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No. 52385-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Parentage of A.W.

MITCHELL WHITE
Appellant

and

LINSDAY SPUCK
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves young parents and a young child, a history of conflict and cooperation, and challenges both adults face as they grow into their roles. This case also involves a trial court abusing its discretion by relying on the prohibited “friendly parent” concept to determine the parenting plan. In doing so, the court actually ignored the main event: how to best serve the child’s interest, which is to foster the strong bond this child has with both her parents.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding it was in the child’s best interests to be placed in the primary care of her mother and by awarding the mother sole decision-making. CP __ (Decision at 12).¹

2. The trial court erred by relying on the “friendly parent” concept in determining the parenting plan, finding the mother “is the parent most likely to foster a relationship between [the child] and her father,” and the father “alienated the mother by supplanting her role in the child’s life with his new wife.” Decision at 12.

3. The trial court erred by concluding the father’s “presentation of this case amounts to an abusive use of conflict,” and

¹ The court entered a sealed “Court’s Written Decision,” which the Clerks Papers Index identifies as CP 292-300 (9 pages), though the ruling is actually 14 pages long (including sealed cover sheet). Undersigned counsel hopes to correct this error by conferring with the clerk and by designating the decision again. In this brief, for clarity’s sake, reference will be made to “Decision.”

finding he “manufactured an emergency using information that he had been aware of for years concerning [the mother’s] mental health” and “obtained ex parte relief placing [the child] with him based on that information.” Decision at 12.

4. Substantial evidence does not support the trial court’s finding that the mother did not make the joint custody arrangement difficult prior to the litigation. Decision at 10.

5. Substantial evidence does not support the trial court’s finding that the evidence was inconclusive regarding the mother’s past suicide attempts. Decision at 2, n. 2.

6. Substantial evidence does not support the trial court’s finding that the mother’s therapist “credibly testified that [the mother] was forthcoming about her past, including past suicidal ideation, transparent, and cooperative.” Decision at 7.

7. Substantial evidence does not support the trial court’s finding that the mother was truthful with her mental health providers and did not fail to disclose the extent of her past mental health issues. Decision at 10.

8. Substantial evidence does not support the trial court’s finding that “[the mother’s] potential for future performance of parenting functions is excellent” insofar as the court found similar evidence

regarding the father affected his potential for future performance of parenting functions. Decision at 10.

Issues Pertaining to Assignments of Error

1. Does the court abuse its discretion when it relies on the “friendly parent” concept?
2. Does a father engage in “abusive use of conflict” when he seeks temporary orders based on verified evidence raising concerns adequate for two separate judicial officers to require, temporarily, the mother’s time with the child be supervised?
3. Does the court abuse its discretion and violate Washington law and policy when it uses a parenting plan to reward or punish a parent, instead of focusing on the best interest of the child?
4. Do numerous of the court’s findings lack substantial evidence and does the court ignore material undisputed facts pertinent to its analysis?
5. Does the court’s treatment of the facts and its misapplication of Washington law suggest bias against the father?

III. STATEMENT OF THE CASE

A. BACKGROUND

Mitchell White and Lindsay Spuck began dating in 2012 while White was a member of the United States Air Force Phoenix Ravens, an

elite military squad stationed at Joint Base Lewis McChord. CP 293. The parties were in their early 20s at the time and the relationship was volatile, complicated by White's frequent deployments and Spuck's emotional instability/mental health challenges. They moved in together in 2013, sharing an apartment with Spuck's friend, Kimmie Hughs. RP 30.

1) Suicide Attempts (January 2014 - May 2015)

In January 2014 after returning from a deployment, White discovered that Spuck had been cheating on him and broke up with her. RP 33-34. Later that day, Hughs called White and told him Spuck locked herself in the bathroom with a knife and gun; Hughs called 911 and her boyfriend had to break down the door to the bathroom. RP 33; Ex 203 (police report). Spuck then tried to jump out the window but they held her back. Ex. 206 at 10. Hughs reported to the police Spuck had a big argument with her boyfriend and threatened to kill herself and Spuck's mother told medical personnel that Spuck had been depressed. Ex. 206 at 5, 10; RP 35. Hughs moved out and White's friend Cody Johnson moved in with White. White and Spuck were still split up but she wanted to get back together. RP 35-36. White then deployed to Germany. RP 37.

In early February, while White was in Germany, Spuck called to tell him she was pregnant; they fought and he hung up on her. RP 37. Shortly after, she called him back in a panic and told him that one of his

guns “went off.” He told her to call the police but she said she had to “get out of there” and hung up. RP 37. It turned out she had discharged the gun, with the bullet penetrating to the apartment above; the tenant called the police. Ex. 202 at 6. Spuck told police she was cleaning her boyfriend’s gun and it just “went off.” Ex. 202 at 6. Her sister later told medical personnel that Spuck had pointed the gun to her head, but just before firing it she pulled her head away. Ex. 206 at 93. Spuck was arrested for reckless endangerment and she and White were evicted from the apartment. RP 39. White and Cody then moved in to another apartment and Spuck moved back in with her parents.

Spuck still wanted to get back together with White because she was pregnant, though White was not convinced he was the father given the infidelity while he was deployed. RP 44. She told him if he did not want to be in a relationship with her she was considering an abortion. RP 45. This upset White and he told her he did not want her to choose that route, especially if he was the father. RP 45. Shortly after the gun discharge incident, she came to his apartment and brought up the abortion; an argument ensued and he told her to leave. She took his handgun and he took it back. During the struggle to escort her out, she punched him in the face and gave him a bloody nose. White called her father who calmed her down and took her home. RP 51-52.

Over the next few months, things settled down and the parties decided to work on their relationship in anticipation of the baby's arrival. RP 54. They went to ultrasounds and newborn parenting classes together, registered for baby items, and decided to live together again. RP 54. White bought a house in Lakewood in August 2014 and the baby, A.W., was born in October 2014. RP 54.

By early 2015, Spuck became emotionally unstable again. She had hip surgery in January and was on pain medication. RP 481. While White was deployed in February, she began having an affair with "Benjamin,"² the husband of a couple with whom she and White were friends. RP 484, Ex. 14 at 8-9. On February 19, 2015, after Benjamin's wife found out about the affair, Benjamin called the police and reported Spuck had locked herself in the bathroom and he suspected she was attempting to overdose on pain medication. RP 484; Ex. 206 at 20.

White was not aware of this incident, though he noticed Spuck seemed distant and withdrawn during that time; he learned of the incident during this litigation, when he obtained records of 911 calls and medical records. RP 58-60; RP 481. At the time, White tried to talk to Spuck about it and get her some help, but during one of these discussions, she tried to leave and took one of his guns, waving it around while their

² No last name was provided at trial. RP 460.

daughter was in the other room; White eventually took the gun away from her, restrained her, and called her parents. RP 60-61.

Sometime after that, she woke him up with a gun on his chest telling him to kill her and that he and their daughter would be better off without her. RP 64. He was able to talk her down and told her that she needed help; he took away the guns and she thanked him and apologized. RP 64-65. When he got to work later that day, he was notified that Spuck reported a domestic violence incident, alleging he assaulted her after he found out about her affair with Benjamin. Ex. 206 at 21 (health records re April 2, 2015 incident). Spuck moved in with Benjamin for a few days, RP 696, and then, apparently, back in with White. A military investigation into Spuck's domestic violence allegations concluded her claims were unfounded, but found White was a victim of emotional abuse.³ Ex. 201.

Spuck became increasingly volatile over the next few months and the police were called to investigate confrontations she had with White. See RP 67-70 (tried to take his car, police called; showed up and tried to take the child while she was sleeping, police called). At the end of May 2015, she attempted suicide again, trying to jump off the Tacoma Narrows Bridge. Ex. 202 at 25-26. Witnesses saw her on the outside rail of the bridge attempting to jump and called the police. Ex. 206 at 53. That same

³ White filed a petition for a protection order, but missed the hearing date because he was deployed at the time. Ex. 220.

night she sent White a suicide note. Ex. 204. During her medical intake following the incident Spuck reported she had been being treated for postpartum depression. Ex. 206 at 53. She was then admitted for inpatient treatment for three days. RP 512.

2) Separation and Agreement to Share Residential Time (May 2015-2016)

After this last suicide attempt, Spuck moved out of White's home for good and moved in with her parents. Spuck's parents encouraged White to seek legal action because their daughter would not agree to get the treatment she needed; instead, the parties informally agreed to a 50/50 residential plan for the child if Spuck did treatment. RP 73-75. Spuck then began seeing a therapist regularly for the next year (until June 2016).

Despite her therapy, Spuck was still emotionally volatile. After the suicide attempt on the bridge, she still wanted to reconcile with White and fell apart when he told her he did not think he could continue their relationship. RP 197 (panic attack). He then relented, telling her there was potential, because he was worried she would regress and go back to being suicidal. RP 198. Over the next several months, the 50/50 schedule went relatively smoothly so long as Spuck thought they were getting back together. But when White was finally honest that he did not want to reconcile and began to see other people, Spuck lost control, stalking and confronting him when she thought he was with other women and picking

fights over a right of refusal to which they informally agreed. RP 199-201. She also ignored him when he reached out to ask about their child when he was deployed. RP 204.

In July 2016, White began dating Leslie Swope,⁴ who he eventually married. RP 14. Once Spuck found out about Swope, the stalking and confrontations worsened. Spuck threatened to keep A.W. from White, followed Swope, drove by the house to see if her car was there, and on one occasion during an exchange when Swope was present, ripped A.W. out of White's arms and sped away in her car, tires squealing. RP 210-211. Another time when she saw Swope's car at White's house while White was at work, she banged on the door and demanded that Swope give back A.W. and then called the police. RP 210-212. This frightened Swope and her young children. RP 212. As these incidents continued through the end of 2016, RP 698, 834, White was concerned about Spuck's increasing emotional instability and feared her unresolved mental health issues might result in another suicide attempt. RP 213.

B. PETITION FOR PARENTING PLAN AND TEMPORARY ORDERS RESTRICTING SPUCK'S RESIDENTIAL TIME

White consulted an attorney and in early February 2017, filed a petition for parenting plan and motion for an ex parte restraining order. RP

⁴ Leslie changed her name when she married White. Here, for clarity's sake, she will be referred to as Swope.

213-215; Ex. 225; CP 83-88. On February 3, 2017, following a hearing, the court issued an immediate restraining order limiting Spuck's residential time and requiring it be supervised by her parents. Supp. CP ___ (sub 2/3/17 order). On February 10, per Spuck's request, the court revisited the order and ruled it remain in full force and effect pending a hearing on February 15. Supp. CP ___ (2/10/17 order). The court further ordered, per the parties' stipulation, that both undergo psychological evaluations. Id.

At the hearing on February 15, the court entered a temporary parenting plan that continued to limit Spuck's residential time to every other weekend (though permitted her to attend A.W.'s swim lessons twice weekly) and gave White sole-decision making. CP 126-140. The court further ordered Spuck to stay away from the child's daycare, CP 147, and appointed a GAL. CP 151-155. The court denied Spuck's subsequent requests to remove the supervision requirement and to prohibit Swope's contact with the child. CP 160-162, 193-195.

In July 2017, White's work schedule changed requiring him to work the weekends he was scheduled to have residential time with A.W., so he asked Spuck to swap weekends. Supp. CP ___ (sub 9/6/17 motion). Spuck refused unless White agreed to remove the supervision requirement. Id. The issue was ultimately resolved by a court order removing the

supervision requirement and switching White's weekends to coincide with his days off. CP 206-208.

C. PSYCHOLOGICAL EVALUATIONS & GAL REPORT

By October 2017, the psychological evaluations were completed, Ex. 13, 14, and the GAL filed her report. Ex. 17. According to the psychological evaluation conducted by Dr. Mark Whitehill, Spuck "demonstrated a tendency to deny psychological difficulties," had "personality traits inimical to the maintenance of long-term interpersonal relationships," and "responded in a manner consistent with persons known to be unwilling to examine their own role in stressful situations and who may react by behaving erratically." Ex. 13 at 15, 18. Dr. Whitehill opined that Spuck's depression preceded her pregnancy and there was merit to the belief that she had been suicidal before May 2015, though noted it had been more than two years since the suicide attempt and her behavior and parenting "should be judged on current functioning." Ex. 13 at 18-19. He concluded that she "remains in need of therapy to address the maladaptive personality traits ... which are likely to cause her interpersonal difficulties," but did not believe those issues required supervision when interacting with her child. Ex. 13 at 19.

As to White, Dr. Whitehill noted evidence of rigidity of thinking, deficiencies in insight and a tendency to act erratically under high-stress

interpersonal circumstances. Ex. 14 at 22. Thus, he opined “it is not difficult to see that these traits would be ascendant in his relationship with an emotionally volatile person such as Lindsay and that conflicts between them were likely to continue in their management of A.W.” Ex. 14 at 22. He concluded White would benefit from therapy and parenting education Ex. 14 at 23. He further recommended both parents meet with a family therapist to coordinate a parenting plan but deferred further recommendations to the GAL and the court. Ex. 13 at 19, Ex. 14 at 23.

