14, 964 P.2d 359. Along with the motion
18 to modify, the petitioner must submit affidavits with specific relevant factual allegations that, if
19 proved, would permit a court to modify the parenting plan under RCW 26.09.260. RCW
20 26.09.270; In re Marriage of Flynn, 94 Wash.App. 185, 191, 972 P.2d 500 (1999); Bower, 89
21 Wash.App. at 14, 964 P.2d 359. If the trial court finds that the affidavits establish a prima facie
22 case, it sets a hearing date on an order to show cause why the requested [74 P.3d 696]
23 modification should not be granted. RCW 26.09.270; Flynn, 94 Wash.App. at 189-90, 972 P.2d
24 500. The trial court's adequate cause determination may be overturned only for abuse of
25 discretion. In re Parentage of Jannot, 149 Wash.2d 123, 126, 65 P.3d 664 (2003)." In re
Marriage of Tomsovic, 118 Wn.App. 96, 74 P.3d 692, (Div. 3 2003)

Had the Commissioner followed RCW 26.09.270 and 26.09.260(1), the Commissioner would
have these facts to rely upon:

3.3.1 "Shortly after the child's birth I was transferred to JBLM (Ft. Lewis, Washington)
where I am a captain in the United States Army. We were able to reach a mediated agreement ...

1 2014 and again did reach an agreement ... 2015 ..." Exhibit 4, p. 2, lines 3-6. RCW
3 26.09.260(1) expressly states that the only relevant changes of circumstances are those involving
4 the child or the nonmoving parent. Therefore, in addressing adequate cause the trial court cannot
5 consider the moving party's changed circumstances. George, 62 Wn.App. at 383." In re
6 Marriage of Swaka, 179 Wn.App. 549, 319 P.3d 69, (Div. 2 2014). So, these facts cannot be
7 considered.
8

9 3.3.2 Even though the Texas Order provides for 42 days of annual summer visitation
10 when the parties are residing more than 100 miles apart, the Petitioner's next reason for adequate
11 cause was, "In 2015 the main reason I allowed the child to visit the Respondent in Texas is that
12 the Respondent had been diagnosed with multiple sclerosis (MS) and spent significant time in a
13 hospital." Exhibit 4, p. 2, lines 7-12. In spite of what she states here, the Texas Order required
14 the alternate parenting time, she allowed the alternate parenting time, and before she filed the
15 Petition on 4/28/16, Alex had spent the Summer of 2015 (42 days), the Winter of 2015-16 (57
16 days), and she'd agreed on the Summer of 2016 (42 days). So, these facts do not show a
17 substantial change of circumstances and do comply with RCW 26.09.270, RCW 26.09.260(1), or
18 the case law included herein.
19
20

21 3.3.3 Her next allegation is, "It is my understanding that the Respondent has also been
22 diagnosed with Lupus and may have other health problems." Exhibit 4, p. 2, lines 13-14. This
23 statement about his health is hearsay and cannot be considered by the court. The Petitioner filed
24 no health care records to support the allegation. And, see paragraph 3.3.2 above explaining the
25

1 history leading up to the date she filed the Petition which is contrary to the requirements of RCW
2 26.09.270 and RCW 26.09.260(1).
3

4 3.3.4 Her next allegation is, "The Father was to provide me under the Texas order his
5 address and he has not done so. The order also requires if he moves he is to provide that
6 information to me and he has not done so. Apparently, he is utilizing his parent's home as his
7 residential address but I have not been able to confirm that. This is of utmost importance and
8 needs to be incorporated into a modified parenting plan." Exhibit 4, p. 2, lines 15-18. She
9 repeats the same allegation again. Id, p. 3, lines 15-16. If one were to compare the address
10 provided in the Texas Order to the address were the process server served Mr. Anderson with the
11 Petition and Summons, the addresses are identical. Exhibit 1, p. 31 and Exhibit 5. Assuming
12 that the Respondent had failed to provide her with a residential address, she's not at liberty to
13 include that as a basis for adequate cause when there is a 4-year history of agreements related to
14 alternate parenting that has never included such an objection. This is what is referred to as using
15 the shot gun approach to sufficiency of adequate cause.
16
17
18