The GAL agreed with Dr. Whitehill’s assessment that Spuck’s depression was farther reaching than postpartum depression. Ex. 17 at 3. She considered the last suicide attempt to be recent enough to merit concern. *Id.* She further agreed with what Dr. Whitehill identified as Spuck’s “conflict driven behavior,” noting what she saw as “a transition from attention-seeking/conflict-driven behavior for issues regarding self, (i.e. suicidal attempts), to attention seeking/conflict-driven behavior for medical care of [A.W.] as well as ‘co-parenting’ issues at the time.” Ex. 17 at 4. The GAL also noted Whitehill was unclear whether the therapy Spuck completed addressed this conflict driven behavior and concluded it had not. Ex. 17 at 4. Rather, as her investigation revealed, Spuck increasingly engaged in conflict-driven behavior that interfered with her parenting (e.g., showing up at White’s home and trying to take A.W.

because Swope was watching her; questioning White's attention to A.W.'s health/medical issues resulting in unnecessary medical appointments and conflict; monitoring A.W.'s attendance at swim lessons and involving YMCA staff; trying to gain access to daycare sign in sheets to see if who was picking up A.W.). Ex. 17 at 4-8.

The GAL did not find any merit to Spuck's allegations of domestic violence or abusive use of conflict by White, other than some access to information issues, which she explained as "most likely reactionary to the conflict driven by Mother" regarding A.W.'s health, daycare and extracurriculars. Ex. 17 at 8. The GAL recommended a parenting plan giving White sole decision-making and the majority of the residential time, with no supervision during Spuck's time. She recommended a three-phase plan that would increase Spuck's residential time (up to 6/14 overnights) upon completion of recommended therapy. Ex. 17 at 10.

Both parties participated in therapy as recommended by Whitehill. RP 427, 699. In December 2017, the parties agreed to lift the restriction on Spuck's access to the daycare and enter a temporary residential schedule that tracked phase 2 of the GAL's recommendation. CP 260, 264.

In January 2018, A.W. disclosed to a daycare worker that Spuck's boyfriend, Richard Fujita, held her down by her legs because she was "being bad" and that her mommy would not let her call her stepmother

(Swope) “mommy,” which upset her. RP 182-183. A CPS investigation concluded the allegations were unfounded. RP 285.

D. TRIAL

In April 2018, the parties proceeded to trial on the parenting plan. White asked the court to make a finding of abusive use of conflict and have Spuck complete a year of counseling and give him sole decision-making. RP 236-237. The only change he sought to the current temporary parenting plan was to change the midweek visit to a different day (Thursday to Friday instead of Wednesday to Thursday). RP 239. The GAL testified consistent with her report and recommended that White remain as the primary residential parent and continue to have sole decision-making. RP 97-104, 164.

Spuck asked to be the primary residential parent and said she wanted joint decision-making if White participated in co-parenting therapy, RP 670-671, 675, while at the same time acknowledging that the conflict between her and White was such that face-to-face contact “should be avoided.” RP 636, 712. She denied having a history of depression or multiple suicide attempts, RP 465, 472, 480, 487, admitting only to the Tacoma Narrows Bridge suicide attempt. RP 514-515. She persisted with these denials throughout the trial even when confronted with her own past admissions and third party reports that she had suffered from depression

for at least seven years and had other suicide attempts. See RP 694, 716-721, 726, 731-733, 736-737; Ex. 206 at 39, 40.

Spuck's current therapist, Carrie St. John, testified she had no concerns about future suicidal ideations, but admitted that Spuck only disclosed the one suicide attempt at the bridge, not any of the other incidents in 2014 involving guns. RP 299. When asked if she felt she could testify that Spuck has been open and transparent about her past, St. John said she did not know. RP 306. She also admitted that it would put Spuck at a higher risk if she had other past suicidal ideations as opposed to a one-time incident over a break up. RP 301.

E. COURT'S DECISION & FINAL ORDERS

On June 5, 2018, the court issued a sealed written ruling. CP 292-300 (Decision). The court declined to follow the GAL's recommendation and instead found it to be in the child's best interests to be placed in Spuck's primary care and gave her sole decision-making on education and medical decisions. As the court found, "Ms. Spuck is the parent most likely to foster a relationship between [A.W.] and her father, and her father's family." Decision at 12. The court noted that "under different circumstances" it would have continued "the parties' historical joint custody arrangement without question," but faulted White's "presentation of this case" which the court found "amounts to an abusive use of

conflict.” Decision at 12. The court found that White “manufactured an emergency using information that he had been aware of for years concerning Ms. Spuck’s mental health,” and “obtained ex parte relief placing [A.W.] with him based on that information,” Decision at 12, despite the fact that the order was reviewed and affirmed twice more by two different judicial officers. See Supp. CP __ (sub 2/10/17 order; sub 2/15/17 order). The court also found White “alienated Ms. Spuck by supplanting her role in [A.W.]’s life with his new wife,” and it had “no confidence that he would ever promote a relationship between [A.W.] and her mother, or her mother’s family.” Decision at 12.

While the court acknowledged Spuck “made a serious suicide gesture in May 2015” and suffered from mental health issues in the past, the court concluded she “has put those issues behind her.” Decision at 10. The court discounted the prior suicide attempts, finding they occurred either before A.W.’s birth or were “incidents that were misconstrued, exaggerated, or simply untrue,” noting the evidence of “other purported attempts” was “inconclusive,” despite documented admissions and reports by third parties of these earlier suicide attempts. Decision at 2. The court also rejected evidence that Spuck had not been truthful with her mental health providers and failed to disclose the extent of her past mental health issues. Decision at 10 (“The Court does not agree with Mr. White’s

assertion that Ms. Spuck was not truthful with her mental health providers and did not disclose the extent of her past mental health issues.”).

Additionally, the court made findings under RCW 26.09.191 for both parents: long-term emotional impairment for Spuck and abusive use of conflict for White, but also added to the findings the phrase: “with no parenting limitations.” Decision, at 12; see, also CP 303. However, the court’s award of sole decision-making to Spuck was based on “the level of conflict and the Father’s refusal to co-parent.” CP 303. The court ordered that if White agreed to participate in co-parenting counseling and the counselor recommended 50/50 residential care and joint-decision-making, White could seek those changes. CP 303, 312.

The court entered final orders on July 13, 2018. CP 302-313, 314-318, 319-331. White appeals. CP 332-362.

IV. ARGUMENT

A. THE STANDARD OF REVIEW.

Generally, a trial court’s parenting plan decision is reviewed for an abuse of discretion, meaning “manifestly unreasonable or based on untenable grounds or for untenable reasons.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362, 1366 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal

standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.* at 47.

B. THE COURT ABUSED ITS DISCRETION WHEN IT ENTERED THE RESIDENTIAL SCHEDULE.

This case involves a very young child and two young parents, who had stopped dating before they knew they had conceived a child together. These parents face more than the usual challenges inherent in such circumstances and both have performed unevenly as they navigate these circumstances. However, both are devoted to the child and both have demonstrated the ability to provide the child with the care she needs and, consequently, both have strong bonds with the child. Or, as the court found, “both parties have stable, strong, nurturing relationships with their daughter.” Decision, at 8; see, also Decision at 11 (“strong relationship with both parents”).

Accordingly, recognizing “the fundamental importance” of the child’s relationship with both parents, the court’s duty is to foster both those relationships. RCW 26.09.002. In particular, unless necessary to protect the child from harm, the child’s best interest “is ordinarily served” by maintaining, as much as is practicable given the parents’ separation, “the existing pattern of interaction” between each parent and the child. *Id.*

1) The trial court improperly relied on the friendly parent concept.

In this case, the kind of continuity contemplated by the statute would mean an equally shared residential arrangement, or what the trial court described as “the parties’ historical joint custody arrangement,” which it would have ordered “without question” if not for its finding “Ms. Spuck is the parent most likely to foster a relationship between [A.W.] and her father, and her father’s family.” Decision at 12. This is an impermissible consideration under Washington law.

Under the “friendly parent” concept, “primary residential placement is awarded to the parent most likely to foster the child's relationship with the other parent.” *Lawrence v. Lawrence*, 105 Wn. App. 683, 687, 20 P.3d 972, 974 (2001). As this Court stated, “Bills adopting the friendly parent concept, either as a presumption or a factor to be considered in custody decisions, have been rejected by our Legislature every year since 1982.” *Lawrence*, 105 Wn. App. at 687. “The Legislature's rejection of this rule is consistent with our state's policy that ‘custody and visitation privileges are not to be used to penalize or reward parents for their conduct.’” *Lawrence*, 105 Wn. App. at 687-88. “Because the 'friendly parent' concept is not the law of the state, a trial court's use of the concept in a custody determination would be an abuse of discretion.” *Lawrence*, 105 Wn. App. at 688.

Here, the court used precisely the “friendly parent” language prohibited by *Lawrence*, leaving no question but that the court abused its discretion. Other cases find the “friendly parent” concept invoked by language even less clearly prohibited, as, for example, by finding one parent “best suited to help the children have a positive relationship with both parents” and likely to “provide the children with the best opportunity to foster and continue their relationship with both parents.” *Matter of Marriage of Farrell-Milosavljevic & Milosavljevic*, (unpublished decision, No. 76403-9-I, 2018 WL 3434706, at *8, Wash. Ct. App. July 16, 2018) (reversing given improper use of the friendly parent concept, premature application of the CRA, and lack of substantial evidence supporting the restrictions). Here, the trial court expressed “no confidence that [White] would ever promote a relationship between [A.W.] and her mother ...” Decision at 12.

Similarly, this Court reversed where the trial court repeatedly expressed concerns about the mother’s behavior toward the father, her “hostility and uncooperative nature,” concluding the father was more likely “to be flexible” and “perhaps provide more contact” with the mother and did not otherwise explain its analysis of the statutory factors. *In re O.E.D.*, 189 Wn. App. 1007 (2015) (unpublished decision, No. 71899-1-I, 2015 WL 45333848, at *10 (Wash. Ct. App. July 27, 2015). This Court

admonished the trial court on remand not to consider the friendly parent concept.⁵ Here, the trial court conditioned any potential increase in White's residential time on his participation in co-parent counseling with Spuck. Decision at 12, CP 312.

As discussed further below, the court took a harsh view of White, sometimes ignoring undisputed or corroborated facts he argued to support his position, and ignoring Spuck's contribution to the conflict. Repeatedly, and also addressed below, the court criticized White, but not Spuck, for essentially the same behavior (for withholding information from treating psychotherapists, for example: Decision at 7). Certainly, the court had cause for concerns about both these parents, as Dr. Whitehill's report describes. However, these concerns must be constrained by the task the court confronts: serving the best interest of the child. In that effort, the court may not "use residential placement to penalize or reward parents for their conduct." *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983). Yet that is precisely what the court here did when it impermissibly relied on the friendly parent concept to upend the historical parenting arrangement, an unwarranted alteration in the child's "existing pattern of interaction" with both her parents.

⁵ These unpublished cases are cited for comparison of language and because only three reported cases deal with the "friendly parent" concept. Both of the other reported cases are discussed below.

2) The Court improperly found abusive use of conflict and improperly relied on that finding to establish the residential schedule and decision-making.

The court said “[u]nder other circumstances” it would have continued the historical shared parenting arrangement and then, as discussed above, described those circumstances as ones our law prohibits the court to consider. Decision at 12. The court also entered findings under RCW 26.09.191(3) for both parents: abusive use of conflict (White) and long-term emotional impairment (Spuck). Decision at 12, CP 303. The court said it imposed no limitations on the parties in respect of those findings. Decision at 12; CP 303.

Nevertheless, the court’s abusive use of conflict finding cannot stand, since it is at odds with the statute and our case law and because it is, frankly, confusing whether or not the court did in fact limit White’s residential time on this basis.⁶ An abusive use of conflict finding requires evidence of both a parent’s problematic conduct and “relatively severe physical, mental, or emotional harm to a child” caused by the conduct. *In re Marriage of Chandola*, 180 Wn.2d 632, 636, 327 P.3d 644 (2014). In other words, RCW 26.09.191(3) bars the trial court from precluding or limiting any provisions of the parenting plan “unless the evidence shows

⁶ Explicitly, the court awarded sole decision-making to Spuck on this basis: CP 303; Decision at 12.

that “[a] parent's ... conduct may have an adverse effect on the child's best interests.” *Chandola*, 180 Wn.2d at 642.

No such evidence exists here, either in terms of White’s conduct or harm to the child. Unquestionably, the parties engaged in conflict, including before they became parents. This was mutual combat, as the numerous calls to police by both parties, witnesses, etc. make plain. Dr. Whitehill explains in detail how both parties’ personalities dispose them to conflict. Decision at 3-7. He diagnosed Spuck as having “Turbulent personality type with histrionic and narcissistic features,” with “personality traits inimical to the maintenance of long-term interpersonal relationships.” Decision at 3, 4. Plainly recognizing Spuck’s role in the relationship conflicts, he recommended a family therapist to help Spuck “mitigate the frequency, intensity, and duration of future conflicts with [White].” Decision at 5.

Dr. Whitehill diagnosed White with “Obsessive-compulsive personality disorder with turbulent and histrionic features,” with problems with insight, rigidity, and impulsivity – traits likely to manifest in a relationship “with an emotionally volatile person such as [Spuck].” Decision at 5, 7. As this Court has recognized, “it is common for parties seeking divorce or separation to be uncooperative.” *Jacobson v. Jacobson*, 90 Wn. App. 738, 745, 954 P.2d 297, 300 (1998). With these two young

parents, their personalities, and their histories, this axiom has special force, which is precisely why Dr. Whitehill recommended treatment for both.

Yet, the trial court tended to discount Spuck's contributions to the conflict, some of which may fall within its fact-finding authority, but which overall appears unfair, as discussed in the section below. Here, the point to be made is how the court improperly tasks White for litigating, characterizing that as an abusive use of conflict. Decision at 12; Ex. 225. First, it should be recalled that White originally resisted the suggestion by Spuck's parents that he initiate court proceedings. RP 73-75. Second, it should be noted that when he did initiate court proceedings, not only had he begun a new relationship (seven months earlier), he was preparing to retire from the military (so would no longer be subject to deployment) and was about to start a new job. In other words, the changes in his life were more extensive than what the court focused on.

In any case, it is not abusive to litigate disputes with your child's other parent. Nothing White did in the early court proceedings was improper: with notice to Spuck, he presented evidence to neutral arbiters, who agreed with him on the appropriate remedy: temporary primary placement with White and supervised visitation with Spuck. That the trial court later disagreed with this series of decisions does not make White

abusive in seeking them. He did not falsify evidence or engage in abusive litigation tactics. Indeed, his concerns, based on a verified history of Spuck's long-term mental health problems, were endorsed by the Guardian ad Litem. Again, the court has the authority to discount the GAL's view but to attribute that view to White's manipulation simply belies the evidence. The GAL interviewed both parents, the child, and the director of daycare, and reviewed police reports, daycare records, medical records, Dr. Whitehill's psychological evaluations, and CPS reports. Ex. 17. She did not rely alone on White's reports.

Nor was the GAL alone in finding grounds for concern about Spuck, as noted above. Dr. Whitehill agreed Spuck's issues predate her relationship with White and will continue, since they are aspects of personality. Ex. 13 at 18-19. He saw no basis at present to impose a supervision requirement, but he did not make recommendations either way for residential time. Ex. 13 at 19. He wanted the parties to collaborate with a family therapist to arrive at a parenting plan with an eye to reducing their conflict and for both to receive treatment and parenting classes. Decision at 5. Implicit in the recommendation is that both parties need help in avoiding conflict.

Most importantly, there was no evidence these early stages of the litigation had any adverse effect on the child, which is not to minimize the

disruption of the temporary orders. But the child was very young and experienced in separations from both parents, including while her father was deployed overseas. Indeed the daycare provider testified there were no noticeable differences in the child's behavior with parent drop-offs. RP 367 (excited to see both parents at pick up; describes her as "a sweetheart. She's very spunky. She's very determined..."). Simply, there was no evidence of harm such that would be grounds to deprive the child of the substantial time with her father to which she was accustomed (speaking here of pre-litigation 50/50 arrangement). Here, the court was careful to take Spuck as she is today: not depressed, not suicidal, having benefitted from some effective therapeutic intervention. Conversely, the court did not extend this principle to White, who finally had removed himself from a relationship that obviously did not bring out the best in either of the parties. The court's discretion "does not extend not extend to completely overlooking factors material to the determination." *In re Marriage of Landauer*, 95 Wn. App. 579, 975 P.2d 577 (1999). Yet that is what happened here.

In particular, for example, when the court considered "[e]ach parent's *past* and *potential for future* performance of parenting functions," as required by RCW 26.09.187(3)(a)(iii), the court faults White for "his failure to grasp the long-term impact his behavior toward Ms. Spuck will

have on [A.W.]” Decision at 10. No evidence suggests White failed to successfully parent A.W. during the years before and after the separation. (Even the court acknowledged his monitoring A.W. from across the street a one-time mistake in judgment. Decision at 7.)

In short, White demonstrated he is a fully capable caregiver to A.W. The court, however, rather than focusing on how White parents A.W., again focuses on what it perceives as White’s one-sided conflict with Spuck, such that his “potential for future performance of parenting functions is contingent upon him learning the skills necessary to co-parent with [A.W.’s] mother, rather than supplanting her with his new wife.” Decision at 10. There is a lot to unpack here, including the court’s apparent alignment with Spuck in opposition to White’s marriage.⁷ Notably, Dr. Whitehill flags Spuck’s concern with A.W. calling Swope “mommy” as a problem Spuck needs to get over. Decision at 5 (not uncommon, better for kids to be able to use parental labels).

Simply, the court’s abusive use of conflict finding pervades its analysis of the statutory factors, in particular, skewing the analysis against White in a manner the evidence does not support. White and Spuck have a turbulent history, but only White got tasked with the blame for that,

⁷ The court finds White “relies heavily on his new wife” for caregiving, but ignores Spuck also relies heavily on her family for caregiving. What would be really concerning if both had entered into relationships where their partners could not be relied upon to assist in the countless day to day challenges of parenting.

specifically, for seeking temporary orders. In fact, White brought well-founded concerns to the court at the start of the proceedings, which prompted evaluations and appointment of a G.A.L. By the time the parties reached trial, some light was shed on both parties. What did not surface was conduct by White constituting an abusive use of conflict. He did not, for example, insert the child into the conflict, as occurred in *In re Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), where the mother made straight-out lies about the father, involving the children in criminal investigations. Here, there is no question White, assisted by experienced and reputable trial counsel, brought to court concerns about Spuck grounded in fact, which two judicial officers properly relied upon to enter temporary orders. Later, these facts were corroborated by the parenting evaluation and persuaded the GAL to recommend primary placement with White. That the court disagreed with this analysis does not render it an abusive use of conflict.

No matter what, the court certainly cannot use its disapproval of White's litigation strategy to punish him because that is a purpose at odds with the best interest of the child. In other words, assuming arguendo the facts supported a finding of abusive use of conflict by White (and him only), the court can impose restrictions only after "identifying a specific, and fairly severe, harm to the child." *Chandola*, 180 Wn.2d at 647-648.

Here, the child is thriving. Certainly, the parties' turbulent history is regrettable, but the relationship in which it was situated is over; the parties are moving on with their lives. To their credit, despite their own personal challenges, they came together to provide love and care to their daughter, who seems, as children often do, to bring out the best in her parents.

The court did not take both these parents in this broader context. Relying on the friendly parent doctrine took the court off course, as did its use of the abusive use of conflict finding. Because its decision was based on untenable grounds and an untenable basis, its orders should be vacated and the case returned for consideration of the factors free of these impermissible concepts. The same applies to the court's order on decision-making suffers from these same flaws, as it is based on the same essential finding. Decision at 12 ("Due to the level of conflict and the Father's refusal to co-parent"). Decision at 12.

C. RATHER THAN DETERMINING A PARENTING PLAN THAT SERVED THE CHILD'S BEST INTERESTS, THE COURT APPEARED BIASED AGAINST THE FATHER AND ENTERED FINDINGS NOT SUPPORTED BY THE RECORD.

While the record establishes that both parents contributed to the conflict – indeed the court acknowledges this fact - the court's findings blamed only White and were the basis for its residential time and decision-making decisions. The unfairness of this approach is demonstrated not only by the court's improper reliance on the friendly parent concept (using

this as the “tie breaker’ and defaulting to mom as the friendly parent) but by making findings unsupported by the evidence.

For example, the court found the parties successfully co-parented prior to the litigation and the mother did not make the joint custody arrangement difficult prior to the litigation. CP 2914, 300; Decision at 10. Yet, Spuck admitted that she called the police as late as December 2016 over what she described as a “parenting dispute.” RP 698 (referring to incident when she banged on the door demanding Swope give her A.W., see RP 210-212, 327).

The record is undisputed that tension between the parties had been mounting since White began to date other people, resulting in constant disputes over co-parenting and their informal agreement to a right of first refusal. RP 199-202, 838. Earlier that year, even before White began dating Swope, Spuck drove by and saw White at the neighbor’s house and banged on the door demanding to know the whereabouts of A.W. RP 204, 834.⁸ Another time when Swope was present, Spuck ripped A.W. from White’s arms and sped off in her car, tires squealing. RP 210; see also RP 204 (Spuck checking up on him and who he was with when he had A.W.); RP 210 (Spuck threatening to keep A.W. from White in 2016); RP 70, Ex.

⁸ A.W. was across the street sleeping in her crib while White was watching football at the neighbor’s with a baby monitor. The court found “this was an isolated event” and not an issue of failing to protect the child. Decision at 7.

202 at 34-35 (Spuck showing up to take the baby late at night while she was sleeping; police called); RP 826 (fight over right of first refusal); RP 847-848 (fight over car seat); RP 835 (Spuck withheld A.W. when Swope was at White's home). And as the GAL noted, Spuck further stoked conflict with her hypervigilance about A.W.'s health and criticism of White's inattention; this resulted in excessive doctor visits for A.W. as White overacted for fear of being accused of neglecting A.W.'s health. RP 164.

These facts are directly pertinent to the court's framing of the issues. The court's discretion "does not extend not extend to completely overlooking factors material to the determination." *Landauer*, 95 Wn. App. at 584.

The court also found White "manufactured an emergency using information that he had been aware of for years concerning [the mother's] mental health" and "obtained ex parte relief placing [the child] with him based on that information." Decision at 12. White did not "manufacture an emergency;" his motion was based on the well-documented history of Spuck's mental health issues. Ex. 225 at 2 (stating Spuck "has had at least three severe suicide attempts in the past three years," referencing "attached police reports, 911 CAD reports and Military Memorandum."). Indeed these facts were reviewed by two different judicial officers who

agreed a restraining order was appropriate until the matter was further investigated. Supp. CP _ (sub 2/3/15 order, 2/10/15 order); CP 141-148. The GAL likewise agreed it was appropriate for White to have asked for supervised visits until the matter was further investigated and psychological evaluations were completed. RP 102. Ultimately, even the court found Spuck to have an impairment, and the longstanding nature of her mental health issues was confirmed by Dr. Whitehill. Rather, the court took the view that Spuck, thanks to therapy, had improved.

The court criticized White for the mere suspicion he had not provided his therapist the psychological evaluation, though, indisputably, he had revealed the diagnosis. Decision at 7. At the same time, the court found Spuck was truthful with her mental health providers and did not fail to disclose the extent of her past mental health issues. Decision at 7 10; see, also, Decision at 7 (finding her therapist testified she “was forthcoming about her past, including past suicidal ideation, transparent, and cooperative”). In fact, as noted above, Spuck’s current therapist testified Spuck did not disclose any past suicidal ideations except the May 2015 bridge incident, and given this failure to disclose, the therapist could not say whether Spuck had been transparent about her past mental health challenges. RP 299, 306. The therapist acknowledged the importance of withholding this information, since Spuck was at “higher risk” if she had

other past suicidal ideations as opposed to a single isolated incident. RP 301. Basically, the court ignored the evidence to find Spuck “good” and White “bad.”

Similarly, although the court found Spuck had not substantiated her domestic violence allegations and otherwise discounted numerous inconsistencies in her testimony, including where her assertions were flatly refuted, the court found her credible. Despite a very similar pattern in White’s presentation of the evidence (e.g., many of his assertions corroborated), the court globally found he lacked credibility. Again, an inconsistency hard to square with the record.

Finally the court found the evidence was “inconclusive” regarding the mother’s past suicide attempts. Decision 2 n. 2. Actually, as detailed above and confirmed during cross-examination of Spuck, her past suicide attempts were verified both by Spuck’s own admissions and by third party reports to police and health care providers. See RP 694, 716-721, 726, 731-733, 736-737, Ex. 203, Ex. 206. White did not make up this stuff. Spuck’s own parents were concerned for her.

These and other examples above reveal an apparent bias against White, when fairness demands “an attitude of neutrality.” *In re Marriage of Black*, 188 Wn.2d 114, 127, 392 P.3d 1041, 1048 (2017) (remanding to new judge); *accord In re Custody of Stell*, 56 Wn. App. 356, 371, 783 P.2d

615, 623 (1989). This bias caused the court to exaggerate White’s failings and minimize Spuck’s, when what is required is an impartial view of the child’s best interest, which includes fostering her already strong, loving bond with both parents. The child is young. The parties are young. Our law and policy wants them to succeed in the choice they made to raise this child together, including by fulfilling their own potentials. The trial court’s decision does not serve that policy and flatly violates our law.

The effect of this variable treatment of the parties was pronounced, steering the court away from the 50/50 plan it otherwise would have “without question” ordered. Decision at 12. Such plans formerly were disfavored, with the Legislature requiring evidence of “a satisfactory history of cooperation and shared performance of parenting functions” before entering a parenting plan requiring equally shared residential time. *Rossmiller v. Rossmiller*, 112 Wn. App. 304, 309, 48 P.3d 377, 379 (2002), citing former RCW 26.09.187(3)(b)(ii)(B).⁹ Since then, the Legislature has lowered the bar considerably, allowing such plans so long as there are no mandatory limitations under RCW 26.09.191 and in consideration of geographic proximity.¹⁰

⁹ This is the third of the three reported cases addressing the “friendly parent” concept.