19 3.3.5 The first allegation that may be qualified as a change of circumstances since she
20 entry of the Texas Order is, "Of grave concern is the mental health and emotional wellbeing of
21 the Respondent. He continues to make allegations now and has over the last year to the United
22 States Army pertaining to our child, alleging that I have abused the child physically, chocking
23 him or not providing for his care." Exhibit 4, p. 2, lines 21-23. However, this allegation is being
24 made after she's agreed to the Summer of 2016 visit (42 days) which commenced on 5/28/16 and
25 ended on 7/11/16. How concerning can this be if she's not elected to bring an action in Texas,

1 not elected to initiate mediation, and not attached any document to her Declaration showing the
3 specifics of her allegation.

4 3.3.6 The Order on Adequate Cause entered on 8/4/16 contains no agreement as to any
5 of the aforementioned allegations. The agreement, which was not authorized by the Respondent,
6 is generic and not in compliance with RCW 26.09.270 or RCW 26.09.260(1). A more complete
7 analysis on the issue of abusive use of conflict will follow this adequate cause analysis.
8

9 3.3.7 The next allegation series she made is, "Alex, our son, was subject to a forensic
10 and intrusive examination that no three-year-old should have to experience. Last summer, the
11 summer of 2015, the Respondent ... took Alex, without my permission, acquiescence, or
12 knowledge whatsoever to a therapist/counselor ... because the child was having nightmares ..."
13 Exhibit 4, p. 3, lines 7-9. Then she corrects herself by declaring, "I found out about this ...
14 because the therapist/counselor contacted me ... I allowed the counselor to see Alex ..." Id,
15 lines 10-14. Again, the making of a sensational allegation that she recants in the next sentence is
16 not supportive of adequate cause. Neither is bringing up facts from two visits before that you
17 knew about, in real time, two visits before. Those facts have been waived and they are not
18 appropriate for a new adequate cause consideration. And, she apparently told the Guardian Ad
19 Litem that she was attending school in San Antonio over the summer of 2015.³ If she was, she
20 could have been as involved in the sessions between Ms. Parten and Alex as she wanted to be.
21
22
23
24
25

³ Richard Bartholomew was appointed as the Guardian Ad Litem in this case. The Respondent stipulates to Mr. Bartholomew's GAL experience and his capability as a family law attorney. The GAL Report is subject to a Hearsay objection. ER 802.

1
3 3.3.8 Next, she doesn't allege a change in circumstance that adversely affects the child
4 or suggests a parenting plan change. She says, "The Respondent should provide a medical
5 certification that his health is such that he is not suffering from aneurisms or any debilitating
6 diagnosis hat would affect his ability to spend time with the child." Id, lines 17-19. So far, she's
7 used MS, lupus, and now it's aneurism none of which are supported by a medical record. She
8 hasn't even provided the court with a copy of a request showing her concerns and asking him for
9 proof of a medical problem, treatment, and recovery. However, it is undisputed that he is a US
10 Army Major, on active duty, stationed in San Antonio, TX. When is the last time anyone has
11 heard about a US Army Major that is suffering from the health problems she is suggesting
12 staying on active duty? Again, she is bringing up ideas that date well before she workout
13 visitation with the Respondent, allowed the child to travel with the Respondent, he flew to and
14 from Washington to facilitate the visitation. These are not facts that allow an RCW 26.09.270
15 and RCW 26.09.260(1) finding of adequate cause.
16
17

18 3.3.9 Next, she declared that, "The Respondent attempted to enroll our child in school
19 in Texas last summer (summer of 2015 which started on 5/30 and ended on 7/11/15) as their
20 schooling starts in August ... without my knowledge, approval, and notice and should be
21 prohibited;" Id, p. 4, lines 1-5. This statement is hearsay unless he told her about it and, in that
22 case, she forgot to leave out that detail. The visit ended on 7/11/15 and she says school starts in
23 August in Texas. Finally, in 2015, he was just 3 years old and too young for school. And, she
24 filed no document showing school enrollment. Again, these facts do not support a finding of
25 adequate cause.

1
3 3.3.10 Here is a telling tale that would have caught the Commissioner's eye had the
4 Commissioner the chance to consider it. Her next statement is, "The existing residential
5 schedule 42 days of summer visitation ... is too long for a child that is four years old." Id,
6 lines 20-21. She also adds, "I am proposing ... that the summer be only 21 days long ... seven
7 days or one-half of the winter vacation ... " Id. p. 4, lines 12-24. If the Petitioner's previous
8 statements were sincere and the focus of this modification is some form of parental alienation or
9 abusive use of conflict, the suggestion of reducing summer time and refining holidays is
10 inconsistent.

11 3.4 The Petition and supporting Declaration do not constitute a prima facie case justifying a
12 finding of adequate cause.
13

14 III.B. ABUSIVE USE OF CONFLICT

15
16 3.5 Since 2002, the law related to analyzing an allegation of abusive use of conflict has
17 included the following ... "In order to restrict a parent's role under a parenting plan, the trial court
18 must find, inter alia, that the abusive use of conflict by the restricted parent creates a danger of
19 serious damage to the children's psychological development." [6] Burrill v. Burrill, 113 Wn.App.
20 863, 56 P.3d 993, (2002) (footnote [6]: RCW 26.09.191(3)(e)). In the Burrill case, the Court of
21 Appeals upheld a trial court ruling that changed primary care of the children from the mother to
22 the father. In analyzing the alleged error related to abusive use of conflict, these facts were
23 found, "*Cindy strenuously opposed any contact by both children with their father, supervised or*
24 *otherwise, despite the fact that they were well bonded with him and enjoyed being with him.*
25 *Indeed, for a period of nearly nine months, the children either did not see their father, or had*

1 *very limited access to him. This severe impairment of parent/child contact, especially when*
3 *considered in light of the numerous interviews A.B. was subjected to asking her about the bad*
4 *things her daddy did to her, constitutes sufficient evidence from which the trial court could*
5 *conclude that Cindy created a danger of serious psychological damage to the children.” Burrill,*
6 *at pp. 871-872. Except for the Burrill case, the rest of Washington’s 23 cases that come up in the*
7 *case law data base when you search “abusive use of conflict” or “RCW 26.09.191(3)(e)” are all*
8 *unpublished opinions, but examples of what constitutes “abusive use of conflict” include a*
9 *history of (a) lack of cooperation, (b) controlling behavior, (c) extraordinary litigation over the*
10 *period of a year and a half up to trial, (d) refusing to facilitate phone calls, and (e) refusing to*
11 *inform the other parent about doctor’s appointments are all examples of behavior that can allow*
12 *a court to find a parent has engaged in abusive use of conflict that can ultimately harm the child*
13 *psychologically.*

16 3.6 When you look at the Petition and the supporting Declaration filed by the Petitioner on
17 4/4/28/16, most of the alleged problems don’t contain dates or good specifics. But, here is the
18 list of allegations she made in those pleadings. A comparison of what constitutes abusive use of
19 conflict to what Ms. Kirschbaum has alleged and declared suggests this court should not find Mr.
20 Anderson liable. Her allegations are:

22 3.6.1 “The Father [has not provided] his address;” Exhibit 4, p. 2, lines 15-18.

23 3.6.2 “[T]he Respondent ... has continues to make allegations ... to the US Army;” Id.
24 lines 21-23.
25

1 3.6.3 “[H]e contacted Child Protective Services in the state of Texas;” Id. p. 3, lines 2-
3 4.

4 3.6.4 “[T]he Respondent’s inability to cooperate and provide information to me ...” Id.
5 p. 4, lines 6-7.

6
7 3.6.5 “I believe that the Respondent’s involvement with our child is having an adverse
8 effect on the child ...;” Id. p. 4, lines 9-11.

9
10 3.7 On the other hand, the facts that are incontrovertible include:

11 3.7.1 The Texas Order that provides for the alternate parenting schedule the parties
12 have followed was the derivative of a combination of trial and an agreement.

13 3.7.2 The Rule 11 Agreement and Order entered on 9/30/13 was the result of an
14 agreement.

15 3.7.3 All of the visits that took place since 2012 were the derivative of the Texas Order
16 and the finer points of varying start times, end times, exchange locations, etc., were the
17 derivative of agreements.

18 3.7.4 There had been no litigation between the parties from 11/21/12 when trial
19 concluded in Texas until the Petitioner filed this Petition on 4/28/16.