¹⁰ RCW 26.09.187(b) now provides:

For example, in *Rossmiller*, this Court rejected a challenge to the trial court denying an equally shared plan by observing the parties’ “inability to cooperate” disqualified them under the former statute. *Id.*, at 310. Here, by contrast, the trial court specifically noted the parties’ history of cooperative parenting. Decision at 10. While that history was not untroubled, it provides a foundation – with their relationship concluded – to move forward together to do their very best by their daughter.

V. CONCLUSION

For the foregoing reasons, this Court should vacate the court’s parenting orders and remand for entry of a orders establishing an equally shared residential schedule, as the court indicated it would do absent the circumstances it improperly considered. Decision, at 12 (“Under different circumstances, the court would continue the parties’ historical joint custody arrangement without question.) In light of this change and because the court’s order on decision-making likewise relies on these impermissible considerations, that order also should be vacated.

Respectfully submitted this 15th day of February 2019.

Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties’ geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

/s Patricia Novotny, WSBA #13604

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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

In the MATTER OF the MARRIAGE OF Erin D. FARRELL-MILOSAVLJEVIC, Respondent,
and
Zmajko MILOSAVLJEVIC, Appellant.

No. 76403-9-I

FILED: July 16, 2018

Appeal from King County Superior Court, 15-3-03827-7,
Honorable [Richard D. Eadie](#), Judge.

Attorneys and Law Firms

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UNPUBLISHED OPINION

[Trickey, J.](#)

*1 Zmajko Milosavljevic and Erin Farrell-Milosavljevic (Farrell) had a contentious dissolution of their marriage. After several days of trial, the court issued a permanent parenting plan allowing Farrell to relocate to Toronto, Ontario, Canada with the children and restricting Milosavljevic's contact with the children due to abusive use of conflict and parental alienation. The trial court committed numerous errors in establishing the permanent parenting plan and the financial obligations. Therefore, we reverse and remand for a new trial.

FACTS

Milosavljevic and Farrell met in 2000. Farrell was a law student working in Notre Dame's immigration law clinic. Milosavljevic was a Serbian refugee seeking political

asylum. They moved to New Jersey so that Farrell could work as an immigration lawyer.

They married in October 2000. Their son, Z.M., was born in 2002. The family moved several times for Farrell's employment. Their daughter, S.M., was born in Massachusetts in 2006. Milosavljevic primarily cared for the children and the family's home, while Farrell worked at a law firm. He started his own carpentry business in Massachusetts.

In 2009, the family relocated to Washington so that Farrell could work as an immigration lawyer with Microsoft. Milosavljevic was forced to close his carpentry business. Farrell's early years at Microsoft were "grueling," and she worked extremely long hours.¹ Milosavljevic took care of the children and managed the family's home. He was the primary caregiver between 2009 and 2012, including driving the children to school and activities. In 2012, Milosavljevic began working as a field carpenter for a construction firm.

Farrell made all the decisions concerning the children's education, mostly without consulting Milosavljevic. These decisions included sending Z.M. and S.M. to private schools. Both Z.M. and S.M. were diagnosed with [Attention Deficit Hyperactivity Disorder \(ADHD\)](#) and struggled in school. Z.M.'s ADHD and whether to medicate him became a significant point of contention between Milosavljevic and Farrell, and Farrell and Z.M.

In mid-2012, Milosavljevic and Farrell's marriage began to deteriorate. Farrell filed for dissolution of the marriage in June 2015. The trial court issued a temporary order, which required Farrell to pay \$1,000 in monthly maintenance to Milosavljevic. The trial court also issued a temporary parenting plan under which the children would reside with Farrell, and Milosavljevic would have them for overnights on Wednesdays and every other weekend. Farrell obtained a temporary restraining order against Milosavljevic.

Milosavljevic and Farrell both alleged that the other suffered from mental health issues and had committed domestic violence. The trial court appointed a Guardian Ad Litem (GAL) to investigate and report on all issues relating to the development of a permanent parenting plan. The court also ordered the GAL to inquire into the allegations of domestic violence and mental health

issues against both Farrell and Milosavljevic, as well as Milosavljevic's substance abuse, abusive use of conflict, and refusal to seek needed services for the children.

*2 In November 2015, the GAL issued her first report which noted the complexity of the case. During her investigation, the GAL found insufficient evidence to restrict Milosavljevic's time with the children based on substance abuse, but recommended that he undergo a chemical dependency evaluation.

She found that Milosavljevic's allegations of domestic violence against Farrell were not credible. She identified isolated incidents of Milosavljevic using physical violence and his frequent loss of temper but was not concerned about physical harm to the children. She thought Milosavljevic's anger issues should be addressed as a mental health or abusive use of conflict concern.

The GAL also investigated both Farrell's and Milosavljevic's mental health. She found that Farrell had been diagnosed with depression and ADHD, which were adequately addressed through medication and therapy. She encountered variable information about Milosavljevic's mental health. His current therapist opined that Milosavljevic had an adjustment disorder that was well managed. An earlier therapist alleged that Milosavljevic suffered from significant personality disorders and posed a risk of harm to himself or others.² The GAL believed the prior therapist's claims were exaggerated but recommended a psychological evaluation to resolve the inconsistent opinions.

Finally, the GAL explored Milosavljevic's alleged abusive use of conflict and parental alienation. Specifically, the GAL stated that Milosavljevic had "engaged ... in a campaign to turn [Z.M.] against [Farrell], in a manner that could have long-term damaging effects on [Z.M.'s] psychological and emotional development, and his relationship with [Farrell]."³ The GAL opined that some of Z.M.'s preferences for Milosavljevic were due to neutral factors, such as a teenage boy's tendency to seek out his father, Farrell's unavailability due to long work hours, and a general preference for Milosavljevic's parenting style. But Milosavljevic's behavior reinforced those factors. The GAL also found that Z.M. was too involved in the conflict between his parents. Additionally, Milosavljevic and Z.M. openly spoke negatively about Farrell, which in turn negatively impacted S.M.

As a result of Milosavljevic's behavior, the GAL recommended that his contact with the children be restricted until a neutral psychological evaluation was conducted. She also recommended counseling for the children and Milosavljevic in order to address Z.M.'s alienation from Farrell. Significantly, the GAL also recommended that the "final parenting plan" restrict Milosavljevic's contact with the children due to his abusive use of conflict.⁴

*3 Subsequently, the court issued a temporary parenting plan implementing the GAL's recommendations by replacing Milosavljevic's residential time with four supervised visits. After these four visits, his residential time would resume. In addition, the trial court ordered Milosavljevic to undergo a psychological evaluation.

In April 2016, Dr. Marnee Milner conducted Milosavljevic's psychological evaluation and submitted a report of her conclusions. She concluded that Milosavljevic suffered from an adjustment disorder and mild ADHD, but did not exhibit the severe personality disorders alleged by his previous therapist. Dr. Milner noted that Milosavljevic could have problems with impulsivity, poor decision-making, and insight into his own emotional and psychological well-being. She also opined that Milosavljevic's perception that Farrell had been emotionally and financially abusive could indicate delusions about the relationship that would make him quick to speak negatively about Farrell.

In May 2016, before the dissolution trial then set in July, Farrell obtained employment in Toronto, Ontario, Canada and petitioned the trial court to allow Z.M. and S.M. to relocate with her. Milosavljevic objected to the relocation. Neither Z.M. nor S.M. wanted to leave Seattle. The trial court issued temporary orders allowing the children to reside with Milosavljevic while Farrell moved to Toronto. The court continued the trial date to October and then to December.

The GAL submitted a second report in July 2016.⁵ She did not find any reasons to restrict Milosavljevic's contact with the children based on substance abuse, domestic violence, or mental health concerns. She no longer recommended restrictions against Milosavljevic due to his abusive use of conflict. She noted that Milosavljevic had "gained some skills in this area" with parent coaching and

therapy.⁶ She also acknowledged many positive aspects of Milosavljevic's relationship with Z.M. and that it was natural for a boy of Z.M.'s age to gravitate toward his father.

The GAL did find, however, that Milosavljevic continued to engage in abusive use of conflict and parental alienation. The GAL opined, “[T]he relationship between [Z.M.] and [Farrell] continues to deteriorate in an unhealthy manner. [Milosavljevic] is not solely to blame, of course, but his allowing [Z.M.] to continue to ‘tattle’ on [Farrell] contributes to [Z.M.’s] rejection of her.”⁷

The GAL also addressed Farrell's relocation in the second report. She mentioned Milosavljevic's abusive use of conflict in her analysis of the statutory factors governing child relocation that consider whether either parent is subject to restrictions on contact with the children. The GAL wrote, “[a]s noted in the earlier report, there should be a finding of abusive use of conflict against [Milosavljevic], based on parental alienation.”⁸ But she also opined that Z.M.'s relationship with Farrell had deteriorated due to both natural factors and Milosavljevic's influence.

After weighing the statutory factors, the GAL concluded that S.M. should relocate to Toronto with Farrell, while Z.M. should remain in Washington with Milosavljevic. The GAL noted that “[t]he relationship between [Farrell] and [Z.M.] has deteriorated to the point where it is not in [Z.M.’s] best interest to relocate with [Farrell] at this time.”⁹ The GAL concluded that “[g]iven their ages and the complex relationship between [Z.M.] and his parents, it is hoped that allowing each child to develop healthy relationships with both parents without the conflict that has arisen between [Z.M.] and [Farrell] will support their well-being.”¹⁰

*4 Pending trial and entry of the permanent parenting plan, the children remained in Washington and lived with Milosavljevic. In December 2016, the GAL met with Z.M. and S.M. and submitted a supplemental third report the trial court had ordered. The GAL found that S.M. had adjusted well to being in Milosavljevic's primary care and had benefited from spending time with Milosavljevic and Z.M. But S.M. had begun to withdraw from Farrell, and the GAL remarked that S.M. had absorbed some of Milosavljevic's arguments against Farrell. During the

meeting, S.M. independently expressed her desire to stay in Washington.

The GAL found that Z.M. still held negative views of Farrell, focusing on her perceived faults and her role in the dissolution. Z.M. had not made any effort to reconcile their relationship. The GAL expressed significant concern about Z.M.'s ability to cope if he were “‘forced’ ” to relocate with Farrell.¹¹ The GAL specifically noted that “all the blame for [Z.M.’s] rejection of [Farrell] should not be placed on [Milosavljevic], but he should accept some responsibility for his alienating behaviors.”¹² The GAL again recommended that Z.M. remain in Washington with Milosavljevic, and that S.M. relocate to Toronto with Farrell.

The parties' dissolution trial took place over several days in late December 2016. The GAL was one of the witnesses who testified. The court ordered that S.M. and Z.M. relocate to Toronto with Farrell. In oral remarks, the trial court stated that this decision would enable the children to have a positive relationship with both Farrell and Milosavljevic. The trial court believed that Farrell was more likely to ensure that both parents had a positive relationship with the children. The court stated, “I just made the decision that I think that the mother is the one that is more capable, more likely, more willing to do that.”¹³

The trial court also restricted Milosavljevic's contact with the children based on his abusive use of conflict and “long term pattern of alienation of the children, causing damage to their relationship with [Farrell].”¹⁴ The court appointed a case manager to establish and enforce communication guidelines between Milosavljevic and the children. The court directed the case manager to make and implement recommendations as to the appropriate residential schedule for the children, subject to the trial court's review.

The trial court ordered Milosavljevic to pay \$836.20 in monthly child support and 32 percent of additional expenses, including uninsured medical expenses, day care, private school tuition and tutoring, flights for visitation, and extracurricular activities. Farrell was responsible for the remaining 68 percent of these additional expenses. The trial court denied Milosavljevic's request for maintenance.

Farrell received a restraining order for one year against Milosavljevic.

Milosavljevic appeals.

ANALYSIS

Parenting Plan

Milosavljevic argues that the trial court erred by addressing the child relocation act (CRA), [RCW 26.09.405-.560](#), factors without applying the best interests of the child factors and establishing a permanent parenting plan under [RCW 26.09.187](#). Farrell responds that the trial court properly applied the correct legal standard to the relocation issue.¹⁵

*5 The trial court must fashion a permanent parenting plan that includes a residential provision that encourages each parent to maintain a loving, stable, and nurturing relationship with the child. [RCW 26.09.187\(3\)\(a\)](#). In order to achieve this, the trial court considers the best interests of the child to determine and allocate parenting responsibilities between the parties. [In re Marriage of Possinger](#), 105 Wn. App. 326, 335, 19 P.3d 1109 (2001). The best interests of the child are analyzed through the seven factors the trial court must consider when establishing a residential schedule. [RCW 26.09.187\(3\)\(a\)\(i\)-\(vii\)](#).¹⁶ The trial court must make a residential placement decision that advances the best interests of the child after considering the factors found in [RCW 26.09.187\(3\)](#). [In re Parentage of J.H.](#), 112 Wn. App. 486, 492-93, 49 P.3d 154 (2002).