20 3.7.5 The Texas Order requires the parties attempt mediation before litigation. Exhibit
21 1, p. 29. Ms. Kirschbaum did not attempt mediation prior to filing her Petition.
22
23
24
25

1
2
3 3.7.6 The general allegation that the Petitioner didn't approve Ms. Parten having
4 counseling/therapy sessions with Alex was recanted in the next paragraph of her Declaration.
5 Exhibit 4, p. 3, lines 12-13.

6 3.7.7 There are no allegations of controlling behavior. There are no allegations of lack
7 of cooperation is too general to comment on. There are no allegations of excessive litigation. In
8 fact, there has been no litigation at all since 11/21/12 when trial concluded.

9 3.8 What could come out a trial, if there has to be a trial, is that the Petitioner was called by
10 Ms. Parten to obtain approval from the Petitioner before she received Alex as a patient.⁴ Alex
11 had three sessions with Ms. Parten. Exhibit 8, Enclosure 6. The Respondent believes that the
12 Petitioner never called or otherwise found out that Ms. Parten had reason to refer Alex to
13 additional therapy. The Texas Order says, "*NOLAN HAMILTON ANDERSON III, as parent*
14 *joint managing conservator, shall have the following rights and duty: 2. The right, subject to*
15 *the agreement of the other parent conservator, to consent to psychiatric and psychological*
16 *treatment of the child, but when not agreeing as directed by the child's primary care*
17 *physician;*" Exhibit 1, p. 5, para 2. We don't know everything that was said between Ms. Parten
18 and the Petitioner, but we know the Petitioner gave permission for therapy and we know the
19 Respondent facilitated Ms. Parten's recommendation to have Alex seen by an additional
20 therapist. If the parties have agreed to therapy, which they did, then why wouldn't the Petitioner
21 have submitted that medical history. Her Declaration contains both the statement, "Alex, our
22 son, was subject to a forensic and intrusive examination that no three-year-old should have to
23
24
25

⁴ Catherine W. Parten, PLLC, Psychiatric Social Worker-Supervisor, Texas Lic. #03185, Registered

1 experience” and “I allowed the counselor to see Alex...” Exhibit 4, p. 3, lines 5-6 and lines 12-
3 13. Allowing counseling, a form of psychiatric treatment, and complaining that the Respondent
4 and she disagreed about it certainly cannot rise to the level of conflict that is, in any way,
5 abusive.

6
7 3.9 The final allegations that the Petitioner made was that the Respondent made false
8 allegations to the Army, Texas CPS and CID. Exhibit 4, pp. 2-3, lines 21-25 and 1-4. She didn't
9 file any CPS reports, CID reports, or any other document in support of the allegation. At trial, if
10 this matter goes to trial, what the evidence will show is that after the Petitioner gave permission
11 to Ms. Parten to treat Alex, Ms. Parten referred Alex to Child Safe, Child Safe couldn't receive
12 Alex, so the Respondent took Alex to Dr. Esparza.⁵ Dr. Esparza hadn't completed the treatment
13 before Alex returned to Washington. When Alex returned to Texas for the summer of 2016, the
14 Respondent, following Dr. Esparza's medical recommendations, tried to have Alex seen by Dr.
15 Esparza again. Dr. Esparza was not available, so Alex ended up being seen by Dr. Lockhart.⁶
16 Dr. Lockhart prepared a report and sent it to Ms. Suellen Howard who represented the
17 Respondent initially. Exhibit 8, Enclosure 6 (cover page). The Guardian Ad Litem has since
18 spoken to Dr. Lockhart. In her report, Dr. Lockhart states that as a mandatory reporter, she
19 reported her concerns to Washington CPS on 7/6/16. The Respondent filed a CID report on
20 8/17/16 only after Dr. Lockhart had filed a Washington CPS report and the Respondent had the
21 benefit of Dr. Lockhart's 7/28/16 report.
22
23
24

25

Play Therapist-Supervisor, email: cp.playtx@live.com, Phone: 210-394-5205

⁵ Dr. Fernando J. Esparza (Psy.D); License No. 30785; 14607 San Pedro, Suite 295, San Antonio, Texas 78232-4325; Phone: (210) 403-2050.