A child's residential time with a parent must be limited when the parent's conduct meets certain statutorily defined circumstances due to adverse effects on the child. [RCW 26.09.191 \(2\)](#). In other situations, the trial court has the discretion to impose limitations. [RCW 26.09.191\(3\)](#). A child's residential schedule must be consistent with restrictions imposed under [RCW 26.09.191](#). [RCW 26.09.187\(3\)\(a\)](#). Limitations imposed under [RCW 26.09.191](#) may be dispositive of a child's residential schedule. [RCW 26.09.187\(3\)\(b\)](#).

Under the CRA, when residential time is shared between parents, the parent with whom the child resides the

majority of the time must provide notice of any intention to relocate. [RCW 26.09.430](#). When there is no parenting plan in place, with whom the child principally resides is a question of fact. [In re Marriage of Fahey](#), 164 Wn. App. 42, 57, 262 P.3d 128 (2011).

If the non-relocating party objects, the trial court must consider eleven factors to determine whether to permit the proposed relocation. [RCW 26.09.520](#).¹⁷ “The CRA shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child and the relocating person.” [In re Marriage of McNaught](#), 189 Wn. App. 545, 553, 359 P.3d 811 (2015) (quoting [In re Marriage of Horner](#), 151 Wn.2d 884, 887, 93 P.3d 124 (2004)). The CRA presumes that the intended relocation of the child will be permitted. [RCW 26.09.520](#). “A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the [eleven] factors.” [RCW 26.09.520](#). The trial court has the discretion to grant or deny a relocation after considering the relocation factors and the interests of the children and their parents. [Fahey](#), 164 Wn. App. at 56-57.

*6 The CRA applies when the person with whom the child resides a majority of the time wants to relocate. [RCW 26.09.520](#). As such, the CRA assumes that the parties have a residential schedule in place that establishes the parent with whom the child resides a majority of the time. This residential schedule is part of the permanent parenting plan determined through consideration of the best interests of the child.¹⁸ [RCW 26.09.187](#). Therefore, the CRA factors are generally assessed after the best interest of the child factors have been applied and the residential schedule is in place.

During an ongoing dissolution proceeding, a trial court may be required to determine the permanent parenting plan and whether relocation is appropriate at the same time. When establishing the permanent parenting plan, the trial court may not draw presumptions from the temporary parenting plan. [RCW 26.09.191\(5\)](#). As a result, the parent with the majority of the residential time is not defined by the temporary parenting plan in later proceedings.

Until a parent with whom the child resides a majority of the time is identified, the CRA factors do not apply.

This parent is identified by the residential schedule in the parenting plan or through factual inquiry if required. See [Fahey](#), 164 Wn. App. at 57. Therefore, when the permanent parenting plan and relocation are determined in the same proceeding, the trial court must first establish a parenting plan and residential schedule before turning to a CRA analysis.

While establishing the residential schedule in a permanent parenting plan generally requires consideration of the best interests of the child factors, RCW 26.09.191 restrictions may be dispositive of the child's residence without examination of the best interests of the child factors. RCW 26.09.187(3)(a). In such cases, the RCW 26.09.187(3) best interests of the child factors are essentially unnecessary and the trial court may proceed directly to consideration of the CRA factors under RCW 26.09.520.

In this case, the trial court imposed discretionary RCW 26.09.191(3) restrictions on Milosavljevic's contact with Z.M. and S.M. If properly imposed, these restrictions are dispositive of Farrell's role as the parent with whom the children principally reside. Based on the above analysis, the trial court's examination of the CRA factors without first addressing the child's best interests was not legal error if the RCW 26.09.191(3) limitations were properly imposed on Milosavljevic's contact with the children.

Discretionary limitations may be imposed for abusive use of conflict “which creates the danger of serious damage to the child's psychological development.” RCW 26.09.191(3)(e). Restrictions may also be imposed for other factors or conduct that “the court expressly finds averse to the best interests of the child.” RCW 26.09.191(3)(g). Before imposing restrictions under RCW 26.09.191(3)(g), the trial court must find “ ‘more than normal ... hardships which predictably result from a dissolution of marriage.’ ” [In re Marriage of Katare](#), 175 Wn.2d 23, 36, 283 P.3d 546 (2012) (quoting [In re Marriage of Littlefield](#), 133 Wn.2d 39, 55, 940 P.2d 1362 (1997)). The court may impose restrictions only where substantial evidence shows the existence of a danger of damage. [In re Marriage of Chandola](#), 180 Wn.2d 632, 645, 327 P.3d 644 (2014). The restrictions must be reasonably calculated to prevent the kind of harm involved. [Chandola](#), 180 Wn.2d at 653. Restrictions are reviewed for abuse of discretion. See [Chandola](#) 180 Wn.2d at 642-43.

*7 A trial court's parenting plan is also reviewed for abuse of discretion, which occurs when a decision is manifestly unreasonably or based on untenable grounds or untenable reasons. [Chandola](#), 180 Wn.2d at 642. The trial court's findings of fact are treated as verities on appeal, as long as they are supported by substantial evidence. [Chandola](#), 180 Wn.2d at 642. “ ‘Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted.” [Chandola](#), 180 Wn.2d at 642. The appellate court reviews errors of law de novo. [Fahey](#), 164 Wn. App. at 55.

Here, the trial court included restrictions on Mitosavljevic's contact with his children based on RCW 26.09.191(3)(e) for abusive use of conduct, and RCW 26.09.191(3)(g) for a long term pattern of alienation of the children, causing damage to their relationship with Farrell. In establishing these restrictions the court stated, “[Milosavljevic] acts and speaks loudly and in a demanding manner to and regarding [Farrell], and undermines and alienates the children from their mother, which interferes with any reasonable expectation that the parties can engage in joint decision making.”¹⁹ Additionally, the trial court noted, “[Milosavljevic] has engaged in undermining [Farrell's] parenting resulting in alienation of the children.”²⁰ The trial court cited the GAL's recommendation as the reasoning behind the RCW 26.09.191(3) restrictions, finding, “[t]he GAL has recommended restrictions against [Milosavljevic] throughout this action due to his abusive use of conflict which has caused serious damage to the children's psychological development, plus his behavior of undermining [Farrell].”²¹

The trial court cited the GAL's recommendation of restrictions in the first report and adopted those restrictions. However, the court failed to acknowledge that the GAL, in her two subsequent reports and her trial testimony, did not renew this recommendation. In fact, the GAL recommended that Z.M. remain in Washington with Milosavljevic rather than relocate to Toronto. The recommendation that Z.M. reside with Milosavljevic fundamentally conflicts with a recommendation of restrictions under RCW 26.09.191(3).

The GAL clearly states that Milosavljevic played an undeniable role in undermining the relationship between Z.M. and Farrell. But the GAL also noted that benign,

developmental reasons contributed to the schism between Z.M. and Farrell. Moreover, the GAL found that Milosavljevic's behavior improved over time. By her second report, the GAL noted that Milosavljevic still engaged in abusive use of conflict but did not renew her explicit recommendation for restrictions.

Therefore, the GAL's reports do not support the trial court's imposition of restrictions under [RCW 26.09.191\(3\)](#).

The trial court relied solely on the GAL's initial reports to impose restrictions on Milosavljevic. The trial court did not cite other evidence or make additional findings to support restrictions on Milosavljevic's contact with his children. As a result, the trial court's determination that restrictions were required was not supported by substantial evidence. The restrictions were imposed on untenable grounds and amount to an abuse of the trial court's discretion.

The trial court determined the parenting plan and residential schedule based on these improperly imposed [RCW 26.09.191\(3\)](#) restrictions. This resulted in legal error. Because the record does not support restrictions that effectively determine residence, the trial court was required to assess the best interests of the children to formulate the residential schedule for the permanent parenting plan. Only after arriving at a permanent parenting plan and establishing the parent with the majority of the residential time can the court consider the CRA factors.

*8 In addition to premature application of the CRA factors, the trial court improperly applied the friendly parent concept to decide relocation and establish the permanent parenting plan. "Under the 'friendly parent' concept, primary residential placement is awarded to the parent most likely to foster the child's relationship with the other parent." *In re Marriage of Lawrence*, 105 Wn. App. 683, 687, 20 P.3d 972 (2001). Washington law does not recognize the friendly parent concept. *Lawrence*, 105 Wn. App. at 688. Therefore, "a trial court's use of the concept in a custody determination would be an abuse of discretion." *Lawrence*, 105 Wn. App. at 688.

Here, the trial court repeatedly stated that Farrell was best suited to help the children have a positive relationship with both parents. Further, the permanent parenting plan

found that residing primarily with Farrell would "provide the children with the best opportunity to foster and continue their relationship with both parents."²² The trial court also explicitly based its permanent parenting plan decisions on its assessment of Farrell's willingness to maintain positive relationships, stating, "I just made [the] decision that I think that [Farrell] is the one that is more capable, more likely, more willing to do that."²³

The trial court's repeated statements emphasizing Farrell's ability to foster relationships with both parents show that the friendly parent concept played a significant role in determining the permanent parenting plan and relocation request. This was an additional abuse of the trial court's discretion.

In light of the trial court's improper use of the friendly parent concept, premature application of the CRA, and lack of substantial evidence supporting the restrictions, we reverse and remand for a new trial.

Maintenance

Milosavljevic requested maintenance based on Farrell's substantially higher income and the negative impacts on his career and earning potential as a result of relocations for Farrell's employment. He argues that the trial court erred by denying his maintenance request without evidence of consideration of the relevant statutory factors. We agree.

The trial court can award maintenance to either party after consideration of all relevant statutory factors. *In re Marriage of Zahm*, 138 Wn.2d 213, 227, 978 P.2d 498 (1999). The statutory factors for maintenance include the financial resources of the party seeking maintenance, time necessary to obtain the skills for employment, the parties' standard of living during the marriage, duration of the marriage, the age, physical and emotional condition, and financial obligations of the seeking party, and the ability to pay of the other party. [RCW 26.09.090\(1\)\(a\)-\(f\)](#).

"Nothing in [RCW 26.09.090](#) requires the trial court to make specific factual findings on each of the factors listed in [RCW 26.09.090\(1\)](#). The statute merely requires the court to consider the listed factors." *In re Marriage of Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004). But "[a]n award that does not evidence a fair consideration of

the statutory factors results from an abuse of discretion.” [In re Marriage of Spreen](#), 107 Wn. App. 341, 349, 28 P.3d 769 (2001). The appellate court reviews maintenance awards for abuse of discretion. [Zahm](#), 138 Wn.2d at 226-27.

Here, the trial court did not provide factual findings, discussion, or analysis of the factors to support its denial of Milosavljevic's request for maintenance. The trial court merely marked the box on the order on findings and conclusions about a marriage, indicating that [RCW 26.09.090](#) did not support an award of maintenance to either party. Thus, the trial court failed to demonstrate consideration of any of the statutory factors prior to denying Milosavljevic's request for maintenance. While [RCW 26.09.090](#) does not require the trial court to make specific factual findings on each of the factors, the court must show fair consideration of the factors. See [Spreen](#), 107 Wn. App. at 349. Therefore, the trial court's decision to deny maintenance was an abuse of discretion.

*9 Farrell cites [Mansour](#) to support her claim that the court was not required to make findings of fact about the maintenance factors. 126 Wn. App. at 16. But [Mansour](#) states that the trial court need not provide findings for *each* factor. 126 Wn. App. at 16. [Mansour](#) does not stand for the idea that the trial court may make a decision on maintenance without demonstrating consideration of *any* statutory factors. In fact, the trial court in [Mansour](#) clearly considered several of the statutory factors, including the parties' postdissolution economic conditions and living expenses. 126 Wn. App. at 16. This differs significantly from the case at hand, where the trial court evinced no consideration of the factors. Therefore, Farrell's reliance on [Mansour](#) is misplaced.

By failing to provide evidence that it considered any of the statutory maintenance factors, the trial court abused its discretion in denying Milosavljevic's maintenance request. We reverse the court's denial of maintenance and remand for consideration of the factors.

Child Support

Milosavljevic claims that the trial court erred by setting his child support obligations based on erroneous income information. Farrell argues that Milosavljevic made contradictory statements about his income and that

the trial court properly assessed his income based on these statements. The trial court employed an income figure unsupported by substantial evidence in the record. Therefore, we reverse the trial court's determination of Milosavljevic's child support obligation and remand for recalculation.

Child support is intended to be equitably apportioned between the parents. [RCW 26.19.001](#). The trial court allocates support between the parents based on their shares of the combined monthly net income. [RCW 26.19.080\(1\)](#). Prior to assigning child support, the trial court must calculate the parents' monthly income. [RCW 26.19.071](#); [State ex rel. Taylor v. Dorsey](#), 81 Wn. App. 414, 423, 914 P.2d 773 (1996).

Child support orders are reviewed for abuse of discretion. [In re Marriage of Schnurman](#), 178 Wn. App. 634, 638, 316 P.3d 514 (2013). “A trial court abuses its discretion if its decision rests on unreasonable or untenable grounds.” [Schnurman](#), 178 Wn. App. at 638.

“[T]he trial court's findings of fact must be supported by substantial evidence.” [In re Parentage of Goude](#), 152 Wn. App. 784, 790, 219 P.3d 717 (2009). “ ‘Substantial evidence’ is that which is sufficient to persuade a fair-minded person of the declared premise.” [Goude](#), 152 Wn. App. at 790. This court will not substitute its judgment for that of the trial court if the record shows the court considered all relevant factors and the award is not unreasonable under the circumstances. [In re Parentage of O.A.J.](#), 190 Wn. App. 826, 830, 363 P.3d 1 (2015).

Here, the trial court's child support worksheet calculated Milosavljevic's total gross monthly income as \$6,208.34. Milosavljevic contends that the trial court erroneously arrived at this total by including \$1,000 in temporary maintenance, which he no longer receives. According to Milosavljevic, his gross monthly income is only \$5,208.34.

The financial evidence in the record is contradictory. On the child support worksheet for the agreed temporary child support order that he prepared and signed, Milosavljevic listed a monthly wage of \$6,208.34 and \$1,000 in temporary monthly maintenance for a total gross monthly income of \$7,208.34. This would support the trial court's use of \$6,208.34 as his total gross monthly income, not including maintenance, for the purposes of the final child support order calculation.

In contrast, Milosavljevic's July 2016 financial declaration to the trial court lists monthly wage income as \$5,208.34 plus \$1,000 temporary maintenance for a total gross monthly income of \$6,208.34. This monthly wage income of \$5,208.34 is supported by additional evidence in the record. As of June 2016, Milosavljevic's yearly salary of \$62,500 was confirmed by his employer. This breaks down to a monthly salary of \$5,208.34. Biweekly paychecks submitted by Milosavljevic to the court show a gross income of \$2,403.85.

*10 Other evidence in the record supports additional income figures. Milosavljevic's 2015 W-2 form shows wages of \$68,773.84, which corresponds to a monthly wage of \$5,731.15. Milosavljevic testified to a salary of \$61,000 per year, which breaks down to a monthly wage of \$5,083.33.²⁴ He also told the court he had just received a \$500 bonus two days before trial.

While the figures of Milosavljevic's monthly income vary, the majority of the evidence shows that Milosavljevic's income was below the \$6,208.34 used by the trial court to calculate his final child support obligation. Only the temporary child support order worksheet lists \$6,208.34 as Milosavljevic's gross monthly income. All other evidence supports a monthly wage between \$5,731.15 and \$5,208.34, without temporary maintenance. Furthermore, the \$6,208.34 used by the trial court is exactly equal to Milosavljevic's claimed salary plus the prior maintenance award. This suggests that Milosavljevic made an error when he completed the child support worksheet for the agreed temporary child support order.

Given the evidence of Milosavljevic's income in the record, the trial court's factual finding of Milosavljevic's gross monthly income as \$6,208.34 is not supported by substantial evidence. The trial court abused its discretion by relying on this figure to calculate Milosavljevic's

child support payments. We reverse and remand for recalculation of Milosavljevic's final child support obligation.²⁵

Fees on Appeal

Milosavljevic requests fees on appeal under [RCW 26.09.140](#). This court has discretion to order a party to pay fees and costs in a dissolution proceeding. [RCW 26.09.140](#). In determining whether to award fees on appeal, this court balances the needs of one party against the other's ability to pay. [In re Marriage of Lilly, 75 Wn. App. 715, 720, 880 P.2d 40 \(1994\)](#). We must consider the parties' relative ability to pay and the arguable merit of the issues raised on appeal. [Leslie v. Verhey, 90 Wn. App. 796, 807, 954 P.2d 330 \(1998\)](#).

Milosavljevic has substantially prevailed on appeal, as we reverse and remand for a new trial. Furthermore, Farrell's net monthly income is approximately double Milosavljevic's net monthly income.²⁶ Farrell has not submitted an affidavit proving inability to pay. Therefore, we grant Milosavljevic's request for reasonable attorney fees and costs on appeal. See [Mansour, 126 Wn. App. at 17](#).

Reversed and remanded for new trial.

WE CONCUR:

[Verellen, J.](#)

[Appelwick, J.](#)

All Citations

Not Reported in Pac. Rptr., 4 Wash.App.2d 1046, 2018 WL 3434706

Footnotes

- 1 Ex. 322 at 14; Report of Proceedings (RP) (Dec. 21, 2016) at 588.
- 2 Dr. Thomas Carter was originally Milosavljevic's therapist. He then began counseling Milosavljevic and Farrell together. Eventually, he became Farrell's individual therapist and no longer treated Milosavljevic. He provided a letter to the trial court that alleged that Milosavljevic suffered from significant mental health issues and committed domestic violence. In her second report, the GAL noted that "[i]t is unfortunate that many of the mental health issues were clouded by the involvement of Dr. Carter, who has aligned with [Farrell] and contributed to the conflict between the parties." Ex. 339 at 38.
- 3 Clerk's Papers (CP) at 73.

- 4 CP at 18.
- 5 The second report was titled the "FINAL GAL REPORT." CP at 242.
- 6 CP at 284.
- 7 CP at 284.
- 8 CP at 286.
- 9 CP at 286.
- 10 CP at 288.
- 11 CP at 528.
- 12 CP at 527.
- 13 RP (Dec. 23, 2016) at 890.
- 14 CP at 406.
- 15 Farrell also argues that Milosavljevic agreed to the application of the CRA in the case and cannot raise this issue for the first time on appeal. See [RAP 2.5\(a\)](#). Farrell's claim that Milosavljevic agreed to the application of the CRA does not accurately describe his position. During a discussion with the trial court, Milosavljevic noted that "there hasn't been a prior determination as to who the primary parent was because the parties weren't divorced, and the Relocation Act more or less contemplates that there's already been a determination as to who the primary parent is." RP (Dec. 22, 2016) at 793. The trial court stated that the CRA applied to any parenting plan, whether temporary or permanent. Milosavljevic was not comfortable with this conclusion because he felt the temporary parenting plan was improperly decided. Thus, Milosavljevic expressed concern about the trial court's premature application of the CRA at the time of the dissolution proceedings. Therefore, the issue is properly raised on appeal. See [Lunsford v. Saberhagen Holdings, Inc.](#), 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), [aff'd](#), 166 Wn.2d 264, 208 P.3d 1092 (2009).
- 16 The seven factors of [RCW 26.09.187\(3\)\(a\)](#) are
- (i) The relative strength, nature, and stability of the child's relationship with each parent;
 - (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
 - (iii) Each parent's past and potential for future performance of parenting functions as defined in [\[RCW 26.09.004\(3\)\]](#), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
 - (iv) The emotional needs and developmental level of the child;
 - (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
 - (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
 - (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.
- 17 The eleven factors of [RCW 26.09.520](#) are
- (1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
 - (2) Prior agreements of the parties;
 - (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
 - (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under [RCW 26.09.191](#);
 - (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
 - (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
 - (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
 - (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;
 - (9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;

(10) The financial impact and logistics of the relocation or its prevention; and

(11) For a temporary order, the amount of time before a final decision can be made at trial.

18 We note that a residential schedule in a temporary parenting plan is also subject to the CRA. [RCW 26.09.410\(1\)](#). When establishing a temporary parenting plan, the trial court considers the best interests of the child factors to determine residential provisions. [RCW 26.09.197](#). Therefore, the CRA factors would apply after the best interest factors have been considered for a residential schedule under a temporary parenting plan.

19 CP at 383.

20 CP at 383.

21 CP at 385.

22 CP at 386.

23 RP (Dec. 23, 2016) at 890.

24 Milosavljevic also testified to an annual income of \$61,450.

25 Milosavljevic also argues that his child support obligations, including his share of the additional expenses, exceed the 45 percent of net income limit established by [RCW 26.19.065\(1\)](#). In this case, the trial court did not provide calculations or estimates of the additional expenses and Milosavljevic has not provided any information on the extent of these costs. Without this information, we cannot assess whether Milosavljevic's total support obligations exceed 45 percent of his net income.

26 Evidence in the record shows Milosavljevic's monthly wage between \$5,731.15 and \$5,208.34. Milosavljevic subsequently submitted a financial declaration identifying his total net monthly expenses as \$4,062.34 and his total monthly expenses and debt payments as \$7,199.00. Farrell's previously identified net monthly income was \$10,608.50.

189 Wash.App. 1007

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

In the Matter of the Parenting and
Support of O.E.D, A Minor Child,
Evelina Barhudarian, Appellant,

v.

Andrew Bernard Danhof, Respondent.

No. 71899–1–I.

|

July 27, 2015.

Appeal from King County Superior Court; Honorable
[Suzanne R. Parisien](#), J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

[SCHINDLER](#), J.

*1 In this parentage action, Evelina Barhudarian appeals entry of the final parenting plan and order of child support. Barhudarian contends the court did not engage in an analysis of the statutory factors under [RCW 26.09.187\(3\)](#) and improperly relied on the “friendly parent concept”¹ in adopting the final parenting plan. Barhudarian also contends the court abused its discretion in admitting a recording of a threat she made and a letter from a therapist. Because neither the written findings nor the oral ruling reflect consideration or application of the statutory factors, we remand. On remand, the court shall

address only the statutory factors in adopting a parenting plan and entering findings of fact and conclusions of law and shall not take into consideration its own philosophy or the friendly parent concept.

FACTS

Andrew Bernard Danhof served in the United States Army for seven and a half years. Danhof returned from his final tour in Iraq in September 2009.

In October, Danhof began dating Evelina Barhudarian. In December, Barhudarian and her two-and-a-half-year-old child, A.G., started living with Danhof.

In the spring of 2010, Barhudarian was pregnant. Danhof left active military duty and started working as a senior service technician at a commercial machinery company. On January 31, 2011, Barhudarian gave birth to O.E.D. Barhudarian stayed home to take care of O.E.D. and A.G.

In October 2011, Danhof and Barhudarian separated. Barhudarian lived with her parents in Renton. Danhof lived with his parents in Bothell. Barhudarian and Danhof agreed to a shared residential schedule for O.E.D. For the next 18 months, O.E.D. lived with each parent every other week.

In September 2012, the State of Washington Department of Social and Health Services sent Danhof a letter stating it “will not be investigating” a recent report of “abuse or neglect of a child.” The letter states that “Child Protective Services (CPS) received a report” in July about “[p]roblems concerning child’s visits with you-including medical concerns of rash of unknown etiology. Also allegedly child returns home hungry and thirsty-however there was no allegation of neglect concerning this.”

On April 14, 2013, Danhof took O.E.D. to the emergency room of Seattle Children’s Hospital. Danhof repeatedly tried to contact Barhudarian because he did not have access to the child’s insurance or medical records. According to Danhof, because he could not reach Barhudarian, he could not obtain medical care and had to take O.E.D. home. That evening, Barhudarian called Danhof and demanded he return the child because O.E.D. had an appointment to see a gastrointestinal specialist the next morning. Barhudarian was “very upset” and

repeatedly told Danhof she was going to have him murdered. According to Danhof,

[Barhudarian] stated repeatedly that she was going to have me murdered. She was very irate, yelling at me a lot, and—at which point in time, you know, I—I told her then, because she was acting so aggressive and whatnot, I did not want to have that around [O.E.D.] You know, give her time to cool down and whatnot. And I told her I was—“Evelina, if you come here, I’m calling the police.” Because I—I did not want that—I did not want any of that with her severe hostility. I heard a male voice in the background.

*2 Danhof called 911. Barhudarian also called 911 to request a welfare check on O.E.D. Barhudarian reported Danhof was intoxicated and “heavily armed.”

A Bothell Police Department officer responded. The officer found O.E.D. “to be well cared for” and O.E.D. “was clean and ... appeared to be happy.... At no time during the investigation did [the officer] suspect [Danhof] had been drinking or consuming any illegal narcotics.” The officer’s report states, in pertinent part:

[O.E.D.] has been sick for several days. [Danhof] attempted to contact [Barhudarian] to let her know, as she has insurance for [O.E.D.] and he does not; but she never responded. [Danhof] told me that [Barhudarian] does not share [O.E.D.]’s medical information with him in respect to appointments, etc. Since [Danhof] could not get in touch with [Barhudarian] he took [O.E.D.] to the Children’s Hospital Urgent Care Center on 04/1 [4]/13. [Danhof] told me that [Barhudarian] made four phone calls to his cell phone today. The first call was at 1832 hours, during this call [Barhudarian] began yelling at [Danhof] for not being at the meet. [Danhof] hung up the phone because [Barhudarian] was yelling at him and not letting him speak. The second call came in at 1834 hours. [Danhof] answered the phone and [Barhudarian] began

yelling at him again. During this call, [Barhudarian] threatened [Danhof] at least twice by saying, I am going to “murder you.” [Danhof] hung up the telephone. At 1835 hours, [Danhof] answered the phone and spoke with [Barhudarian] briefly before hanging up because he could not get her to calm down. At 1838 hours, [Danhof] answered the phone and spoke with [Barhudarian]. [Barhudarian] told [Danhof] that he was going to be murdered. [Danhof] responded by telling [Barhudarian] not to come to his house or he would call 911.