⁶ Ann-Louise T. Lockhart, PsyD, ABPP, Pediatric Psychologist, Board Certified; 16607 Blanco Road, Suite 701, San Antonio, TX 78232; Phone: (210) 816-4149

RESPONDENT'S TRIAL BRIEF

Page 14 of 18

SANS M. GILMORE, P.S. Inc.
2646 R.W. Johnson Blvd. SW, Ste. 100
Tumwater, WA 98512
Phone: 360-489-1120

1
3.10 I hope that the court can keep in mind that the Respondent is a US Army officer. He is a
3 field grade officer. He has the benefit and the obligation to make a report and CID is who Army
4 officers make such reports to. Exhibit 6. The CID report made its way to Kristine A. Marsh,
5 LICSW.⁷
6

7 3.11 Next, the court may be familiar with "Talia's Law" signed into law by President Obama
8 in 2016. Articles regarding the death of 5-year-old Talia and the new law are plentiful. Here are
9 two examples from such articles. [1] "A measure aimed at protecting children of military
10 families is heading to the president's desk for his signature. "Talia's Law" passed the U.S.
11 Senate last week as part of the National Defense Authorization Act. The law would require
12 service members and their children to immediately report child abuse to their installation and to
13 the state Child Protective Services. Cite: [http://khon2.com/2016/12/13/congress-passes-talias-](http://khon2.com/2016/12/13/congress-passes-talias-law-to-protect-children-of-military-families/)
14 [law-to-protect-children-of-military-families/](http://khon2.com/2016/12/13/congress-passes-talias-law-to-protect-children-of-military-families/). [2] Included in the 2016 National Defense
15 Authorization Act, the law makes it mandatory for anyone employed by the Defense Department
16 to report to their base Family Advocacy Program "credible information" or "a reasonable belief"
17 that there has been an incident of child abuse or neglect. The law also requires that a report be
18 made to the appropriate state agency, regardless of whether or not the family lives off base. Cite:
19 [https://www.military.com/spousebuzz/blog/2017/01/how-military-child-abuse-law-protects-](https://www.military.com/spousebuzz/blog/2017/01/how-military-child-abuse-law-protects-kids.html)
20 [kids.html](https://www.military.com/spousebuzz/blog/2017/01/how-military-child-abuse-law-protects-kids.html). The Respondent was doing his duty by following through on the evidence of abuse
21 found by Ms. Parten, Dr. Esparza, and Dr. Lockhart. He was not committing acts of parental
22 alienation or abusive use of conflict.
23
24
25

⁷ Kristine A. Marsh, Licensed Social Worker (LICSW), Family Advocacy Social Worker, Family Advocacy Program, Department of the Army, Western Regional Medical Command, Tacoma, WA 98431-1100; Phone: (253)

1
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

III.C. MODIFICATION OF THE PARENTING PLAN

3.12 If the trial court ultimately decides there was adequate cause, then the court may make further determinations according to RCW 26.09.260(2) and RCW 26.09.187. If the court finds that either or both parent's actions rise to the level of abuse of a child, parental alienation, or abusive use of conflict AND that such parental action is likely to continue AND it is more likely than not that the child at risk of "severe emotional harm," then the court should make appropriate changes to the overall parenting plan that are in the best interest of the child.

3.13 RCW 26.09.260(2) says, "(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.

3.14 The parties have not agreed to the modification.

3.15 The child has not been integrated into family of the petitioner with the consent of the other parent in substantial deviation of the parenting plan. In fact, it is the opposite in that the child has been integrated into the Respondent's family with the permission of the Petitioner. The parties have (a) a consistent history of agreeing on Alex spending more time than allowed by the Texas Order and (b) a consistent history of not litigating minor differences for five years.

968-4159.

RESPONDENT'S TRIAL BRIEF

Page 16 of 18

SANS M. GILMORE, P.S. Inc.
2646 R.W. Johnson Blvd. SW, Ste. 100
Tumwater, WA 98512
Phone: 360-489-1120

1 3.16 The child's relationship with the Respondent and the Respondent's family is rock solid.
3 There is no evidence that suggests the changes that the Petitioner proposes will benefit the child
4 at all.