The officer took a statement from Danhof about trying to obtain medical information from Barhudarian and the threats she made to him. The officer spoke to Barhudarian by phone. Barhudarian denied “threatening to murder” Danhof. Barhudarian told the officer Danhof had “threatened her.” The report states both parties alleged domestic violence against each other in the past. The officer told Danhof and Barhudarian to obtain a parenting plan and gave them information about how to file for a protection order. The report states, in pertinent part:

Both parties alleged that they were assaulted in the past by the other. No information provided to me during the investigation suggested that there was a recent assault.

Both parties were advised to obtain a parenting plan. Both parties were advised where to go to petition for a court order. Neither party had any supporting evidence to substantiate their complaint.

The next morning, Danhof, his stepmother, and O.E.D. met Barhudarian, Barhudarian’s mother, and Barhudarian’s ex-boyfriend “Danny” at the doctor’s office. According to Danhof, after the doctor’s appointment, Barhudarian “forcibly took” O.E.D. from him.

*3 That afternoon, Danhof filed a “Petition for Order for Protection” in King County District Court. In the petition, Danhof alleges, in pertinent part:

During our time living together from Nov[ember] 2010 to Oct[ober] 2011, [Barhudarian] physically assaulted me multiple times. She has often bragged about her ties to violent criminals. On December 9th 2012 she said "I'm going to put a bullet in your head." I have a whitness [sic] for that event. On April 14th 2013 she said "I'm going to murder you" multiple times and "I'm going to have you murdered."

....

Today, April 15, 2013, [Barhudarian] came to [O.E.D.]'s doctor appointment and forcibly took [O.E.D.] from my possession. As there is no current court orders I was unable to do anything. She was with ... a convicted felon that has been physically abusive to her in the past and I am greatly concerned with [O.E.D.]'s safety in that environment.

The court entered a temporary domestic violence protection order preventing Barhudarian from "harassing, threatening, or stalking" Danhof but allowing supervised "exchange of the child."

On April 19, Barhudarian filed a petition for a protection order and a petition for a parenting plan and order of child support. The proposed parenting plan designates Barhudarian as the primary residential parent. Barhudarian requested imposition of restrictions on Danhof's residential time based on a "history of acts of domestic violence" and a finding that his "involvement or conduct may have an adverse effect on the child's best interests." Barhudarian requested supervised visitation and imposition of conditions requiring Danhof to obtain a psychological evaluation, a domestic violence assessment, and a substance abuse evaluation and prohibiting him from carrying a firearm. That same day, the court entered a temporary domestic violence protection order restraining Danhof from being within 500 feet of Barhudarian's house.

On May 6, Danhof responded to the petition and submitted a proposed parenting plan designating him as the primary residential parent with sole decision-making authority. His proposed parenting plan allows Barhudarian to have residential time with O.E.D. every other weekend and each Wednesday evening. Danhof requested the court impose restrictions on Barhudarian's residential time with O.E.D. based on a "history of acts

of domestic violence" under [RCW 26.09.191](#). Danhof also requested entry of a finding that Barhudarian's "involvement or conduct may have an adverse effect on the child's best interests." Danhof alleged a long-term emotional or physical impairment that interferes with the performance of parenting functions and the abusive use of conflict that creates the danger of serious damage to the child's psychological development. Danhof also asked the court to impose conditions prohibiting Barhudarian from making "derogatory remarks about the father" to the child or in the presence of the child and prohibiting either parent from denying "access to the child's medical records."

*4 On May 10, the court entered a mutual restraining order prohibiting "[b]oth parties" from "disturbing the peace of the other party or of any child." The court also entered a temporary parenting plan designating Barhudarian as the primary residential parent. The temporary parenting plan gave Danhof visitation on "alternating weekends from 5:00 p.m. on Friday to 5:00 p.m. on Sunday" plus "one overnight visit on the alternating week on Wednesday at 5:00 p.m." The court entered a temporary order of child support requiring Danhof to pay Barhudarian \$564.82 per month. The court also entered an order appointing a guardian ad litem (GAL) to represent the best interests of O.E.D.

On January 10, 2014, the GAL filed a report. The GAL recommended the court designate Barhudarian as the primary residential parent but allow Danhof visitation on the first, second, fourth, and fifth weekend of each month. The report states the recommended schedule for O.E.D. is "based upon the parent's schedules and [the child's] young age." The GAL states that because Danhof works during the week, "it appears the best way to maximize [O.E.D.]'s time with both parents is for [the child] to have residential time with [the] mother during the week and residential time with [the] father on the weekends."

According to the GAL, the "biggest concern" is the "very poor and somewhat hostile communication between the parties." Both parents "allege the other to have been violent, physically and emotionally and it seems the relationship was highly conflictual and volatile." The GAL recommended imposing no restrictions under [RCW 26.09.191](#) "though abusive use of conflict was considered."

The report states O.E.D. has “attachments to both parents that were observed during both sets of home visits.” The report states that “both parents were patient, soft spoken, encouraging, smiling and pleasant,” and O.E.D. “was physically affectionate, responsive, expressive and pleasant” to both parents.

However, the GAL notes that a significant concern from “the collateral information and review of text messages” is “the mother's anger and bad-mouthing of the father.” The report states, “Given that [O.E.D.] has witnessed name calling, yelling, conflict and more between or by one of [the child's] parents, [O.E.D.] could have feelings of confusion, hurt, anger or sadness in the future.”

A noteworthy concern is what [O.E.D.]'s doctor's office reported to this GAL about the mother speaking negatively about the father in [O.E.D.]'s presence on multiple occasions. [O.E.D.] is old enough now to pick up on this.... Negative comments about another parent in front of the child can greatly upset that child, as the child likely loves both parents and has relationships with both parents, like [O.E.D.] does. Negative comments can be internalized by a child and can also lead to the child feeling resentment at the parent making the comments.

The GAL also states the pediatrician reported Barhudarian “has a ‘litany of negative things’ against the father” and “can be ‘extreme’ in thinking the father is a horrible person and responsible for any of [O.E.D.]'s illnesses.” The pediatrician told the GAL O.E.D. has heard Barhudarian speak negatively about Danhof “a million times.”

*5 The GAL recommended both Danhof and Barhudarian participate in individual therapy and the court make clear that both parents have “full access” to O.E.D.'s medical records. The GAL recommended a number of other conditions to encourage the parents to be “flexible and adaptable” and refrain from

making negative comments or otherwise inappropriately involving the child in disputes.²

Before trial, Barhudarian submitted a revised parenting plan that incorporated most of the conditions recommended by the GAL, including the need to be flexible and cooperatively work together.

Fourteen witnesses testified during the three-day trial including Barhudarian, her mother, her sister, Army Reservist Frank Rorie, Danhof, his stepmother, and his girlfriend. Danhof represented himself pro se. The court admitted into evidence a number of exhibits including text messages, medical records, and photographs.

Barhudarian testified Danhof was controlling and there were “lots of incidences of aggression” and assault. Barhudarian testified Danhof hit her with a closed fist and submitted photographs showing a bruise on her face. Barhudarian testified that after they separated, “the conflict did not stop.” According to Barhudarian, Danhof would call her repeatedly “just to yell at me.”

Barhudarian testified she blocked Danhof's access to O.E.D.'s medical records “[a]fter obtaining the restraining order, in accordance with the hospital regulation and policy.” When asked “why it would be in [O.E.D.]'s best interest to deny [Danhof] medical access,” Barhudarian answered, “The intention was not to deny specifically medical access; however, I had [a] basis to get a restraining order which was granted by the Court.”

According to Barhudarian, Danhof refused to comply with O.E.D.'s “very strict diet” and the child often had health problems after visiting with him including rashes, bruises, and scratches. Barhudarian described one occasion when O.E.D. “was in such poor condition—clothing soiled, smelled unpleasant—that the hospital staff had requested a social service worker.” Barhudarian testified that “the social services worker had then forwarded this information to CPS.” When the court asked whether she told “anyone at the hospital that there was abuse or neglect committed by Mr. Danhof,” Barhudarian answered, “I don't remember saying that.” Upon further questioning about whether she made the CPS referral, Barhudarian testified, “I wasn't aware at the time when I spoke to the social worker that it would be forwarded to CPS.”

Barhudarian testified her ex-husband never physically abused her and there was no “history or allegations of domestic violence” with him. Barhudarian said she was very close to her ex-husband and her relationship with him was “very good.” During questioning by the court, Barhudarian said she did not remember whether her exhusband abused her, but said she never sought a protection order against him.³ However, the next morning, Barhudarian said she recalled reporting “two prior incidences” of domestic violence by her ex-husband.

*6 Frank Rorie testified that he and Danhof served “two tours [in] Iraq together.” After returning from their final tour, Danhof lived with Rorie until he moved out to live with Barhudarian and A.G. Rorie testified that one time when he was visiting the couple at their apartment, he witnessed Barhudarian “smacking” Danhof in “the face, the chest, [and] the arms.” Rorie said Danhof was “kind of like offering himself as a cathartic punching bag, if you will, so she could kind of work out the issues that she was going through.” Rorie testified that after the couple separated, he was in the car with Danhof while Danhof and Barhudarian were arguing on the speakerphone. Rorie testified that Barhudarian told Danhof, “I will put a bullet in your head.”

Danhof testified and denied the allegations of domestic violence. Danhof said Barhudarian first threatened to kill him in December 2012. Danhof introduced a recording of the exchange on March 28, 2013 when he met Barhudarian to pick up O.E.D. for the week. After discussing dietary restrictions for the child, Barhudarian warned Danhof not to bring O.E.D. back “sicker.” Barhudarian then threatened to tie Danhof “to a pole outside” and feed him fish, to which he has an allergy.

Danhof testified that after receiving the GAL report, he engaged in counseling. Danhof submitted evidence showing he did not suffer from PTSD.⁴

At the conclusion of the trial, the court issued a written memorandum opinion. The “Findings of Fact and Conclusions of Law on Petition for Parenting Plan and Order of Child Support” incorporate the “Memorandum of Opinion.”

The court found that after receiving the GAL report, Danhof “immediately began to comply with the recommendation” to participate in counseling while

Barhudarian “has yet to attend a single session.” The court found the record established no evidence supported finding Danhof suffered from PTSD.

The court “did not find credible” Barhudarian's testimony of domestic violence. The Memorandum of Opinion states, in pertinent part:

Most determinative to the court's opinion on this issue was the mother's contradictory testimony regarding the presence of domestic violence in her prior marriage. Other witnesses testified that the mother alleged that she was abused by her prior husband. When directly questioned regarding this, mother testified “it's hard to remember whether there was [domestic violence].” The next day at trial, she testified that she now recalled two past instances of domestic violence involving her prior husband. The court did not find it credible that the mother (or anyone) would “forget” being the victim of domestic violence. Such testimony demonstrates that the mother was willing to either fabricate domestic violence or that her memory is such that it cannot be trusted on this point.

Because the court found no credible evidence of domestic violence, the court did not impose parenting plan restrictions under [RCW 26.09.191](#). However, the court found the text messages from Barhudarian were “troubling.” The court found the text messages Barhudarian sent Danhof demonstrated “open hostility, name calling and extreme profanity.” The court found Rorie's testimony that in December 2012, Barhudarian told Danhof, “I will put a bullet in your head” credible.⁵ The court also notes that on March 28, 2013, Barhudarian threatened to tie Danhof to a pole and feed him fish “(to which he is allergic),” and that on April 14, 2013, she told him, “I am going to murder you.”

*7 The court also expressed concern about the pediatrician's report that “the mother berates the father incessantly in front of [O.E.D.]” and “report[s] concerns of abuse and/or neglect by the father,” but notes the pediatrician “has never seen any abuse or neglect by either parent.” The court found Barhudarian's refusal to provide medical information to Danhof created a risk of harm to the child. The Memorandum of Opinion states, in pertinent part:

[T]ext messages between the parties showed the father repeatedly trying to be involved in the child's health and well-being (including efforts to go to doctor appointments and exchange medical information regarding [O.E.D.]) and the [mother] refusing such requests. Again, the texts were laced with name calling, profanity and hostility. The court was troubled by the petitioner's action in blocking the respondent from having access to any of [O.E.D.]'s medical records and/or history. Petitioner also advised respondent that he was prohibited from using the insurance that she provided for [O.E.D.] Such behavior with regard to the child's health is inexcusable and could potentially put the child's health at risk were [O.E.D.] to experience a medical emergency while with the father.

The memorandum opinion also addressed the CPS referral.

The mother testified that in September 2012, she took [O.E.D.] to the emergency room because of a bruise on [the child's] arm. She testified that a nurse had initiated a CPS referral of the father for that injury. In reality, it was the mother who initiated the referral which was later determined to be “unfounded.”

The final parenting plan establishes a shared residential schedule until O.E.D. begins school. After O.E.D. starts kindergarten, the parenting plan designates Danhof as the primary residential parent and allows residential time with Barhudarian on Wednesday and every other

weekend. The parenting plan gives sole decision-making authority to Danhof for education and nonemergency health care. The final parenting plan includes conditions recommended by the GAL and requested by Barhudarian including “[i]t is expected that the parenting plan residential provisions will be flexible and adaptable.”

In the motion for reconsideration, Barhudarian asked the court to defer entry of a final parenting plan until O.E.D. is enrolled in school. Barhudarian also asked the court to allow her “the right of first refusal to provide daycare” if Danhof is unavailable. The court denied the motion for reconsideration.

ANALYSIS

Parenting Plan

Barhudarian contends the court erred in ordering a shared residential schedule, designating Danhof as the primary residential parent when O.E.D. begins school, and giving Danhof sole decision-making authority for education and nonemergency health care. Barhudarian asserts the court did not consider or address the best interests of the child or the statutory factors listed in [RCW 26.09.187\(3\)](#) but instead improperly relied on the friendly parent concept.⁶

*8 Under the Uniform Parentage Act of 2002, chapter 26.26 RCW, after paternity has been acknowledged, the parties may commence a judicial proceeding for a parenting plan on the same basis as provided in chapter 26.09 RCW. [RCW 26.26.375\(1\)\(a\)](#).

We review the trial court's parenting plan decision for abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). The court abuses its discretion only if the decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Littlefield*, 133 Wn.2d at 46–47.

A trial court has broad discretion in adopting and ordering a parenting plan. *Littlefield*, 133 Wn.2d at 51–52. This court does not review the trial court's credibility determinations, nor can it weigh conflicting evidence. *In re Marriage of Rich*, 80 Wn.App. 252, 259, 907 P.2d 1234 (1996).

An appellate court will not retry the facts on appeal and will accept findings of fact as verities if they are supported

by substantial evidence in the record. *In re Marriage of Thomas*, 63 Wn.App. 658, 660, 821 P.2d 1227 (1991). Because of the trial court's unique opportunity to observe the parties, we are “‘extremely reluctant to disturb child placement dispositions.’” *In re Parentage of Schroeder*, 106 Wn.App. 343, 349, 22 P.3d 1280 (2001) (quoting *In re Marriage of Schneider*, 82 Wn.App. 471, 476, 918 P.2d 543 (1996)).

When making decisions regarding residential placement, the trial court must analyze the factors in RCW 26.09.187(3). *Littlefield*, 133 Wn.2d at 52. The Parenting Act of 1987, chapter 26.09 RCW, requires the court to consider the best interests of the child at the time of trial “after considering the factors set forth in RCW 26.09.187(3)(a).” *Littlefield*, 133 Wn.2d at 52. RCW 26.09.187(3)(a) sets forth the following factors:

Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

- (i) The relative strength, nature, and stability of the child's relationship with each parent;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions, as defined in ... RCW 26.09.004[(2)],⁷ including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
- (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

*9 Factor (i) shall be given the greatest weight.

Because the written findings do not “clearly reflect a consideration of the statutory factors,” we look to the oral ruling. *In re Marriage of Murray*, 28 Wn.App. 187, 189, 622 P.2d 1288 (1981). Barhudarian argues the oral ruling shows the court improperly relied on the “friendly parent concept.”

Under the friendly parent concept, primary residential placement is awarded to the parent most likely to foster the child's relationship with the other parent. *In re Marriage of Lawrence*, 105 Wn.App. 683, 687, 20 P.3d 972 (2001). A trial court's use of the friendly parent concept is an abuse of discretion. *Lawrence*, 105 Wn.App. at 688. The legislature has repeatedly rejected the friendly parent concept, and our courts disfavor its use because residential placement should not be used to penalize or reward parents for their conduct. *Lawrence*, 105 Wn.App. at 687–88. The court cannot use residential placement and visitation “to penalize or reward parents for their conduct.” *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983).

In the oral ruling, the trial court addressed the need to make a decision in the best interests of the child before turning to the allegations of domestic violence and whether to impose restrictions under RCW 26.09.191. The court found Barhudarian's “testimony with regard to domestic violence to be not credible, and ... there was no evidence of any violence perpetrated against [Barhudarian].” The court concluded, “[T]here will be no [RCW 26.09.]191 ... restrictions in this case.”

The court then addressed the “substantial evidence” of Barhudarian's “threatening and aggressive behavior and, frankly, openly hostile behavior” toward Danhof. In particular, the court expressed concern about the threats to harm him and the refusal to allow Danhof to have access to the child's medical information.

The Court was very troubled by the petitioner's actions in blocking the father's access to [O.E.D.]'s medical records. There's simply—on the facts of this case and the evidence in this case can be—the Court cannot conceive of any valid reason for

any parent to block another parent's access to medical information. Not only is it unnecessary and punitive, it was potentially dangerous given that [O.E.D.] was partly at this time in [the] father's care, and if he were to have to take [the child] for emergency care he would not have access to medical information or the medical history that he might need.

The court also expressed concern about negative comments Barhudarian made about Danhof in front of the child.

Perhaps most troubling was [the pediatrician]'s statements that he—that [Barhudarian]'s extremely anxious and has reported the father is evil and should not be involved.... He reports that [O .E.D.] has heard the mother say this, quotation marks, a million times. The Court doesn't need to tell the parties how damaging it is for children to hear those kinds of things from one parent about another.

***10** The court then discussed its philosophy about parenting plans.

I want to talk philosophically for a moment about parenting plans and my belief that parenting plans are designed to be in the ideal setting very flexible, and nothing will—should deter the parties from, frankly, going around the parenting plan and providing flexibility to one another, compassion to one another, and frankly, more access to one another if it works out that way.... I always hope that parents will work together to not, you know, abide

by the parenting plan every dotted I or crossed T, but rather work together to—in the best interests of their child, and that's what this court wants.

The court concluded by stating, “With that in mind, ... given what I have already discussed regarding the mother's hostility and uncooperative nature toward Mr. Danhof,” the court would adopt Danhof's proposed parenting plan.

[I]t's clear to this court that the only party that is going to be flexible, at least at this point, and perhaps provide more contact between the parent and child is Mr. Danhof, and it is for that reason that the Court is adopting, not a hundred percent, but in—substantially is adopting Mr. Danhofs parenting plan.

Because we are unable to determine the basis for the court's ruling, we remand to address the statutory factors and enter findings of fact and conclusions of law. Although the court considered the best interests of the child, the court did not engage in an analysis of the statutory factors under [RCW 26.09.187\(3\)](#) in either the written findings or the oral ruling. If the written findings and the oral ruling do not reflect any application of the statutory elements, we must remand for entry of findings based on the statutory factors. On remand, the court shall not consider either the court's own philosophy or the friendly parent concept.

Evidentiary Rulings

Barhudarian also challenges the trial court's decision to admit a recording and a letter of a therapist. Because we remand, we address the evidentiary rulings.

Barhudarian contends the court erred in admitting the March 28, 2013 recording, Exhibit 125. Barhudarian argues the recording violates the Privacy Act, chapter 9.73 RCW.

As a general rule, evidence obtained in violation of the Privacy Act is “inadmissible in any civil or criminal case.” [RCW 9.73.050](#). The Privacy Act “prohibits anyone not operating under a court order from intercepting or recording certain communications without the consent of all parties.” *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014).

However, if the conversation “convey[s] threats of extortion, blackmail, bodily harm, or other unlawful requests or demands,” it may be legally recorded with the “consent of one party.” [RCW 9.73.030\(2\)\(b\)](#). The term “convey” is broadly defined as “to impart or communicate either directly by clear statement or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance.” “*State v. Caliguri*, 99 Wn.2d 501, 507–08, 664 P.2d 466 (1983) (quoting Webster's Third New International Dictionary 499 (1971)).

*11 Exhibit 125 states, in pertinent part:

[I]f [O.E.D.] comes back sicker.... If anything happens to [the child], I'm tying you up to a pole outside and feeding you fish. I'm not joking, so I would not be laughing.... Okay, well if you don't think I'm doing it, you're dead wrong.... Dead wrong.

The court ruled Barhudarian threatened Danhof in the March 28, 2013 recording.

The ... recording of March 28th, 2013, wherein the petitioner threatened to tie Mr. Danhof up and feed

him fish, to which he is allergic. Interesting about that recording is Mr. Danhof laughs, at which point the mother said, “This is nothing to laugh about. This is serious and I'm serious.”

The court did not err in admitting Exhibit 125 under the threat exception to the Privacy Act. [RCW 9.73.030\(2\)\(b\)](#).

Barhudarian contends the court abused its discretion in admitting a letter dated February 21, 2014 from the couple's joint therapist, Exhibit 114.⁸ Barhudarian objected to the admission of Exhibit 114 as hearsay.⁹ In overruling the objection, the court ruled, “It's a letter from a therapist that was referenced in both the petitioner's case and the respondent's case and as such it's admissible as an exception to the hearsay rule.” The record does not support the court's finding that Barhudarian referenced the letter during her case, and it is not clear what exception to the hearsay rule applies. Contrary to Danhof's argument on appeal, the letter is not admissible as a statement made for the purpose of medical diagnosis or treatment under [ER 803\(a\)\(4\)](#), or as impeachment under [ER 613](#). We conclude the court abused its discretion in admitting the letter from the therapist as an exception to the hearsay rule.

We remand for further proceedings consistent with this opinion.¹⁰

WE CONCUR: [COX](#) and [LEACH, JJ.](#)

All Citations

Not Reported in P.3d, 189 Wash.App. 1007, 2015 WL 4533848

Footnotes

¹ *In re Marriage of Lawrence*, 105 Wn.App. 683, 687, 20 P.3d 972 (2001).

² For example, the GAL recommended the court impose the following conditions:

12. It is expected that the parenting plan residential provisions will be flexible and adaptable in accordance with the child's changing needs. As the child increases in age and maturity the child's needs and desires will become increasingly important and will be considered by both parents in scheduling residential time

....

23. Each parent shall exert every reasonable effort to maintain free access and unhampered contact and communication between the child and the other parent, and promote the emotions of affection, love and respect between the child and the other parent. Each parent agrees to refrain from words or conduct, and further agrees to discourage other persons from uttering words or engaging in conduct, which would have a tendency to estrange

the child from the other parent, to damage the opinion of the child as to the other parent, or to impair the natural development of the child's love and respect for the other parent.

24. Each parent shall honor the other parent's parenting style, privacy and authority. Neither parent shall interfere in the parenting style of the other nor shall either parent make plans or arrangements that would impinge upon the other parent's authority or time with the child, without the express agreement of the other parent. Each parent shall encourage the child to discuss his or her grievance against a parent directly with the parent in question. It is the intent of both parents to encourage a direct parent-child bond and communication.

25. Neither parent shall advise the children of any child support or other legal matters.

26. Neither parent shall use the child, directly or indirectly, to gather information about the other parent or take verbal messages to the other parent.

....

28. The parents may revise the parenting plan by mutual consent in writing at any time.

....

31. The parents understand that this residential schedule represents a minimum amount of time that the child will reside with the parents and that the child may reside with them at any other agreed to times.

3 Q. Okay. And is it your testimony that [A.G.'s father] was never abusive to you? Physically or emotionally?

A. We've had altercations but—

Q. Physical altercations?

A. Sorry. It's hard to remember. Not that I can remember any at—at this point. I—I'm sorry.

Q. So you don't remember whether or not you had any physical altercations with [A.G.]'s dad?

A. That's correct.

Q. Were the police ever called to any domestic conflict between you and [A.G.], whether he called or you called?

A. Between me and [A.G.]?

Q. Yeah.

A. My—my child?

Q. I'm so sorry. [A.G.]'s father?

A. No.

Q. No? Okay. And did you ever obtain any kind of a protection order or restraining order or domestic violence order against [A.G.]'s father?

A. No.

4 Post-traumatic stress disorder.

5 Barhudarian contends substantial evidence does not support the court's finding that Rorie's testimony was credible. Because this court defers to the trier of fact's credibility determinations, we do not address this argument. *In re Marriage of Meredith*, 148 Wn. App. 887, 891 n. 1, 201 P.3d 1056 (2009).]

6 Barhudarian also asserts substantial evidence does not support the court's finding that her "behavior with regard to the child's health is inexcusable and could potentially put the child's health at risk were [O.E.D.] to experience a medical emergency with the father." We disagree. Danhof testified that in April 2013, he was unable to obtain treatment for O.E.D. at Seattle Children's Hospital because of his lack of access to the child's medical information. Danhof's stepmother testified she worries that "if [Danhof] was somewhere with [O.E.D.], and God forbid something happened, he didn't even know if [O.E.D.] was allergic to anything."

7 RCW 26.09.004(2) states, in pertinent part:

"Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:

(a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;

(b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care ...;

....

(d) Assisting the child in developing and maintaining appropriate interpersonal relationships;

(e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances.

8 The letter states, in pertinent part:

To whom it may concern,

On 9/13/12 Andrew Danhof and Evelina Barhudarian came to my office for counseling. Their goals were to have a healthy strong family and relationship. They returned for two more sessions and then stopped coming. There was no mention of abuse or violence during these sessions.

9 Barhudarian also contends the letter was not authenticated as required by ER 901. But the joint statement of evidence clearly states Barhudarian admitted to the authenticity of the letter but objected to admission.

10 We decline to award either Barhudarian or Danhof attorney fees on appeal.

ZARAGOZA NOVOTNY PLLC

February 15, 2019 - 4:40 PM

Transmittal Information

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