5 3.17 There has never been a finding of contempt. And, she's made no allegation of contempt.

6 3.18 So, if none of the factors found in RCW 26.09.260(2) apply, the court lacks authority to
7 do anything other than retain the current parenting plan.
8

9 IV. CONCLUSION

10 4.1 Before the court officially opens the trial, the court should take a fresh look at the Petition
11 and supporting Declaration to determine if the court has the authority to modify the Texas Order.
12 RCW 26.09.270 and RCW 26.09.260(1) do not allow the court to avoid doing the analysis.
13 These statutes don't support a finding of general adequate cause by agreement that can lead to a
14 complete rewriting of a trial determined Final Parenting Plan.
15
16

17 4.2 The allegation the Petitioner has made against the Respondent that he's endangering the
18 child by filing a CID complaint does not constitute an abusive use of conflict. The CID report he
19 filed was supported by medical evidence derived from agreed medical treatment. The Petitioner
20 gave her permission to have Alex seen by Ms. Parten in the Summer of 2015. That treatment led
21 to follow on treatment concluding with the treatment provided by Dr. Lockhart in the summer of
22 2016. The CID report was filed at the direction of the Respondent's commander. The filing of a
23 CID report of this type is supported by the Talia Law.
24
25

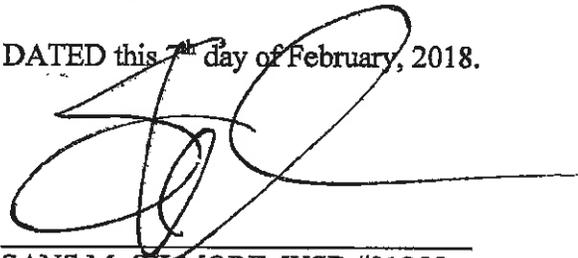
4.3 The agreements that the parties reached after the summer of 2015 shows that the
Petitioner acquiesced to the earlier medical treatment and really limits the trial court to facts that

1
2 came after the summer 2016 visit. The summer 2016 visit happened just as agreed. The
3 Petitioner cannot allege her filing the Petition before the summer visit started or the letter Mr.
4 Houser sent the Respondent that arrived after the visit started as some form of line-drawing and
5 having the child seen by Dr. Lockhart somehow demonstrates that the Respondent crossed that
6 line. The filing of the Petition without attempting mediation was a violation of the Texas Order.
7

8 4.4 The totality of the situation suggests the Petition should be dismissed and the Texas
9 Order returned to being the parties' Parenting Plan.
10

11 Thanks for considering these ideas. Our Witness List and Exhibit List to Follow.
12

13 DATED this 7th day of February, 2018.
14

15
16 

17 SANS M. GILMORE, WSB #21855
18 Attorney for Respondent
19
20
21
22
23
24
25

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Brief of Respondent*** in Court of Appeals Cause No. 51945-3-II to the following parties:

Charles H. Houser, III
Pope, Hauser & Barnes, PLLC
1605 Cooper Point Road NW
Olympia, WA 98502-8325

Sans Michael Gilmore
Attorney at Law
2646 R W Johnson Road SW, Suite 100
Tumwater, WA 98512-5630

Original E-filed with:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4427

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

DATED: January 11, 2019 at Seattle, Washington.



Jacqueline T. R. Rush, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

January 11, 2019 - 3:25 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51945-3
Appellate Court Case Title: Sherri Kirschbaum, Respondent v. Nolan Anderson, III, Appellant
Superior Court Case Number: 16-3-00596-0

The following documents have been uploaded:

- 519453_Briefs_20190111152219D2836364_4858.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Br of Respondent.pdf
- 519453_Designation_of_Clerks_Papers_20190111152219D2836364_9960.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was Not of Filing of Suppl DCP.pdf

A copy of the uploaded files will be sent to:

- jacqueline@tal-fitzlaw.com
- ranger1278@gmail.com
- sansgilmore@gmail.com
- shouser@wbpopelawfirm.com

Comments:

Sender Name: Jacqueline T R Rush - Email: assistant@tal-fitzlaw.com

Filing on Behalf of: Sidney Charlotte Tribe - Email: sidney@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20190111152219D2836364